



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Cuff v. Cuff*, 2021 NLCA 31

Date: May 28, 2021

Docket Number: 202001H0031

BETWEEN:

GARY EDWARD CUFF

APPELLANT

AND:

ELIZABETH ANN CUFF

RESPONDENT

Coram: Welsh, O'Brien and Butler JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Family Division 201504F0194

Appeal Heard: December 17, 2020

Judgment Rendered: May 28, 2021

Reasons for Judgment by: O'Brien J.A.

Concurred in by: Welsh and Butler JJ.A.

Counsel for the Appellant: Adam Crocker

Counsel for the Respondent: Melissa May

Authorities Cited:

CASES CONSIDERED: *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303; *Beanland v. Beanland*, (1997), 151 Nfld. & P.E.I.R. 51 (Nfld. C.A.); *Taylor v. Braund (Taylor)*, 2018 NLCA 3, 2 C.A.N.L.R. 428; *M.K. v. J.P.*, 2021 NLCA 6; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.); *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.); *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42; *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, 113 A.C.W.S. (3d) 68 (Ont. C.A.); *O’Keefe v. O’Keefe*, 2019 NLCA 70; *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269; *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231.

STATUTES CONSIDERED: *Family Law Act*, R.S.N.L. 1990, c. F-2; *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2.

RULES CONSIDERED: *Court of Appeal Rules*, N.L.R. 38/16.

OTHER: *Spousal Support Advisory Guidelines* (July 2008).

O’Brien J.A.:

Introduction

[1] This appeal is about whether errors were made in awarding spousal support to the respondent, Ms. Cuff.

[2] Mr. Cuff and Ms. Cuff had been in a long-term relationship of more than 20 years, from 1993 to 2015. They cohabitated in a common-law relationship from 1993 until 2001, married in 2001, and separated in 2015.

[3] After their separation Ms. Cuff applied to the Supreme Court of Newfoundland and Labrador, Family Division, seeking a divorce, spousal support, and the division of property. She also sought an order setting aside a real property conveyance made shortly before separation, by which Mr. Cuff acquired title to a residential property that had been owned by Ms. Cuff.

[4] The divorce was granted in a separate proceeding.

[5] The proceeding leading to this appeal involved a multi-day hearing in which Mr. Cuff, Ms. Cuff, and eight other witnesses testified. The judge divided the property between the parties, denied Ms. Cuff's request to set aside the real property conveyance, and awarded her spousal support.

[6] The spousal support award is the only issue that has been appealed.

[7] Mr. Cuff argues on appeal that the judge erred in awarding spousal support in two respects. First, he claims that there was a denial of procedural fairness with respect to the spousal support issue. Second, he contends that the judge erred regarding the appropriate commencement date for spousal support.

[8] For the reasons that follow, I would conclude that the judge did not err in respect of procedural fairness or in determining when spousal support commenced. Accordingly, I would dismiss the appeal.

Background Information

[9] To provide context for the issues on appeal, background information is provided regarding: (i.) a cohabitation agreement entered into between the parties relating to property and support; and (ii.) the connection between Ms. Cuff's claim for spousal support and her claims respecting property.

(i.) The cohabitation agreement

[10] The parties entered into a cohabitation agreement when they began their common law relationship in 1993. The agreement, dated March 24, 1993, was made pursuant to section 63 of the *Family Law Act*, R.S.N.L. 1990, c. F-2. Before they married in June 2001, they signed a further agreement indicating that the terms of the 1993 cohabitation agreement would continue throughout the marriage.

[11] The agreement dealt primarily with property and support.

[12] Regarding property, it indicated that their property would not be shared, but would be held separately, and that neither party could claim an interest in the property of the other. For greater certainty, the agreement stated that Ms. Cuff was the sole owner of two residential properties, one in Corner Brook and the other in Bonne Bay, and that Mr. Cuff released any interest in these properties. This is significant because, shortly before separation, the Bonne Bay property was transferred to Mr. Cuff. Ms. Cuff argued at trial that this transaction should be set aside.

[13] The judge outlined the property provision of the agreement. (*N.B. In the judge's decision, Ms. Cuff is referred to as Ms. Tipple.*)

Now, section 4 deals with property. And it states that, "The parties adopt a property regime of complete separation as to property and declare that no property shall be a matrimonial asset for the purposes of any division of any interest therein."

...

Then the agreement went on to declare that Ms. Tipple was the sole owner of a residential dwelling at 51 Allen's Road and also the sole owner of the cabin and real property located at Bonne Bay Pond ...

[14] Regarding support, the agreement indicated that the parties released each other from any obligation to provide support arising from the provisions of the *Family Law Act*. Mr. Cuff relied on the agreement at trial in arguing that Ms. Cuff was not entitled to support.

[15] The judge described the support provision as follows:

And then paragraph 5 or clause 5 ... speaks about support obligations, and, "Each of the parties release the other from any obligation whatsoever to provide support for the other at any time, and, more particularly, in the event that there shall be a termination of cohabitation each of the parties hereby releases any entitlement whatsoever which he or she might have had against the other for support or interim support for themselves."

(ii.) The claim for spousal support and the claims relating to property

[16] Ms. Cuff's claim for spousal support at trial was a claim made in the alternative. She primarily argued that the Bonne Bay real estate transaction, wherein the property was transferred to Mr. Cuff, should be set aside. She also submitted that the matrimonial property should be divided unequally.

[17] The claim for spousal support was an alternative argument, to be considered only if she was unsuccessful on the property claims. Her submission at trial was that, if the property arguments were successful, she would have sufficient resources such that spousal support would not be required. If not, spousal support would be needed, and was claimed on that basis.

[18] The judge noted Ms. Cuff's arguments on the property issues, and her alternative claim for spousal support:

Now, the Applicant's counsel framed the issues for the Court's determination as follows: whether the conveyance of the title of the real property of the Applicant

situate at Bonne Bay Pond to the Respondent should be set aside; and, in the alternative, whether the matrimonial property of the parties should be divided unequally; thirdly, based on the answers to the first two questions, what is the appropriate division of property between the parties? So, those are the property questions or issues, if I can put it that way.

And, then, depending on the answers to questions 1 to 3, whether the Applicant is entitled to receive spousal support from the Applicant, and if the answer to question 4 is yes, what is the appropriate quantum and duration. So, those are the spousal support issues.

So, essentially, I guess, counsel and parties, it's a matter of what happens with the property and what happens with spousal support, if there's any.

[19] The judge considered Ms. Cuff's argument that the Bonne Bay property transaction should be set aside due to alleged fraud, unconscionable conduct or duress. He reviewed what had occurred respecting the property between January and May 2015, and noted that it had been transferred shortly before the parties separated. The judge considered Ms. Cuff's allegations that Mr. Cuff had duped her; that he had orchestrated the conveyance by unduly pressuring her and taking advantage of her poor health condition in order to acquire title to the property in March 2015, and then telling her, in May 2015, that he wished to separate:

... And in the Applicant's brief, counsel noted that in January, February, 2015, the parties talked about the property at Bonne Bay Pond. Mr. Cuff had a debt of about thirty thousand dollars owing to CRA because of his company. CRA was talking about garnishing his mother's pension to pay towards the debt. He wanted Ms. Tipple to transfer the Bonne Bay property to him. He said the bank required that he hold title to the Bonne Bay property, Bonne Bay Pond property ... alone so he could obtain financing to pay the CRA debt. Ms. Tipple said Mr. Cuff and his mother were relentless in their efforts to have the transfer happen. He said that Ms. Tipple was in agreement with doing this.

During this time, Ms. Tipple was also having some serious health issues. She was hospitalized on February 21st, 2015, had major bowel surgery on March 6th, 2015, and was discharged from hospital on March 10th, 2015. She received morphine for pain management. She said this interfered with her ability to think clearly. She continued to have some effects of the morphine and complications with healing after she left the hospital.

On March 27th, Ms. Tipple signed the deed of conveyance of the Bonne Bay Pond property, transferring it to Mr. Cuff. The deed was signed in her car in the parking lot of Mr. Cuff's lawyer. She indicated that she did not read the document. It was not read to her. She was not advised of her right to seek independent legal advice. She did not speak to Mr. Cuff's lawyer, and she dealt with the lawyer's assistant, Ms.

Gallant. She also noted that Mr. Cuff was present when Ms. Tipple and Ms. Gallant were meeting. Now, Ms. Gallant confirmed that no legal advice was given in this matter.

So, shortly after that, or the next event that seems to have occurred is Mr. Cuff encouraged Ms. Tipple to go to Florida for a vacation after her surgery, and she was gone from April 22nd to May 8th.

...

On April 23rd, 2015, Mr. Cuff signed a mortgage on the Bonne Bay Pond property with the Bank of Montreal. Ms. Tipple did not expressly consent to the encumbrance of the property. She did not speak to the lender, according to what she said. ...

Then, on May 15th, 2015, Mr. Cuff told Ms. Tipple that he wished to separate from her. ...

[20] Ultimately the judge determined that the evidence did not support setting aside the transaction, and he did not set it aside. Nor did the judge find that there was any basis upon which the parties' matrimonial property should be divided unequally, as Ms. Cuff had requested.

The spousal support award

[21] In the result, as Ms. Cuff was unsuccessful in respect of the property claims, the judge considered her alternative claim, which was for spousal support. He outlined Ms. Cuff's argument as to why she was entitled to support, as well as Mr. Cuff's position that the agreement between the parties precluded spousal support.

[22] As part of the analysis, the judge noted provisions of section 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), which relate to a claim for spousal support. These included section 15.2(4)(c), which states that "any order, agreement or arrangement relating to the support of either spouse" is to be considered in making an award for support. This section is relevant in light of the parties' agreement in this case. The judge also noted section 15.2(6), which sets out the objectives to be considered in a spousal support order:

Now, the other major remedy that was raised in this matter is that the Applicant sought spousal support. And the way it was framed was, depending on the answers with respect to the property, whether the Applicant is entitled to receive spousal support from the Respondent, and if the answer is yes, what is the appropriate quantum and duration.

So, Ms. Tipple's counsel referred to section 15.2(4) of the *Divorce Act*, which sets out the factors the Court must consider. She also referred to the objectives of a spousal support order set out in section 15.2(6). She noted that the Applicant is retired. She retired in 2011. She did so, relying on her pension from the Provincial Government and her capital assets to see her through her retirement years. She noted that a key part of Ms. Tipple's retirement plan was the retention of real property and other assets she acquired personally, without sharing these with Mr. Cuff. And she pointed out as a result of the separation and Mr. Cuff's actions with respect to the property at Bonne Bay Pond and the jointly held property, she is no longer able to rely upon her retirement plan. She moved to Nova Scotia to be closer to family support. She was forced to return to work to sustain herself, and she's unable to achieve the standard of living she enjoyed during the marriage.

Counsel also noted that Mr. Cuff earns a substantial income. He's able to maintain the standard of living enjoyed by the parties during the marriage. And she concluded that Ms. Tipple has suffered an economic disadvantage as a result of the marriage breakdown; she's entitled to spousal support; and she suggests the entitlement is on the basis of need.

Now, counsel for Mr. Cuff argued that on the basis of clause 5 of the cohabitation agreement, wherein Ms. Tipple released Mr. Cuff from any claim for spousal support, her claim for spousal support should be dismissed.

So, the question becomes, is Ms. Tipple entitled to spousal support and, if so, what is the appropriate quantum and duration?

So, one of the factors that's noted in section 15.2(4) of the *Divorce Act* is paragraph (c), which states, "any order, agreement or arrangement relating to the support of either spouse". The focus of this particular clause is prior agreements between the parties which pertain to spousal support entitlements.

So, we have to consider, what's the effect of clause 5 of the cohabitation agreement?

[23] The judge referred to case authorities and academic writing, and identified the two-stage approach of the Supreme Court of Canada set out in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, to be applied when considering the terms of a prior agreement made between the parties in the context of an application for support.

[24] The judge further observed that the two-stage approach in *Miglin* requires consideration of the parties' circumstances at the time the agreement was executed, and at the time the application for support is made:

So, applying these comments, the Court has to look at a two-stage approach. The first is at the time of the negotiation and execution of the agreement, and the second is to the time of the application for spousal support. There is a period of twenty-three years

between these times, when the agreement was first negotiated and then eight years later it was amended to make it apply to the marriage that the parties were intending several days after they signed the variation.

In the first stage, it appears that the agreement was negotiated under satisfactory conditions. The parties had a property division that left each party with particular assets.

In the case of the Applicant, she was relying on her pension and her capital assets to see her through her retirement years, as her counsel said.

Bearing in mind that the variation of cohabitation agreement stated that the parties intend that the clauses set out in the cohabitation agreement shall continue in full force and effect during the marriage of the parties, the Court should look at the second stage. In my view, at that point the parties are governed by the *Divorce Act*. ...

[25] Ultimately, the judge found that Ms. Cuff's economic circumstances had changed, and that she had become economically disadvantaged at the time of the second stage of the analysis, in part due to the fact that she no longer owned the Bonne Bay property:

In this case, the most valuable assets were the two properties that Ms. Tipple was the sole owner of. She was relying on these for her retirement years. The priority of the properties changed over time, with the Bonne Bay property becoming the more valuable asset. The division of the property relieved any economic hardship to the spouses arising from the breakdown of the marriage, initially, I should say. However, when the Bonne Bay property was conveyed to Mr. Cuff, there was, in my view, a major change in the economic disadvantage of Ms. Tipple. The circumstances of the parties departed significantly from the range of reasonable outcomes anticipated by them. Ms. Tipple was no longer able to rely on her capital assets.

[26] As a result, the judge determined that it was appropriate to consider whether Ms. Cuff was entitled to spousal support under section 15.2 of the *Divorce Act*. Based on his analysis and review of the evidence, he concluded that Ms. Cuff was entitled to spousal support on a non-compensatory basis:

And as I said, the parties were in a cohabiting relationship for about twenty-two years, the last fourteen of which was marriage.

So, I have considered section 15.2 of the *Divorce Act*, particularly subsections (4) and (6). And the *Divorce Act* gives a broad discretion to the Court in cases of spousal support for all three aspects: entitlement, amount, and duration.

In the circumstances of this matter, I find that Ms. Tipple is entitled to spousal support on a non-compensatory basis. The non-compensatory support relates to her financial need and her significant financial disadvantage from the marriage breakdown. ...

[27] The judge then determined quantum, awarding support at the low end of the range as presented by Ms. Cuff's counsel. He further concluded that, based on the length of the relationship, an award of indefinite duration was appropriate:

And the DivorceMate calculation of spousal support provided by Ms. Tipple's counsel indicates a range of one thousand three hundred and forty-nine dollars to one thousand seven hundred and ninety-nine dollars per month for an indefinite, unspecified duration, subject to variation and possibly review. And the latter is the indefinite duration ... because, as I understand spousal support guidelines, this would be considered a long relationship. This is over twenty years.

So, having considered the full circumstances of the parties and the factors and objectives set out in section 15.2 of the *Divorce Act*, I find that the spousal support in this matter should be at the lower end of the range. ...

Issues on appeal

[28] Mr. Cuff has appealed on two specific points regarding spousal support. First, he argued that the judge should not have considered the issue of spousal support at all, and that it was procedurally unfair and a breach of natural justice for him to have done so. Second, he maintained that the judge erred regarding when an award for spousal support should have commenced.

[29] Notably, Mr. Cuff did not argue on appeal that the judge erred in finding that Ms. Cuff was entitled to spousal support. Nor was it argued that the judge had erred in respect of the quantum or duration of support that was awarded.

[30] Accordingly, the following issues will be considered on appeal:

1. Did the judge err, by denying Mr. Cuff procedural fairness and natural justice, in considering and determining the issue of spousal support?
2. Did the judge err in determining the commencement date for spousal support?

Analysis

Issue 1: Procedural Fairness and Natural Justice

[31] Mr. Cuff's main argument is that the issue of spousal support should not have been dealt with by the judge because this issue was beyond the scope of the

pleadings and not argued. Therefore, he contends, it was procedurally unfair and a breach of natural justice for the judge to have considered and determined the support issue.

[32] Allegations of a denial of procedural fairness or natural justice have been previously considered by this Court. For example, in *Beanland v. Beanland*, (1997), 151 Nfld. & P.E.I.R. 51 (Nfld. C.A.), Green J.A. noted that the requirements of procedural fairness are fact specific and must be considered in the context of the proceedings in question:

[11] ... it must be recognized that issues of procedural fairness are not determined in a vacuum, but in concrete fact situations where competing interests of the parties must constantly be balanced against each other. The rules of court and other principles of adjective law are manifestations of this balancing process. Accordingly, it is to the specific procedural principles applicable to the particular procedural stage that is involved to which a court must first turn for guidance to ensure that fairness issues are determined in this balancing context. ...

[33] This contextual approach to assessing procedural fairness, set out in *Beanland*, has been consistently applied by this Court. For recent examples in this respect, see *Taylor v. Braund (Taylor)*, 2018 NLCA 3, 2 C.A.N.L.R. 428, at paras. 104-125, and *M.K. v. J.P.*, 2021 NLCA 6, at paras. 15-16.

[34] The Supreme Court of Canada has also determined that the requirements of procedural fairness vary, depending on the circumstances. As L'Heureux-Dube J. observed in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."

[35] Similarly, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court cited *Knight*, and noted that "the existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances", but rather that "all of the circumstances must be considered in order to determine the content of the duty of procedural fairness" (para. 21).

[36] In the present case, Mr. Cuff argues that the issue of spousal support was considered and decided by the judge when it was not apparent, from the pleadings, the evidence or the argument at the hearing, that this was an issue for determination. However, as discussed next, the record confirms that the issue of spousal support was clearly pleaded and argued.

Spousal support referenced in the pleadings (originating application and response)

[37] There are several instances where spousal support was referenced and argued throughout the course of the litigation.

[38] First, the issue was pleaded in the originating application that commenced the proceedings. This was filed June 25, 2015. Ms. Cuff stated in the application that she was seeking an order for spousal support. Under the heading “Spousal, Partner or Parental Support” Ms. Cuff wrote:

I am claiming spousal, partner or parental support. I am attaching a Financial Statement in Form 56A.27A. My reasons for claiming spousal, partner or parental support are non-compensatory (need).

[39] Included with the originating application were details of Ms. Cuff’s income and monthly expenses. This information would only be relevant to the issue of spousal support. It did not relate to the other relief sought in the application, namely the request for a divorce, the division of matrimonial property or the request to set aside a real property transaction between the parties. Further, there was no request for child support, as it was not applicable in this case.

[40] In his response to the application, dated September 25, 2015, Mr. Cuff contested the claim for support, stating “I disagree with the following claims made by the Applicant: spousal support...” Mr. Cuff also provided income information in his response, which, again, concerned only the spousal support claim. Notably, the schedule in which details of annual income is provided indicates, in the instructions to completing the schedule, that it should be completed only if a claim is being made for child support (which does not apply in this case) or for spousal, partner or parental support (which does apply here). Details of Mr. Cuff’s income tax returns were also filed with the response. Again, these related solely to the spousal support claim.

[41] As stated recently by Green J.A. of this Court in *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42, at para. 13: “... the pleadings define the scope of the controversy between the parties and are intended to identify the basis of the claim or defence to which the other side must respond (*Humby Enterprises Ltd. v. Humby*, 2003 NLCA 20, 225 Nfld. & P.E.I.R. 268, per Welsh J.A. at paras. 14-19).”

[42] In the present case, it is clear that the pleadings identified that spousal support was a claim being advanced by Ms. Cuff.

Spousal support argued in the pre-trial brief

[43] Ms. Cuff filed a brief in advance of the hearing. In it, she provided details regarding her claim for support. Among the issues listed in the brief was whether she was entitled to receive spousal support and, if so, what would be the appropriate quantum and duration of support.

[44] The brief also set out relevant sections of the *Divorce Act* including section 15.2(4) (the factors considered in making a spousal support order) and section 15.2(6) (the objectives of a spousal support order), and provided particulars as to why she met the criteria for entitlement in this circumstance. She submitted:

The Applicant submits that she has therefore suffered an economic disadvantage as a result of the breakdown of the marriage and is entitled to spousal support. The Applicant further submits that she is entitled to spousal support on the basis of need.

[45] Regarding quantum and duration of the award, Ms. Cuff indicated in her brief: “The Applicant seeks spousal support in quantum and duration consistent with the spousal support advisory guidelines”.

[46] Mr. Cuff also filed a brief. In it, he focused extensively on the issues relating to property division and the claim by Ms. Cuff to set aside the Bonne Bay property transaction. His response to the spousal support claim was succinct. He indicated that the “parties waived claims to spousal support in the said domestic contracts”, and submitted that support was therefore not an issue in these proceedings. He did not otherwise address Ms. Cuff’s submissions that entitlement was provided for under the provisions of the *Divorce Act*, and that quantum and duration of spousal support could be ascertained with reference to the *Spousal Support Advisory Guidelines*.

Evidence at the hearing related to spousal support

[47] Mr. Cuff and Ms. Cuff both testified at the hearing. There is, in the transcript, testimony from Ms. Cuff with respect to her alleged economic disadvantage arising from the breakdown of the marriage, and also evidence relating to income. Evidence of economic hardship subsequent to marriage breakdown, and evidence concerning the parties’ incomes, was relevant to spousal support. While much of the evidence at the hearing clearly concerned

matters other than spousal support, this evidence related exclusively to the support issue.

Claim for spousal support particularized in post-hearing written submissions

[48] After the hearing, the judge requested written submissions on the issues he was to decide. Ms. Cuff's submissions addressed entitlement, quantum and duration of spousal support. She again cited references to sections 15.2(4) and 15.2(6) of the *Divorce Act*, which, she argued, were relevant to her claim for support.

[49] Ms. Cuff also referenced, in her written submissions, financial information relating to the income tax returns of both parties, which outlined their respective earnings for the years 2012-2016. Based on this information, she proposed a range for monthly spousal support in accordance with the *Spousal Support Advisory Guidelines*. The range, she submitted, would provide for a monthly award of \$1339 on the low end, \$1574 in the middle of the range, and \$1799 on the high end.

[50] Mr. Cuff, in his post-hearing written submissions, maintained the position that there was no entitlement to spousal support because of the agreement between the parties which, he argued, precluded a support award. There was no argument made in response to Ms. Cuff's assertion that, despite the agreement, entitlement could be grounded in the provisions of the *Divorce Act*. There were no references to quantum or duration of support. Mr. Cuff stated:

The Respondent submits that, on the basis of the Domestic Contract, wherein the Applicant released the Respondent from any claim for spousal support, the Applicant's claim for spousal support should be dismissed.

[51] The judge ultimately made a spousal support award of \$1339 per month, corresponding to the low end of the range submitted by Ms. Cuff, for an indefinite period.

[52] In light of the record, I would conclude that there was no denial of procedural fairness or natural justice regarding the judge's consideration and determination of the spousal support award. A claim for spousal support was made in the pleadings, argued in the pre-trial brief, referenced in the evidence at the hearing, and further particularized with respect to the specific quantum sought in the post-hearing submissions. The fact that the claim for support was made in the alternative to claims made regarding property issues is of no consequence. The request for support was clearly made, and it was open to Mr.

Cuff to address it and respond to it. It was also appropriate for the judge to deal with it.

[53] When considered in the particular context of this litigation, and consistent with the contextual approach set out in *Beanland* and other related authorities discussed above, I would conclude that it cannot fairly be said that Mr. Cuff should have been surprised that the issue of spousal support was in play and was decided by the judge. This is not a situation where the judge could be said to have erred “in finding liability on a theory never pleaded and with respect to which battle was never joined at trial.” See *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, 113 A.C.W.S. (3d) 68, at para. 63 (Ont. C.A.). There is no unfairness arising, in these circumstances, from the judge having addressed spousal support.

[54] The record does not support the argument that the judge erred by breaching natural justice or denying procedural fairness to Mr. Cuff in this context. Consequently this argument cannot succeed.

Issue 2: Commencement date of the spousal support award

[55] The parties separated on May 15, 2015. Ms. Cuff’s originating application was filed on June 25, 2015 and was served on Mr. Cuff in July 2015.

[56] Having determined that spousal support should be awarded, the judge next considered the commencement date. He decided that the award “would be effective August 1st, 2015, which is the month after which Mr. Cuff was served with the originating application seeking spousal support”. The judge stated:

There's no issue of retroactive spousal support because that ... only applies to support if an application wasn't taken fairly quickly after a separation. And in this case, the application that Ms. Tipple filed was filed a little more than a month after the separation, and it was served on Mr. Cuff a little more than a month after that. So, I would, as I said, make it effective the month after service.

[57] Mr. Cuff makes two arguments relating to this commencement date. First he submits that the judge’s determination of the commencement date raised specific issues of procedural fairness. Second, Mr. Cuff submits that the judge erred in the legal analysis in determining the commencement date.

[58] First, regarding procedural fairness, Mr. Cuff argues that once the judge decided that spousal support should be ordered, counsel should have had an opportunity to make further submissions regarding the commencement date. Mr. Cuff contends that it was procedurally unfair for the judge to have determined

the commencement date without receiving further submissions, specific to this issue.

[59] I would conclude that the judge did not err in this regard. As discussed above there was no denial of procedural fairness, generally, with respect to the judge dealing with spousal support. The issue was clearly before the judge, properly pleaded and argued. Nor did the judge make any procedural fairness error in dealing with the specific issue of commencement of spousal support.

[60] Mr. Cuff submits that a bifurcated process, with a separate hearing or at least separate submissions related to the commencement date, was required. This separate hearing or submissions, Mr. Cuff contends, should have occurred after the decision to award spousal support and before any determination was made about commencement.

[61] However, there is nothing in the record to suggest that the idea of a bifurcated process was ever raised by counsel, or discussed in any way. Further, there is no evidence in the record that the judge suggested or intimated that there might be a separate hearing or an opportunity for additional submissions regarding the commencement date. This is not a situation where a party could fairly claim to have been misled by a judge's words or directions, thereby being denied an opportunity to fully argue their position. (See, for example *O'Keefe v. O'Keefe*, 2019 NLCA 70, at paras. 19-24.)

[62] Rather, in this case, the issue of spousal support was before the Court, and counsel had full opportunity to make submissions on any aspect of this issue, including the commencement date. Mr. Cuff's position throughout the litigation was that there was no entitlement. He did not make alternative submissions regarding a possible commencement date, in the event that the judge found that there was entitlement to support.

[63] In this circumstance, I would conclude that the judge made no error in deciding the commencement date for spousal support without further submissions or a separate hearing. No further hearing or submissions would have been expected or required in this context.

[64] Mr. Cuff's second argument is that the judge erred in his analysis, resulting in his concluding that the appropriate commencement date for the spousal support award should be the month after the date of service of the originating application.

[65] Notably, Ms. Cuff is not seeking an award of spousal support for any period before she commenced legal proceedings. The judge determined that the spousal support award was to begin shortly after Mr. Cuff was served with the originating application in which the claim for spousal support was made. Ms. Cuff submits that the judge made no error in doing so, and that the award properly started at that time. Mr. Cuff argues that the commencement date should have been much later.

[66] The Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269, considered the commencement date for a partner support award, and decided that the trial judge made no error in making the award effective from the date that legal proceedings were commenced.

[67] The Supreme Court in *Kerr*, citing the Court's earlier decision in *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, discussed two "underlying interests at stake" when deciding the appropriate commencement date of a support award. One involves fairness to the payor, and the other involves the duty of a person claiming support to make a timely claim. The Court explained:

[209] ... The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see *D.B.S.*, at paras. 100-103).

[68] Applying these two interests in *Kerr*, the Court concluded that the payor had been put on notice that support was being claimed from the date of commencement of the legal proceedings, and that the applicant had been diligent in bringing the claim. As a result, there was no error in making the support award effective from the start of the proceedings. The Court noted at para. 210: "Commencement of proceedings provided clear notice to the payor that support was being claimed and permitted some planning for the eventuality that it was ordered. There is thus little concern about certainty of the payor's obligations".

[69] Similarly, in the present case, Ms. Cuff included a claim for spousal support in the originating application and pursued this claim throughout the course of the litigation. This would have provided clear notice to Mr. Cuff that this claim was in play, and would have permitted him to arrange his financial situation in the event that the court accepted Ms. Cuff's claim, and ordered him to pay support.

[70] Mr. Cuff argues that the judge erred because he did not explicitly refer to, consider or apply the factors set out in *D.B.S.* when deciding that support would be awarded from the commencement of proceedings. These factors were described in *Kerr* (para. 212) where the Court noted that: “Other relevant considerations noted in *D.B.S.* include the conduct of the payor, the circumstances of the child (or in the case of spousal support, the spouse seeking support), and any hardship occasioned by the award.”

[71] However, while not expressly referring to these factors, the judge in his decision clearly considers the circumstances of Ms. Cuff, and the negative financial consequence of marital breakdown. As for the other factors, there was no evidence regarding financial hardship on Mr. Cuff resulting from a support order, and no evidence of misconduct which the court could consider.

[72] The Court in *Kerr*, at para. 212, also observed that, even when considering the various factors, a “holistic view” must be maintained regarding the appropriate start date for support: “However, it is also critical to note that this Court in *D.B.S.* emphasized the need for flexibility and a holistic view of each matter on its own merits; ...”.

[73] Further, the Court in *Kerr* also noted that, while not determinative of the issue, the commencement date of litigation is often a significant feature in determining the commencement of support:

[211] ... While in my view, the decision to order support for a period before the date of the order should be the product of the exercise of judicial discretion in light of the particular circumstances, the fact that the order is sought effective from the commencement of proceedings will often be a significant factor in how the relevant considerations are weighed. It is important to note that, in *D.B.S.*, all four litigants were requesting that child support payments reach back to a period in time preceding their respective applications; such is not the case here.

[74] Moreover, in *Kerr*, the Court discussed the “general rule” that, while always subject to the factual context and a number of global factors, the “default option” for the commencement of a support order has frequently been considered to be the date on which proceedings were commenced:

[211] In *D.B.S.*, Bastarache J. referred to the date of effective notice as the “general rule” and “default option” for the choice of effective date of the order (paras. 118 and 121; see also para. 125). The date of the initiation of proceedings for spousal support

has been described by the Ontario Court of Appeal as the “usual commencement date”, absent a reason not to make the order effective as of that date: *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175, at para. 24. ...

[75] Similarly, in the present circumstances, the judge determined that the effective date for the award was after the originating application was filed with the Supreme Court, and served on Mr. Cuff. Service of the application on Mr. Cuff would have provided “clear notice” (*Kerr*, at para. 210) that he might be responsible to pay spousal support if Ms. Cuff’s application was successful on this issue. This should not have constituted a surprise to Mr. Cuff. It would have provided him with the opportunity to arrange his finances to allow for this contingency.

[76] Guided by the analysis in *Kerr* and *D.B.S.*, I would conclude that the judge made no error in deciding that the spousal support award commenced in the month following the date of service of the originating application on Mr. Cuff.

Summary and Disposition

[77] For the reasons provided above, I would dismiss the appeal.

[78] As Ms. Cuff was successful, I would award costs of this appeal payable to her based on Column 3 of the Scale of Costs in the *Court of Appeal Rules*. I would not disturb the costs award made in the Court below.

F.P. O’Brien J.A.

I Concur: _____
B.G. Welsh J.A.

I Concur: _____
G.D. Butler J.A.