COURT OF APPEAL FOR ONTARIO

CITATION: Climans v. Latner, 2020 ONCA 554

DATE: 20200904

DOCKET: C66766

Gillese, Brown and Paciocco JJ.A.

BETWEEN

Lisa Jean Climans

Applicant (Respondent)

and

Michael Elliot Latner

Respondent (Appellant)

Chris G. Paliare and Andrew K. Lokan, for the appellant

Bryan R.G. Smith and Jennifer Cook, for the respondent

Heard: June 24, 2020 by video conference

On appeal from the order of Justice Sharon Shore of the Superior Court of Justice, dated February 25, 2019, with reasons reported at 2019 ONSC 1311.

Gillese J.A.:

[1] In this family law appeal, three significant issues are explored.

[2] The first issue revolves around the meaning of "spouse" and "cohabit" in s. 29 of the *Family Law Act,* R.S.O. 1990, c. F.3 (the "FLA"). Cohabit is defined in s. 1(1) of the FLA as "to live together in a conjugal relationship". Where the parties in a long-term romantic relationship never marry, do not have children together, and choose to maintain their own homes rather than live together, was the time they spent together sufficient to amount to "living together" in a conjugal relationship?

[3] The second issue relates to the "Rule of 65". The Rule of 65 applies where the length of cohabitation in years plus the recipient's age at the date of separation equals or exceeds 65: *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, 2008), (the "SSAGs"), s. 7. If the Rule of 65 applies, indefinite spousal support is appropriate: *Djekic v. Zai*, 2015 ONCA 25, at para. 9.

[4] The third issue relates to the costs award at trial. What is the effect of partial success on appeal on that costs award? How are the trial judge's findings on the reasonableness of one party's conduct dealt with on a reconsideration of that costs award?

OVERVIEW

[5] Lisa Climans and Michael Latner were in a romantic relationship from October 2001 to May 2015, a period of almost 14 years. Throughout their relationship, they maintained separate homes in Toronto where each resided. They never married or moved in together. Both had children from previous marriages. Mr. Latner was very wealthy. Early in their relationship, Mr. Latner told Ms. Climans that he would not marry her or live with

her unless she first signed a domestic contract. At times, he prepared draft contracts and presented them to her but no such contract was ever signed.

[6] During their relationship, Ms. Climans and Mr. Latner lived together in July and August at Mr. Latner's Muskoka cottage. They spent weekends in Florida in the winter months. Sometimes, they spent March break week in Florida. The parties also vacationed together. Beginning early in their relationship, Mr. Latner supported Ms. Climans financially. During their relationship, he provided her and her children with a lavish lifestyle. The parties' personal and social lives were closely interwoven and they presented as a couple in public.

[7] When their relationship ended, Ms. Climans brought an action in the Superior Court of Justice, asking that she be recognized as Mr. Latner's spouse and that he be required to pay her spousal support. Mr. Latner resisted the claim, arguing that while they had had a romantic relationship, as they had never married or cohabited, Ms. Climans was not his spouse.

[8] Following an eight-day trial, by order dated February 25, 2019 (the "Order"), the parties were declared to be spouses within the meaning of s. 29 of the FLA. Mr. Latner was ordered to pay Ms. Climans spousal support of $53,077 per month, commencing January 1, 2019, for an indefinite duration.

[9] As the successful party at trial, Ms. Climans was found to be entitled to costs. The trial judge ordered costs on a substantial indemnity basis for two reasons. First, she viewed Mr. Latner's position that he and Ms. Climans had not been spouses to be unreasonable. Second, she found that Mr. Latner had not been "forthcoming" in his financial disclosure. By further order dated September 10, 2019 (the "Costs Order"), Mr. Latner was ordered to pay Ms. Climans costs in the total amount of $324,179.

[10] Mr. Latner appeals. He says that the trial judge erred in finding that he and Ms. Climans were spouses. He also contends that the trial judge erred in concluding that the Rule of 65 applied, which was the basis for ordering that he pay spousal support indefinitely. Finally, he argues that the trial judge erroneously awarded costs on an increased scale.

[11] For the reasons that follow, I would allow the appeal in part. I see no basis on which to interfere with the trial judge's finding that the parties were spouses within the meaning of s. 29 of the FLA. However, in my view, the trial judge erred in principle in concluding that the Rule of 65 applied. Consequently, I would set aside the order for indefinite spousal support and substitute an order requiring that spousal support be paid for a period of ten years. Further, I would vary the Costs Order, substituting an order for costs on a partial indemnity basis.

BACKGROUND IN BRIEF

[12] The following account of the parties and their relationship is based on the trial judge's findings, as set out in her reasons for decision (the "Trial reasons").

[13] Ms. Climans and Mr. Latner had a passing acquaintance before they met by chance, on October 17, 2001, at a gas station.

[14] Ms. Climans was 38 years old when the chance meeting took place. She was separated from her husband[1] and lived in Toronto. Her two children were aged 8 and 11 at that time and their primary residence was with her. Ms. Climans was working in sales and marketing for her brother's construction business, earning approximately $5,000 per month. She was also receiving $850 per month in child support, which increased to $2,000 per month at some point and ended in 2018, when the children finished school and started working.

[15] Mr. Latner was 46 years old at the time of the chance meeting. He was divorced and lived in Toronto. His three children from his marriage were aged 12, 16, and 18. Mr. Latner was a very wealthy man when the parties met and remains so.

[16] Mr. Latner actively pursued Ms. Climans and they quickly began a relationship. By November 2001, Ms. Climans began sleeping at his home on alternate weekends when her children were with their father. She also

quit her job so that she could be available to run errands for Mr. Latner, travel with him, or spend time with him. Ms. Climans did not work again until after her relationship with Mr. Latner ended.

[17] The first several years of the parties' relationship were intense although there were periods in which they were not speaking and a few short breakups.

[18] However, theirs was a committed relationship. In 2002, Mr. Latner gave Ms. Climans a 7.5 carat diamond ring; he proposed to her on several occasions, which Ms. Climans accepted; and he gave Ms. Climans several rings, which she wore throughout the relationship. Ms. Climans also gave Mr. Latner a ring that he wore throughout their relationship. Each year, they celebrated the anniversary of the day that they met. He sent her many cards and letters in which he declared his love for her. He often referred to her by his last name. When Mr. Latner was in hospital dealing with a health issue, Ms. Climans slept at the hospital, occasionally alternating with Mr. Latner's children. She drove him to his follow-up medical appointments. The parties were sexually active throughout their relationship. They introduced each other to their respective children early on. While there was no melding of their children into one family, the parties and their children did celebrate special occasions together. The parties also attended extended family functions together, went out socially, and held themselves out as a couple.

[19] In the early years of their relationship, Ms. Climans and Mr. Latner interacted daily. They usually ate dinner together at one home or the other's, often with whichever of their children were around. They had coffee together in the morning, walked their dogs together, and talked on the phone frequently.

[20] The parties agree that something in their relationship changed in 2006, though they disagree on the reason. In any event, after 2006, Ms. Climans slept very infrequently at Mr. Latner's home. (Throughout the relationship, Mr. Latner seldom stayed over at Ms. Climans' home.) Other than that, their relationship remained unchanged.

[21] Beginning in 2012, the parties attended counselling for two to three years, to work on their relationship and on Ms. Climans' strained relationship with Mr. Latner's daughter.

[22] The parties never merged their finances. They maintained separate bank accounts and had no joint bank accounts. Nor did they own property jointly. However, beginning in November 2001, Mr. Latner gave Ms. Climans $5,000 per month, later increased to $6,000. Soon after, in 2002, Mr. Latner started covering Ms. Climans' home expenses and gave her a credit card for other expenses. Later, he paid off a mortgage on Ms. Climans' home and paid for renovations to it. He gave her expensive gifts of jewellery and fur coats, cars to drive, and extravagant holidays. He was also extremely generous in terms of her children, paying for many of their expenses. Mr. Latner provided Ms. Climans and her children with a lavish lifestyle throughout the parties' relationship.

[23] The parties always maintained their separate residences in Toronto but stayed together when they travelled outside of Toronto. They spent July and August together each year in Mr. Latner's Muskoka cottage. In the winter months they spent time together in Florida – from Thursday until Monday morning on alternate weeks when Ms. Climans' children were with their father and sometimes during the winter school break. The parties also frequently vacationed together.

[24] In 2007, Mr. Latner bought the property next to his home in Toronto (the "New Property"). The parties discussed moving into the New Property together. Renovations to the house on the New Property began during the parties' relationship but were not completed. Neither party lived in that house during their relationship. Mr. Latner now lives in it.

[25] When their relationship ended on May 11, 2015, Ms. Climans was almost 52 years old. She became qualified as a yoga instructor and was expected to earn $24,000 in 2019 from teaching yoga. At the time of trial, Ms. Climans was 55 years old. Her position was that the parties had been spouses and she sought indefinite spousal support.

[26] Mr. Latner was 63 at the time of trial and chairman of his family's group of companies. He acknowledged his romantic relationship with Ms. Climans and described her as his girlfriend and travel companion. Because they had never married or lived together, his position was that they were not spouses. He said that he had been clear throughout his relationship with Ms. Climans that he would never marry her, or move in with her, without a domestic contract. He presented Ms. Climans with a draft contract in 2002, which she took to a lawyer but never signed. In 2013, when problems had developed in the relationship, Mr. Latner again gave Ms. Climans a domestic contract. There were discussions between the parties and their lawyers and a second draft was prepared. However, again, no domestic contract was ever signed.

[27] After Ms. Climans began this proceeding, under the terms of a consent order entered into in April 2016, Mr. Latner agreed: to pay Ms. Climans $6,000 per month; Ms. Climans could spend up to $5,000 per month on the VISA he had provided to her during their relationship; and that he would pay for an enumerated list of her other expenses. He made all the payments under the consent order. Pursuant to its terms, between May 2015 and December 2018, Mr. Latner paid Ms. Climans $621,783.88.

THE RELEVANT LEGISLATION

[28] Sections 29 and 1(1) of the FLA are the relevant provisions in this matter. Section 29 falls within Part III of the FLA and defines "spouse" for the purpose of support obligations as follows:

29 In this Part,

…

"spouse" means a spouse as defined in subsection 1(1), and in addition includes either of two persons who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, …

Section 1(1) defines "cohabit" as follows:

1(1) In this Act,

…

"cohabit" means to live together in a conjugal relationship, whether within or outside marriage[.]

THE TRIAL DECISION

[29] After describing the parties, their relationship, and the evidence of the witnesses that each had called, the trial judge set out her legal analysis. She began by determining whether the parties were spouses within the meaning of ss. 29 and 1(1) of the FLA. As the parties never married and their relationship lasted longer than three years, the trial judge's analysis focused on whether the parties had "cohabited", which is defined in s. 1(1) to mean "to live together in a conjugal relationship".

[30] The trial judge referred to *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), which sets out a non-exhaustive list of criteria to be considered in determining whether a conjugal relationship exists: "shared shelter, sexual and personal behaviour, services, social activities, economic support, children as well as the social perception of the couple": *Campbell v. Szoke* (2006), 45 R.F.L. (5th) 261, at para. 51. She observed that in *M. v. H.*, [1999] 2 S.C.R. 3, at paras. 59-60, the Supreme Court of Canada adopted and affirmed the *Molodowich* criteria and its contextual and flexible approach to determining whether a relationship is conjugal.

[31] Based on the *Molodowich* criteria, the trial judge had "no doubt" that the parties had been in a conjugal relationship. At para. 120 of the Trial reasons, she wrote:

They were in a long term committed relationship. Mr. Latner treated Ms. Climans as his wife. Their relationship was sexual in nature. They held themselves out as a committed couple and were perceived as a couple by their family and friends. Ms. Climans was considered family by the extended Latner family. The parties participated in social activities as a couple. Mr. Latner supported Ms. Climans financially. They travelled extensively together. They lived together at the cottage each summer.

[32] At para. 121 of the Trial reasons, the trial judge said that the one issue that gave her pause was whether the parties had a "shared shelter". She posed the question: had Ms. Climans and Mr. Latner "lived together", even though they maintained separate residences in Toronto?

[33] In answering this question, the trial judge canvassed caselaw which establishes that the fact the parties maintained separate residences was not the end of the inquiry. She observed that in *Stephen v. Stawecki* (2006), 32 R.F.L. (6th) 282 (Ont. C.A.), this court declined to impose a bright-line rule requiring that two people must move in together to be considered as living together or cohabiting. She noted that, at para. 4 of *Stephen v. Stawecki*, this court said "[T]he specific arrangements made for shelter are properly treated as only one of several factors in assessing whether or not the parties are cohabiting".

[34] At para. 128 of the Trial reasons, the trial judge stated:

To determine whether the parties lived together in a conjugal relationship, all the factors must be considered in conjunction with one another. However, there needs to be some element of living together under the same roof. The very definition of "cohabit" requires that the parties **live together** in a conjugal relationship. [Emphasis in original.]

[35] The trial judge's conclusion, at para. 139 of the Trial reasons, that the parties were spouses, plays an important role in this appeal. For that reason, I set it out now in its entirety.

[139] I find that Ms. Climans and Mr. Latner were spouses for the purpose of spousal support having regard to all the factors. The dynamic of their relationship was such that all of the elements were present to some degree or another, but when viewed all together, lead to the conclusion that they were spouses:

a. Committed relationship: The parties were in a committed [14-year] relationship, as set out in more detail above, having exchanged rings (even if only "commitment rings", as described by Mr. Latner), celebrated their anniversary each and every year, exchanged numerous love letters with expressions of deep commitment, Mr. Latner calling [Ms. Climans] Mrs. Latner (or other similar names), and Ms. Climans caring for Mr. Latner during hospital stays. There was an expectation that Ms. Climans be available to Mr. Latner, and run errands for him.

b. Financial Arrangements: Mr. Latner paid for Ms. Climans' expenses for the entirety of the relationship, provided her with a lavish lifestyle, paid off one of her mortgages and created a financial dependency.

c. Extended Family and Social Perception: Ms. Climans was treated as family by the extended Latner family. The parties held themselves out as a couple in a long-term committed relationship to both family and friends. They have referred to each other as spouses in public. Ms. Climans participated in the extended Latner family lifecycle events and even walked down the aisle with Mr. Latner at his daughter's wedding, standing under the chuppah (canopy) with him.

d. Living together:

i. I find that every summer, Mr. Latner and Ms. Climans moved up to and lived together at the cottage. This was their summer home, where they could be located throughout the summer for almost the entire 14 years.

ii. I also find that for the first several years of the relationship, Ms. Climans was residing at Mr. Latner's home on a regular basis, when her children were not in her care, being alternate weekends. I accept that she maintained a separate home for her children, to be close to their school, and by the time they graduated the parties were

already in the process of building a home together. This may have changed later in the relationship but was certainly present in the first few years.

iii. The parties also lived together as spouses when in Florida.

Had these been the only factors, I would not have concluded that they were spouses. However, when taken into account along with all the other dynamics in this relationship (summarized above), I conclude that they were common law spouses.

[36] The trial judge then considered the issue of spousal support and concluded that Ms. Climans was entitled to both non-compensatory and compensatory spousal support.

[37] In terms of non-compensatory support, she based entitlement on the difference between the needs and means of the parties, saying: "The circumstances of this relationship clearly created a pattern of economic dependency": at para. 143. As Ms. Climans' only source of income is from teaching yoga, she needs support payments to meet her needs.

[38] The trial judge found that Ms. Climans was entitled to compensatory support because she had suffered economic loss or disadvantage as a result of the role she played during the relationship. She noted that Ms. Climans had given up her job at the start of the relationship to be available to Mr. Latner and had been out of the workforce for 14 years as a result.

[39] However, the trial judge found that Ms. Climans' compensatory claim was weak: she had not contributed to Mr. Latner's success nor did he owe his success to her role in the relationship. While Mr. Latner did receive "some benefit" from Ms. Climans during the relationship, when the parties met, Mr. Latner was already well established in his family's business. Ms. Climans played no role in the acquisition or improvement of the family business and any benefit she conferred did not survive the breakdown of the relationship.

[40] The trial judge next considered Mr. Latner's income. She noted that he had not taken a position on his true income for support purposes because he acknowledged that his ability to pay support was not an issue. She found the quantum of spousal support was driven mainly by Ms. Climans' needs but stated it was still necessary to make some finding as to Mr. Latner's income. After discussing some of the complex financial arrangements that impacted Mr. Latner's income, she found he had an average annual income of over $6.5 million in the preceding three years. She was satisfied that he had sufficient income from which to pay support and that it was Ms. Climans' needs, measured against her standard of living during the relationship, that was the driving factor in determining the quantum of spousal support.

[41] The trial judge then addressed the duration for which spousal support was payable. At para. 181 of the Trial reasons, she noted that under the SSAGs, spousal support was payable for between 7 and 14 years, "unless the years of their relationship and Ms. Climans' age total 65 or more", in which case the Rule of 65 applied and spousal support was payable indefinitely. However, she noted, by ordering indefinite support, she was not necessarily making a finding that Ms. Climans was entitled to permanent spousal support.

[42] Ms. Climans was 51 years, 9 months, and 13 days of age when the parties' relationship ended. Her position was that she and Mr. Latner started cohabiting on November 1, 2001, and separated on May 11, 2015. On Ms. Climans' calculation, she met the Rule of 65 (65 years and 5 months) and was entitled to indefinite spousal support.

[43] At para. 181 of the Trial reasons, the trial judge said, "While I may not agree that they started cohabiting as early as November 1, 2001, there is a five-month leeway". She found that "at some point in those first five months of the relationship, the parties did start cohabiting".

[44] After weighing the relevant factors and considerations – including lifestyle, ages, contribution to expenses, a weak compensatory claim, the duration of support and length of the relationship – the trial judge concluded that Ms. Climans was entitled to indefinite spousal support of $53,077 per month.

THE COSTS DECISION

[45] In her reasons for the Costs Order (the "Costs reasons"), the trial judge set out the four fundamental purposes of costs rules: to partially indemnify successful litigants; to encourage settlement; to discourage and sanction inappropriate behaviour by litigants; and to ensure that cases are dealt with justly. She noted that in family law cases, costs are addressed by rule 24 of the *Family Law Rules*, O. Reg. 114/99 (the "Family Law Rules"). She further noted this court's recent decision in *Beaver v. Hill*, 2018 ONCA 840, 143 O.R. (3d) 519, which emphasized the need for reasonableness and proportionality in the exercise of discretion when making a costs award.

[46] The trial judge considered the factors in rule 24. She found Ms. Climans to have been successful on the central issue of whether she was a spouse, and on the issues of quantum and duration of spousal support. She noted Mr. Latner's success on the smaller issue of life insurance. The trial judge observed that both parties had made various offers to settle but found that the offers were neutral on the issue of costs. She concluded that, as Ms. Climans had succeeded at trial, she was entitled to costs.

[47] The trial judge also considered the time spent by each party and the legal fees they had incurred. Each had spent in excess of $430,000 in legal fees. While she described those amounts as "high", she found they were reasonable in this case. She also found them to be proportionate to the quantum of money at stake for both parties and to the legal fees spent by one another.

[48] In considering each party's behaviour during the legal proceedings, the trial judge rejected Ms. Climans' invitation to find that Mr. Latner had acted in bad faith. However, she found his conduct had been "unreasonable" in two ways: (1) his position that Ms. Climans "was nothing more than a travel companion or girlfriend"; and (2) he had not been "forthcoming" in his disclosure.

[49] Because of her determination that Mr. Latner had been unreasonable in these ways, the trial judge ordered costs in favour of Ms. Climans on a substantial indemnity basis, fixed at 70% of actual costs. Of Ms. Climans' total legal fees of $463,114, Mr. Latner was ordered to pay her costs of $324,179.

THE ISSUES

[50] Mr. Latner raises three issues on appeal. He says that the trial judge erred in:

1. concluding that he and Ms. Climans met the definition of "spouse" in s. 29 of the FLA;

2. concluding that the parties began cohabiting in the first five months of their relationship so as to meet the Rule of 65; and

3. awarding Ms. Climans costs on a substantial indemnity basis.

ANALYSIS

ISSUE #1: Were the parties "spouses" within the meaning of s. 29 of the FLA?

The Parties' Positions

[51] Mr. Latner acknowledges that he and Ms. Climans had a long-term romantic relationship. However, he submits, as they never married or "lived together" in a conjugal relationship, they were not spouses within the meaning of s. 29 of the FLA and the trial judge erred in concluding that they were. His submission rests on two lines of argument: first, that the parties did not live together; and second, that the other factors indicating a conjugal relationship did not establish that they had lived together.

[52] The first line of argument runs as follows. Relying on *Stajduhar v. Wolfe*, 2017 ONSC 4954, at para. 65, aff'd 2018 ONCA 256, leave to appeal refused, [2018] S.C.C.A. No. 431, to live together means to have a "common abode" in the sense that there is a "readily identifiable" place "where *both* are ordinarily to be found

most of the time when they are at 'home'" (emphasis in original). As the parties maintained separate residences throughout their relationship, Mr. Latner says that the evidence does not support a conclusion that they had a common abode.

[53] Mr. Latner acknowledges that maintaining separate residences does not automatically lead to the conclusion that the parties did not live together. However, he contends that Ms. Climans did not sleep over at his home with anything like the frequency that characterizes the cases relied on by the trial judge in which cohabitation was found. In the early years, Ms. Climans only slept at his home on alternate weekends when her children were with their father. Further, she stayed over at his Toronto home with even less frequency when her children were older. On Ms. Climans' evidence, between 2006 and 2013, she slept over at Mr. Latner's Toronto home no more than 10 to 20 times.

[54] Mr. Latner notes that, in considering whether the parties lived together, the trial judge also relied on the time they spent together in the summer at the Muskoka cottage and on trips to Florida in the winter months. But, he says, the cottage only accounted for approximately eight weeks each year and the time in the Florida condo was basically only alternate weekends. He argues that in the cases relied on by the trial judge, there was much stronger and more tangible evidence that the parties lived together at a "common abode" and that Ms. Climans failed to demonstrate that they lived together at a common abode or "under the same roof" on a continuous and consistent basis.

[55] The second line of argument can be summarized as follows. "Cohabitation" and a "conjugal relationship", while overlapping and interwoven concepts, are separate concepts. Ms. Climans had to show both that she and Mr. Latner lived together, and that they did so in a conjugal relationship. He contends that the interwoven nature of the concepts cannot be permitted to overwhelm the plain language of the statutory test and that the *Molodowich* factors pointing to a conjugal relationship should not be applied so as to read out the legislative requirement that the parties "live together". In short, he says, the factors pointing to a conjugal relationship do not make up for the basic fact that he and Ms. Climans chose not to live together.

[56] Ms. Climans' position on this issue can be summarized simply. The trial judge made no error in her articulation of the legal principles for determining whether the parties were spouses and her findings of fact are not challenged. As the trial judge considered the different elements of the parties' relationship, and applied the correct legal principles, there is no basis to interfere with her determination, on the totality of the evidence, that the parties were spouses.

Analysis

[57] I accept Ms. Climans' submission on this issue.

[58] I reject Mr. Latner's submission that the trial judge erred in finding that the parties had lived together in a conjugal relationship. Lack of a shared residence is not determinative of the issue of cohabitation. As the trial judge's review of the caselaw demonstrates, there are many cases in which courts have found cohabitation where the parties stayed together only intermittently.

[59] The trial judge recognized that cohabitation requires not only that the parties had a conjugal relationship but also that they lived together. As she stated at para. 128 of the Trial reasons, all of the *Molodowich* factors must be considered in conjunction with one another when determining whether the parties cohabited, however, "there needs to be some element of living together under the same roof".

[60] As the trial judge observed, whether the parties lived together – despite having chosen to maintain separate residences – was a question that gave her pause. She wrestled at length with whether the intermittent periods during which the parties shared a roof – including Ms. Climans' overnight stays, the summers at the cottage, and the time spent in Florida – could, in all the circumstances, constitute living together in a conjugal relationship. She was entitled to conclude that they did and to find cohabitation. A review of para. 139 of the Trial reasons (set out above) shows that she took into consideration both the *Molodowich* factors for a conjugal

relationship and her findings of fact on the parties' relationship that led her to conclude that they had lived together.

[61] The trial judge correctly interpreted the legislation and articulated the governing legal principles in deciding whether the parties had been spouses. We have been pointed to no errors in her factual findings, much less ones that are palpable and overriding. In effect, on this ground of appeal, Mr. Latner asks this court to reweigh the evidence – that is, to apply the law to the facts and come up with a different result than that of the trial judge. But that is not the role of this court. Absent reversible error, this court must defer to the trial judge's application of the law to the facts as she found them.

[62] As Mr. Latner has not established a basis for appellate intervention with the trial judge's determination that the parties had been spouses, her determination must stand. I would dismiss this ground of appeal.

ISSUE #2: Was the Rule of 65 met?

The Parties' Positions

[63] The trial judge concluded that Ms. Climans satisfied the Rule of 65 based on her finding that the parties began cohabiting at some point in the first five months of their relationship – that is, prior to March 17, 2002 (the "Finding"). Mr. Latner submits that the trial judge erred in that Finding. He says that by mid-March 2002, the parties had not yet spent any time together at his Muskoka cottage – that first occurred in July 2002. Further, he points out that they had spent only a few nights together at his home in Toronto. In this regard, it will be recalled that because of Ms. Climans' responsibilities to her children, in the early years of their relationship, she slept at Mr. Latner's Toronto home only on alternate weekends when the children were with their father. And, as the trial judge found, Mr. Latner did not stay over at Ms. Climans' home. Moreover, Mr. Latner says, very few of the indicia of a conjugal relationship that the trial judge relied on to conclude that the parties ultimately became spouses had actually occurred by mid-March 2002.

[64] Thus, Mr. Latner submits, even if the parties met the statutory requirement that they "live[d] together in a conjugal relationship" at a later stage in their relationship, they were not cohabiting within the first five months of their relationship and the Rule of 65 was not met.

[65] Ms. Climans begins by observing that Mr. Latner has not made clear the basis on which he appeals the Finding: is he alleging that the trial judge made an error of fact, of law, or of mixed fact and law? Ms. Climans contends that the question of when the parties started to cohabit is a question of fact that attracts the highest standard of review: appellate intervention is warranted only where the trial judge made a "palpable and overriding error" or a finding which is "clearly wrong". She submits that there was ample evidence before the trial judge, which she was entitled to accept, that the facts indicative of each of the *Molodowich* factors existed within the first five months of the relationship. Therefore, she says, the trial judge made no error in finding that the parties began cohabiting within that period.

Analysis

[66] I accept Ms. Climans' complaint that Mr. Latner fails to make clear his position on the appropriate appellate standard of review on this issue. Having said that, I find it unnecessary to decide that matter. For the purpose of this appeal, I will accept Ms. Climans' submission that this issue revolves around the Finding (i.e. that the parties started cohabiting at some point in the first five months of their relationship) and that the Finding is a question of fact which attracts the highest standard of appellate review.

[67] Applying that standard, it is my view that the Finding cannot stand because it is the result of palpable and overriding error. Ms. Climans could only meet the Rule of 65 if the parties were found to have begun cohabiting in the first five months of their relationship. As the Finding to that effect must be set aside, the trial judge erred in principle in concluding that Ms. Climans met the Rule of 65.

[68] The full text of the trial judge's reasons on this issue is found at para. 181 of the Trial reasons. Paragraph 181 reads as follows:

Under the SSAGs, spousal support is payable for a duration of between 7-14 years, unless the years of their relationship and Ms. Climans' age total 65 or more (the Rule of 65). Ms. Climans was 51 years of age at separation (or to be exact, 51 years, 9 months and 13 days). Ms. Climans has taken the position that they started cohabiting as of November 1, 2001 and separated May 11, 2015. This means that they cohabited, by her calculations, for 13 years, 6 months and 24 days. By her calculations she hits the "Rule of 65" (65 years and 5 months), and is asking for indefinite spousal support. While I may not agree that they started cohabiting as early as November 1, 2001, there is a five-month leeway. It was Mr. Latner's position that the parties never cohabited, so he did not provide any evidence or take a position as to the start date. I find that at some point in those first five months of the relationship, the parties did start cohabiting.

[69] The trial judge gave no reasons in para. 181, or elsewhere in the Trial reasons, for why she concluded that the parties began cohabiting in the first five months of their relationship. She referred to no legal principles, factual findings, or evidence in support of that Finding.

[70] However, in concluding that the parties were spouses within the meaning of ss. 29 and 1(1) of the FLA, the trial judge relied on her extensive factual findings to determine that the parties had cohabited. On those findings, the parties did not begin cohabiting within the first five months of their relationship. Accordingly, the Finding is the result of palpable and overriding error.

[71] As I explain on the first issue, the trial judge found that the parties were spouses within the meaning of s. 29 of the FLA because they "cohabited" for a period of not less than three years. To determine whether the parties had cohabited, the trial judge applied s. 1(1) of the FLA and asked: did the parties "live together in a conjugal relationship". She readily found that the parties had a conjugal relationship but struggled with whether they had lived together. A review of paras. 120, 128, and 139 of the Trial reasons makes this evident.

[72] At para. 120, the trial judge said:

They were in a long term committed relationship. Mr. Latner treated Ms. Climans as his wife. Their relationship was sexual in nature. They held themselves out as a committed couple and were perceived as a couple by their family and friends. Ms. Climans was considered family by the extended Latner family. The parties participated in social activities as a couple. Mr. Latner supported Ms. Climans financially. They travelled extensively together. They lived together at the cottage each summer.

[73] It is notable that there is no timeline for the findings in para. 120. Rather, they reflect the trial judge's findings about the relationship over its duration of almost 14 years. While some aspects of their conjugal relationship began right away – for example, its sexual nature – others did not. For instance, the first time the parties lived together at the Muskoka cottage was in the summer of 2002. Self-evidently, the summer of 2002 is later than March or April of that year. And, the trial judge's findings that underpin her conclusion that the relationship was a committed one include Mr. Latner's proposal to Ms. Climans and gift of a ring. However, those events took place in October 2002 – again, well after the first five months of their relationship. Other matters that the trial judge refers to in para. 120 are based on findings she made about the parties' relationship as it progressed over time. Examples of this include the evidence on which the trial judge found that family and friends perceived the parties as a couple. Again, those events occurred later than the first five months of their relationship.

[74] Importantly, the trial judge did not conclude in para. 120 that the parties had cohabited – she concluded that they had been in a conjugal relationship. This is made clear at para. 128 of the Trial reasons, where the trial judge notes that it was not sufficient to find that the parties had a conjugal relationship – it was necessary to find that they "lived together" in a conjugal relationship. As she explained, "[T]here needs to be some element of living together under the same roof. The very definition of 'cohabit' requires that the parties **live together** in a conjugal relationship" (emphasis in the original).

[75] Thus, it is significant that when the trial judge ultimately concluded, at para. 139 of the Trial reasons, that the parties were spouses for the purpose of spousal support, she did so based on the entirety of their relationship, with specific consideration of the periods of time that they lived together: the "almost … 14 years" that they spent summers together at the Muskoka cottage; the "first several years" of their relationship when Ms. Climans stayed at Mr. Latner's Toronto home on alternate weekends; and, the time they spent together in Florida in the winter months.

[76] Two points of significance arise from this review of para. 139 of the Trial reasons. First, the time the parties spent together over the duration of their relationship was a critical consideration for the trial judge in reaching her conclusion that the parties had cohabited. Second, the trial judge found that the "living together" requirement necessary to establish cohabitation was met, in part, because the parties lived together at the cottage each summer – and they first lived together at the cottage in the summer of 2002, a time later than the first five months of the parties' relationship.

[77] As the parties did not begin cohabiting within the first five months of their relationship, the Rule of 65 does not apply and it was an error in principle to find that it did. Consequently, time-limited support is warranted.

[78] As the Rule of 65 was not met, spousal support under the SSAGs is payable for between 7 and 14 years: see Trial reasons, at para. 181. Having regard to the purposes of a support order set out in s. 33(1) of the FLA, and the trial judge's findings on Ms. Climans' contributions to the relationship, as well as the economic consequences of the relationship to her, I would order that spousal support be paid for a period of ten years. In my view, such an order will relieve the financial hardship Ms. Climans is experiencing and make fair provision to assist her in becoming able to contribute to her own support.

ISSUE #3: Reconsidering the Costs Order

The Parties' Positions

[79] Mr. Latner seeks leave to appeal the Costs Order on the basis that the trial judge erred in principle in awarding costs against him on a substantial indemnity basis. He submits that she erred in finding his position that he had not been in a spousal relationship with Ms. Climans to be unreasonable. He points to the jurisprudence and the evidence to argue that he had a reasonable basis for his position.

[80] Mr. Latner also contends that the trial judge erred in finding his approach to financial disclosure was unreasonable. He set out the various ways in which he was forthcoming about his finances during the relationship and provided financial information during the proceedings and at trial. He highlights the extremely complex nature of his financial affairs and points out that Ms. Climans produced hundreds of documents only on the eve of trial. Based on the overall principles of reasonableness and proportionality, he submits that costs on an enhanced basis were not warranted.

[81] Ms. Climans' position is that Mr. Latner needs leave to appeal the Costs Order and that leave should not be granted because Mr. Latner has not established an error in principle that warrants appellate interference.

[82] In terms of the merits of the Costs Order, Ms. Climans points out that as the successful party at trial, she was presumptively entitled to partial indemnity costs. In awarding her costs equal to 70% of the legal fees that she incurred, Ms. Climans says that the trial judge addressed the relevant factors – including reasonableness and proportionality – and made findings about Mr. Latner's behaviour that were justified. As the trial judge found that Mr. Latner had acted unreasonably, Ms. Climans says that the enhanced costs award was warranted.

Analysis

Leave to Appeal the Costs Order is not Required

[83] Section 133(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that leave is required where the appeal is only as to a discretionary costs order. However, when "the disposition on appeal changes the decision under appeal, leave to appeal from a costs order is not necessary": *Tadayon v. Mohtashami*, 2015 ONCA 777, at para. 70; see also *Beaver v. Hill*, 2018 ONCA 840, at para. 2, leave to appeal refused, [2019] S.C.C.A. No. 82.

[84] Since I would allow the appeal on the issue of the duration of spousal support, my disposition would change the decision below. Consequently, leave to appeal the Costs Order is not required.

Reconsidering the Costs Order

1.The General Principle

[85] The general principle is that when an appeal is allowed, the order for costs below is set aside and the appellant is awarded costs below and on appeal: *St. Jean (Litigation Guardian of) v. Cheung*, 2009 ONCA 9, at para. 4. However, on my determination of the appeal, Mr. Latner would enjoy only partial success on appeal. Thus, the general principle does not apply. However, partial success on appeal still requires this court to reconsider the costs disposition at trial.

2.Factoring in the Effect of the Appeal

[86] Reconsidering the Costs Order begins by factoring in the effect of the appeal on the decision below. This leads to the conclusion that Ms. Climans enjoyed a reduced level of success at trial.

[87] At trial, Ms. Climans was successful on the issue of whether she and Mr. Latner were spouses within the meaning of s. 29 of the FLA. She remains successful on this important issue. Ms. Climans also succeeded on the quantum of support at trial, a matter that was not challenged on appeal. However, as I would order time-limited rather than indefinite spousal support, Mr. Latner is successful on the issue of the duration of spousal support.

3.The Reasonableness of Mr. Latner's Conduct

[88] The next step in reconsidering the Costs Order is to review the two aspects of Mr. Latner's conduct that the trial judge found to be unreasonable and justified awarding costs on an elevated scale: Mr. Latner's legal position that he and Ms. Climans had not been spouses, and his financial disclosure. On both matters, it is my view that the trial judge erred in principle in finding Mr. Latner acted unreasonably.

a. Mr. Latner's Legal Position

[89] The trial judge's criticism of Mr. Latner's legal position is found at para. 17 of the Costs reasons where she says, "His position at trial – that [Ms. Climans] was nothing more than a travel companion or girlfriend – was unreasonable".[2] Respectfully, I disagree.

[90] A basic principle in our legal system is that a defendant is entitled to require the plaintiff to prove its claim – something more than advancing a reasonable position at law is required to attract heightened costs consequences. Thus, an unsuccessful party will not incur heightened costs consequences if his or her conduct, including the legal position advanced, is reasonable: *Hunt v. TD Securities Inc.* (2003), 66 O.R. (3d) 481 (C.A.), at para. 153; see also *Foulis v. Robinson; Gore Mutual Insurance Co., Third Party* (1978), 21 O.R. (2d) 769 (C.A.), at p. 776.

[91] Importantly, this basic principle does not result in a party litigating "with total immunity": *Hunt v. TD Securities*, at para. 153 (citations omitted). Where one party forces the other to prove its case and is unsuccessful, the length of the trial will be reflected in the bill of costs of the successful party. That is what happened in the present case. Because Mr. Latner required Ms. Climans to prove that they had been spouses within the meaning of s. 29 of the FLA, Ms. Climans had to spend significant time at trial introducing evidence about their relationship. In large measure, this accounts for the fact that the trial lasted for eight days.

[92] In light of this basic principle, when determining whether to make an elevated costs award, the question for the trial judge was whether Mr. Latner's conduct, including his legal position, was reasonable.

[93] Mr. Latner's legal position was that he and Ms. Climans had not been spouses within the meaning of s. 29 of the FLA because they had not lived together during their relationship – they maintained separate residences throughout, never married, and never moved in together. He said that he was clear throughout the relationship that he would not marry Ms. Climans or move in together with her unless and until they first entered into a domestic contract. This was not an after-the-fact justification for his legal position; the various draft domestic contracts he gave Ms. Climans during their relationship and which were introduced into evidence at trial bear witness to that. In this regard, it is notable that Mr. Latner again raised the issue of a domestic contract when he purchased the New Property that the parties had discussed as a future shared residence. Ms. Climans never signed the draft domestic contract and they never moved in together.

[94] In my view, Mr. Latner's legal position was reasonable. This is evident from the Trial reasons in two ways. First, as I explain in my analysis on the first issue, the trial judge expressly acknowledged that she struggled with whether the time the parties spent together during their relationship was sufficient to find that they "lived together" in a conjugal relationship. Second, the trial judge's review of the caselaw demonstrates that where parties neither marry nor move in together, it is an open question as to whether they will be found to have cohabited. The fact that Mr. Latner lost on the issue of whether the parties had been spouses does not mean his legal position was unreasonable.

[95] Did Mr. Latner otherwise act unreasonably in his conduct of the litigation? Setting aside the issue of financial disclosure, to which I return below, on the findings of the trial judge he did not. Rule 24(5) of the Family Law Rules provides that "in deciding whether a party has behaved reasonably or unreasonably, the court shall examine … the party's behaviour in relation to the issues from the time they arose, including whether the party made an offer to settle … and the reasonableness of any offer…". In this case, the trial judge found that Mr. Latner made offers to settle that "show[ed] a desire to settle": Costs reasons, at para. 14.

[96] When considering whether Mr. Latner acted reasonably "in relation to the issues", I would add this. The biggest issue in this case was whether he and Ms. Climans had been spouses – without that, he had no obligation to pay her spousal support. Recall that, early in the proceedings, Mr. Latner entered into a consent order in which he agreed to provide Ms. Climans with significant financial support. Recall also that he fully complied with the terms of the consent order, providing Ms. Climans with over $620,000 between May 2015 and December 2018. In light of his legal position on the issue of whether the parties had been spouses, this conduct also shows that he acted reasonably.

[97] For these reasons, the trial judge erred in principle in finding that Mr. Latner acted unreasonably in terms of his legal position.

b. Mr. Latner's Financial Disclosure

[98] Respectfully, I am of the view that the trial judge also erred in principle in finding that Mr. Latner acted unreasonably in terms of his disclosure. At para. 18 of the Costs reasons, she states:

Mr. Latner was not forthcoming in his disclosure. There is an absolute obligation in family law to provide reasonable disclosure. Mr. Latner's response to his lack of disclosure was that [Ms. Climans] did not bring a motion asking for the disclosure. This is not an acceptable excuse. [Mr. Latner's] unreasonable behaviour will increase the costs award.

[99] I fully agree with the trial judge that Mr. Latner had an obligation to make "reasonable disclosure". The question is whether he did.

[100] In deciding whether Mr. Latner's disclosure was reasonable, r. 24(12)(a)(i) of the Family Law Rules is of assistance. It directs the court, when setting the amount of costs, to consider "the reasonableness and proportionality of [each party's behaviour] as it relates to the importance and complexity of the issues".

[101] The trial judge was critical of Mr. Latner's position that his annual income was not relevant because he conceded from the outset that he had the ability to pay any amount of spousal support: Costs reasons, at para. 15. In my view, that position was not unreasonable.

[102] Mr. Latner disclosed the standard items used to establish annual income, such as his income tax returns from 2012 to 2017. He also candidly admitted that through the complex financial dealings of his family-controlled companies, in any given year, his actual annual income was substantially higher than that shown on the tax returns. He directed his corporate counsel to provide detailed information to Ms. Climans' lawyer on those matters and this was done.

[103] Further, Mr. Latner's disclosure needs to be considered in context. He made extensive financial disclosure to Ms. Climans and her lawyers during their relationship, especially when they attempted to negotiate a domestic contract in 2002 and again in 2013 and 2014.

[104] He also provided extensive disclosure during the proceedings, including various financial statements disclosing his personal net worth. True, those statements varied in terms of how many hundreds of millions of dollars he was worth, as did the evidence on the effect of his being a discretionary beneficiary of a family trust. And, on the sole occasion that Ms. Climans' lawyer took the issue of disclosure before a judge, the matter was resolved on consent and Mr. Latner fully complied with the terms of the consent order.

[105] Further, the reasonableness of Mr. Latner's disclosure must be considered in relation to the issues. Two points warrant mention in that regard. First, as the trial judge found, the quantum of support to which Ms. Climans was entitled was based largely on her need, as disclosed by her financial information, and the difference in the needs and means of the two parties. There was no question that Mr. Latner was a person of extraordinary means – financial disclosure beyond that which he provided was not necessary to demonstrate that. Second, as the trial judge found, Ms. Climans played no role in Mr. Latner's financial success or in the acquisition or improvement of the family business. To the extent she had a compensatory claim, it was weak and related only to the fact that, as a result of the relationship, she had been out of the workforce for its duration (Trial reasons, at para. 145). Accordingly, Mr. Latner's means – beyond his ability to continue to support Ms. Climans at the level he had during the relationship – were not relevant.

[106] Finally, when considering the reasonableness of his disclosure, it cannot be overlooked that Mr. Latner directed his corporate counsel and the internal and external accountants for the Latner family's group of companies to deliver all requested documents and to meet with Ms. Climans' counsel before trial. He also arranged for both the Latner group's internal and external accountants to be available to be cross-examined at trial.

[107] Was Mr. Latner unreasonable because he took the position that his actual annual income was irrelevant given that his ability to pay was not in issue? In my view, in the circumstances of this case, he was not. Reasonableness and proportionality are to be judged in context, which includes a consideration of the matters in issue and the positions taken by the parties. These factors should also reflect a consideration of the other party's disclosure. In this case, Ms. Climans produced hundreds of documents only shortly before trial, a matter to which the trial judge did not advert.

4. Conclusion on Reconsidering the Costs Order

[108] After factoring in the result of the appeal, in my view, Ms. Climans remains the more successful party at trial and, consequently, is presumptively entitled to costs: see r. 24(1) of the Family Law Rules. For the reasons given, I see no basis for an elevated level of costs. Consequently, I would order costs of the trial in her favour on a partial indemnity basis. Her total legal fees at trial were $463,114. On the usual approach of treating partial indemnity costs as 60% of full indemnity costs, I would award her trial costs of $277,868, all inclusive.

DISPOSITION

[109] Accordingly, I would allow the appeal in part.

[110] I would vary para. 4 of the Order by adding the words “for a period of ten years” to the end of the first sentence. Thus, the amended first sentence of para. 4 of the Order would read as follows:

The Respondent shall pay the Applicant, spousal support in the sum of $53,077 per month, commencing January 1, 2019 and on the first day of each month thereafter, for a period of ten years.

[111] Further, I would vary para. 1 of the Costs Order by substituting the figure of $277,868 for $324,179.

[112] In light of the divided success on appeal, I would make no order as to costs of the appeal.

Released: September 4, 2020 (“E.E.G.”)

“E.E. Gillese J.A.”

“I agree. David Brown J.A.”

“I agree. David M. Paciocco J.A.”

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[1] Her divorce was finalized in September 2005.

[2] At para. 17, the trial judge also said that Mr. Latner was “deliberately evasive and inconsistent” in his trial testimony. However, those comments go to the issue of his credibility, not to whether his legal position was reasonable.