IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chawla v. Gebert,*
2024 BCSC 2123

Date: 20241015
Docket: M200898
Registry: New Westminster

Between:

Rina Chawla

Plaintiff

And

Kevin Leonard Gebert

Defendant

Before: The Honourable Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J.S. Malik, appearing October 9, 2024
	D. Luddu, appearing October 15, 2024
Counsel for the Defendant:	I. Birk, appearing October 9, 2024
	J. Moise, appearing October 15, 2024
Place and Date of Hearing:	New Westminster, B.C. October 9, 2024
Place and Date of Judgment:	New Westminster, B.C. October 15, 2024

Table of Contents

[1] **THE COURT:** This is an application brought by the defendant, Mr. Gebert, and the third party, Insurance Corporation of British Columbia ("ICBC"), for an order staying execution of a final judgment granted against Mr. Gebert following a jury trial in January 2024. The applicants say that execution should be stayed until there has been a hearing pursuant to s. 83 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 [*Act*], in respect of benefits payable under Part 7 of the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83.

[2] The trial in January 2024 related to two motor vehicle accidents, one on June 2, 2016, and the other on May 19, 2019. Significantly for this case, one accident was before and the other was after the coming into force of the *Insurance (Vehicle) Amendment Act, 2018*, S.B.C. 2018, c. 19. This complicates resolution of this matter. As explained by Justice Gibb-Carsley in previous reasons for judgment in this matter, indexed at 2024 BCSC 1502, at paras. 7–9:

> [7] As I will describe below, the amendments included changes to s. 83 of the *Pre-Amendment Act*. The amended version of s. 83 eliminates the private insurer/employer subrogation rights by making formerly non-deductible collateral benefits deductible. The First Accident occurred before the amendments were in effect. The Second Accident occurred after the amendments were in effect.
>
> [8] Under the *Pre-Amendment Act*, disclosure of private insurer payments or amounts payable would not be necessary, because there could be no deduction from the tort claim by ICBC for those amounts. However, under the Act, disclosure of amounts paid or payable to a plaintiff may be relevant for ICBC to know what amounts might be deductible under s. 83.
>
> [9] The primary disagreement between the parties, and thus the plaintiff's opposition to disclosure, relates to which legislation applies to the plaintiff's injuries.

Background Facts

[3] Two separate actions were commenced claiming damages arising from the two motor vehicle accidents. The two actions were heard together before a judge and jury from January 15 to 30, 2024. At the conclusion of the trial, the jury gave a verdict awarding the plaintiff damages totalling $309,100. The jury award was broken out into components as follows:

1.	Non-pecuniary Loss		$10,000.00
2.	Pecuniary Losses		
	a.	Special Damages	$16,000.00
	b.	Past Loss of Income	$28,000.00
	c.	Loss of Future Income Capacity	$107,000.00
	d.	Loss of Homemaking Capacity	$70,000.00
	e.	Cost of Future Care	
		i. Pain Management	$1,300.00
		ii. Home Making Assistive Devices	$1,500.00
		iii. Home Making Assistance (seasonal assistance only)	$9,000.00
		iv. Ergonomics	$1,800.00
		v. Rehabilitation/Health Related Costs	
		1. Pain Program	$12,500.00
		2. Fitness Pass, Adult	no award
		3. Fitness Pass, Senior	no award
		4. Fitness Pass, 70+	no award
		5. Kinesiology	no award
		6. Massage Therapy	$23,000.00
		7. Acupuncture (in place of physiotherapy)	$23,000.00
		8. Chiropractic Treatment	no award
		9. Psychologist, initial 12 sessions	$3,000.00
		10. Occupational Therapy	$3,000.00
		vi. Medication Related Costs	no award

[4] It appears that the jury proceeded on the basis that the injuries suffered in these two accidents were indivisible, and as such, its award did not distinguish between them.

[5] I note that the present application is made in only one of the two actions. I understand that is for simplicity, and it is understood that any order I make in this action will be respected in regard to both proceedings.

[6] On February 1, 2024, plaintiff's counsel wrote to defence counsel asking for the defendants' position on what, if any, s. 83 deductions would be sought in respect of the jury award. Defence counsel responded that he was working on obtaining instructions. There was further correspondence on February 14, 2024, at which time counsel for the applicants noted that ICBC would be seeking disclosure of documents from the plaintiff's extended health benefits providers. ICBC also sought disclosure of documents from the plaintiff's employer with respect to her salary indemnity plan offered through the BC Teachers' Federation. As noted by Justice Gibb-Carsley at paras. 10–12:

> [10] The plaintiff opposes the disclosure application for two reasons. First, she contends that the documents sought are not relevant. She says that, the disclosure sought relates only to the Second Accident. However, because the jury determined that the injuries she suffered were indivisible between the First Accident and the Second Accident, only the s. 83 regime in place when the First Accident occurred is engaged. The plaintiff asserts that under the *Pre-Amendment Act*, the disclosure would be irrelevant because ICBC would not be entitled to deduct from the damages awarded at trial any amounts related to benefits received by the plaintiff from her private insurer or employer.
>
> [11] Second, the plaintiff contends that, even if the documents are relevant, ICBC should have brought the application for disclosure to the third party record holders because the documents sought are not in the possession of the plaintiff. Indeed, the requested order seeks to have the plaintiff order the documents from her insurers.
>
> [12] I note that ICBC has requested these same documents from the plaintiff before trial, but they were not provided. The insurance policies and the plaintiff’s private insurance were also the subject of questioning during the plaintiff’s examination for discovery by ICBC. Further, since the conclusion of the jury trial, ICBC has requested the documents from the plaintiff. She has opposed production, either because she says she does not have the documents in her possession or because she says she is not obligated to provide them to ICBC.

[7] While not strictly relevant to the present application, I understand that on February 23, 2024, the plaintiff filed a notice of appeal in the Court of Appeal. The plaintiff intends to argue that the award of non-pecuniary damages was inordinately low. I do not understand there to have been a cross-appeal. The applicants did not, in submissions before me, argue that the existence of this appeal should impact the application for a stay of execution.

[8] At some point, not clear from the materials in the record, the applicants' counsel advised that he would be making application to compel production of these documents. On March 6, 2024, a requisition was filed scheduling a judicial management conference before Justice Gibb-Carsley on April 5, 2024.

[9] On April 2, 2024, plaintiff's counsel wrote expressing concern that ICBC had not yet particularized what items the defendants would seek to deduct, stating:

> Since February 1, 2024, I have been requesting your position on the s. 83 deductions. You have not particularized what items if any you intend to have clawed back from the judgment pursuant to s. 83. The balance of the judgment should be paid forthwith.

[10] Counsel for the applicants responded on April 3, 2024, that:

> My understanding is that in addition to the delay caused by setting this down for a phone call with the judge rather than the s. 83 hearing itself, there has been a further delay due to your refusal to provide the extended health benefits printouts, which we require in order to calculate the s. 83 deductions. This also causes a delay in preparing any affidavits we need. As soon as I have everything, we will be able to move forward.

[11] At the judicial management conference on April 5, 2024, Justice Gibb-Carsley gave directions with respect to the filing of application materials and scheduled a hearing of the document-production application for May 21, 2024.

[12] On April 9, 2024, plaintiff's counsel wrote to inquire as to the purpose of a cheque that their office had received from ICBC in the amount of $7,337.08, payable directly to the plaintiff. The cheque had arrived with no cover letter or explanation. This email was responded to by an ICBC adjuster, Mr. Anthony, who advised that:

> The Jury had awarded $16,000 for specials a trial which was the same amount that was sought by Ms. Chawla.
>
> In addition to the items that are listed in the attached list of special damages, an additional amount of $3,864.00 was claimed by Ms. Chawla for 92 months worth of Advil and Tylenol. The total ask at trial was then rounded down to $16,000.00.
>
> The cheque in the amount of $7,337.08 is reimbursement under Part 7 for eligible items that were awarded under specials.

The letter went on to specify exactly which of the expenses included in the $16,000 claim had been determined to be reimbursable under Part 7.

[13] On April 29, 2024, the applicants filed their materials for the document production application.

[14] On May 4, 2024, plaintiff's counsel wrote inquiring about a further cheque that had arrived from ICBC, this one for $10,000 and made payable to the law firm "in trust", but otherwise without explanation. Mr. Anthony responded on May 6, 2024, advising that the cheque was for "the non-pecuniary damages award as per the jury judgment." This provoked a response from plaintiff's counsel later that day. Mr. Malik wrote:

> We had requested that the defendant identify those amounts and heads of damage it sought to claw back under part 7. Am I to understand that everything other than the $10k non-pec award is sought to be clawed back?

[15] There was no response to this inquiry.

[16] The document production application was heard by Justice Gibb-Carsley on May 21, 2024. Judgment was reserved.

[17] There were a series of emails between a Mr. Brun, who had been retained by the defendants for proceedings in the appeal court, and plaintiff's counsel. On July 4, 2024, plaintiff's counsel wrote advising:

> Thanks for your patience on this file. We are still litigating this matter in the trial court. There is a s. 83 application pending for September 27. Costs will be litigated after that. A post trial disclosure application was litigated in May and a decision is on reserve. With all of this background, my preference is to wait until the matter is actually completed in the trial court before we prosecute the appeal.

[18] As all of this was going on, the parties finalized and submitted for entry the final orders with respect to the trial verdict. A final order was entered in action M237443 on July 25, 2024, and a final order was entered in action M200898 on August 15, 2024.

The Disclosure Order

[19] Justice Gibb-Carsley's reasons for judgment were released on August 15, 2024. In them, he noted at para. 9 that the parties disagreed as to whether the determination of s. 83 deductions would be based on the *Pre-Amendment Act* or the *Act* in its current form. He described the positions advanced at paras. 10–12, which I have already quoted above.

[20] Justice Gibb-Carsley noted, at paras. 20–22, the underlying purpose behind s. 83 of the *Act*. Where an injured person is entitled to recover in respect of a loss, both by way of benefits under Part 7 and by way of a tort claim, s. 83 provides a mechanism by which the injured person's claims are covered first by Part 7 benefits, thus "remov[ing] the burden of future care from the tortfeasor."

[21] He referenced the decision of Justice Armstrong in *Wheeler v. Wilson*, 2023 BCSC 246, where the effect of the 2018 amendments was considered at paras. 46–47:

> [46] The result of the 2018 amendment to s. 83(1) of the Act is that for accidents which occurred on or after May 17, 2018, the meaning of “benefits” is expanded to include “amounts paid or payable, for loss or expense covered by benefits under Parti 1” including “under insurance, wherever issued and in effect”. In this case, the change to the definition of “benefits” is relevant due to the application of s. 83(2) of the Act, which was not changed by the 2018 amendments, and reads as follows:
>
> > (2) A person who has a claim for damages and who receives or is entitled to receive benefits respecting the loss on which the claim is based, is deemed to have released the claim to the extent of the benefits.
>
> [47] The effect of this scheme, after the 2018amendment, is that amounts paid or payable under an injured person’s private or extended health insurance plan “for a loss or expenses similar to a loss or expense covered by benefits under Part 1” are considered “benefits” and the injured person is deemed to have released their claim to the extent of those benefits: Act, s. 83(1)(b)(i) and (2).

[22] As Justice Gibb-Carsley explained at para. 25:

> [25] In effect, this means that ICBC (or the Court) will deduct from any damages award all benefits paid or payable to the plaintiff under private insurance, employment insurance benefits, and government benefits

> extended through an employment agreement. There are some exceptions such as British Columbia's Medical Service Plan.

[23] He summarized the position advanced by ICBC at para. 29:

> [29] ICBC asserts that the Act in its current form, mandates that the plaintiff produce the documents and also argues the documents will be relevant to deductions ICBC may be entitled to make to avoid double recovery of the award by the plaintiff. As I understand ICBC's argument, it wants the disclosure to be able to argue at a s. 83 hearing that it should be entitled to deduct benefits paid or payable to the plaintiff from her private insurers so that she is not doubly compensated, for example, through compensation she may have received for lost wages specifically as a result of the Second Accident.

[24] His conclusion on this submission is found at para. 38:

> [38] In my view, the plaintiff's Pacific Blue Cross, Canada Life, and salary indemnity plan fall under the definition of benefits contemplated by s. 83 which are to be deducted from the awards for wage loss and special damages at trial. Clearly the Second Accident occurred after the time of the amendment. As such, pursuant to the Act, the plaintiff must disclose what is now requested by ICBC.

[25] He noted that the law was not clear as to how the s. 83 amendments would be interpreted in a case in which indivisible injuries had been suffered in two accidents, one before and the other after the amendments. At para. 46 he said:

> [46] In my view, there remains ambiguity as to how specific damages should be assessed for the purpose of s. 83 when two or more accidents occur under the different versions of the legislation. Ambiguity favours disclosure so that a complete argument, based on the relevant documents, can be made by the parties as to whether ICBC may deduct amounts from the Trial Award. To reiterate, it appears to me to be unfair to ICBC to deprive them of the opportunity to have the documents it requests to make the argument at the s 83 hearing. ICBC's argument may or may not ultimately prevail, but it strikes me as premature and unfair to foreclose that opportunity by denying disclosure.

[26] The specific order he made was set out at para. 51 as follows:

> a) Within seven (7) days of receipt of an entered Order, the plaintiff shall order her complete file from Pacific Blue Cross, including but not limited her extended health benefits printout from May 19, 2019, to the present, and the amount of the subrogated claim of Pacific Blue Cross;
>
> b) Within seven (7) days of receipt of an entered Order, the plaintiff shall order her complete Salary Indemnity Plan file from the British Columbia

> Teacher's Federation from May 19, 2019, to the present, including the amount of the subrogated claim of the British Columbia Teacher's Federation and/or Salary Indemnity Plan;
>
> c) Within seven (7) days of receipt of an entered Order, the plaintiff shall order her complete file from Canada Life, including but not limited her extended health benefits printout from May 19, 2019, to the present and the amount of the subrogated claim of Canada Life; and
>
> d) the plaintiff will provide ICBC with confirmation of the details, including the dates of her requests made, and any responses received, in relation to the requests for the documents sought set out in this order upon the request of ICBC.

[27] The first three subparagraphs of this order track the wording of the notice of motion. Notably, they do not specifically require any action of the plaintiff until after receipt of an entered order. This wording is typical of document production orders directed at non-parties, particularly where a non-party does not have counsel of record and does not participate in the court hearing. The need for such language is less apparent when the order directs action by a party.

Events After Disclosure Order

[28] On August 19, 2024, plaintiff's counsel sent copies of the entered orders reflecting the trial judgment to the applicants' counsel "for service upon you."

[29] That same day, applicants' counsel sent to plaintiff's counsel proposed draft orders with respect to the document production application. Plaintiff's counsel responded on August 20, advising that the registry would reject an order with two styles of cause—that had been an issue with respect to entry of the trial order—and requesting revised orders with a separate document for each action. The applicants' counsel responded on August 21 with revised orders as requested. The applicants' counsel followed up on August 29. That email prompted an auto-reply from plaintiff's counsel that he was in trial and would be "returning to the office on September 13."

[30] Notwithstanding this trial, on September 3, 2024, plaintiff's counsel emailed the applicants' counsel, stating:

> As discussed, only $10,000 of the $309,100 has been paid. No stay has ever been obtained. The order has been entered. No amounts under s. 83 have ever been identified and no application has ever been set.

> If by Friday September 6, 2024 we do not have (a) your s. 83 deductions identified and (b) the balance paid with interest, we will on September 9, 2024, commence an action under s. 76 of the *Insurance Vehicle Act* as against ICBC. I trust your client will comply with its obligations under the Court Order.

[31] The applicants' counsel responded to this on September 4, 2024. Although the email is headed "Without Prejudice," it was included in the materials without objection and does not appear to contain or reference any overtures of settlement. It states:

> As discussed several times now, the whole purpose of our Application for document production (which you opposed) was to be able to assess what section 83 deductions we are claiming. We now have a Court order in hand and are waiting for you to provide those records. Once we have those records, we will be in a position to identify the section 83 deductions.
>
> If you had not unreasonable opposed our Application and simply provided the records when they were requested (prior to Trial), then we could have either settled or had the s. 83 hearing months ago. I look forward to your cooperation (by producing the records) so that we can move this matter forward.

[32] As noted in the July 4, 2024 email with Mr. Brun, the parties had reserved a hearing date for the s. 83 application for September 27, 2024. Although it is not clear exactly how and when, it is common ground that the hearing date was cancelled at some point.

[33] The next correspondence in the record was 20 days later. On September 24, 2024, plaintiff's counsel wrote an email headed "With Prejudice", stating:

> I've attached a title search indicating that your client owns property in Surrey. If I do not have payment of the judgment in full plus post-judgment interest by Thursday September 26 at 4 pm, I will register judgment against Mr. Gebert's house. Immediately upon confirmation of registration, we will commence sale procedures under the *Court Order Enforcement Act*. I look forward to hearing from you.

[34] The applicants' counsel responded later that day forwarding the email of August 21, 2024, with the revised formal orders, and stating:

> I am following up on Ike's email below. We look forward to hearing from you regarding the attached draft orders.

[35] Plaintiff's counsel responded two days later advising that he had "missed those draft Orders" and seeking two further changes:

a) suggesting that there was no need to duplicate the order in both actions and that it should be made only in the action against Mr. Gebert; and

b) deleting any references to the applicants' counsel making the application on behalf of Mr. Gebert.

[36] I note that the April 29, 2024 notice of application identified the applicants as both Mr. Gebert and ICBC, although Justice Gibb-Carsley's reasons for judgment at para. 1 refer to it as an application brought by "ICBC, the third-party defendant."

[37] There was further back-and-forth between the parties about these final concerns. I was advised that the order was submitted for entry shortly in advance of the hearing before me, which occurred on October 9, 2024. At the time of hearing, the order was still being processed for entry.

[38] As these discussions about entry of the order continued, plaintiff's counsel indicated that he continued to have instructions to register the judgment against Mr. Gebert's home and take steps to have the home sold. On September 27, 2024, the applicants' counsel sought and obtained a short-leave order to bring the present application returnable on October 3, 2024. The hearing was ultimately adjourned to October 9, 2024, with counsel agreeing that no steps would be taken by way of execution until the stay application was heard.

[39] So far as I am aware, the plaintiff has to date taken no steps to comply with the order of Justice Gibb-Carsley for document disclosure. However, given the way the order is worded, she is not legally obligated to do so until seven days after service of the entered order, and the order has not yet been entered.

[40] Finally, I note that at the hearing before me, the applicants' counsel advised that he had been provided with instructions to pay a further $71,000 in respect of the judgment, and had the funds on hand to do so. He had been provided with no

instructions as to how this $71,000 amount was calculated, and it does not match any of the components of the jury award.

[41] Counsel also had instructions to pay the balance of the judgment, either into court or to counsel in trust, pending resolution of the s. 83 issues. Plaintiff's counsel advised that his client had no interest in this and asserted that it would be prejudicial to his client given that the applicable post-judgment interest rate is significantly higher than the interest that could be obtained on funds held in trust.

Positions of the Parties

[42] The applicants say that there are potential claims pursuant to s. 83 with respect to all of the remaining amounts in the jury award and that given the deemed release provided for by s. 83(2) of the *Act*, it is inappropriate to require that those amounts be paid until the s. 83 issue is determined. The applicants say that it is the refusal of the plaintiff to produce the documents that Justice Gibb-Carsley has found are necessary for prosecution of the s. 83 application that has caused the delays in resolving this issue and that the plaintiff should not be permitted to insist on full payment while it is preventing the determination of the s. 83 claim.

[43] The applicants argued as well that given that Mr. Gebert is insured, the plaintiff's proper remedy is that identified in the September 3, 2024 email from plaintiff's counsel – that is, the bringing of an action against ICBC pursuant to s. 76 of the *Act*.

[44] The applicants reference the discussion by Justice Burnyeat of the broad jurisdiction to grant a stay of execution in *Canada (Attorney General) v. Lau*, 2002 BCSC 87, at paras. 25–27, including a quotation from Justice Beck in *Humberstone v. Trelle* (1910), 14 W.L.R. 145 at 147 (Alta. S.C.):

> The power of Courts temporarily to stay the issuing or execution is exercised in an almost infinite variety of circumstances in order that the ends of justice may be accomplished; in many cases this power operates almost as a substitute for proceedings in equity, and enables the defendant to prevent any inequitable use of the judgment or writ.

[45] Justice Burnyeat also referenced at para. 30 the court's inherent jurisdiction to order a stay in special circumstances in order to prevent prejudice, which jurisdiction exists in addition to that found in the *Supreme Court Civil Rules*.

[46] The applicants say that this is a case in which a stay is appropriately granted until the s. 83 issues can be determined.

[47] They say that it is appropriate for them to be awaiting production of the documents that Justice Gibb-Carsley ordered produced before they finalize their application materials and finalize their position on exactly what portion of the various components of the award should be deducted pursuant to s. 83.

[48] The plaintiff says that it is unreasonable that ICBC has been unwilling to give any indication as to the nature of its s. 83 claim and that it is unreasonable to think that it would be entitled to claw back the entirety of the plaintiff's remaining claims under that section.

[49] The plaintiff says that a judgment has been granted, and the plaintiff is entitled to the fruits of that judgment and in the absence of a stay of execution, is entitled to take steps to realize on the judgment as against the defendant, who is the person named on the judgment. The plaintiff says that Mr. Gebert has exigible assets, and nothing provides him with immunity from steps taken by way of execution.

[50] The plaintiff says that the test applicable on a stay application was the subject of a recent and authoritative review by Justice Voith, as he then was, in *Concord Pacific Acquisitions Inc. v. Oei*, 2020 BCSC 832, beginning at para. 23, and that Justice Voith ultimately concluded that the three-part test found in cases such as *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, 1987 CanLII 79, [1987] 1 S.C.R. 110, should be applied. The plaintiff says that this includes, as a mandatory element, evidence of irreparable harm to the applicants should the stay not be granted. The plaintiff says that the applicants have not established irreparable harm.

[51] In reply, the applicants' counsel submitted that the fact that Mr. Gebert's house may be sold in order to pay a judgment for which he is fully insured satisfies any requirement of irreparable harm that may exist.

Analysis

[52] As noted in *Concord Pacific*, at paras. 24–25, the court's jurisdiction to grant a stay of execution of an order is found both in the *Supreme Court Civil Rules* and in its inherent jurisdiction. Rule 13-2(31) provides:

> (31) The court may, at or after the time of making an order,
>
> (a) stay the execution of the order until such time as it thinks fit, or
>
> (b) provide that an order for the payment of money be payable by instalments.

[53] In *Concord Pacific*, Justice Voith noted at para. 33 that:

> [33] There is a surprising lack of clarity or consistency in the case law that addresses the legal framework a hearing judge should apply on a stay of execution application and that considers what weight should be given to various factors within that framework. …

[54] He noted that one such approach is the *Metropolitan Stores* framework, and quoted from *Coolbreeze Ranch Ltd. v. Morgan Creek Tropicals Ltd.*, 2009 BCSC 151, at para. 65:

> [65] A stay of execution is like an injunction and similar principles should apply in considering whether a stay is appropriate: *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321. The governing principles are the existence of an arguable case and the balance of convenience, including the potential for prejudice to a party as a consequence of a stay being granted or denied.

[55] I note that the *Coolbreeze* expression of the test reflects the two-pronged test for such relief rather than the three-pronged approach discussed in *Metropolitan Stores*. As noted in *Coburn v. Nagra*, 2001 BCCA 607, at para. 7, the distinction is in most cases going to be without practical effect. The balance of convenience will include consideration of the prejudice to the parties of the granting or withholding of the order sought.

[56] At paras. 48–49 of *Concord Pacific*, Justice Voith noted that:

> [48] Aspects of the cases I have referred to are reasonably consistent. The jurisdiction to grant a stay of execution is broad: *Greenside* at para. 13 and *Paramount Drilling* at para. 17. The question is where the balance of convenience lies: *Coolbreeze* at para. 65; *Natco International Inc.* at paras. 39 and 44. Differently expressed, the question is where the "interests of justice" or the "ends of justice" lie; *F.A. Bernard* at para. 11 and *Litynsky v. Litynsky*, 2012 BCSC 1160 at paras. 62 and 64 or whether the "circumstances raise such circumstances as would warrant the exercise": *Barclays Bank of Canada* at para. 5. A stay is "conditioned by the extant facts of a given case": *F.A. Bernard* at para. 11.
>
> [49] Each of these various formulations is consistent with a court having a broad discretion, having regard to the various factors that are present in a given case, to do what it considers appropriate or just. In addition to the factors or considerations I have already identified, a number of further factors can be relevant:
>
> a) The relatedness of the counterclaim: *665530 B.C. Ltd.* at para. 27.
>
> b) Whether the amount of the counterclaim can be calculated with reasonable certainty: *665530 B.C. Ltd.* at para. 27; But not necessarily, see *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation*, 2007 BCSC 286 at para. 97.
>
> c) The defendant's delay, if any, in pursuing their counterclaim: *China Dragon Fund Ltd. v. FIC Real Estate Fund Ltd.*, 2010 BCSC 1698 at para. 48.

[57] It is important to consider the context of *Concord Pacific*. An action commenced by Concord Pacific was dismissed after a 40-day trial. While discussing the claims of Concord Pacific, Justice Voith did order that a deposit of $10 million be returned by Mr. Oei to Concord Pacific. However, Mr. Oei had commenced a separate action, alleging that the initial action was an abuse of process, having been commenced for the sole purpose of preventing the original contract from proceeding. Those claims were not dealt with at the trial before Justice Voith. Mr. Oei applied for an order that his repayment of the $10 million to Concord Pacific be stayed until his claims for damages for abuse of process in the other action were determined.

[58] As I read Justice Voith's decision, particularly the analysis beginning at para. 50, the primary issue before him was whether in order to obtain the stay, Mr. Oei was required to establish an arguable case or a strong *prima facie* case. At para. 61, he concluded:

> [61] Accordingly, I consider that *Metropolitan Stores*, *RJR-MacDonald* and the First Group of Cases dictate the legal framework that governs applications for a stay of execution that are brought under the *Rules*. That framework, in most instances, contemplates a reasonably cursory assessment of the merits of an applicant's counterclaim or cross-claim. I say "in most cases" because even in the interlocutory injunction context, there are some exceptions to this. Once an applicant has established a "serious question" or an "arguable case", it will be necessary for the court to consider the question of irreparable harm and the myriad other factors, many of which I have identified, that can inform the balance of convenience.

[59] In the case before him, Justice Voith concluded (para. 63) that Mr. Oei had not raised an arguable case, and thus (at para. 68):

> [68] Based on the foregoing, I do not consider that the Defendants have, at this point, established an arguable case in relation to the Abuse of Process Claim. That conclusion obviates the need for me to further develop the additional considerations that are raised in the *Metropolitan Stores* or the *RJR-MacDonald* analysis.

[60] I have spent some time discussing *Concord Pacific* in these reasons. It is, of course, a carefully considered decision considering the same rule as that in issue in the present case. There are, however, significant differences in context. In *Concord Pacific*, the stay was sought pending an unscheduled trial of a complex commercial claim that arose from the same factual matrix but was legally distinct from the claim that had already been tried. It was in the nature of an unliquidated claim for damages that could potentially have been a counterclaim.

[61] In the present case, we are dealing with a statutory right that is in the nature of a setoff. Specifically, as noted by Justice Armstrong in *Wheeler*, s. 83(2) of the *Act* contemplates that although a judgment has been granted, a plaintiff is by statute "deemed to have released the claim to the extent of" the Part 7 benefits that are paid or payable. Section 83 contemplates a process by which the availability of Part 7 benefits is not disclosed to the trier of fact until after damages have been assessed at trial (s. 83(4)), and then, after judgment is given at trial, an application is made to determine the amount of Part 7 benefits to be deducted (s. 83(5)).

[62] This process, by its nature contemplates, a judgment being given and then clawed back. The distinction between this and the usual trial process, in which no

order is typically entered until a claim has been fully assessed and determined following which the trial judge is *functus*, is significant. The sorts of deductions required by a s. 83 application are the sort that would normally be decided before any judgment is finalized, and thus, before a successful plaintiff can begin taking steps by way of execution.

[63] In circumstances like this, it would seem to me that strict adherence to a requirement that evidence of irreparable harm be given may not be entirely equitable. This may be the sort of question that could be considered were a court to eventually do the "further development" averted to by Justice Voith in para. 68, as quoted above.

[64] All of that said, I am satisfied that in this case, the potential for Mr. Gebert's home to be sold in execution of a judgment for which he is fully insured is sufficient to meet the irreparable harm requirement.

[65] I am also satisfied that the applicants have established a serious question to be tried. It seems to be common ground that the plaintiff's position as a teacher entitles her to extended health and salary replacement benefits. While I appreciate the frustration of plaintiff's counsel that ICBC has not provided at least some sort of position with respect to the amounts that it may likely seek to claw back, and it is clear that there is a significant legal issue arising from the fact that only one of the two accidents in this case occurred after the current provisions made those benefits a relevant consideration, I am satisfied that the applicable standard of a claim on the merits to a deemed release of portions of the judgment has been met.

[66] I turn now to the question of balance of convenience. In reviewing the balance of convenience, I will consider the extent to which conditions may ameliorate the impact on either party of the granting or not granting of the order.

[67] I do not see the conduct of either ICBC or the plaintiff as being entirely above criticism in the circumstances of this case. ICBC has been anything but transparent in the information it has given with respect to the potential s. 83 deductions. This

makes it very difficult to assess a reasonable amount to hold back from the judgment in respect of s. 83 claims. I suspect that if ICBC had been more transparent about that, this application might have been avoided. At the same time, the plaintiff has had it within her power at all material times to simply obtain and provide the applicants with the documents they seek. While she is not in breach of the document production order, given that it requires nothing of her until seven days after receipt of an entered order, it has been clear since August 15, 2024, that the documents that are to be produced are necessary in order for the s. 83 hearing to go ahead and for the actual amount payable on the judgment to be determined. The plaintiff could have moved much more quickly to allow that to happen.

[68] Caught between the two sides is Mr. Gebert. Like most insureds—particularly where liability is admitted—he would have had little involvement in this litigation. Counsel would have been instructed by ICBC staff. Yet, it is Mr. Gebert whose home is at risk if a stay is not granted.

[69] I am satisfied that a stay of execution is appropriate. However, the stay should be time limited to provide an incentive to the plaintiff to produce the documents in an expeditious manner and should be conditional upon a portion of the outstanding balance of the judgment being paid.

[70] As noted above, counsel for the applicants advised that he had instructions to offer to pay unconditionally $71,000 in respect of the judgment. However, he provided no information on how that amount was calculated, leaving somewhat of an evidentiary vacuum. I note that there is nothing in the evidence suggesting that the plaintiff would be unable to eventually repay any amounts received that turn out to exceed the final net amount payable. That said, the amounts in question are substantial and would potentially be a challenge for many individuals to repay.

[71] In my view, an appropriate amount to be required to be paid up front as a condition of the stay of execution is $100,000.

[72] The stay of execution will be time limited. It will last for 60 days from the date that the plaintiff provides to the applicants' counsel the documents that Justice Gibb-Carsley ordered to be produced on August 15, 2024.

"Veenstra J."