

CANADA / JUDGMENT

Este v. Esteghamat-Ardakani

2020 BCCA 202

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 202 Este v. Esteghamat-Ardakani

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Este v. Esteghamat-Ardakani,

2020 BCCA 202

Date: 20200717

Docket: CA46581

Between:

Rosa Donna Este

Respondent

(Plaintiff, Defendant by Counterclaim)

And

Mina Esteghamat-Ardakani

Appellant

(Defendant, Plaintiff by Counterclaim)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

December 10, 2019 (Este v. Esteghamat-Ardakani, 2019 BCSC 2214,
Vancouver Docket S151066).

Counsel for the Appellant

(via videoconference):

J.K. McEwan, Q.C.

E.A. Kirkpatrick

The Respondent, appearing in person

(via videoconference):

R.D. Este

Place and Date of Hearing:

Vancouver, British Columbia

June 1, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 17, 2020

Written Reasons by:

The Honourable Madam Justice Saunders

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

Summary:

The appellant and respondent are tenants in common in respect of a property on which a house fire occurred. The appellant appeals from an order directing her to sign permit applications and do all things necessary to secure demolition of the house, cooperate to rebuild the house using insurance proceeds, and sign applications necessary to effect the rebuilding of the house. The order also provided that if the parties had disagreements about building specifications and applications, either party could apply for a further court order or directions. The judge based this order, in part, on his characterization of the insurance proceeds as a fund or "property" that stood in place of the house, and his consideration that this "property" was threatened and in need of preservation under the Supreme Court Civil Rules. The judge also based the order on a three-part test for injunctive relief, and for which he asked whether there was 1) a serious question to be tried and 2) irreparable harm, and 3) whether the balance of convenience favoured the order.

Held: Appeal allowed. There are several reasons the order should not have issued. The insurance proceeds are not "property" under the Supreme Court Civil Rules. Further, the judge erred in law in failing to apply the proper test for a mandatory injunction, in concluding there was a serious question to be tried, and in concluding there was irreparable harm. As well, the order for cooperation was impermissibly vague and unenforceable.

Reasons for Judgment of the Honourable Madam Justice Saunders:

- [1] This appeal is from a mandatory interlocutory injunction ordered on December 10, 2019. The injunction compels Ms. Esteghamat-Ardakani to cooperate in the demolition and rebuilding of a residence on property of which she is a registered owner as a tenant in common.
- [2] With the agreement of the parties, I refer to them in the same fashion as did the judge in his reasons for judgment and the parties in their written materials, as Donna and Mina. Mina is Donna's mother.
- [3] In 2003, Mina and Donna purchased the property. Donna resided in the residence on the property until 2015, when a fire caused such extensive damage to the residence that it must be demolished.
- [4] An insurance policy taken out by Donna covered the residence and its contents. The policy is said to allow for two possible options of insurance benefits: either "extended replacement cost and rebuilding-to-code" coverage, which the judge said had a value of \$5.6 million, or "verified replacement-cost" coverage, said to have a value of \$1.6 million.
- [5] The insurance company has extended the time limit for Donna to elect the extended replacement cost and building option, and the appeal proceeded on the basis that such was still available. There is no evidence, however, that the insurance company has irrevocably committed to a payout on the basis of extended replacement cost.
- [6] The property has been the subject of litigation in family law proceedings between Donna and her former husband, in addition to these proceedings. In that family litigation, Donna's former husband claimed an interest in the property. In filed documents Donna swore that Mina was the sole beneficial owner of the property, and she gave evidence to that effect. The family claim was resolved by a consent order made in May 2014 in which the former husband's claim of an interest in the property was effectively dismissed.
- [7] This action was commenced by Donna in February 2015. In it she claims interests in several properties and funds, including that she is the sole beneficial owner of the property in dispute before us. Donna alleges that Mina suggested to her that both she and Mina be registered as owners of the property in joint tenancy, that Mina wrongly severed the joint tenancy with the result the title records ownership as tenants in common, and that Mina's entire registered interest in the property is held for her benefit. That is, Donna alleges in the amended notice of civil claim that she is the sole beneficial owner of the property.

- [8] Mina filed a response to the notice of civil claim as well as a counterclaim. In it Mina alleges that she and Donna each hold a 50% interest in the property. In relation to the property, Mina seeks partition and sale pursuant to the Partition of Property Act, R.S.B.C. 1996, c. 347, damages, and an accounting.
- [9] At the trial in May 2017, Mina applied for dismissal of the action on the basis of abuse of process. In particular, Mina contended that Donna's position concerning the property in this action was inconsistent with the ownership interests she had advanced in the family proceedings, and an abuse of the judicial process. The judge agreed and dismissed Donna's claim against Mina in its entirety. The counterclaim remains outstanding.
- [10] Donna appealed from the order dismissing her action. By reasons for judgment indexed as 2018 BCCA 290, leave to appeal ref'd [2018] S.C.C.A. No. 477, this court dismissed the appeal, upholding the judge's conclusions that Donna had engaged in deceitful conduct that amounted to abuse of process warranting dismissal of her claim.
- [11] After Donna's claim was dismissed, the consent order in the family claim was set aside and the family claim was reopened. Donna's former husband again asserts an interest in the property, by way of a contended interest in "family property" under the Family Law Act, S.B.C. 2011, c. 25.
- [12] In the context of the dispute before us, Donna and Mina do not agree that the residence should be rebuilt. Donna wishes to rebuild it using insurance proceeds and has requested Mina to sign an authorization to secure demolition and building permits; Mina has refused, preferring that her application for partition and sale proceed without rebuilding the residence.
- [13] On December 3, 2019, Mr. Justice Giaschi heard Donna's application for a mandatory interlocutory injunction compelling Mina to sign an authorization that would allow Donna to act on behalf of Mina for all purposes relative to the application and issuance of demolition and building permits for the property.
- [14] Mina contended that in light of Donna's initial position in the family claim, it was an abuse of process for her to allege any interest in the property that should be protected or advanced by a mandatory interlocutory injunction. She contended that Donna had no enforceable legal right in the property that would support injunctive relief; she claimed that the court could not compel a party to consent; and she submitted the test for an injunction had not been made out.
- [15] The justice rejected Mina's submissions. In doing so he relied upon Mina's allegation in her counterclaim alleging that Donna had a 50% interest in the property to say there was no abuse of process in Donna advancing this 50% interest in the property to secure the mandatory injunction, and to reject Mina's contention that Donna had no enforceable legal right in the property to support injunctive relief.

- [16] On the issue of compelling consent, the judge concluded that the order sought by Donna was an order within his authority in relation to preserving property under R. 10-1 of the Supreme Court Civil Rules.
- [17] The judge integrated the test for preservation of property under R. 10-1 and for a mandatory interlocutory injunction, and posed these questions:
1. is there a claim on the evidence, and not just the pleadings, to an interest in property?
 2. is there some evidence to render reasonable the belief that property is threatened with disposition or transfer outside the jurisdiction?
 3. is there a serious question to be tried?
 4. will there be irreparable harm to the applicant if the injunction is not granted?
 5. does the balance of convenience favour granting the injunction?
- [18] He answered each of these questions in favour of granting a mandatory interlocutory injunction, and ordered:
1. Mina Esteghamat-Ardakani shall forthwith sign a demolition permit application for the property at [address] British Columbia (the "Property") and do all other things necessary to secure the demolition of the house on the Property.
 2. The parties are to cooperate with each other and with [the insurance company] with a view to rebuilding the house on the Property as expeditiously as possible using only the insurance proceeds.
 3. The parties are to sign any necessary building permit applications, bylaw variance applications or other documentation necessary to effect the rebuilding of the house using only the insurance proceeds.
 4. In the event the parties are not able to reach agreement with respect to the building design and plans, applications for needed variances or the application for a building permit, either party is at liberty to apply for a further court order or directions or for the appointment of a receiver under s. 39(1) of the Law and Equity Act.
 5. Costs to the Plaintiff at Scale B.
 6. The need for an undertaking to be given is dispensed with.

Grounds of Appeal

- [19] Mina appeals from the order. She says that the judge erred in fact in finding there were "insurance funds of at least \$4 million for rebuilding the house" available to Donna.

[20] She also advances several errors of law concerning the availability of a mandatory interlocutory injunction as between Donna and Mina as tenants in common, the proper test to be applied on an application for a mandatory interlocutory injunction, and the monetary character of the "harm" Donna sought to rely upon. She also challenges the order requiring her to "cooperate with a view to rebuilding the house" on the basis it is impermissibly vague.

Standard of Review

[21] As an appellate court, our role is to determine whether the judge has made a reversible error. The grounds of appeal pose one question of fact and several questions of law. As to the question of fact we must ask whether the judge made an obvious and material (palpable and overriding) error; as to the questions of law, we must ask whether the judge was correct: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 10.

Discussion

[22] I conclude the judge erred both in fact and in law, and that it was not open to him to issue a mandatory interlocutory injunction which had the effect of compelling construction on Mina's property absent a contractual arrangement between Mina and Donna which would mandate construction. Amongst other problems created by the order, which in my view is not allowed by the law relating to tenants in common, R. 10-1, or the law of mandatory interlocutory injunctions, is that it created an injunction that is impermissibly vague and incapable of enforcement.

[23] I will not address all of the bases advanced by Mina as reasons to set aside the order and will keep myself to these five:

1. the application of R. 10-1 to the issue before the court;
2. the proper test for a mandatory interlocutory injunction;
3. the availability of a mandatory interlocutory injunction compelling construction with respect to property held as tenant in common;
4. the issue of irreparable harm where the claim may result in damages; and
5. the order for cooperation.

1. The Application of Rule 10-1

[24] Rule 10-1 of the Supreme Court Civil Rules provides:

- (1) The court may make an order for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise and, for the purpose of enabling an order under this rule to be carried out, the court may authorize a person to enter on any land or building.

- (2) If the right of a party to a specific fund is in dispute in a proceeding, the court may order the fund to be paid into court or otherwise secured.
- [25] In his reasons for judgment, the judge determined that the insurance policy "obligates [the insurance company] to pay the full cost of rebuilding the house to current building code requirements " and said the evidence before him established that cost would be approximately \$5.6 million, "which amount will be covered by the policy", with rebuilding to start within 180 days (now potentially extended), otherwise the amount payable would be approximately \$1.6 million, the difference being about \$4 million. The judge then characterized this amount as "property" coming within R. 10-1(1). He said:
- [28] It is also important to appreciate that the property to be protected and preserved in this case is not just the house. The property to be protected is, in fact, both the house and the available insurance funds. The insurance funds are "property" within the meaning of the Rule as they temporarily stand in place of the house. It is clear on the evidence that these funds are threatened if an appropriate order is not made.
- [29] I also note that a purpose of R. 10-1 is to preserve the status quo, and the status quo at the time of the commencement of the action was that the Property contained a valuable house. That status quo can only be restored by rebuilding the house, which will put the parties in essentially the same position as they were in when this action was commenced.
- [30] The evidence before me establishes that the house was in existence when this action was commenced, the house was destroyed in a fire, the house was insured, the house can be rebuilt with the insurance funds available (provided the rebuild commences before Chubb secures an order under its petition), and Mina has been less than co operative if not adverse to a rebuilding of the house using the insurance proceeds. These facts are sufficient to establish a reasonable belief that the Property is threatened or in need of preservation.
- [34] ... Additionally, given that there is approximately \$4 million in jeopardy should the application not be granted, there is no question of the application being frivolous or vexatious.
- [38] If an injunction is not granted, the parties will lose the benefit of the insurance funds of at least \$4 million for the rebuilding of the house. ...
- [40] The evidence clearly establishes that \$4 million in insurance proceeds will be squandered if the house is not rebuilt.
- [Emphasis added.]
- [26] In my respectful view, the judge erred in treating the amount of \$4 million as a fund of monies to which R. 10-1 applies. There was no evidence before the judge that a fund of money exists. At most there was an estimate obtained by Donna that reconstruction costs could amount to \$5.6 million, and that the insurance policy has a term providing for coverage for extended replacement costs. There was no evidence that the sum spoken of by

the judge was ear-marked for rebuilding the house, or that payment of that amount was assured, and certainly no evidence the fund existed in specie. There was no evidence of a commitment by the insurance company to commit \$5.6 million to replacing the residence and no evidence the insurance company accepted the estimated cost advanced by Donna for the replacement.

- [27] At most, the evidence demonstrated that Donna and the insurance company had entered into a contract, and that the insurance company had not rejected payment of a substantial amount to reflect replacement costs, under the insurance contract. That is, Donna had a contract with the insurance company that may give her proceeds on the rebuilding coverage but the right to such monies had not crystallized or been declared or been agreed before the mandatory interlocutory injunction issued. There simply was no evidence of a pool of money waiting to be applied to rebuilding. At this stage Donna has a contingent contractual claim, determination of which is a matter between her and the insurance company, not between her and Mina.
- [28] In these circumstances I consider the judge erred in fact in considering that the \$4 million difference between the \$5.6 million estimate and the \$1.6 million assured payment of insurance proceeds would be "squandered" absent the injunction. In the same vein I consider he erred in fact in saying there are "available insurance proceeds" and that such proceeds "temporarily stand in place of the house".
- [29] What is the import of this error in identifying the amount as funds that stand in for the residence? In my view the error is relevant both to the application of R. 10-1 and the application of the law of mandatory interlocutory injunctions, the latter of which I address below.
- [30] In respect of R. 10-1, sub-rule (1) refers to "property that is the subject matter of the proceeding". We have not been directed to cases comparable to the one before us. Falling back, then, on the plain words of the rule, the question becomes whether the amount of the potential insurance proceeds is "property that is the subject matter of a proceeding" (sub-rule (1)) or a "specific fund in dispute in a proceeding" (sub-rule (2)). In my view the answer is no.
- [31] First, the only remaining dispute between Donna and Mina with respect to the property on which a residence formerly stood is Mina's counterclaim against Donna for partition and sale, damages, and an accounting. This proceeding does not have as its subject the so-called "fund" of insurance proceeds, the claim for which would be a concern between Donna and the insurance company. I, therefore, do not consider R. 10-1(1) to be available to Donna for support of the injunction.

[32] Second, I do not consider that the so-called "fund" is a "specific fund in dispute" in the legal proceeding under R. 10-1(2). Again, no fund exists - at most there is an expectancy and the legal proceeding does not put this in dispute. Looking at the live claim, being Mina's counterclaim, we see in respect of property only a claim for partition and sale, relief that does not claim monies from the insurance contract.

[33] I conclude the judge erred in fact in identifying a fund of insurance proceeds which either stood in for the residence or existed alone as a fund. Removing this error leaves no basis on which to issue a preservation order under R. 10-1 of the Supreme Court Civil Rules.

2. The Proper Test for a Mandatory Interlocutory Injunction

[34] Rule 10-1 is but a species of injunction, and taking it out of the analysis does not mean, by itself, that the appeal must be allowed. We must go further to the larger question of whether the judge erred, considering the law of mandatory interlocutory injunctions, in making the order appealed.

[35] An interlocutory injunction is an order with the special character of restricting the behaviour of others before the issue in dispute is determined by the court. Although an interlocutory order is only effective until final judgment is given, an interlocutory injunction often operates as the only, and therefore ultimate, resolution of issues between parties. Consistent with these special characteristics, the law of interlocutory injunctions demands there be merit to the position advanced by the applicant, and imposes standards for the anticipated consequences of the order. While I consider there is room for the two-part test for an interlocutory injunction as described by Madam Justice McLachlin (later Chief Justice of Canada) in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.), *aff'd* [1991] 1 S.C.R. 62, discussed in *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, this case involves an injunction in a private dispute where the more commonly applied three-part test of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, (which lists irreparable harm as a free-standing requirement) will lead to the same result. The three-part test requires that:

1. there is a serious question to be determined;
2. irreparable harm will occur to the applicant if the injunction is refused; and
3. the balance of convenience, sometimes referred to as the balance of inconvenience, between the parties favours the injunction.

[36] A mandatory interlocutory injunction, compelling a person to take a positive action, sets the test higher. Rather than requiring a "serious question to be tried", a mandatory interlocutory injunction requires that the applicant establish a "strong prima facie case": *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5. In *CBC Justice Brown* explained at para. 18:

[18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR -- MacDonald* test, which proceeds as follows:

- (1) The applicant must demonstrate a strong prima facie case that it will succeed at trial. This entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
- (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
- (3) The applicant must show that the balance of convenience favours granting the injunction.

[37] The judge acknowledged the CBC test but then, referring to *Carnivate Growing Systems Ltd. v. Brazier*, 2019 BCSC 899, which restricted the application of the more stringent test to cases in which the effect of the mandatory injunction is tantamount to a final judgment, applied the lesser test of a serious issue to be tried. In my view, that approach is inconsistent with CBC and is not correct. In applying this lesser standard applicable to a common injunction restraining behaviour, the judge erred in law.

3. The Availability of a Mandatory Interlocutory Injunction Compelling Construction on Property Held as Tenants in Common

[38] More seriously in this case on this first prong of the test for the injunction, however, was the judge's conclusion on the "question to be tried". I step past the obvious difficulty for Donna presented by the fact her claim to the entire beneficial interest in the property has been dismissed, to examine the nature of the application.

[39] Donna's application was for an order removing from a tenant in common the ability to decline construction on the property. This implicates the law of property as concerning tenants in common. It specifically raises the question of the relief, if any, tenants in common can seek against each other qua tenants in common.

[40] In *Megarry and Wade, The Law of Real Property*, 7th ed. (London: Sweet & Maxwell, 2008), the general rights of property owners are described thus at 3-038:

The owner may in general use his property in the natural course of user in any way he thinks fit. Formerly, it had been held that a landowner might waste or despoil his land as he pleased, and was not liable merely because he neglected it. [footnote omitted] However, the courts now impose "a measured duty of care" on a landowner if he knows or is presumed to know of a defect or condition giving rise to a hazard on his land [footnote omitted] and foresees as a reasonable person that the defect or hazard will, if not remedied, cause damages to a neighbour's land.

[41] These principles have a particular application to tenants in common. Subject to an agreement to the contrary, each tenant in common has a right of use over the entire property, and there is no right as between tenants in common to compel property uses. As stated in the Law Reform Commission of British Columbia, *Report on Co-Ownership of Land* (1988) at 12:

The theory underlying co-ownership is antithetical to viewing one co-owner's rights as separate from those of other co-owners. Each co-owner is entitled to possession of the whole of the land and, however many co-owners there may be, they constitute in theory one entity. For that reason, the common law was unable to recognize rights arising between, or provide remedies to, co-owners. The single exception where the common law could assist a co-owner arose when one co-owner committed a wrong, such as waste or ouster.

[42] Professor Bruce Ziff in *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010) at 349 also explains accurately:

Disputes may ultimately lead to the winding up of the co ownership relationship. Termination can occur through the release of one owner's interest to the other, or by a transfer by all. Alternatively, a co owner may invoke the judicial power to order a physical division of the land (partition) or a sale.

The common law provides no remedies of partition and sale to joint tenants or tenants in common; they are left to their own devices to resolve irreconcilable differences. The power to order a partition was conferred by statute in the mid-sixteenth century. [footnote omitted] The English partition statutes required the courts to grant a division "however inconvenient or undesirable partition may be". [footnote omitted] The power of sale, added in the nineteenth century, allowed a court to order a sale in lieu of partition.[footnote omitted] But a court did not have the power to refuse an order altogether. The assumption was that a co-owner had a right to end the relationship.

[43] The statutes referred to by Professor Ziff have their modern equivalent in the *Partition of Property Act*, R.S.B.C. 1996, c. 347, which is much the same as the first partition statute passed and enacted in British Columbia: *Partition Act*, 1880, S.B.C. 1880, c. 21. Under the *Partition of Property Act*, the court may order partition of the property, on sale, but does not have the jurisdiction to compel tenants in common to engage in particular uses of property. Indeed, in recognition of the limited remedies available to tenants in common in respect of a common property, the tenure of tenancy in common has been called "a tenure of inconvenient nature" and "unfit for persons who cannot agree among themselves": *Leigh v. Dickson* (1884), 15 Q.B.D. 60 at 69 (C.A.).

[44] Professor Anne Warner La Forest in *Anger & Honsberger Law of Real Property*, 3rd ed. (Toronto: Thomson Reuters, 2016) (loose-leaf updated May 2006) vol. 2, and the Law Reform Commission in the *Report on Co-Ownership of Land* identify exceptions to this narrow scope of relief, including an injunction against waste or destruction. As quoted above, the Law Reform Commission states in the *Report on Co-Ownership of Land* at 12 that the "single exception where the common law could assist a co-owner arose when one co-owner committed a wrong, such as waste or ouster". Professor La Forest writes at 14-36 that such an injunction restraining a tenant in common requires destruction of the common property:

The court will not restrict a tenant in common in the legitimate enjoyment of the estate because an undivided occupation is of the very essence of a tenancy in common and to interfere with that right would be to deny an essential quality of title. Therefore, a tenant in common is not entitled to an injunction where their co-tenant is exercising their rights in a legitimate manner. If a tenant in common desires relief, they must proceed by partition. Equitable waste will not be restrained but, if a tenant in common proceeds to destroy the common property, they will be restrained by injunction.

[Emphasis added.]

- [45] The possibility of injunctive relief against a tenant in common for destruction of property has been raised by this court. In *Reid v. Strata Plan LMS 2503*, 2003 BCCA 126, Madam Justice Ryan referred to the principle in the context of a strata dispute:
- [16] According to s. 66 of the Strata Property Act, an owner owns the common property of the strata corporation as a tenant in common. At common law, there was little a tenant in common could do to prevent a fellow tenant from making changes to their shared property. The courts were reluctant to restrict a tenant in common in the legitimate enjoyment of his or her property. An injunction to prevent the changes would not be ordered unless the changes would result in the destruction of the property. The normal recourse was to seek an order for partition: A.H. Oosterhoff and W.B. Rayner, *Anger and Ho[ns]berger Law of Real Property*, 2d ed. (Aurora: Canada Law Book Inc., 1985).
- [46] Permissive waste - that is, waste resulting from a failure to preserve or repair property (see *British Columbia (Director of Civil Forfeiture) v. Onn*, 2009 BCCA 402 at para. 28) - is not expressly contemplated by Professor La Forest or in the Report on Co-Ownership of Land. In any event, permissive waste, which is typically a concept applicable between a life tenant and remainder and not between tenants in common, arises only when the instrument that creates the estate - here, the tenancy in common - imposes a duty to preserve the property: Ziff at 181.
- [47] This is not a case of Mina destroying common property; the fire did that, and we are left to address the property as it now is. Nor is this a case of an agreement between tenants in common to restore the property, rendering the concept of permissive waste inapplicable. This case is, therefore, not a case of waste of any sort.
- [48] I conclude in this rather long way that it was not open to Donna to demand Mina take any action in respect of the use of the property. This leaves before the court only Mina's counterclaim advancing a tenancy in common. But as part of a tenancy in common, and absent a positive act of destruction of the property or an agreement to the contrary, Mina is immune from a mandatory injunction compelling her to act so as to alter the property, even if the alteration may be seen by some as likely to improve its value.

[49] For that reason, there simply was not a basis in law for the judge to find there is a strong prima facie case that Donna could compel Mina to participate in any fashion in construction of a new residence. Indeed, there is not even a serious issue to be tried. In my view, on this basis alone, the injunction must be set aside. Absent agreement between the parties, the issues must be resolved under the Partition of Property Act.

4. Irreparable Harm

[50] Whether harm is irreparable depends on the adequacy of damages as a remedy. In *Wale*, Justice McLachlin explained at p. 345:

In other words, it must be shown that the applicant may suffer irreparable harm in the sense that "the remedy by damages is not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood": *Kerr On Injunctions*, 6th ed. (1927), at pp. 17-18, applied in *MacMillan-Bloedel Limited v. Mullin*, 61 B.C.L.R. 145, [1985] 3 W.W.R. 577, [1985] 2 C.N.L.R. 28 (C.A.), per Seaton J.A.

[51] The judge said here as to irreparable harm:

[35] The second part of the test applicable to injunctive relief is whether the applicant has satisfied the Court she will suffer irreparable harm if the injunction is not granted. I have no hesitation in finding that this part of the test is made out. If the injunction is not granted, there is a serious probability, if not a certainty, that the house will not be rebuilt and that the insurance proceeds available for the rebuild will be squandered.

[36] I note that Mina submits that there is no evidence the rebuilding of the house will add to the value of the Property. I reject this submission outright. The evidence is that the Property is waterfront Property with an assessed land value of about \$7 million. The evidence further establishes that the cost of rebuilding the house will be approximately \$5.6 million, all of which will be paid by the insurance. I have no hesitation in inferring that the combined value of the land and buildings after the house is rebuilt will be substantially more than the land value alone. I similarly have no hesitation in finding that the price the Property will eventually fetch on the open market with a brand-new house, will be substantially more than what it will fetch as it currently sits.

[52] By his very description of the "harm" in terms of money, the judge demonstrated that the "harm" (if there be harm) is quantifiable. In the circumstances of the parties, such cannot be said to be irreparable. I conclude the judge erred in law in holding the loss of a sum of money constituted irreparable harm.

5. The Order for Cooperation

[53] An obvious problem presented by compelled participation in property construction is management of the myriad small and large decisions required of owners. The judge addressed this by ordering the parties to cooperate, with the court as the arbiter should they disagree. To state this proposition is, in my view, to demonstrate the impermissibly vague

and unenforceable nature of the cooperation order, and the unsuitability of the court making those construction decisions is obvious. On what principle could a judge decide door handles or counter-tops?

- [54] I take it that one measure of the propriety of an injunction is its enforceability. An injunction is enforced, ultimately, through the law of contempt of court. In *Onn*, this court applied the statement in *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52:
- [20] [An] example of a case in which a court has refused to impose a mandatory injunction due to vagueness is [Pro Swing]. Madam Justice Deschamps, writing for the majority held at paras. 23-24:

The traditional rule does not leave any room for discretion as regards such considerations or forms of relief. In contrast, equitable orders are crafted in accordance with the specific circumstances of each case. The most relevant equitable remedies for the purposes of the present case are specific performance, that is, an order by the court to a party to perform its contractual obligations, and the injunction, that is, an order to a party to do or refrain from doing a particular act.

Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant's ability to follow up non- performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources.

[Emphasis added in *Onn*.]

Thus the reluctance of courts to grant mandatory injunctions is directed more to the question of the enforceability of the order rather than the public policy against ordering personal service.

- [55] In my view the cooperation clause is impermissibly vague and unenforceable. While it would not be tested here because the order simply imposes on the parties a wrong enterprise of construction, on its own the clause is incapable of enforcement and should not have been made.

Fresh Evidence

- [56] Both parties have applied to adduce fresh evidence. Given my conclusions on the issues of law I have discussed, I consider the fresh evidence would not affect the outcome of the appeal, were it to be received. That means all of the fresh evidence fails to meet the fourth criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. I would dismiss the applications to adduce fresh evidence.

Conclusion

[57] I conclude for these several reasons that the order should not have issued. I would allow the appeal and set aside the order.

"The Honourable Madam Justice Saunders"

I agree:"

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Butler"

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