

CANADA / JUDGMENT

Taherkhani v. Este

2020 BCCA 345

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 345 Taherkhani v. Este COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Taherkhani v. Este, 2020 BCCA 345 Date: 20201123 Dockets: CA46688; CA46711 Docket: CA46688 Between: Mehran Taherkhani Respondent (Claimant) And Rosa Donna Este also known as Rosa Donna Taherkhani also known as Donna Este Respondent (Respondent)

- and - Docket: CA46711 Between Mehran Taherkhani Respondent (Claimant) And Rosa Donna Este also known as Rosa Donna Taherkhani also known as Donna Este Respondent (Respondent) And Mina Esteghamat-Ardakani also known as Mina Esteghamat-Ardakani, Francis Amir Este, 0831295 BC Ltd., Vitality Holdings Corp., and John/Jane Doe as Trustee of the Mina Esteghamat-Ardakani Alter Ego Trust No. 1 Appellants (Respondents) Before: The Honourable Madam Justice Saunders The Honourable Mr. Justice Harris The Honourable Mr. Justice Butler On an application to vary: Orders of the Court of Appeal for British Columbia, dated July 29, 2020 (Taherkhani v. Este, Vancouver Dockets CA46688 and CA46711) and July 31, 2020 (Taherkhani v. Este, 2020 BCCA 226, Vancouver Dockets CA46688 and CA46711) Oral Reasons for Judgment Counsel for the Appellants, Mina Esteghamat-Ardakani and Francis Amir Este (via videoconference): J.K. McEwan, Q.C. E.A. Kirkpatrick Counsel for the Respondent, Mehran Taherkhani (via videoconference): J.M. Richter The Respondent, Rosa Donna Este, appearing in person (via videoconference): R.D. Este Place and Date of Hearing: Vancouver, British Columbia November 23, 2020 Place and Date of Judgment: Vancouver, British Columbia November 23, 2020 Summary: This is an application to review and vary several orders of a single justice dismissing an application for a finding of contempt of court in relation to an alleged breach of an undertaking to given to this Court. Held: Application dismissed. No error of principle has been established in relation to the orders made.

[1] HARRIS J.A.: These are applications to review or vary orders of a justice sitting in chambers. The orders in issue are the following:

- 1) An order refusing to adjourn an application brought by the applicant here to adjourn his application to find the respondents here in contempt of court;
- 2) An order dismissing the contempt application; and

- 3) An order awarding special costs against the applicant in favour of both the respondents here and their counsel.
- [2] The reasons for judgment of the single justice on the adjournment application are unreported. The reasons on the merits are indexed as 2020 BCCA 226.
- [3] The test that a division of this Court applies to applications of this kind is well established and highly deferential. We do not rehear the application as if we were considering it anew. We are entitled to interfere only where a single justice made an error of law, committed an error of principle, or misconceived the facts: see *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para. 7; and *Seattle Environmental Consulting Ltd v. Workers' Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 5-8.
- [4] I do not find it necessary to recite the background leading to these applications. They are canvassed carefully and in detail in the reported reasons for judgment. This judgment may be read together with that one.
- [5] I turn to the justice's refusal to adjourn the contempt application, although Mr. Richter did not press this matter before us at the suggestion of the Court. Here, in my view, it is sufficient to note that the applicant brought a series of applications in chambers. For the most part, those applications were misconceived because they sought relief a single justice did not have the jurisdiction to grant. The applicant eventually agreed with that conclusion, and those matters were adjourned to be dealt with in the two appeal proceedings currently ongoing.
- [6] The parties agreed, however, that a single justice did have jurisdiction to grant relief for contempt of court. In this case, the alleged contempt was said to arise from positions the respondents were taking in these appeal proceedings that were alleged to be contrary to an undertaking given to a division of this Court by counsel for the respondents in a related appeal.
- [7] The justice refused the applicant's request to adjourn his own application for contempt. He concluded that it was in the interests of judicial efficiency to hear the contempt application. In my view, it was open to the justice to reach that conclusion in the exercise of his discretion. The applicant has not demonstrated any error of principle in the exercise of the justice's discretion. In any event, and fatally, the contempt application has been decided. The current application is moot. I see no basis on which it can be reopened.
- [8] I turn now to the contempt application. The judge extensively examined the principles governing the enforcement of undertakings given to a court by a party: at paras. 26-33. The judge accepted that an undertaking given to the court can be enforced through contempt proceedings. He observed that contempt proceedings should be used with restraint, citing both persuasive and controlling authority for that proposition. The justice noted that there are a variety of ways in which an undertaking can be enforced and whether to rely on the contempt power is discretionary and a last resort. After giving two examples of alternative

means by which the applicant could have dealt with the question of the alleged breach of the undertaking, the justice concluded:

- [35] In my view, Mr. Taherkhani's invocation of contempt powers in this case, even if he were able to prove a breach of the undertaking, would be completely inappropriate.
- [9] The first point to note is that the basis of the decision to dismiss the application was discretionary; the invocation of contempt powers was inappropriate, even if the respondents had breached the undertaking. The result does not turn on a finding that the respondents had not breached the undertaking. The applicant has not demonstrated that the judge made any error in the exercise of his discretion. That is sufficient for us to dismiss the application to vary the order on the merits, and I would do so.
- [10] The applicant alleges, however, that the justice did not have the jurisdiction to make a finding of fact that the undertaking had not been breached. The justice found:
- [39] The same principles apply to contempt in relation to an undertaking to the court. The undertaking must be clear and precise. The court will punish a person for contempt only if their actions clearly violate the precise undertaking that was given.
- [40] As I have indicated, the undertaking given to this Court in *Este v. Esteghamat-Ardakani*, 2018 BCCA 290 was a very limited one. It was an undertaking that in the event that that appeal was dismissed (as it was), Ms. Esteghamat-Ardakani and Mr. Este would not take the position that the order of Justice Funt estopped Mr. Taherkhani from pursuing any rights he might have to property or funds in the hands of Ms. Esteghamat-Ardakani.
- [41] I have carefully considered whether anything the Appellants have done, either in opposing the motion before Justice Giaschi, or in appealing the orders of Justice Pearlman and Justice Giaschi violates the undertaking. Nothing that the Appellants have done in this litigation comes even remotely close to violating that undertaking. They have in no way argued that the order of Justice Funt estops Mr. Taherkhani from pursuing rights.
- [11] It is not strictly necessary to address this argument, but it may be helpful to do so. The applicant cites no authority to support his argument that finding facts was beyond the justice's jurisdiction as an element of adjudicating the contempt application. The finding of fact is incidental to adjudicating a matter in respect of which he had jurisdiction. I see no error in the judge making a finding of fact, and there is no plausible argument that the judge made a palpable and overriding error in doing so. In the absence of an error of that kind, a division hearing an application to vary does not review or opine on factual findings. More importantly, and in any event, the justice's finding is clearly an alternative basis on which he dismissed the contempt application. Even if the judge fell into error on this point, there is no basis on which this division could interfere with the order since it rests principally and independently on the justice's exercise of discretion.

- [12] An issue arose, however, during the hearing. Mr. McEwan fairly informed us that his position is and will be that the finding of fact is *res judicata* between the parties and, therefore, binding on a division that hears the appeal, and may hear arguments in support of a declaration that the undertaking has been breached or that the appeal or appeals (if there are two) are an abuse of process. That view of the matter appears to have been shared by the justice. It must be recalled that the finding of fact about the alleged breach of undertaking was made in the context of a contempt application by a single justice. The allegation of a breach of undertaking is potentially relevant to the abuse of process claim, as well as to the contempt application. That allegation could be advanced to a division hearing the merits of the appeals in support of relief sought by the respondent (applicant before us). As I would uphold the order on the basis of the exercise of the judge's discretion, I have not engaged the issue of the finding of fact on the undertaking, and that finding of fact cannot be before us as an independent issue (a review is from the order, not the findings of fact). I would refer that issue to the division before whom the abuse of process issues, declaration, or other matters in the appeal or appeals will be heard, if an express referral be needed. Our concern on this application is restricted to whether the orders should be varied, and the test we apply is tailored to that issue.
- [13] I turn briefly to the order for special costs. The judge ordered special costs in favour of both the respondents and counsel. The justice acted appropriately within his jurisdiction. He did so in the context of a complicated procedural history focussed on the inappropriateness of invoking the contempt power, and the manner in which the positions were advanced, both against the parties and counsel. I think there is no basis to interfere with this aspect of the application to vary, and I would dismiss it.
- [14] In my view, having dismissed the application to vary the contempt orders, I am not aware of any impediment to the appellants advancing their appeal and application for leave to appeal.
- [15] I would order costs of this application to the appellants in any event of the cause, including costs of the recent application before Justice Goepel.
- [16] SAUNDERS J.A.: I agree.
- [17] BUTLER J.A.: I agree.
- [18] SAUNDERS J.A.: The applications are dismissed. The appellants are entitled to their costs of the application, and also entitled to costs of the recent application before Justice Goepel.
"The Honourable Mr. Justice Harris"

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