

CANADA / JUDGMENT

Taherkhani v. Este

2020 BCCA 226

COURT

British Columbia Court of Appeal

DECIDED

31 July 2020

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2020 BCCA 226 Taherkhani v. Este

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Taherkhani v. Este,

2020 BCCA 226

Date: 20200731

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 Estegahamat-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)

Corrected Judgment: The text of the judgment was corrected at paragraph 30 on

August 14, 2020.

Before:

The Honourable Mr. Justice Groberman

(In Chambers)

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

January 28, 2020 (Taherkhani v. Este, 2020 BCSC 101, Vancouver Docket

E-131501) and February 7, 2018 (Taherkhani v. Este, Vancouver Docket E-131501).

Oral Reasons for Judgment

Counsel for the Appellants, Mina Esteghamat-Ardakani and Francis Amir Este

(via teleconference):

J.K. McEwan, Q.C.

E.A. Kirkpatrick

M.G. Underhill

Counsel for the Respondent, Mehran Taherkhani

(via teleconference):

J.M. Richter

The Respondent, Rosa Donna Este, appearing in person

(via teleconference):

R.D. Este

Counsel for J.K. McEwan, Q.C. and E.A. Kirkpatrick

(via teleconference):

T.M. Cohen, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

July 29 and 30, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 31, 2020

Summary:

The respondent seeks orders finding the appellants in contempt of court for breaching an undertaking not to raise certain arguments in the litigation. They also seek orders terminating the appeal proceedings on the basis that they constitute an abuse of process. Acknowledging that a judge in chambers does not have jurisdiction to dismiss an appeal as an abuse of process, the respondent applied to adjourn all of the applications and have them referred to a division of the Court, and, in the alternative, argued that the judge should find the appellants in contempt. Held: The applications to have the proceedings terminated should, in this case, be heard at the same time as the proceedings themselves. The contempt application proceeded. A breach of an undertaking to the court may be enforced by contempt proceedings. Such proceedings should not be used to enforce undertakings where lesser, effective remedies are readily available. In this case, the alleged breach of undertaking should simply have been raised at the time when arguments were being made to the judge in the court below. The undertaking given by the appellants in this case, was, in any event, a limited one, and was not contravened. The invocation by the respondent of the contempt jurisdiction of the court to deal with the matter was heavy-handed, the more so because he sought remedies against not only the appellants, but also their solicitors. In the circumstances, an award of special costs of the contempt application is appropriate.

[1] GROBERMAN J.A.: Mr. Taherkhani contends that Mina Esteghamat-Ardakani and Francis Amir Este (who I will refer to collectively as the Appellants) have breached an undertaking given to this Court by:

- a) opposing his application to add them as parties to the Supreme Court proceedings;
- b) opposing his application to amend his pleadings in the Supreme Court; and
- c) pursuing appeals to this Court.

He seeks the following substantive relief:

- a) An order staying, quashing or dismissing the appeal in CA46688 as an abuse of process;
 - b) An order staying, quashing or dismissing the application for extension of time and for leave to appeal in CA46711 as an abuse of process;
 - c) A finding that the Appellants are guilty of civil contempt of court and the imposition of a fine for that contempt; and
 - d) Special costs, including special costs payable by counsel for the Appellants.
- [2] He also seeks a number of declarations that can best be described as representing the findings necessary to ground a finding of abuse of process or of contempt of court. I will, in the balance of this judgment, use the word "terminate" as a comprehensive term that encompasses all of "stay", "quash" and "dismiss".

Jurisdiction of a Judge in Chambers, and Disposition of the Applications Other Than the Contempt Application

- [3] The Appellants, in their response to Mr. Taherkhani's applications, took the position that it is beyond the power of a judge sitting in chambers to terminate an appeal for abuse of process. Mr. Taherkhani accepts that proposition. I agree with the parties that a decision terminating the appeal for abuse of process, at least in the circumstances of this case, would amount to "a decision of the appeal on the merits", and is not within my power sitting as a single judge (see s. 10(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77).
- [4] The parties accept that a single judge in chambers has jurisdiction to make a finding of contempt of court, and to impose a fine, pursuant to s. 9(7) of the Court of Appeal Act. Again, I agree with that proposition.
- [5] Acknowledging that some of the relief he seeks is beyond the jurisdiction of a judge in chambers, Mr. Taherkhani commenced this hearing by seeking an order adjourning all of his applications and referring them to a division of the Court. I have the power to make such a procedural order, for the efficient management of applications in the appeal, pursuant to s. 10(2) of the Court of Appeal Act.

- [6] I declined Mr. Taherkhani's invitation to simply refer his notices of motion to a division of the Court for disposition. In my view, the contempt issue is best dealt with separately from the other relief claimed, as there are special procedural and evidentiary rules applicable to contempt hearings. I was also of the view that it would be most efficient to deal with the allegations in the contempt application expeditiously, both to give some finality in respect of the issue, and because a determination on that issue may assist the parties in the balance of the appeal proceedings.
- [7] As I have indicated, I accept that I have no jurisdiction to hear an application to terminate proceeding CA46688 on the basis that it is an abuse of process. The power to do so resides with a division of this Court, not with a single judge. The issues raised by the application to terminate the appeal are closely tied to those on the appeal itself, however, and I am not persuaded that it would be efficient or conducive to the expeditious resolution of matters to have the application heard separately. I am therefore directing, pursuant to my powers under s. 10(2) of the Act, that the application to terminate the appeal as an abuse of process be heard at the same time as the appeal.
- [8] The situation in respect of appeal proceeding CA46711 is somewhat different. The parties agree that the proceeding is not an appeal as of right, and that the appellants require leave to appeal. In my view, a single judge in chambers has the power to terminate an application for leave to appeal if it constitutes an abuse of process. In those circumstances, a chambers judge could refuse leave to appeal on the basis that it is not in the interests of justice for an appeal to go ahead.
- [9] The issue of abuse of process in respect of proceeding CA46711 will be most efficiently considered in conjunction with the application for leave to appeal. I therefore direct that the application to terminate proceeding CA46711 be heard at the same time as the leave application.
- [10] Apart from the applications to terminate the proceedings as an abuse of process and the contempt application, the notices of motion seek only declaratory relief. While it is arguable that a single judge in chambers has jurisdiction to make at least some of the declarations sought by Mr. Taherkhani, I do not intend to entertain the applications for declaratory relief. The granting of declaratory relief is discretionary, and a court will usually refuse such relief (and may refuse to even hear an application for such relief) if it is not of immediate or practical importance: *William v. British Columbia*, 2012 BCCA 285 at para. 260 (appeal allowed, but not on this issue, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44). The declaratory relief sought in this case consists of declarations that the grounds for a finding of abuse of process or of contempt of court have been made out. It seems to me that there is no independent purpose to such declarations. In any event, to the extent the declarations sought are ancillary to the applications to terminate appeal proceedings, they are best dealt with in conjunction with those applications. If Mr. Taherkhani wishes to pursue the declaratory relief in his notice of motion, he should do so in conjunction with his applications to terminate the two appeal proceedings.

[11] I turn, then, to the contempt application.

Litigation Background

- [12] Mr. Taherkhani married Donna Este in 2004. The marriage broke down, and in 2013, he filed a family claim, seeking a divorce, spousal support and a division of family property. In that litigation, Ms. Este stated that certain real property over which she held legal title did not actually belong to her. She produced trust declarations to show that she held the properties in trust for her mother, Ms. Esteghamat-Ardakani. She also failed to list a bank account in her property disclosure and the money in that account was later transferred to Ms. Esteghamat-Ardakani. The assets that she failed to list, or denied that she owned, have a value of several million dollars.
- [13] Eventually, the family claim was settled, and a consent order was entered in 2014. Mr. Taherkhani received a payment of \$70,000 in full settlement of his claims for spousal support and property division. It appears that the settlement was reached on the footing that Ms. Este's property was limited as indicated in her disclosure statements.
- [14] In 2015, Ms. Este commenced an action against the Appellants, claiming that the real properties she had denied owning in the family claim (and other property, including the bank account) did actually belong to her and not to them. She asserted that the trust declarations that she filed in the family law proceedings were fraudulent, having been created to defeat creditors and any claims advanced by Mr. Taherkhani. She claimed to have been counselled by the Appellants to commit the fraud.
- [15] The Appellants filed an application to dismiss Ms. Este's action as an abuse of process, which application was heard during the trial. In reasons indexed as 2017 BCSC 878, the trial judge, Justice Funt, granted an order dismissing Ms. Este's claim as an abuse of process. In a passing comment in his reasons, he noted (at para. 86) that "taking [Ms. Este's] case at its highest, [Mr. Taherkhani] may now bring an action against [Ms. Este and the Appellants].
- [16] After Justice Funt gave his judgment, Mr. Taherkhani brought an application in his family law action to set aside the consent order and to reopen the proceeding on the basis that the order had been obtained through fraud. Ms. Este did not oppose the reopening of the action, and Justice Pearlman granted the order on February 7, 2018.
- [17] Ms. Este appealed the order of Justice Funt. Mr. Taherkhani, who had not been a party at trial, applied to become a respondent on the appeal. In her judgment granting Mr. Taherkhani status on the appeal (*Este v. Esteghamat-Ardakani*, 8 February 8, 2018, B.C.C.A. Vancouver Docket CA44482), D. Smith J.A. said:

- [14] [The respondents on this appeal] take the position that Mr. Taherkhani should not be added as a respondent because he will not be affected by Ms. Este's appeal. They submit that Mr. Taherkhani will be able to pursue his claim in the trial court for a division of what he alleges to be family property regardless of whether that property is left in the hands of Ms. Esteghamat-Ardakani and Mr. Este or the appeal is allowed and the matter remitted to trial.
- [15] In my opinion, Mr. Taherkhani has met the test under R. 2(2). The outcome of Ms. Este's appeal could affect him. If this Court grants Ms. Este the order she has requested, the matter would be remitted and the issue of whether the property is owned by Ms. Este or by Ms. Esteghamat-Ardakani and Mr. Este would be finally decided. If the appeal is dismissed, however, Mr. Taherkhani would need to add Ms. Esteghamat-Ardakani and Mr. Este to his family claim. He would be the one who had to prove that Ms. Este owned some or all of the property at the time they separated before he could proceed to make a claim that some of that property was family property that should have been divided between them.
- [18] Mr. Taherkhani raised these concerns during the appeal (indexed as 2018 BCCA 290), but this Court did not consider them to be pertinent:
- [120] Mr. Taherkhani submits it will be difficult for him to pursue his property claims against [Ms. Este]. He notes that if this appeal is dismissed, then he will have to add [Ms. Esteghamat-Ardakani] and [Mr. Este] as parties to the divorce action and then, in the context of that action, carry the burden of establishing the disputed assets are beneficially owned by [Ms. Este] and are, therefore, family property. Mr. Taherkhani says he will have to expend considerable time and money in that regard. To avoid having to do so, he supports [Ms. Este's] request for a new trial of the within matter; a trial in which [Ms. Este] will bear the burden of establishing her beneficial ownership of those assets.
- [121] The lis at the trial of the within matter was between [Ms. Este] on the one hand, and [Ms. Esteghamat-Ardakani, Mr. Este] and Mr. Blackburn on the other. [Ms. Este's] action was dismissed because she had abused the process of the court. That subsequent events in another action have opened the door for Mr. Taherkhani to advance a claim to the disputed assets does not, in any way, lessen the seriousness of [Ms. Este's] misconduct, or militate in favour of her being allowed to proceed in the face of that misconduct.
- [122] In my view, the position Mr. Taherkhani finds himself in is not relevant to the disposition of this appeal.
- [19] During the hearing of Ms. Este's appeal from Justice Funt's order, Mr. Taherkhani raised a rather different concern. He suggested that if Ms. Este did not succeed on her appeal, Ms. Esteghamat-Ardakani could argue that Justice Funt's order precluded him from making a claim to the property. The theory put forward by Mr. Taherkhani's counsel was that as Mr. Taherkhani's rights to the property arose from Ms. Este's ownership of it, an order precluding Ms. Este from asserting her right to ownership might also preclude Mr. Taherkhani from making a claim. Given that Mr. Taherkhani's claim against Ms. Esteghamat-Ardakani would be based in fraud, breach of trust, or unjust enrichment, it is difficult to see

that his fears had any basis in law. Nonetheless, the court looked to Ms. Esteghamat-Ardakani and Mr. Este for assurance that no such argument would be advanced. Their counsel, on instructions, gave an undertaking to that effect. The Court noted the terms of the undertaking in its judgment:

[68] [Ms. Esteghamat-Ardakani and Mr. Este], through their counsel, gave an undertaking that in the event this appeal were to be dismissed, they would not take the position Mr. Taherkhani is in any way estopped by [Justice Funt's] order from pursuing any rights he may have to those properties and funds.

[20] In the course of the application before me, counsel have, on several occasions, referred to the transcript of the appeal hearing, which records both the context and the language in which the undertaking to the Court was given. As might be expected, the transcript records exchanges that are not always grammatical or precise, but the tenor of the discussion is clear. The following portions of the transcript demonstrate, in my view, that the Court's recital of the terms of the undertaking, as quoted above, is an entirely accurate description of the limited undertaking given by the Appellants:

[March 6, 2018]

THE COURT: You may need instructions on this. Are you essentially saying that your clients undertake that in any action Mr. Taherkhani may bring either independently or by joining your clients in the family law proceeding, that this judgment - the order in this case [i.e. Justice Funt's order] will not be relied on as a basis for precluding and determination on the merits whatever forum his claim takes.

MR. McEWAN: Whatever rights Mr. Taherkhani has. That's correct, My Lord. And that was the position taken before Mr. Justice Funt because it was obviously a concern in the court below.

THE COURT: So I take it, then, that your clients - you are advising us on behalf of your clients that they are giving that undertaking.

MR. McEWAN: Yes. And I will - my client is here, and will confirm that for you again at 10 o'clock tomorrow morning, but that has been the position.

[March 7, 2018]:

MR. McEWAN: I have gone back to my client and I have confirmed that it is my instruction notwithstanding what law [Mr. Taherkhani's] counsel may have found - I'm not sure that it says that - that the order of Justice Funt if upheld by this court, they undertake they do not take a position that Mr. Taherkhani is in any way estopped by that order from pursuing whatever rights he may have.

- [21] Mr. Richter, in his argument, isolates certain statements made in the course of argument to the Court, and suggests that the undertaking went further. I am satisfied that such an argument can only be advanced by taking the statements out of context. The undertaking was simply a representation to the Court that the Appellants would not try to use Justice Funt's order to argue that Mr. Taherkhani was precluded from making a direct claim against the Appellants.
- [22] After this Court dismissed Ms. Este's appeal, and after the Supreme Court of Canada denied Ms. Este's application for leave to appeal the decision, Mr. Taherkhani applied to add the Appellants as respondents in the family law action and to amend the claim to include claims against them. The Appellants opposed the application on a number of bases. In reasons indexed as 2020 BCSC 101, Justice Giaschi granted the relief sought by Mr. Taherkhani.

The Appeals

- [23] Two appeals are now before this Court. First, the Appellants have sought leave to appeal Justice Pearlman's order reopening the family law claim. They wish argue that the reopening is procedurally irregular, citing *D.K. Investments Ltd. v. S.W. Investments Ltd.* (1990), 44 B.C.L.R. (2d) 1 (C.A.) and *Long v. Red Branch Investments Limited*, 2018 BCCA 115 for the proposition that the proper manner for a party to set aside a judgment obtained by fraud is through the initiation of a new action, not the bringing of an application within the concluded action to reopen it. Mr. Taherkhani contends that those cases do not govern the situation in which the earlier action was concluded by way of a consent order, citing *Racz v. Mission (District)* (1988), 22 B.C.L.R. (2d) 70 (C.A.) and *Lochhead v. Lochhead*, 2011 BCSC 1662.
- [24] The Appellants also intend to argue that Mr. Taherkhani's application before Justice Pearlman did not contain adequate evidence to justify the reopening of the family matter, because he did not provide sworn information to the effect that he had been misled by Ms. Este's fraud. They intend to argue that, in fact, Mr. Taherkhani was, at material times, aware of the fraud. Mr. Taherkhani says that the record was sufficient to allow the judge to infer that he had been misled by Ms. Este's fraud, and that the order was therefore well-founded.
- [25] The second appeal is an appeal as of right from the order of Justice Giaschi adding the Appellants as parties, and allowing amendments to the claim. A variety of arguments are advanced, including arguments of delay, and the absence of a statutory basis for the family property claim. These arguments were advanced before Justice Giaschi and rejected by him.

The Role of Contempt Proceedings in the Enforcement of Undertakings to the Court

- [26] A question arises on this application as to whether a breach of an undertaking to the Court is enforceable by way of contempt of court proceedings.

- [27] It is important, first, to understand the nature of an undertaking to a court. Lawyers are very familiar with the concept of a "solicitor's undertaking", which is a formal promise by a lawyer to act in a particular way. Solicitor's undertakings are solemn commitments, and it is a serious breach of professional ethics for a lawyer to breach an undertaking. Such undertakings may found civil claims in a court, and may be the basis for professional discipline. They do not, however, ordinarily give rise directly to contempt of court proceedings.
- [28] An undertaking to a court is a different thing. It is a formal promise by a person before a court to do or refrain from doing something. The person giving the undertaking does not have to be a solicitor, and ordinarily is not. Familiar examples of undertakings to a court include an undertaking to appear for a hearing, and an undertaking as to damages when an injunction is sought. When such undertakings are breached, contempt of court proceedings are available, despite the fact that the undertaking is not embodied in a court order.
- [29] The nature of an undertaking to the court was described by Diplock L.J. in *F. Hoffmann-La Roche & Co. AG v. Secretary of State for Trade and Industry*, [1975] A.C. 295 at 361 (H.L. (E.)) in the context of an undertaking as to damages:

The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts, but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking if it considers that the conduct of the defendant in relation to the obtaining or continuing of the injunction or the enforcement of the undertaking makes it inequitable to do so, but if the undertaking is enforced the measure of the damages payable under it is not discretionary. It is assessed on an inquiry into damages at which principles to be applied are fixed and clear. The assessment is made upon the same basis as that upon which damages for breach of contract would be assessed if the undertaking had been a contract between the plaintiff and the defendant that the plaintiff would not prevent the defendant from doing that which he was restrained from doing by the terms of the injunction.

- [30] In his argument, counsel for the Appellants suggests that, unless an undertaking is formally incorporated into a court order, it is not enforceable through the use of contempt powers. He cites *Williams Information Services Corp. v. Williams Telecommunications Corp.* (1998), 142 F.T.R. 76 (F.C.T.D.), appeal dismissed (1999) 250 N.R. 67 (F.C.A.) for that proposition. *Williams*, however, does not stand for that proposition. Rather, in *Williams*, the court concluded that while lawyers had, as between themselves, agreed that an undertaking to the court would be given, the undertaking was never actually communicated to the court.

- [31] Where an undertaking has been given to a court, it can be enforced through contempt proceedings. That is, however, a means of enforcement that should be used with restraint. As Lord Diplock indicated, a court has discretion as to whether it will enforce an undertaking through its contempt powers. Indeed, courts always have discretion in respect of contempt powers, even when the use of those powers is sought in respect to the violation of court orders. In *Carey v. Laiken*, 2015 SCC 17, Cromwell J., speaking for the Court said:
- [36] The contempt power is discretionary and courts have consistently discouraged its routine use to obtain compliance with court orders: see, e.g., *Hefkey v. Hefkey*, 2013 ONCA 44, 30 R.F.L. (7th) 65, at para. 3. If contempt is found too easily, "a court's outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect": *Centre commercial Les Rivières ltée v. Jean Bleu inc.*, 2012 QCCA 1663, at para. 7. As this Court has affirmed, "contempt of court cannot be reduced to a mere means of enforcing judgments": *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at p. 1078, citing *Daigle v. St-Gabriel-de-Brandon (Paroisse)*, [1991] R.D.J. 249 (Que. C.A.). Rather, it should be used "cautiously and with great restraint": *TG Industries, [TG Industries Ltd. v. Williams]*, 2001 NSCA 105 at para. 32. It is an enforcement power of last rather than first resort: *Hefkey*, at para. 3; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 89 O.R. (3d) 81, at paras. 41-43; *Centre commercial Les Rivières ltée*, at para. 64.
- [See also *Morasse v. Nadeau-Dubois*, 2016 SCC 44 at para. 19; *Workers' Compensation Board of British Columbia v. Seattle Environmental Consulting Ltd.*, 2017 BCCA 19 at para. 104]
- [32] A similar point was made by Saunders J.A., in *Hokhold v. Gerbrandt*, 2016 BCCA 6:
- [31] Contempt of court is a heavy, blunt tool.
- [32] A measured response to non-compliance with court orders is the standard; a contempt order should be a last resort to obtaining compliance.
- [33] Often, there are effective means of enforcing undertakings to the court that do not involve resort to contempt powers. For example, undertakings as to damages are normally enforced by seeking a court assessment of damages, followed by an order for payment. This allows a court to assess the appropriateness of enforcement of the undertaking in a systematic and thoughtful way (see, for example, the recent decision of this Court in *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.*, 2020 BCCA 120). While, as Lord Diplock indicated, an undertaking as to damages may theoretically be enforced through contempt powers, it would be extraordinary for those powers to be resorted to.

- [34] Similarly, in the case before me, Mr. Taherkhani could, if he considered that the Appellants were making arguments in contravention of their undertaking, simply have raised that issue before Justice Giaschi. If the judge had been of the view that the arguments were inadmissible as a result of the undertaking, he would have been able to prevent the Appellants from advancing them. Similarly, the contention that the Appellant's arguments are admissible could be advanced by Mr. Taherkhani on appeal.
- [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.

Was There a Breach of the Undertaking?

- [36] I turn to the question of whether, quite apart from the discretionary nature of the contempt jurisdiction, Mr. Taherkhani has proven a violation of the undertaking.
- [37] Before a person can be found to be in contempt of court for violating a court order, it must be shown that the order itself was clear. In *Carey*, the Supreme Court of Canada described this requirement as follows:
- [33] The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done": *Prescott-Russell* [*Prescott-Russell Services for Children and Adults v. G.(N.)* (2006), 82 O.R. (3d) 686 (C.A.)], at para. 27; *Bell ExpressVu* [*Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85], at para. 28, citing with approval *Jaskhs Enterprises Inc. v. Indus Corp.*, 2004 CanLII 32262 (Ont. S.C.J.), at para. 40. This requirement of clarity ensures that a party will not be found in contempt where an order is unclear: *Pro Swing* [*Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52], at para. 24; *Bell ExpressVu*, at para. 22. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning: *Culligan Canada Ltd. v. Fettes*, 2010 SKCA 151, 326 D.L.R. (4th) 463, at para. 21.
- [38] The strictness with which this rule is applied is shown by the judgment of this Court in *Gurtins v. Goyert*, 2008 BCCA 196:
- [14] [A]n order alleged to have been breached must be precise and unambiguous in its direction, and the alleged contemnor is entitled to the most favourable interpretation of it: *Hama v. Werbes*, 2000 BCCA 367, 76 B.C.L.R. (3d) 271 at para. 8 .
- [15] The rule of law requires that court orders be obeyed. Accordingly, it is of paramount importance that persons who are subject to court orders be able to readily determine their obligations and responsibilities. They do this by having regard to what is on the face of the formal order setting out what they are required to do, or refrain from doing. As stated in *Arlidge, Eady & Smith on Contempt* (London: Sweet & Maxwell, 2005) (at para. 12-55), "[a]n order should be clear in its terms and should not require the person to whom it is addressed to cross-refer to other material in order to ascertain his precise obligation". See also: *Northwest Territories Public Service Association v. Commissioner of the Northwest*

Territories (1979), 107 D.L.R. (3d) 458 (N.W.T.C.A.) at 478, 479; *In re A Bankrupt*; *Rudkin-Jones v. The Trustee of the Property of the Bankrupt* (1965), 109 Sol.Jo. 334 (C.A.).

- [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.
- [42] I would, therefore, dismiss the contempt application.

Costs

- [43] I turn, now, to the issue of costs. Mr. Taherkhani sought special costs, even in the event he was unsuccessful in his application. His position is that he is the victim of a fraud, and that the tactics of the Appellants are calculated to grind him down so that he will be unable to pursue the litigation.
- [44] When all is said and done in this litigation, it is possible that Mr. Taherkhani will be able to show that he is a victim of fraud at the hands of the Appellants. He might even argue, at that point in time, for special costs if he can show that the Appellants engaged in inappropriate litigation tactics. Even if such arguments can ultimately be made in respect of the rest of the litigation, however, they do not justify the bringing of an inappropriate contempt application. I reject entirely the suggestion that Mr. Taherkhani should be awarded costs of any sort on this application.
- [45] For their parts, the Appellants and their counsel all seek special costs, as well. They say that the contempt application was inappropriate, and that it was particularly improper to seek costs against counsel personally, thus putting them in a potential position of conflict of interest, and necessitating the engagement of additional counsel (Ms. Cohen to address the issue of costs against the solicitors), and Mr. Underhill to present submissions on behalf of the Appellants independent of the submissions made on their behalf by their counsel, in the event of conflict.

- [46] I am of the view that the Appellants should be awarded costs, to be assessed as special costs. The bringing of contempt proceedings in this situation was high-handed and utterly inappropriate. Even if there had been a breach of an undertaking to the Court (which there has not been), other enforcement options were readily available, and ought to have been pursued.
- [47] I am also of the view that counsel should have special costs in respect of Ms. Cohen's appearance on this matter to address the issue of the costs sought against counsel. There was absolutely no basis to seek costs against counsel, and seeking such costs has unnecessarily complicated these proceedings.
- [48] I am not inclined, however, to make any separate costs award in respect of the appearance of Mr. Underhill on this matter. If it was thought necessary for the Appellants to have counsel independent of Mr. McEwan and Ms. Kirkpatrick in order to be properly represented, such counsel should have appeared instead of, and not in addition to, them.
- [49] In the result, I am making the following orders:
- a) The application to terminate the appeal in proceeding CA46688 on the basis that it is an abuse of process, if Mr. Taherkhani still wishes to pursue it, is to be heard at the same time as the hearing of the appeal;
 - b) The application to terminate the leave application in proceeding CA46711 on the basis that it is an abuse of process, if Mr. Taherkhani still wishes to pursue it, is to be heard at the same time as the application for leave;
 - c) The applications for declarations, if Mr. Taherkhani still wishes to pursue them, are to be heard together with the appeal or leave application to which those declarations relate; and
 - d) The application to find the Appellants in civil contempt of court is dismissed. The Appellants are entitled to one set of special costs in respect of the application. In addition, counsel for the Appellants are entitled to special costs in respect of their representation on the appeal by Ms. Cohen.

"The Honourable Mr. Justice Groberman"

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