IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jones v. 1251078 B.C. Ltd.,*
2024 BCSC 48

Date: 20240110
Docket: S235324
Registry: Vancouver

Between:

Maria Sandberg Jones

Plaintiff

And

1251078 B.C. Ltd. and Leslie Thomson and Andrew Press

Defendants

Before: The Honourable Justice Chan

Oral Reasons for Judgment

Counsel for the Plaintiff:	A. Folino
Counsel for the Defendants:	T.M. Reid
Place and Date of Trial/Hearing:	Vancouver, B.C. December 13-14, 2023
Place and Date of Judgment:	Vancouver, B.C. January 10, 2024

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Introduction

[1] This is an application by the plaintiff Maria Sandberg Jones for an interlocutory injunction to remove the defendants and their belongings from a property in Gibsons, British Columbia ("Property"). As well, Ms. Jones seeks to cancel a certificate of pending litigation ("CPL"), filed by the defendants in August 2023, against title to the Property.

[2] The underlying dispute between the parties relates to ownership of the Property and the construction of a home on the land. The venture began with Ms. Jones, together with the personal defendants, Leslie Thomson and Andrew Press, planning to purchase the Property to build a home on it for the three of them to reside in, with Ms. Jones having her own separate living space. The Property was purchased in 2020 when Ms. Jones was approximately 74 years old. The idea was for Ms. Jones to be able to age in place, nearby to her friends. Unfortunately, most of the terms of the agreement between the parties were never written down. Each side claims the agreement says something different, in particular, about who was going to pay, how much and when. To date, Ms. Jones has contributed approximately $3.47 million to the venture, about 97% of the total cost, while Mr. Thomson and Mr. Press have contributed approximately $115,000, about 3% of the total cost. The construction of the home is still not complete.

Background Facts

[3] Both sides have filed numerous affidavits. I have reviewed them all. I take the following chronology from the affidavits. Where the evidence is in conflict, I make no findings of fact.

[4] Ms. Jones moved from the Lower Mainland to Gibsons in 2017, when she was 71 years old. She met Mr. Thomson and Mr. Press, who own a café in Gibsons. She became friends with them. In May 2020, Mr. Thomson told Ms. Jones that he and Mr. Press had located a piece of property in Gibsons and intend to build a home on it. Ms. Jones viewed the Property on approximately May 26, 2020 with Mr. Thomson. The three friends agreed to buy the Property and build a home together. They agreed

that Ms. Jones would have her own suite, separate from Mr. Thomson and Mr. Press, with the plan that they would assist the plaintiff as she aged. Ms. Jones deposed the three of them verbally agreed in May 2020 that she would occupy 1/3 of the living space and Mr. Thomson and Mr. Press would occupy 2/3 of the living space, that the total construction budget would not exceed $800,000 of which Ms. Jones would be responsible for a maximum contribution of $300,000, and that the three of them would jointly obtain a construction loan with Ms. Jones being responsible for 1/3 of the loan.

[5] On June 1, 2020, Mr. Thomson and Mr. Press entered into a contract to purchase the Property through their numbered company 1251078 B.C. Ltd. (“125”). On June 5, 2020, Ms. Jones was added to the contract of purchase and sale. It was agreed between the three friends that Ms. Jones would pay the down payment for the Property, which was 1/4 of the purchase price, in cash while Mr. Thomson and Mr. Press would finance the remaining 3/4 of the purchase price through vendor financing. This was done through a vendor take-back mortgage (“VTB”).

[6] On July 6, 2020, the parties entered into a written co-ownership agreement. The terms included that: (1) 125 would be the registered owner of an undivided 3/4 interest in the Property and Ms. Jones would be the registered owner of an undivided 1/4 interest in the Property; (2) that in the event of a sale of the Property, Ms. Jones is entitled to receive 25% of the net proceeds and 125 would be entitled to receive 75% of the net proceeds; (3) 125 is to be responsible for all property taxes; and (4) 125 is to be responsible for all costs related to the VTB and 125, Mr. Thomson and Mr. Press will indemnify Ms. Jones from any and all costs arising from the VTB.

[7] On July 7, 2020, the purchase of the Property completed for the price of $474,050. After taxes and adjustments, the total amount paid for the Property was $492,713.53. Of this amount, Ms. Jones paid $126,448.80 and Mr. Thomson and Mr. Press paid $10,724.73. The remaining $355,540 was financed through the VTB. The vendor was the lender, with 125 and Ms. Jones as the borrowers, and Mr. Thomson and Mr. Press as covenantors. The monthly payment for the VTB was

$2,067.84. Starting in August 2020, Mr. Thomson and Mr. Press made these payments.

[8] The parties also executed two additional written agreements, each dated September 16, 2020, pursuant to which Ms. Jones granted the defendants the right of first refusal to purchase the Property, and vice versa. These agreements were registered against title to the Property on September 21, 2020.

[9] After the purchase of the Property, the parties began planning the design and construction of the home. The parties learned that the initial budget of $800,000 to build was not realistic. In May 2021, the parties retained Lincoln Construction, who provided an estimate of construction of approximately $1.526 million to build to the drywall stage. This would require the parties to obtain significantly more financing than originally contemplated. Ms. Jones deposed that since she had already contributed substantially more money to the purchase of the Property, she asked that Mr. Thomson and Mr. Press provide her with a budget of their expenses, as she wanted to ensure they were able to repay her within ten years, due to her age.

[10] Some time in the fall of 2021, while the parties were in the process of obtaining approval from the Royal Bank of Canada ("RBC") for the construction financing, Ms. Jones learned from the mortgage specialist at RBC that Mr. Thomson and Mr. Press had negative credit history and would not qualify for financing. Ms. Jones learned that Mr. Thomson and Mr. Press did not include in the budget they had provided to her their complete debt and credit history, including significant credit card debt and debts owing to Canada Revenue Agency, as well as debts related to the foreclosure of a property they previously owned in Gibsons. RBC agreed to provide financing only if Ms. Jones became the sole registered owner of the Property and the sole borrower on a construction mortgage ("RBC Construction Loan"). Mr. Thomson and Mr. Press dispute that Ms. Jones did not know about their earlier foreclosed home, and dispute that RBC would only extend financing if Ms. Jones was the sole registered owner and sole borrower. Mr. Thomson deposed that RBC would extend more financing if Ms. Jones became the sole registered owner and sole borrower.

[11] In order to proceed with construction, the parties made a new verbal agreement ("November 2021 Agreement"). The November 2021 Agreement replaced all previous agreements between the parties. The parties verbally agreed that Ms. Jones would purchase 125's interest in the Property and become the sole registered owner. Ms. Jones would be the sole borrower on the RBC Construction Loan. The parties would pay for construction through draws on the construction loan. Ms. Jones deposed that they agreed her maximum contribution to the construction costs would not exceed $510,000, which was approximately 1/3 of the $1.526 million estimate. Ms. Jones deposed the parties opened a joint bank account at the time, with Mr. Thomson and Mr. Press agreeing to pay $7,000 a month into the joint account ("Monthly Deposits"). She deposed the Monthly Deposits would cover the payments due on the RBC Construction Loan, which initially would be interest-only payments, and the balance of the Monthly Deposits would serve as Mr. Thomson and Mr. Press' contributions toward equalization with Ms. Jones' financial contributions, which were to be repaid within ten years ("Equalization Schedule"). Provided that Mr. Thomson and Mr. Press contributed 2/3 of the total funds according to the Equalization Schedule, the plaintiff would transfer 2/3 of the Property to them.

[12] However, the defendants dispute the terms of the November 2021 Agreement. The defendants dispute there was any agreement on repaying the plaintiff in ten years. The defendants' position is the plaintiff was always aware she would be fronting the cost of the construction, which "…would be reimbursed partially through a lender, and after completion of construction, the Defendants would make payments to the Plaintiff, or the lender, in the years following to equalize the financial investments of the parties…". Mr. Thomson deposed Ms. Jones agreed to a trust arrangement where she agreed to hold a 2/3 interest of the Property in trust for him and Mr. Press.

[13] Ms. Jones deposed that she agreed Mr. Thomson and Mr. Press could live in a camper on the Property, so they could save on rent. She also agreed they could store their belongings in several storage containers on the Property. She deposed this arrangement would save them approximately $6,000 a month in rental payments.

However, Mr. Thomson deposed that the reason he and Mr. Press moved on to the Property in July 2021 was to supervise the construction.

[14] On November 19, 2021, Ms. Jones purchased the remaining 3/4 interest in the Property from 125 for the purchase price of $348,790. This was the amount outstanding on the VTB. Ms. Jones paid $355,293.38 after fees and taxes. Mr. Thomson and Mr. Press directed the entirety of the proceeds be used to pay out the VTB, as it was a condition of the RBC Construction Loan that the VTB be retired. Mr. Thomson and Mr. Press paid $1,459.02 for the legal fees associated with the transfer. The right of first refusal agreements were cancelled.

[15] Starting in December 2021, Mr. Thomson and Mr. Press made some deposits into the joint account. They made payments in small increments ranging between $250 and $500. Ms. Jones also made deposits of $1,610 twice a month. She deposed the reason for her deposits was so there would be just over $10,000 a month in the account, which was what she expected the mortgage payments to be once the RBC Construction Loan converted into a residential mortgage. Ms. Jones made a total of 13 payments of $1,610 into the joint account. Mr. Thomson and Mr. Press made payments for the first few months, but their contributions decreased and then stopped in January 2023. Aside from $340 in May 2023, there were no more contributions from them into the joint account after January 2023.

[16] Prior to receiving the construction financing, Ms. Jones paid approximately $64,000 to cover the pre-construction costs, such as site preparation, architect's fees and survey costs. The defendants contributed approximately $13,000 to these costs.

[17] Ms. Jones was approved for an RBC Construction Loan in the amount of $1,312,498. On approximately December 3, 2021, a mortgage in favour of RBC was registered against the Property as security for the RBC Construction Loan. Ms. Jones received the first draw on the RBC Construction Loan on December 3, 2021, in the amount of $414,187.32.

[18] Construction did not proceed on schedule. Ms. Jones deposed some of the delays were caused by changes to the scope of work made by Mr. Thomson, without her knowledge. Mr. Thomson deposed the delays were due to other reasons. The RBC Construction Loan was structured so that financing would be provided when milestones were achieved in the construction process. Ms. Jones received the second draw from the RBC Construction Loan on January 23, 2023, in the amount of $211,311.49.

[19] Mr. Thomson and Mr. Press contributed approximately $23,000 in May 2022 to supplement the draws from the RBC Construction Loan.

[20] To keep up with the payment of the construction costs, in 2022 and 2023, Ms. Jones resorted to her retirement savings, other financing and borrowing from family and friends. Ms. Jones in December 2022 obtained additional financing from a private lender, registering a mortgage of $200,000 against her personal residence. In June 2023, Ms. Jones replaced this with a mortgage from HomeEquity Bank in the sum of $301,500, using this to pay out the private mortgage. Ms. Jones cashed out more than $1.8 million of her investments. Ms. Jones also borrowed approximately $283,500 from her friends and family and withdrew money from her life insurance policy.

[21] To date, Ms. Jones has spent approximately $3.47 million on the purchase of the Property and the construction of the home. Mr. Thomson and Mr. Press have paid approximately $115,000.

[22] Mr. Thomson deposed that “we all understood that the Plaintiff would incur the upfront costs of the construction, which would be reimbursed partially through a lender, and following completion of construction, Andrew and I would make payments to the Plaintiff, or the lender, in the years following to equalize the financial investments of the parties”. He further deposed that “the parties agreed, verbally, that in order to equalize the expenditures for the purchase of the Property and the construction of the house, Andrew and I would pay the interest on the construction line of credit until it was converted into a residential mortgage, at which point Andrew and I would assume

the entirety of the mortgage payments and the Plaintiff would be released from any financial commitments regarding the Property". Mr. Thomson deposed that from January 2022 to May 2023, he and Mr. Press paid sufficient amounts into the joint account to cover the interest payments on the RBC Construction Loan, in accordance with the parties' verbal agreement.

[23] In approximately May 2022, Ms. Jones learned from Lincoln Construction that Mr. Thomson and Mr. Press had made changes to the design of the home which were increasing the costs of construction. Ms. Jones learned that Mr. Thomson had revised the design of the home to include a lap pool, a helicopter landing pad and a rooftop terrace. Mr. Thomson deposed that these additions were on building plans that Ms. Jones had seen. In the end, it does not appear these additions were built. However, Ms. Jones deposed these proposed additions required the residence to be moved 25 feet toward the edge of the building envelope which resulted in an increase of approximately $300,000 to the cost of the foundation. Mr. Thomson deposed the movement of the building envelope was due to Ms. Jones' desire for a larger workshop. Ms. Jones deposed that in July 2022, she learned that Mr. Thomson and Mr. Press had increased the ceiling height of the home to 14 and 16 feet in some areas.

[24] In October 2022, all parties agreed to terminate Lincoln Construction, as its estimate to complete construction was too high. The parties engaged Drar Investments Ltd. ("Drar Investments") to take over the construction of the home. Mr. Thomson deposed that all three parties entered into a fixed price contract with Drar Investments on October 11, 2022 to complete the construction; however, the contract attached to the affidavit of Mr. Thomson was dated September 27, 2022, and was not signed by Ms. Jones. Ms. Jones deposed that she contracted with Drar Investments on her own, as "I was paying for almost all of the construction costs and in light of Thomson and Press' constant interference with the construction process and because they had breached every agreement they had made with me". She signed a contract with Drar Investments on October 11, 2022, for a fixed price of $850,000 to complete the construction of the home.

[25] Drar Investments began work in October 2022. Mr. Drar, the principal of Drar Investments, advised that Mr. Thomson was making changes to the build. On March 17, 2023, Ms. Jones advised Mr. Thomson and Mr. Press that she was taking over full responsibility for the construction. Ms. Jones asked her lawyer to send a letter to Mr. Drar, advising that he was to only take instructions from Ms. Jones. In April 2023, Ms. Jones hired Luc Tremblay to be her project manager.

[26] In March 2023, Ms. Jones learned from the building inspector that there was to be no kitchen in her portion of the residence, as that had been rejected when the building permit was issued in early 2022. Ms. Jones deposed that Mr. Thomson had told her that she was allowed to have a kitchen in her part of the home. Without a kitchen in her part of the home, Ms. Jones no longer has a self-contained area and cannot live independently from Mr. Thomson and Mr. Press.

[27] Ms. Jones deposed that Mr. Thomson and Mr. Press have been interfering and intimidating workers, including in particular Mr. Drar and Mr. Tremblay. Ms. Jones asked Mr. Tremblay to install two cameras on the Property in April 2023 to allow her to monitor the construction site. Since the cameras have been installed, they have been tampered with such that Ms. Jones is not able to access the images. Ms. Jones deposed that on numerous occasions, Mr. Thomson has prevented tradespeople and Mr. Tremblay from entering the Property, asserting that they are trespassing on his property. Mr. Tremblay video recorded an incident on June 6, 2023, where Mr. Thomson is shown confronting Mr. Tremblay on the video, threatening Mr. Tremblay with a lawsuit for trespass, and advising Mr. Tremblay he is only allowed on “Maria’s” part of the property. At one point, Mr. Thomson grabs Mr. Tremblay’s phone and throws it on the ground.

[28] Ms. Jones deposed that Mr. Thomson and Mr. Press have two video cameras on the Property, which they use to monitor the construction site. Ms. Jones deposed that when she has attended the Property, Mr. Thomson has aggressively questioned her, asking why she was there and who she was with if someone else was with her.

[29] Ms. Jones has through her counsel demanded that Mr. Thomson and Mr. Press leave the Property, but they have refused. They are still living in the trailer on the Property. Ms. Jones deposed that the presence of Mr. Thomson and Mr. Press on the Property has made it difficult for Mr. Drar and his tradespeople to complete the construction, due to the threats and intimidation. Ms. Jones can no longer afford to live in the home once it is complete. She needs to sell it, before she defaults on the RBC Construction Loan. She has been advised by a realtor that to list it now, while Mr. Thomson and Mr. Press are still living on the Property, would not be conducive to achieving the best price. The trailer and storage containers ought to be removed before listing photos are shot, as they degrade the appearance of the Property. Further, the conflict with Mr. Thomson and Mr. Press on the Property in these circumstances will not attract buyers.

Issues

[30] The issues in this application are:

1. Should the Court grant an interlocutory injunction to require the defendants to leave the Property and to restrain them from entering on the Property?

2. Should the CPL registered by the defendants on the Property be cancelled?

Claim for Injunctive Relief

[31] The plaintiff seeks an interlocutory injunction to enjoin the defendants from trespassing on the Property and to prevent them from any further interference with the construction of the home.

[32] The plaintiff filed a notice of civil claim in July 2023, alleging breach of contract, negligent or fraudulent misrepresentation, trespass and nuisance. As I understand it, the basis for the plaintiff's claims is that the defendants misrepresented to her their financial ability to purchase the Property and construct a home for the three of them. The plaintiff was misled into entering into an agreement with the defendants. The

plaintiff argues the defendants have breached the November 2021 Agreement in various ways, including by failing to make the Monthly Deposits in the full amount of $7,000 per month and then by ceasing Monthly Deposits altogether by May 2023, by making changes to the design of the home without the plaintiff's knowledge and approval, and by obtaining a building permit which did not allow for a kitchen in the plaintiff's living area. The plaintiff's position is by these breaches, the November 2021 Agreement has been terminated. She seeks an injunction to remove the defendants from the Property, so construction can be completed without their interference.

[33] The defendants dispute the plaintiff's version of the November 2021 Agreement. They argue there was no agreement to repay the plaintiff in ten years or that they were to pay Monthly Deposits of $7,000. The defendants argue they were responsible for paying sufficient funds into the joint account to pay for the interest portion of the RBC Construction Loan only, which they did. Fundamentally they take the position that when they agreed to transfer legal ownership to the plaintiff, all parties agreed the plaintiff was at all times to hold the defendants' 2/3 interest in the Property in trust, for the defendants' benefit. The defendants argue the plaintiff must meet the test for a mandatory injunction, which is a higher test requiring proof of a *prima facie* case. Their position is the plaintiff has not met the test for a mandatory injunction.

Is the remedy sought a prohibitory or mandatory injunction?

[34] The starting point in considering an application for an interlocutory injunction is the well-known three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [*RJR*]. However, for a mandatory injunction, as opposed to a prohibitory injunction, the first part of the three-part test requires a higher threshold in the determination of merits.

[35] The defendants argue the relief the plaintiff is seeking is in essence a mandatory injunction, as she seeks to have them removed from the Property, where they have lived since some time in 2021. The defendants argue the plaintiff is requiring them to take positive steps, and is not seeking only to prevent them from further access to the Property. On this point, the defendants rely on *R. v. Canadian*

Broadcasting Corp., 2018 SCC 5 at para. 15 [*CBC*]; *Dupont v. The Corporation of the City of Port Coquitlam*, 2020 BCSC 1127 at paras. 32–33; and *Este v. Esteghamat-Ardakani*, 2020 BCCA 202 at paras. 35–36, where the Court of Appeal set out the test for a mandatory injunction:

> [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), 1986 CanLII 171 (BC CA), 9 B.C.L.R. (2d) 333 (C.A.), aff'd 1991 CanLII 109 (SCC), [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 CanLII 117 (SCC), [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.

[36] In addition to the higher threshold test for a mandatory injunction, the defendants argue as the granting of the injunction is tantamount to the granting of the main relief sought at trial or amounts to a final determination of the action, a more stringent "strong arguable case" standard applies*: Taseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507 at paras. 32–33 [*Taseko Mines*]. I take this to be an alternative argument on behalf of the defendants if the Court finds this to be a prohibitory injunction. No submissions were made that if the Court finds this to be a mandatory injunction, that a strong *prima facie* case test is lower than a strong arguable case test.

[37] In the alternative, the plaintiff argues that in cases involving trespass to land, the *RJR* test does not apply. Where a *prima facie* case of trespass is made out, the plaintiff is entitled to an injunction without proof of harm, and questions of irreparable harm or balance of convenience do not arise: *Fraser Health Authority v. Evans*, 2016 BCSC 1708 at paras. 48–50 [*Fraser Health*], and *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355 at para. 59 [*BC Hydro*].

[38] In my view, this is in essence an application for a mandatory injunction. The granting of the injunction would require the defendants to take positive steps to remove themselves and their belongings from the Property. The granting of the injunction is not to preserve the current status quo, but would require the defendants to move their trailer home and storage containers, and reside elsewhere.

[39] With respect to the plaintiff's argument that this is a case of trespass to land where the *RJR* test does not apply, in my view, this argument does not assist the plaintiff as the disputed issue is whether the plaintiff holds legal interest to the Property for the benefit of the defendants. As I read the decisions of *Fraser Health* and *BC Hydro*, it is only where title is not disputed that the *RJR* test for an injunction may not apply.

[40] As such, I find the proper framework of analysis to determine if the interlocutory injunction should be granted is the test to be applied to a mandatory injunction.

Strong Prima Facie Case

[41] The meaning of a "strong *prima facie* case" is set out in *CBC*:

> [17] This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is 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.

[42] As I understand the defendants' position, they argue the plaintiff has not shown a strong likelihood that she will succeed at trial at proving the defendants have breached the November 2021 Agreement and thus, that their claim for a beneficial interest in the Property is defeated. The defendants argue that it was a term of the November 2021 Agreement that the plaintiff hold a 2/3 interest in the Property for the benefit of the defendants and that at no time did the defendants breach any terms of the November 2021 Agreement which released the plaintiff from the obligation to hold the defendants' beneficial interest in trust. Specifically, the defendants argue that the November 2021 Agreement did not stipulate they had to pay $,7,000 a month in Monthly Deposits; that they never agreed to repay the plaintiff in the time span of ten years; that the plaintiff agreed to front the construction costs, with some of that cost coming from the RBC Construction Loan; and that the plaintiff was aware all along of changes to the scope of the design of the residence.

[43] The plaintiff disputes there was an agreement for her to hold part of the Property in trust for the defendants. The plaintiff's position is that the defendants' 2/3 interest in the Property would be transferred to them once they have paid their portion of the total costs.

[44] It is not disputed that the plaintiff is the sole registered owner of the Property. In my view, the critical issue to be determined at trial is whether, as part of the

November 2021 Agreement when title was transferred to the plaintiff, there was an agreement that the plaintiff hold a 2/3 of the interest in the Property for the benefit of the defendants. If such an agreement to hold the property in trust exists, the terms of this trust agreement will need to be determined to see if the defendants are in breach.

[45] In my view, the plaintiff does have a strong *prima facie* case, based on the evidence presented and the law, that the defendants breached the November 2021 Agreement, such that the plaintiff does not hold a 2/3 interest in the Property in trust for the defendants. That is, even if an oral trust agreement is found to have existed as part of the November 2021 Agreement, the evidence is strong that the defendants have breached fundamental terms of the November 2021 Agreement.

[46] The evidence is not disputed that the defendants have not made any payments to the joint account, or towards the RBC Construction Loan, since at least May 2023. The evidence is not disputed that the plaintiff has had to fund the majority, if not the whole, cost of construction. She has put in approximately $3.47 million to date while the defendants have contributed $115,000. On the basis of the evidence of their respective contributions, the efforts the plaintiff has made to keep the project afloat and the lack of financial efforts made by the defendants while being aware of the mounting costs, the plaintiff has a strong *prima facie* case that she did not agree to hold the defendants' interest in trust for their benefit. Even if there was such a trust agreement, the plaintiff has a strong *prima facie* case that she did not agree to pay for everything upfront so the defendants can repay her at their leisure. Further, the amount of the deposits made by the defendants to the joint account are not consistent with their position that they were only to pay the interest on the RBC Construction Loan, and not $7,000 per month. The defendants deposited in small increments of a few hundred dollars totalling almost $5,000 in the first two months after the November 2021 Agreement. The amount of interest on the RBC Construction Loan was approximately $865 a month at that time.

[47] The evidence is the plaintiff is retired and was on a fixed income when she first met the defendants. There is no evidence to support the defendants' contention that

the plaintiff agreed to fund the cost of the construction upfront and allow the defendants an unspecified period of time to repay her. On the evidence, the plaintiff was the only person responsible for the RBC Construction Loan. The defendants have not advanced much evidence to support their version of the November 2021 Agreement, other than their oral argument that people may choose to make poor financial decisions.

[48] On the evidence, the plaintiff has a strong *prima facie* case that she did not agree to hold 2/3 of the property in trust for the benefit of the defendants. In the alternative, if there was such an agreement, part of the terms was that the defendants make Monthly Deposits of $7,000 and repay the plaintiff the defendants' portion of the total cost of the Property in ten years.

[49] The defendants in oral submission argued there was no consideration flowing to the defendants in November 2021 when title was transferred from 125 to the plaintiff, when she became the sole registered owner of the Property. They argue this bolsters their position there must have been a trust agreement, as there would be no reason for the defendants to relinquish all legal rights for no payment. The defendants' position is there is a resulting trust arising when transfer of property is done for no consideration.

[50] In my view, I do not agree with the defendants that they received no consideration when title was transferred to the plaintiff in November 2021. As such, I do not agree a presumption of resulting trust arises in these circumstances. As I understand it, before the transfer of title, 125 and the defendants were responsible for all payments and costs associated with the VTB. This amounted to monthly payments of more than $2,000 a month. When title was transferred to the plaintiff, the proceeds paid by the plaintiff to 125 was used to retire the VTB in full, as that was a term of the RBC Construction Loan. The defendants no longer had the obligation to pay the monthly payments required under the VTB. That is, the defendants did not transfer title in full to the plaintiff for no consideration.

[51] The defendants argue the plaintiff's version of the November 2021 Agreement is inconsistent with the amounts needed to repay the plaintiff. That is, the defendants argue if the agreement was for the defendants to pay $7,000 a month for ten years, the total amount paid would be $840,000, which will not be 2/3 of the cost of the purchase of the Property plus the cost of construction of the home. At the time of the November 2021 Agreement, the parties were already advised the construction cost estimate was approximately $1.5 million just to the drywall stage. However, there is no evidence the plaintiff intended the $7,000 a month for ten years to be the full amount of payment by the defendants to her. In any event, the important point is there is undisputed evidence the defendants did not make the $7,000 monthly payments, even for one month.

[52] The defendants point to other alleged breaches of the November 2021 Agreement and argue they have not been made out. These breaches include whether the plaintiff knew the defendants' prior credit history; whether the plaintiff was aware that a kitchen would not be permitted in her living area; and whether the plaintiff was aware of other changes to the design of the home. The defendants argue there is evidence the plaintiff was aware of the defendants' prior credit history, that she was aware a kitchen was not permitted on her side and that the design changes were on building plans she reviewed. The defendants argue the plaintiff does not have a strong *prima facie* case in relation to these allegations. In my view, the Court is not required to determine if the plaintiff has a strong *prima facie* case for all alleged breaches. The main breach—the failure to make the Monthly Deposits—is in my view sufficiently strong such that it is likely the plaintiff can prove her case at trial.

[53] The defendants argue that granting the plaintiff the interlocutory injunction will in effect be granting her the main relief she claims at trial. The defendants say their counterclaim will be defeated. The counterclaim seeks a declaration that the plaintiff holds 2/3 of the interest of the Property in trust for the defendants, an order transferring to the defendants this 2/3 interest in the Property, and an injunction to prevent the plaintiff from selling the Property. The defendants argue the legal threshold ought to be a strong arguable case: *Taseko Mines* at para. 33. As stated earlier, there is no

legal authority cited to me that states a strong arguable case is a higher standard than a strong *prima facie* case. As a result, I have analyzed this part of the test using the strong *prima facie* case threshold.

[54] I have not considered the application of s. 23 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*] of the effect of indefeasible title or s. 59(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, requiring that contracts for land be in writing, as these sections were not argued. I will only comment that these sections, if applicable, appear to assist the plaintiff.

[55] Upon a preliminary review of the case, I am satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the plaintiff will be ultimately successful in proving the allegations set out in the notice of civil claim.

Irreparable Harm

[56] Irreparable harm has been described as harm that cannot be remedied. It is harm that cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other: *RJR* at 341. Doubt as to the adequacy of damages may be sufficient to support the issuance of an injunction*: Red Chris Development Company Ltd. v. Quock*, 2014 BCSC 2399 at para. 63, citing *B.C. (A.G.) v. Wale*, 9 B.C.L.R. (2d) 333 at 345–346, 1986 CanLII 171 (C.A.). The applicant must show the inadequacy of damages on a sound evidentiary foundation, with mere speculation being insufficient: *Husby Forest Products Ltd. v. Jane Doe*, 2018 BCSC 676 at paras. 43–44.

[57] The plaintiff has adduced evidence of irreparable harm to her if the injunction is not granted. There is evidence of confrontations between Mr. Thomson and the contractors, such that some of the workers have reported to the plaintiff that they are reluctant to bring work crews to the Property. One of these confrontations was video-recorded, and the recording shows Mr. Thomson demanding the plaintiff's project manager to leave the Property, that he was only allowed on "Maria's side", and grabbing his iPhone and throwing it to the ground. The evidence is Mr. Thomson has been aggressive and antagonistic towards workers hired by the plaintiff, threatening

to sue them. Mr. Thomson advised workers that the plaintiff is not involved in the construction and that he is the person authorized to give instructions to the workers. His behaviour has caused workers to leave the Property without performing the scheduled work. There is evidence that the construction will be delayed if Mr. Thomson continues to reside at the Property.

[58] The plaintiff is afraid to visit the Property alone. She had two security cameras installed in April 2023 so she could be updated on the progress of the construction. On multiple occasions, the cameras were interfered with such that the plaintiff could not access any video footage. In May 2023, the plaintiff attended the Property with a friend. Mr. Thomson sent the plaintiff a text while she was at the Property, saying he would sue her friend if she walked on the radiant heating pipes or caused any damage. The plaintiff believes Mr. Thomson is using cameras he had installed earlier to monitor her attendances at the Property.

[59] The plaintiff is currently in financial difficulties. She is retired and on a fixed income. She is the only person making repayments to the RBC Construction Loan. She has obligations to repay in full the amount of the mortgage taken out on her personal residence in June 2024. Her monthly expenses exceed her monthly income by approximately $2,000 a month. She has cashed out all of her retirement savings, approximately $1.8 million, to fund this construction. She needs to sell the Property as soon as possible to cut her losses. Further, as the Property will not have a self-contained unit for her, it will not allow her to live independently.

[60] She has sought the advice of a realtor. The realtor provided evidence that to achieve the best price, the trailer and storage containers need to be removed, as they are cluttering the front access. If the defendants continue to live at the Property, this may reduce its value. Hostility from the defendants will make potential buyers not want to view the Property. The Property should be completed so it can be marketed for the highest price.

[61] Mr. Thomson in his affidavits have not disputed the incidents of confrontation and hostility between him and the plaintiff's workers. He deposed that he was not aware that the plaintiff had hired a project manager or the scope of his work.

[62] The defendants argue the plaintiff has not shown irreparable harm, as they argue any harm can be quantified and addressed through an award of damages. However, this does not account for the stress and anxiety the plaintiff has suffered and will continue to suffer if the Property is not completed as soon as possible and sold. The plaintiff has deposed to being desperate to sell the Property "to recover as much money as possible for me to have enough money to live on for the balance of my life". She has deposed that she has "experienced extreme stress and anxiety because of this situation and, primarily Thomson's and Press's actions. I feel they have used me to allow them to build a home for themselves to live in that they would not otherwise have been able to afford". The defendants argue the plaintiff has not led any medical evidence, but has cited no authority to the Court that proof of irreparable harm in an application for an interlocutory injunction requires expert medical evidence.

[63] In addition to the stress and anxiety to the plaintiff to continue to carry and fund this construction, there is evidence that the plaintiff has already suffered monetary damages that cannot be cured. The defendants obtained an appraisal for the Property in October 2023 which put the appraised value at $2.85 million. The evidence is the plaintiff has put in approximately $3.47 million. There is evidence the plaintiff would not be able to collect from the defendants any award of damages.

[64] The plaintiff has shown irreparable harm if the injunction is not granted.

Balance of Convenience

[65] This third part of the test has been described as a determination of which party will suffer the greater harm from the granting or refusal of the injunction, pending a decision on the merits: *RJR* at 342. The Court must consider whether it is just or convenient to grant the injunction. Some of the factors to be considered include the status quo; the strength of the plaintiff's case; the relative magnitude of the harm; and whether the public interest is engaged: *BC Hydro* at para. 69.

[66] I have considered all of these factors. It is clear the balance of convenience favours the granting of the injunction. If the injunction is not granted, the plaintiff continues to suffer from the stress and anxiety of the mounting costs, and when she is no longer able to make the monthly payments on the RBC Construction Loan, the Property will be foreclosed. The plaintiff will receive less from any foreclosure sale. If the plaintiff is eventually successful on this action, based on the evidence, she will not be able to collect any damages from the defendants.

[67] The defendants argue this is their dream home. If the injunction is granted, the plaintiff will sell the Property. They argue they will not be able to live in the home that they designed. They argue if they are successful in this action, there is evidence they will not be able to collect damages from the plaintiff, as the evidence is she is already overstretched.

[68] With respect, I do not find the defendants' arguments persuasive. It is unclear to me why the defendants cannot purchase the Property from the plaintiff if they have the funds to do so.

[69] With respect to the defendants' argument that they would not be able to collect an award of damages from the plaintiff if they are successful in this action, there is evidence to support the opposite. I note the plaintiff owns a personal residence. There is no evidence the defendants have any assets. There is evidence they operate a café in Gibsons; however, there is no evidence as to how much money they earn from the café.

[70] The plaintiff has provided an undertaking as to damages. Considering the totality of the circumstances, in my view, it is just and fair to grant the injunction.

Should the Certificate of Pending Litigation be Removed?

[71] The defendants registered a CPL on title to the Property on August 22, 2023. The plaintiff applies to have it removed from title.

[72] The plaintiff applies pursuant to s. 215 of the *LTA*, arguing the CPL was not properly filed as the pleadings do not disclose an interest in land. Alternatively, the plaintiff argues the CPL ought to be cancelled pursuant to ss. 256–257 of the *LTA*, on the basis of hardship and inconvenience.

[73] In my view, this application ought to be considered under ss. 256– 257 of the *LTA*. The pleadings do assert an interest in the Property by the defendants, satisfying the requirement in s. 215 of the *LTA* to file a CPL. As such, the proper approach for the plaintiff is to apply under the summary judgment rule to dismiss the claim as without merit, after which the CPL may be cancelled pursuant to s. 254 of the *LTA*: *Xiao v. Fan*, 2018 BCCA 143 at paras. 13, 22. It is difficult at this stage for the Court to assess pursuant to R. 9-6(4) of the *Supreme Court Civil Rules* whether the defendants' claim for interest in the Property is "bound to fail": *Serup v. School District No. 57*, 54 B.C.L.R. (2d) 258 at para. 18, 1989 CanLII 5192 (C.A.). While the Court has found the plaintiff has a strong *prima facie* case for the issuance of the injunction, no submissions were made as to how that relates to the test for summary dismissal of the defendants' counterclaim. Further, it is unclear if the plaintiff has brought an application for summary dismissal pursuant to R. 9-6(4). As such, the Court ought to consider this application pursuant to ss. 256–257 of the *LTA*, on the basis of hardship and inconvenience.

[74] Section 256(1) of the *LTA* permits an application to cancel a CPL to be made on evidence of hardship and inconvenience:

> Cancellation of certificate of pending litigation on other grounds
>
> **256** (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
>
> (a)particulars of the registration of the certificate of pending litigation,
>
> (b)that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
>
> (c)the grounds for those statements, apply for an order that the registration of the certificate be cancelled.

[75] Section 257(1)(a) permits the court, on hearing an application under s. 256(1), to order the cancellation of the CPL, in whole or in part, if it is satisfied that an order requiring security to be given is proper in the circumstances and damages will provide adequate relief to the party in whose name the CPL has been registered.

[76] The degree of hardship and inconvenience that must be shown in an application pursuant to s. 256(1) to cancel a CPL must be more than "trifling", but the court need not be "exacting" in its analysis: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.,* 2014 BCCA 388 at para. 28 [*Youyi Group*]. The hardship must be more than insignificant. Even where hardship and inconvenience are demonstrated, an order to cancel a CPL is discretionary: *Youyi Group* at para. 29.

[77] Where hardship and inconvenience are established, the court has the discretion to order cancellation of the CPL upon being satisfied an order for security is proper and that damages will provide adequate relief to the party that filed the CPL: *Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd.*, 2019 BCCA 357 at para. 28.

[78] In this case, the defendants argue in their counterclaim, they seek a remedy akin to specific performance, as they seek a declaration and an order transferring to the defendants a 2/3 interest in the Property. As such, the plaintiff has to show even if the defendants are successful, specific performance can be eliminated as having no reasonable chance of success: *Youyi Group* at para. 39. The court has to consider whether there is a triable issue as to whether the defendants would be entitled to the remedy of specific performance at trial. The plaintiff must show that it is plain and obvious the defendants would not succeed on the claim of specific performance at trial.

[79] The defendants argue the plaintiff has not shown the hardship is caused directly by the CPL, as required pursuant to s. 256: *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society,* 2023 BCSC 1257 at para. 52. They argue the plaintiff's hardship, if any, is caused by the decisions she has made by entering the November 2021 Agreement even after she was made aware of the defendants'

financial circumstances; the reason she is not able to sell the Property is not due to the CPL but her inability to pay the contractors to complete construction; and that they offered in May 2023 to pay the plaintiff $7,000 for two months which she refused.

Hardship and Inconvenience

[80] The plaintiff has shown evidence of hardship and inconvenience caused by the registration of the CPL. There is specific evidence from the plaintiff that she has received the maximum amount of $1.3 million from the RBC Construction Loan. She has set out all the details of other loans she has taken out to finance the construction, including cashing out her life savings of $1.8 million and borrowing from friends and family. She is currently barely able to meet her financial obligations each month, and expect she will soon be in default of the RBC Construction Loan. Her only recourse is to sell the Property to recover as much money as possible. The CPL will prevent the property from being sold. In my view, the evidence is that not being able to complete a sale of the Property will directly cause the plaintiff hardship which is not insignificant.

[81] Section 256(1) of the *LTA* allows a court to cancel a CPL on the showing that hardship and inconvenience are experienced or are likely to be experienced by the registration of the CPL. In this case, there is evidence showing hardship and inconvenience has been experienced and will likely be experienced if the CPL is not cancelled.

Is it Plain and Obvious that Claim for Specific Performance Will Fail?

[82] The defendants concede they have not claimed specific performance, but argue their counter-claim is akin to a claim for specific performance. They argue it is not plain and obvious their claim for a beneficial 2/3 interest in the Property will fail at trial.

[83] The defendants' argument on this point was not well developed. I take it they are arguing that they have a beneficial interest in 2/3 of the Property regardless of how much money they have contributed to date, as they rely on an oral trust agreement made as part of the November 2021 Agreement. They are seeking specific

performance of this oral trust agreement. This would be an agreement where the plaintiff agreed to finance 97% of the cost of construction upfront, while agreeing to hold 2/3 beneficial interest in the Property for the defendants, for them to repay her at a later, unspecified time. The evidence in support of such an agreement is minimal. Even if the defendants obtain this transfer of a beneficial 2/3 interest in the Property, what they seek is to be able to reside in the home they have designed. Specific performance of this oral trust agreement will not necessarily result in that occurring. The defendants have not addressed the impact and effect of the plaintiff being the sole registered owner, or what would happen if the plaintiff wishes to sell the Property and the defendants not being in a financial position to buy her out. In my view, even if the pleadings were amended to allow the defendants to plead specific performance, it is plain and obvious this claim will fail.

Should the Plaintiff Pay Security for the Removal of the CPL?

[84] In my view, the plaintiff should pay $115,000 as security for the removal of the CPL. This represents how much the defendants have contributed to the Property to date. This amount will be adequate to protect the defendants' interests. The security can be paid with the proceeds of sale of the Property, as requested by the plaintiff.

Conclusion

[85] There will be an injunction that the defendants be restrained from occupying or entering on the Property until the trial of this matter.

[86] There will be an order pursuant to s. 257 of the *LTA* that the CPL registered upon title to the Property be cancelled upon the Plaintiff posting security in the amount of $115,000. This can be paid with the proceeds of sale of the Property.

[87] As the plaintiff has been successful, my preliminary view is she is entitled to her costs on these applications at the ordinary scale, in the cause. If either party wishes to make different submissions on costs, they are to contact the registry within 30 days to set a date for a hearing.

"Chan J."