IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Claxton v. Claxton,*
2023 BCSC 2417

Date: 20230929
Docket: S222909
Registry: Victoria

Between:

Allan Claxton and Earl Claxton

Plaintiffs

And

Vanessa Claxton and Sheri Claxton

Defendants

Before: The Honourable Mr. Justice Gaul

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	J.W. Gailus C.A. Jacklin
Counsel for the Defendants appearing by videoconference:	B. Isitt
Place and Date of Trial/Hearing:	Victoria, B.C. June 23, 2023 September 1, 2023
Place and Date of Judgment:	Victoria, B.C. September 29, 2023

[1] **THE COURT:** These are oral reasons for judgment and therefore they are subject to editorial revisions in the event they are reproduced in written form. That simply means I may make grammatical or stylistic changes or I may make additional references to the evidence, the submissions of counsel, or the case authorities that they provide were put before me. In no manner will the result of my decision be changed.

Judgment

[2] The parties are members of the Tsawout First Nation (the "TFN"), a band as defined under the *Indian Act*, R.S.C. 1985, c. I-5. (the "*Indian Act*")

[3] The present dispute involves a residential property located on the reserve lands of the TFN and, more particularly, Lot 47-6, CLSR 81466, East Saanich Indian Reserve No. 2 (the "Premises").

[4] The defendants live in a small house located on the Premises (the "House"). The plaintiffs hold a certificate of possession over the premises issued pursuant to s. 20 of the *Indian Act*.

[5] On 26 April 2023, Mr. Justice Saunders granted the plaintiffs an interim injunction requiring the defendants to provide vacant possession of the Premises within 45 days. His reasons for judgment are indexed at 2023 BCSC 665.

[6] The defendants have not vacated the Premises. Instead, they have come to court seeking a stay of the injunction until the plaintiffs' action has been adjudicated.

Background

[7] The relationship between the parties and the history of the Premises and House are described in greater detail in Justice Saunders' reasons. For the sake of simplicity, I note the following portions of Justice Saunders' reasons:

> [3] The plaintiffs are sons of the late Ernie Earl Claxton, whom I shall refer to as Earl Sr. Earl Sr. was granted a certificate of possession in 1978 over Lot 47, CLSR 63988, East Saanich Indian Reserve No. 2. In 1983, he granted each of the plaintiffs and their brother, Calvin Claxton, an undivided

> 1/3 interest in Lot 47. Those interests of the three brothers, as holders of certificates of possession, were registered with the First Nations Land Registry (the "Registry").
>
> [4] In 1994, Lot 47 was subdivided into four parcels. Each of the three brothers maintained a 1/3 interest in Lots 47-3, 47-4, and 47-5, CLSR 81466, under certificates of possession. With respect to the Premises, Lot 47-6, they pledged their interests to TFN as collateral against TFN's guarantee of a construction loan obtained by Calvin. The Registry reflects a grant of interest in the Premises from the three brothers to TFN.
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> [5] The defendant Sheri Claxton is the now-former spouse of Calvin; the defendant Vanessa Claxton is their daughter.
>
> [6] Calvin used the loan proceeds to begin building a log home on Lot 47-6. Construction was never completed. Calvin instead built a small house on the Premises (the "House"). Calvin, Sheri, and Vanessa have lived in the House from time to time, and it is currently occupied by Sheri and Vanessa.

[8] In or about 1995, after Sheri and Calvin Claxton separated and Sheri had relocated her residence, the defendant Vanessa Claxton, the second defendant in this matter, moved in with her father and began living with him in the House. Vanessa Claxton has continued to do so since 1995, except for a three-year hiatus between 2012 and 2014 when she was away pursuing her post-secondary studies in the Greater Vancouver region.

[9] In 2002, Calvin Claxton transferred his membership from the TFN to the Squamish Nation. Around the same time, he defaulted on the loan he had received from the TFN in order to build the House on the Premises.

[10] In July 2022, the plaintiffs reached an agreement with the TFN whereby they would repay the balance of the loan their brother Calvin had received from the TFN, in return for which their interest in the Premises that had been pledged as security for the loan would be returned to them.

[11] Starting in July 2022, Allan Claxton began sending the defendants notices that they needed to vacate the House and Premises. Those notices were disregarded.

[12] As noted earlier in these reasons, the plaintiffs hold a certificate of possession over the Premises, issued pursuant to the *Indian Act*. The plaintiffs have requested

that the defendants vacate the House and the Premises. The defendants have refused to do so, claiming they have a right to remain in the House and on the property, the Premises.

Nature of the litigation

[13] In their notice of civil claim filed 12 September 2022, the plaintiffs seek, amongst other things, a declaration that the defendants' continued occupation of the Premises is unlawful and constitutes a trespass; an order for vacant possession of the Premises; and damages, including general and special damages.

[14] By notice of application filed 15 September 2022, the plaintiffs sought to have a portion of their application determined summarily. Specifically, they sought to have the court determine whether the defendants' conduct constituted trespass, and whether an order directing the defendants to leave the Premises was justified and appropriate. In the alternative, the plaintiffs sought an interlocutory injunction directing the defendants to vacate the Premises pending trial.

[15] As noted earlier in these reasons, the plaintiffs' application came on for hearing before Justice Saunders, who declined to summarily adjudicate the plaintiffs' claim for an order for vacant possession of the Premises. At paragraphs 25 to 27 and 29 of his decision, Justice Saunders explains:

> [25] . . . I am unable to find the necessary facts and I find that it would be unjust to decide the issue of entitlement to an order for possession on this application. I say so for two reasons.
>
> [26] First, in bringing this application, the plaintiffs are seeking to sever the issue of their entitlement to an order of possession from all other forms of relief sought in the notice of civil claim. As determining this sole issue would still leave significant issues to be tried, there are few if any efficiencies to be obtained through proceeding summarily, and such piecemeal decision-making is not to be encouraged [citation omitted].
>
> [27] Second, while Sheri and Vanessa have never held a certificate of possession, it appears that they continued to inhabit the House on the Premises to the knowledge of TFN, and that TFN accepted mortgage or rent payments from Sheri for a period of several years. Under s. 25(2) of the *Act*, the right of possession of the Premises would appear to have reverted to TFN when Calvin transferred his band membership and failed to transfer his interest under s. 25(1). TFN's subsequent acceptance of Sheri's payments

> would appear possibly to give rise to an equitable interest. That issue cannot be determined.
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> . . .
>
> [29] As in *Terbasket*, I find that entitlement to an order of possession is not an appropriate issue for summary determination. I turn to consider whether an interlocutory injunction should be granted.

[16] Justice Saunders granted the interlocutory injunction sought by the plaintiffs and, in doing so, explained at paragraphs 31 to 33:

> [31] … in trespass cases, if there is no arguable case against a plaintiff's right of possession, an injunction will normally lie against a trespasser without consideration of the second and third parts of the *RJR-Macdonald* test: *Terbasket* at paras. 24–25; *The Sol Sante Club v. Biefeld*, 2005 BCSC 1908 at paras. 17–19. When the evidence clearly establishes a plaintiff's rights, the onus shifts to the defendant to establish that their continuing possession of the property is as of right. In this context, the claim to possession "as of right" must be established as of the date of the application: *Terbasket* at para. 27.
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> [32] Under s. 20(1) of the *Act*, no member of a First Nation is in lawful possession of reserve land unless possession of the land has been allotted to them by the band council, with the Minister's approval. The defendants have not established that they meet that requirement. They have never held certificates of possession or a registered interest in the Premises. Under the *Act*, their possession is unlawful. They have not proven that they had a legal right to possession of the Premises as of the hearing of the application.
>
> [33] Accordingly, the interlocutory injunction is granted. Within 45 days of the date of this Order, the defendants will provide vacant possession of the Premises, pending the trial of this civil claim.

[17] Since Justice Saunders' decision, the defendants have filed a response to the plaintiffs' notice of civil claim as well as a counterclaim of their own. Moreover, they have initiated legal proceedings in Federal Court seeking a judicial review of the TFN's purported allocation of an interest in the Premises to the plaintiffs in July 2022.

Nature of the present application

[18] By notice of application filed 23 May 2023, the defendants seek an order staying the execution of Justice Saunders' order and, more particularly, the injunction pending the trial of this action.

Discussion

The law

[19] Rule 13-2(31) and (33) of the *Supreme Court Civil Rules* provides:

> (31) The court may, at or after the time of making an order,
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> (a) stay the execution of the order until such time as it thinks fit, or
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> (b) provide that an order for the payment of money be payable by instalments.
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> …
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> (33) Without limiting subrule (31), a party against whom an order has been made may apply to the court for a stay of execution or other relief on grounds with respect to which the supporting facts arose too late for them to be pleaded, and the court may give relief it considers will further the object of these Supreme Court Civil Rules.

[20] The discretion to grant a stay pursuant to these Rules is a broad one that must be exercised judiciously, and generally only where special circumstances exist or where there are material facts that now exist that were not before the court when the initial order was made:-*Canada (Attorney General) v. Lau*, 2002 BCSC 87.

[21] The court also has the inherent jurisdiction to grant a stay of execution. The applicable test is the same as the one used to obtain an injunction. That three-part test is described in *RJR - MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 as follows:

> a) Is there a serious question to be tried?
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> b) Will the applicant suffer irreparable harm if the stay is refused? And,
>
> c) Does the balance of convenience favour granting the stay?

[22] As Mr. Justice Marchand recently noted in *Creative Wealth Media Lending LP 2016 v. Access Road Capital, LLC*, 2023 BCCA 208:

> [32] The overarching consideration is whether granting the stay is in the interests of justice: *British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia*, 2022 BCCA 289 at para. 6 (Chambers).

Is there a serious question to be tried?

[23] To no surprise, the parties adopt polar opposite positions when it comes to this first question. The defendants maintain they have a number of arguably valid grounds to challenge the plaintiffs' principal assertion that the defendants have no legal interest in the Premises or justifiable right to occupy them. The plaintiffs, on the other hand, contend that all of the bases upon which the defendants claim an interest in the Premises are meritless and bound to fail.

[24] The threshold for this first element of the test is a low one, particularly given the interim nature of the relief sought. While the court will generally engage in a preliminary assessment of the case; however, it should avoid any prolonged examination of the merits of the case. In other words, at this point I need only be satisfied that the application before me is neither vexatious nor frivolous: *RJR-MacDonald*, at pp. 337-338.

[25] Relying upon the common law, including W̱SÁNEĆ customary law and the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, S.C. 2013, c.20, (the "*FHRMIRA*") the defendants maintain that Sheri Claxton has a legal interest in the House and Premises as the former spouse of Calvin Claxton, and that this interest has never been extinguished. The defendants also point to the fact that they have occupied the House for an extended period of time and have made mortgage or rental payments in relation to the Premises that have been accepted by the TFN. As Justice Saunders observed in his decision granting the injunction in question:

> [27] . . . while Sheri and Vanessa have never held a certificate of possession, it appears that they continued to inhabit the House on the Premises to the knowledge of TFN, and that TFN accepted mortgage or rent payments from Sheri for a period of several years. Under s. 25(2) of the *Act*, the right of possession of the Premises would appear to have reverted to TFN when Calvin transferred his band membership and failed to transfer his interest under s. 25(1). TFN's subsequent acceptance of Sheri's payments would appear possibly to give rise to an equitable interest. That issue cannot be determined.

[26] Finally, the defendants argue that the proceedings they have initiated in Federal Court challenging the TFN's decision to allocate an interest in the Premises, on the basis that the decision breached the rules of natural justice and procedural fairness, and that there was no consultation with either of the defendants before approving the allocation.

[27] The plaintiffs argue that all of the various bases upon which the defendants maintain there is a serious question to be tried are erroneous or defective and without merit.

[28] With respect to the *FHRMIRA*, the plaintiffs submit that the provisions of this legislation have no applicability to the circumstances before the court and cannot be relied upon by the defendants as it was enacted in 2013, with associated Regulations promulgated in 2014. As these legislative provisions cannot be applied retroactively, they cannot, say the plaintiffs, apply to Sheri Claxton's situation, given she separated from Calvin Claxton in or around 1995. I find this argument persuasive. I also accept that if the provisions of the *FHRMIRA* and its Regulations did apply to Sheri Claxton's situation, they would only found a claim against her former spouse, Calvin, and not the plaintiffs.

[29] The plaintiffs advance a similarly persuasive argument with respect to the defendants' attempt to rely upon the common law and W̱SÁNEĆ customary law as bases for their claims. I agree with counsel for the plaintiffs that any claim Sheri Claxton may have based on these potential legal avenues would be as against Calvin Claxton and not the plaintiffs.

[30] The defendants maintain that case authorities confirm that traditional use and occupation of land gives rise to lawful possession, even in the absence of a certificate of possession. In my respectful view the defendants are misinterpreting the jurisprudence they cite.

[31] In *George v. George*, [1997] 2 C.N.L.R. 62 (B.C.C.A.), Madam Justice Rowles concluded, on behalf of a unanimous court, that the specific facts of the case

permitted the trial judge to find that the appellant was in lawful possession of the land in dispute, regardless of the fact that they had not obtained a certificate of possession under the *Indian Act*. However, the evidence in *George* satisfied the court that the band council had allotted the land in question to the appellant and that the Minister had consented to it pursuant to the *Indian Act*. These facts do not exist in the present case, as the TFN has not allotted the Premises to the defendants, nor has the Minister consented to such an allotment. In this respect, I agree with the submissions of counsel for the plaintiffs that *George* is not authority for the proposition that traditional use and occupation gives rise to lawful possession.

[32] In my view, the same can be said with respect to the legal principles that can be derived from *Nicola Band v. Trans-Canada Displays Ltd.,* 2000 BCSC 1209 and *Penticton Indian Band v. Jack*, 2013 BCSC 2587.

[33] In *Nicola Band*, Madam Justice Smith concluded:

> [151] The recognition of traditional or customary use of land cannot create a legal interest in the land that would defeat or conflict with the provisions of the *Act*. Such an approach to governance by a band council would be adverse to its fiduciary duty to manage reserve lands in the best interests of all band members. As stated by Rae J. at page 330 in *Leonard v. Gottfriedson*, supra:
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> > It should be apparent that the chief and councillors of a band are in a position of trust relative to the interests of the band generally, the band's assets and the members of the band.
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> …
>
> [162] The above findings may be summarized as follows:
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> …
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> > 4. Ownership of lands based on traditional or customary use of the land does not exist independent of interests created by the *Act*. Recognition of an individual's traditional occupation of reserve lands does not create a legal interest or entitlement to those lands unless and until the requirements of the *Act* are met.
>
> …

[34] While Justice Saunders was, quite understandably in my view, not prepared to discount the possibility that the defendants held some form of equitable interest in the Premises based upon payments they have made to the TFN relating to the property, that possibility was not sufficient to convince him that the injunction sought

by the plaintiffs ought not to be granted. I come to the same conclusion on the present application. In my opinion, even if the defendants have some form of equitable claim, it does not prevail over or trump the clear requirements of the *Indian Act*, and in particular s. 20. Support for this conclusion can be found in *Squamish Indian Band v. Findlay*, 26 B.C.L.R. 376 (C.A.) and *Leonard v. Gottfriedson*, 21 B.C.L.R. 326 (S.C.).

[35] The defendants also argue that their Federal Court challenge to the TFN's allocation of the Premises provides a basis for a finding that there is a triable issue in the present case. I do not find that argument persuasive. The allocation in question, based on the evidence before me, was made in 1979 when the TFN granted a certificate of possession for the Premises to the plaintiffs and Calvin Claxton's father, Earl Claxton Senior. In 1983, right to possess the Premises was granted to the plaintiffs and Calvin Claxton.

[36] In my opinion, what the defendants are actually challenging is not the decision of the TFN to allocate an interest in the Premises. Rather, it is the private agreement between the TFN and the plaintiffs in which the plaintiffs agreed to pay the debt that their brother Calvin had incurred and secured against the Premises, in return for which they would obtain a clear possessory interest in the Premises.

[37] I am not convinced that this challenge to the TFN's conduct constitutes a viable ground upon which I can find that there is a serious issue to be tried in the present case.

[38] The dispute is between the plaintiffs, who hold a certificate of possession, issued in accordance with the provisions of the prevailing legislation, over the Premises, and the defendants, who claim an interest in the Premises, based upon a historical relationship with Calvin Claxton and an assertion of traditional use and occupation of the Premises.

[39] Although the threshold for this portion of the test is low, the defendants have not convinced me that there is a serious issue to be tried in the present case. In my

respectful view, the various bases upon which they rely for their claim to the Premises are unsustainable and this includes the one involving an alleged equitable interest in the Premises. In my respectful view, the evidence does not support any of these bases.

[40] In my opinion, once a certificate of possession has been granted, all of the incidents of ownership of the property in question are vested in the band member who possesses the certificate, including the right and ability to have trespassers removed from the property.

[41] Having considered all of the evidence, as well as the submissions of counsel and the case authorities they have referred to; and recognizing that I am not to engage in an in-depth assessment of the merits of the defendants' arguments, I am not convinced there is a serious question to be tried in this case. In other words, I accept the submissions of plaintiffs' counsel that the claims being advanced by the defendants are not supported by the facts or applicable law and, consequently, they are, using counsel's words, “doomed to fail”.

Will the defendants suffer irreparable harm if the stay is refused?

[42] In the event I am wrong on the first part of the test and there is a triable issue in this case, then I would still deny the relief being sought by the defendants because of their failure to meet the second part of the test.

[43] In *RJR*, Mr. Justice Sopinka and Justice Cory addressed the question of irreparable harm and explained:

> [58] At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> [59] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources

> will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

[44] In *Terbasket v. Harmony Co-ordination Services Ltd.*, 2003 BCSC 17, a decision cited by Justice Saunders, Madam Justice Quijano observed:

> [30] …The general rule is that harm that cannot be put right or compensated for by an award of damages or other equitable relief is "irreparable".

[45] The defendants say they have a close and longstanding attachment to the House and Premises. They further submit that if they are compelled to vacate the House and leave the Premises, then they will suffer not only psychological and emotional harm, but also financial harm because of the challenges posed by having to find a new home in what they claim is a very difficult and expensive housing market.

[46] The evidence in support of the defendants' argument is limited. In affidavits sworn by each of the defendants, they both respectively affirm:

> [14] I have suffered financial harm, psychological and emotional harm, harm to physical health, and loss of quiet enjoyment of the [house and premises] as a result of the actions of Tsawout, Allan and Earl Jr. regarding the allocation of [the Premises], the clearing of land and improvements on [the Premises], and the cutting off of utilities to [the Premises].

[47] The defendants further assert that refusing to stay the execution of Justice Saunders' order will essentially determine the result of this litigation as well as the judicial review in Federal Court, because the plaintiffs will be free to do as they please with the Premises, including razing the House and redeveloping the land.

[48] While I accept that it will be upsetting and unsettling to both defendants to have to vacate what they consider is their home, I am not convinced this reaches the level of irreparable harm that cannot be compensated or remedied by a monetary

award or compensation, in the event the plaintiffs are unsuccessful in their action against the defendants.

[49] While it is entirely understandable that the defendants do not wish to leave what they say is their home and they are prepared to litigate the issue before the courts, I find the evidence in this case generally supports the plaintiffs' position.

[50] I repeat the simple fact that the plaintiffs have a certificate of possession, and consequently they have the exclusive right to possess the Premises. The defendants have no evident legal right that supersedes the plaintiffs' certificate of possession. The defendants have been asked and told on multiple occasions over the years that they must vacate the Premises. They have refused to comply with those requests. There is no evidence before me that the House or Premises are particularly unique or special, or that the defendants have invested any significant effort into making improvements to them.

[51] The plaintiff Allan Claxton is a councillor of the TFN and the chairperson of the First Nation Infrastructure Institute. In his Affidavit Number 1, he affirms :

> [24] The Defendants' continued occupation of the House has given rise to several health and safety concerns. The House is in poor condition, and I understand that it may be condemned. The House is on a septic tank that hasn't been pumped. The hydro is illegally connected. Parties held at the House sometimes last until the morning. These partygoers have harassed workers when they arrive in the morning to work on neighboring lots. On September 6, 2022, an individual was shot with a pellet gun and the police were called to investigate. The police are continuing to investigate the incident.
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> . . .
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> [26] Given these health and safety concerns, it is extremely important to me that this issue is resolved as soon as possible.

[52] In my opinion, if the stay the defendants seek is denied and the House is eventually razed and the Premises redeveloped, then the defendants will still be able to pursue their counterclaim for damages against the plaintiffs.

[53] Finally, I am not satisfied that refusing the stay will be fatal to the defendants' judicial review proceedings in Federal Court or render those proceedings moot and

pointless to pursue. As counsel for the plaintiffs correctly points out in his submissions, the defendants' assertion regarding the impact of a refusal to grant a stay of execution on the judicial review proceedings is speculative at best and, in any event, the Federal Court has a multitude of other remedies at its disposal in the event it finds the TFN or its agents have breached any rules of natural justice or procedural fairness with respect to the defendants.

[54] While the defendants will likely suffer some material impact from a refusal to stay Justice Saunders' order, that is they will likely have to leave the House and Premises, this impact does not, in my respectful view, reach the level of irreparable harm, as that term is explained in the jurisprudence. Adopting the words of Justices Sopinka and Cory in *RJR* and applying them to the present situation, I am not convinced that denying the defendants' application and refusing to grant a stay will so adversely affect their interest that the harm could not be remedied in the event the eventual decision on the merits of the case does not accord with the results of the interlocutory application.

[55] In my opinion, the defendants have failed to meet the second part of the *RJR* test.

Does the Balance of Convenience favour granting a stay?

[56] Although not strictly necessary, given my conclusion that the defendants have failed to meet the first and second parts of the *RJR* test, I will address this third part of that test.

[57] The defendants maintain that the balance of convenience overwhelmingly favours their request for a stay of the Saunders order. In this regard, they contend that a stay would be entirely consistent with the legal principles articulated in *Terbasket*. In the *Terbasket* case, the plaintiffs of a First Nation community held a certificate of possession to certain reserve lands. The defendants were in possession of several properties located on the plaintiffs' reserve lands. The plaintiffs sued the defendants seeking, amongst other things, a writ of possession for the properties the defendants possessed. By notice of application, the plaintiffs

sought to have their claim determined summarily. In the alternative, the plaintiffs sought an interim injunction requiring the defendants to deliver up the properties in question pending trial. Justice Quijano granted the interim injunction. However, she stayed the execution of the injunction on specific terms. In explaining her decision, Justice Quijano observed:

> [31] Here the plaintiffs say that they will suffer irreparable harm if the injunction is not granted in that they will lose the rental revenue to which they say they are entitled. The defendants say that if they are deprived of possession of the subject properties they will suffer irreparable harm in losing the ability to ensure the maintenance and preservation of the property pending a final resolution of the dispute at trial.
>
> [32] I conclude that on the basis of the decision in *Patel* . . . the plaintiffs are entitled to the interlocutory injunction sought. However, in the circumstances of this case, in particular the substantial investment the defendants have made in the improvements to the property in issue, I am of the view that execution of the injunction should be stayed on the following conditions . . .

[58] The conditions imposed by Justice Quijano consisted of the defendants having to pay the plaintiffs the arrears that were owing and to continue paying the plaintiffs' fair market rent for the properties in question.

[59] In my opinion, the factual differences between the instant case and those in *Terbasket* distinguish it to the point where it provides little support to the defendants' position before me. The stay in *Terbasket* was granted principally because of the substantial investment the defendants had made to the improvements to the properties in issue. This is not the situation in the present case, as there is scant evidence of any investment, let alone substantial investment, made by either of the defendants in improving the House or Premises.

[60] Moreover, in *Terbasket* the defendants had, at one time, held a legal interest in the properties in question, but it had been extinguished when the head lease relating to the properties was terminated by the Crown. In the present case, there is no convincing evidence that the defendants hold a legal interest in the Premises beyond one based upon Calvin Claxton's entitlement to them, which was extinguished in or around 2002.

[61] In my view, the balance of convenience favours the plaintiffs. The plaintiffs in good faith repaid Calvin Claxton's debt to the TFN, a debt that amounted to more than $100,000. The plaintiffs now possess the sole legal interest in the Premises and they wish to exercise the rights that accompany that interest. They have, for the past 14 months or so, attempted unsuccessfully to have the defendants vacate the House and Premises. In my opinion, the plaintiffs are entitled to have their legal rights respected and enforced. This will mean that the defendants' lives will be disrupted. However, I am not convinced, on the evidence before me, that the disruption will be as significant or as dire as counsel for the defendants asserts. The defendants have been on notice for quite some time that the plaintiffs wish them to vacate the Premises. Their need to now do so cannot come as a monumental surprise to them.

Special circumstances

[62] Before concluding, I should address the applicability of Rules 13-2(31) and (33) of the *Rules of Court* in this case, and more specifically the court's ability under these Rules to stay the execution of the order in question.

[63] As noted earlier in these reasons, special circumstances are generally required before the court will grant a stay pursuant to sub-rule 13-2(31). In many respects, the factors to be considered under this Rule overlap with those that must be considered under the *RJR* test. This is particularly so when it comes to considering where the balance of convenience lies.

[64] In the present case, the defendants contend that their appearance as self-represented litigants before Justice Saunders constitutes a special circumstance. I reject that assertion. While they technically were self-represented litigants, they were nevertheless assisted by their now-counsel when they appeared before Justice Saunders.

[65] In any event, I am not persuaded that having counsel represent them before Justice Saunders would have made a material difference to the outcome, nor am I

satisfied that there are material facts or evidence now available that were not before Justice Saunders that would warrant a stay pursuant to sub-rule 13-2(31).

[66] I should also note that I remain unconvinced that any possible impact a refusal to grant the stay may have on the defendants' Federal Court proceedings constitutes a special circumstance for the purpose of Rule 13-2(31).

[67] Finally, I do not find on the evidence before me that the defendants' assertion that refusing a stay will render them homeless. I have no evidence relating to the availability of alternate accommodations on TFN lands and, consequently, it would be speculative on my part to conclude that they will not be able to find new accommodations within their own community.

[68] I also note that the defendants have been on notice for a very long time that the plaintiffs wished them to vacate the Premises. As Justice Saunders observed in his reasons for judgment:

> [24] …the defendants have been aware of the plaintiffs' claim of ownership since the July 25, 2022 letter of eviction, if not earlier. The defendants' failure to take any steps to investigate the merits of the plaintiffs' claim, or to positively assert their own rights, cannot be to their advantage.

Conclusion

[69] I acknowledge that my decision will be disappointing to the defendants. That is understandable and I wish to be respectful of that fact. However, I am to apply the law in a fair and impartial manner without any preference or sympathy for any of the parties who appear before me.

[70] I am satisfied that the plaintiffs have a legal right to the Premises and that the right is being infringed by the ongoing conduct of the defendants.

[71] Just as the defendants are entitled to come to court seeking a remedy, the plaintiffs are equally entitled to have the court uphold their rights.

[72] I underscore that I have made my decision based on the evidence presented to me, as well as the submissions of counsel and the state of the law as I

understand it. This is not a final determination of the plaintiffs' claim against the defendants or the defendants' counterclaim against the plaintiffs. That will have to be decided later.

[73] After careful consideration, I say respectfully I am not persuaded a stay of Justice Saunders' injunction is justified or warranted.

[74] For all of these reasons, the defendants' application is dismissed.

[75] Mr. Gailus, the one question I have for you and your clients relates to the timeframe in which the defendants should vacate the Premises. Do you have any submissions on this?

(DISCUSSION ABOUT TIMEFRAME TO VACATE THE PREMISES)

(PROCEEDINGS ADJOURNED AND RECONVENED)

[76] THE CLERK: We're back on the record, Justice.

[77] THE COURT: Who wishes to go first? Mr. Isitt, Mr. Gailus? Mr. Isitt?

[78] CNSL B. ISITT: Yes, yes, Mr. Justice. Given the applicants' financial position, they -- their preference, if it was between the November 15th and November 30 dates, would be the November 15th, 2023, date, the earlier date.

[79] THE COURT: And so, they will pay rent for October and that will be on October 23rd, and that if they vacate the House and Premises on or before the 17th, which is the Friday, of November, if they vacate that, then no rent will be due for November, but if they stay past the 17th and vacate on or before the 30th, then rent will be owing for November. Is that what you are proposing?

[80] CNSL B. ISITT: Yes, that's -- that's agreeable, those terms, yes.

[81] THE COURT: Mr. Gailus?

[82] CNSL J. GAILUS: Yes, I'm fine with that, Justice.

[83] THE COURT: Okay. So that will be incorporated into the order.

[84] Anything further, Mr. Gailus?

[85] CNSL J. GAILUS: Just two issues. We didn't speak about costs, and then the second one is we are currently holding the rent monies in trust. I think just to clean that up, just an order that we can release those funds to our clients.

[86] THE COURT: Okay. Do you wish to address the issue of costs?

[87] CNSL J. GAILUS: We didn't seek -- we didn't seek costs in the first -- in the first application. Well, actually, we sought costs, we didn't get costs or we certainly didn't follow up on it. I mean, I would suggest just costs on the ordinary scale for this application.

[88] THE COURT: In the cause?

[89] CNSL J. GAILUS: In the cause.

[90] THE COURT: Mr. Isitt, costs in the cause?

[91] CNSL B. ISITT: My clients are generally impecunious, so they are going to have difficulty, whatever costs may or may not be levied, so we would simply ask that the court take their financial circumstance and the imbalanced economic situation of the plaintiffs and the defendants into consideration when awarding any costs.

[92] THE COURT: Okay. And with respect to your friend's comments with respect to monies that are being held in trust, any --

[93] CNSL B. ISITT: Those were paid on the basis of them being rent payments for each month, so yeah, we would have no concerns. We didn't pay them out needing them to be held in trust. I think that was a cautious and sensible approach for my friend to take, but we don't -- there was no expectation that those funds would go anywhere other than to the plaintiffs.

[94] THE COURT: So not objecting to them being paid out now to the plaintiffs.

[95] CNSL B. ISITT: No.

[96] THE COURT: Okay. All right, with respect to costs, I accept what you are saying about the potential consequences of a costs order in this matter. I think that there may be or there should be a resolution to this case that would not incorporate any further court hearings. Perhaps that is just me being hopeful. In any event, given the plaintiffs have been successful on this application, I am simply going to order costs in the cause.

(DISCUSSION ABOUT PROCEEDINGS BEING RECORDED)

[97] THE COURT: Thank you, sir. All right, so costs are in the cause. That means no costs are payable right now. They will be determined when this matter is concluded or they can be addressed if there is an agreement between the parties.

[98] And with respect to the monies that are being held in trust, Mr. Gailus, they are now -- was there an order that they be held in trust?

[99] CNSL J. GAILUS: No, Justice, it was just the language was they were being paid without prejudice, so I thought that, you know, just out of an abundance of caution, we would just keep them in our trust account.

[100] THE COURT: All right. Well, given that there is no order that they be held in trust and given what Mr. Isitt has indicated, that he and his clients now are agreeable to the monies being paid out, it may well be at a future date there is an argument about them, but it is not inappropriate to release them to your client.

[101] Do I have that right, Mr. Isitt? You are not objecting -- you are not objecting to --

[102] CNSL B. ISITT: No.

[103] THE COURT: -- counsel releasing them.

[104] CNSL B. ISITT: We paid them, as I say, on the expectation those were monthly rent payments to the plaintiffs, so yeah, there is no expectation that Mr. Gailus would withhold transferring those funds from his clients -- to his clients.

[105] THE COURT: All right, thank you. Anything further, Mr. Gailus?

[106] CNSL J. GAILUS: Nothing further.

[107] THE COURT: Anything further from your side of things, Mr. Isitt?

[108] CNSL B. ISITT: No, Mr. Justice.

[109] THE COURT: All right. Well, in situations like this, there is a successful party and an unsuccessful party. I do not anticipate or expect that the unsuccessful parties are happy but that is the nature of contested litigation. Nevertheless, I do wish to say and acknowledge that counsel have represented their clients well. Mr. Gailus and Ms. Jacklin, you have, I think, represented your clients well. Mr. Isitt, you too have represented your clients well.

"G. R. J. Gaul, J."