COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Parihar v. Royal Bank of Canada,* 2023 BCCA 378

Date: 20231011
Docket: CA48646

Between:

Mohit Parihar

Appellant
(Respondent)

And

Royal Bank of Canada

Respondent
(Petitioner)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux

On an application to vary: An order of the Court of Appeal for British Columbia, dated June 12, 2023 (*Parihar v. Royal Bank of Canada*, Vancouver Docket CA48646).

The Appellant, appearing in person:	M. Parihar
Counsel for the Respondent:	L.G. Yang
Place and Date of Hearing:	Victoria, British Columbia September 14, 2023
Place and Date of Judgment:	Vancouver, British Columbia October 11, 2023

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux

Summary:

Two applications are brought before the Court. First, the applicant submits an application to review and vary the order of a single justice. Second, the petitioner submits a cross application for a declaration that the proposed appellant is a vexatious litigant. Held: Both applications are dismissed. The single justice did not err in law or principle, or misconceive the facts. The applicant does not have a history of bringing multiple unmeritorious proceedings on matters already litigated at the trial or appellate level.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] Two applications are before us. The first is an application to review and vary the order of a single justice. The second is an application for a declaration that the proposed appellant is a vexatious litigant. I will deal with each matter in order.

[2] The order of the justice dismissed three applications. The first was an application to extend time to file an application book as part of an application to vary the order of another single justice, on a matter otherwise started in time. That order had dismissed an application for leave to appeal. With regards to the second and third applications, the applicant, Mr. Parihar, sought a stay of proceedings and a dismissal of the underlying proceeding in the Supreme Court because he claimed the respondent, the Royal Bank of Canada (the “Bank”), had not filed its response book for the leave to appeal application.

[3] Before turning to the merits of the matter before us, it is important to reiterate, as we explained to the applicant, that a review hearing is not a rehearing of the underlying application on its merits as if the application was being heard for the first time. Before we may interfere with an order made in chambers by a single justice, we must be satisfied that the justice erred in law or principle, or misconceived the facts. This proposition is deeply entrenched in our law (*Yang v. Shi*, 2023 BCCA 146 at para. 10; *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para. 7 [*Haldorson*]). The issue, therefore, is not whether we agree or disagree with the order made by the justice, but whether the justice erred in such a way as to justify our interfering with that decision. This is a deferential exercise.

[4] At the outset, it is important to recognise the basis of the argument alleging that an error had been made by the single justice. Mr. Parihar candidly acknowledged that his merits argument was a new argument: one that had not been advanced to any of the judges in this Court or the Supreme Court who had previously dealt with the merits of his position in resisting foreclosure proceedings started by the respondent Bank. Mr. Parihar did not focus his argument on any errors alleged to have been made in the assessment of the merits of his case as those merits had previously been advanced by him to the Court. Counsel for the Bank accorded Mr. Parihar considerable latitude in advancing this argument. She raised no objection to it, as she could have done, rather, choosing to address it on its merits. I will address the merits of this new argument below. As we shall see, the merits of Mr. Parihar's defence of the foreclosure proceedings lie at the heart of the issue before us. In these circumstances, I think it appropriate to consider whether there is any merit to his proposed appeal in light of the new argument.

[5] Justice Willcock succinctly summarized the facts of this case in the judgment under review:

> [16] The underlying appeal in this case is from an order *nisi* of foreclosure on a residential property at 4037 Lakehill Place, Saanich, made by Justice Young on October 6, 2022. When the order was made, there was approximately $270,000 owing on the mortgage. The bank asserted default. The respondent did not appear. The judge accepted the evidence of default. An order *nisi* was made with a 6 month redemption period expiring April 6, 2023. The respondent bank took the position that there had been a breach of the terms of the mortgage precluding the appellant from making significant structural changes to the mortgaged property without the bank's approval; a breach of municipal bylaws arising from unapproved work on the property, and, ultimately the cancellation of the insurance on the property.
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> [17] Mr. Parihar applied to have the chambers judge reconsider that decision. The reconsideration application was heard October 21, 2022, and dismissed. Mr. Parihar set out the basis for his opposition to the issuance of the order *nisi* at that time.
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> [18] He explained that he had not appeared on the initial hearing because he had to take his mother to the hospital.
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> [19] He said he was able to rectify the bylaw infractions, and he was appealing his conviction for breach of the bylaws. The bank said not all problems were rectified and that, in any event, rectification of the bylaw infractions was irrelevant because there had clearly been a breach of the mortgage terms, and it had decided to terminate the loan.

[20] The judge held as follows:

> [16] Now, although I found that he wilfully failed to appear, I still wanted to look at the defence to see if it is worthy of investigation. My understanding of his position is that, although he was convicted of bylaw infractions, he has rectified those and he is appealing the convictions, and therefore I should not consider those as a default. I do not accept that. He was in breach of the mortgage when he was convicted of these bylaw infractions. There are numerous alterations to the house and he never did get the consent of the bank, which he was required to do, and he was supposed to keep the property in good order and not be in breach of bylaws, so there are several permits that had not been granted. They may have been granted now, but certainly there was a breach of the mortgage, and that was proven to me on October 6, 2022 when the convictions were shown to me on October 6, 2022.
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> [17] Now, a notice of appeal does not mean that the convictions have been overturned. There has to be a hearing on the appeal, and so I do find that he was guilty of these infractions, and that is a breach of the mortgage.
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> [18] I will now address the issue of the insurance. Mr. Parihar was in default of the mortgage by not having insurance. Fortunately, he says he now has insurance, and he showed the bank just a portion of the insurance document and he says that he can show them the full information. It was Intact Insurance and he is looking up the number of the insurance policy, but the reality is he was in breach, so there is no defence to the fact that the mortgage was breached.

[6] The applicant required leave to appeal the orders granting an order *nisi* and the dismissal of the reconsideration decision. After certain procedural steps had been taken, Mr. Parihar brought on an application for leave to appeal. Justice Marchand refused leave in careful and thorough reasons in which he set out the background giving rise to the proposed appeal in detail. After setting out the relevant factual background, Marchand J.A. concluded that leave should be denied because the proposed appeal had no merit. He explained the foundation of his conclusion at paras. 20–27. It is worthwhile to set out the basis of his decision:

> [20] I agree with RBC that Mr. Parihar's proposed appeal has no merit.
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> [21] Although neither Mr. Parihar nor his counsel was present for the hearing on October 6, 2022, the record of proceedings shows that counsel for RBC did inform Justice Young of Mr. Parihar's pending appeal of his convictions and his wish to adjourn until the appeal had been decided.
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> [22] RBC's application did not turn on whether Mr. Parihar had insurance on the home on October 6, 2022. There were a number of established

> breaches of RBC's mortgage. The result would have been the same whether Mr. Parihar did or did not have insurance in place on the date of the hearing.
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> [23] While Ms. Parihar may not have been personally served with the petition, as often happens when a party cannot be located, she was substitutionally served in accordance with a court order. For purposes of the proceeding, she had been served.
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> [24] Mr. Parihar fully informed Justice Young of his view of the relevant facts when he appeared before her on October 21, 2022. She did not revise her order. There is no reason to think she would have granted Mr. Parihar an adjournment or found merit in any of his arguments if he or his counsel had been present on October 6, 2022.
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> [25] Rule 22-1(2) of the *Supreme Court Rules* authorized Justice Young to proceed in Mr. Parihar's absence. In order for Justice Young to reconsider her order, Mr. Parihar had to satisfy her that he was "not guilty of wilful delay or default". Mr. Parihar did not satisfy that threshold and has not identified any basis on which this Court could interfere with Justice Young's determination.
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> [26] Justice Saunders did not misunderstand Mr. Parihar's submissions on November 22, 2022. Rather, Justice Saunders had no jurisdiction to set aside the order made by Justice Young. Only this Court has that jurisdiction.
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> [27] Mr. Parihar has not shown an arguable case that Justice Young erred in granting the order *nisi* or in subsequently not setting aside the order *nisi*. Further, he has not shown an arguable case that Justice Saunders was wrong to not have dismissed the order *nisi*. He has not met the merits threshold.

[7] The dismissal of an application for leave to appeal gives rise to a right in the disappointed applicant to apply to a division to vary that order (*Court of Appeal Rules*, R. 62(2) [*Rules*]). The applicant eventually took that step, but he did not file and serve his application book within the required fourteen days after the filing of the notice of application (*Rules*, R. 62(3)). The applicant had sought the consent of the respondent to a late filing within the 14 days, but it had refused consent.

[8] The applicant then filed and set down an application seeking the orders described above. It is important to emphasize that the matter before us does not directly concern the merits of the refusal by Marchand J.A. to grant leave to appeal. It involves, in the first place, only whether Willcock J.A. erred in principle in refusing to extend time to file the application book to permit the application to vary Marchand J.A.'s order to proceed. The issue before Willcock J.A. was, therefore, narrow. Justice Willcock had no jurisdiction to overturn Marchand J.A.'s decision.

The jurisdiction lies only with a division, if the applicant were permitted to proceed with his application (*Haldorson* at para. 7).

[9] Justice Willcock properly set out the test he was to apply at paras. 6–7 of his reasons and identified the questions he had to resolve at para. 8. He observed, rightly in my view, that the critical question was whether there was any merit to the application to vary. He recognised that on such an application the test is as I have set it out above. Justice Willcock stated his opinion that Marchand J.A. had correctly identified the test to be applied for leave to appeal. He then analysed the circumstances giving rise to the proposed appeal and the issues arising from them. The critical part of his judgment is worth repeating:

> [26] Mr. Parihar, today, before me, says that he delayed in applying for a variation order because he is not a lawyer and he was not aware of the short limitation period within which an application to vary an order of a judge in chambers can be brought. I accept that timeline is short and lay litigants may have difficulty recognizing that they must act expeditiously. I am not particularly concerned about the fact that Mr. Parihar delayed in bringing the application.
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> [27] However, Mr. Parihar does not identify any error in law or principle, nor does he say Marchand J.A. misconceived the facts. He repeats the basis for his opposition to the granting of the order *nisi* of foreclosure. Most of his arguments are those made before Young J. on the reconsideration application, others were argued before Marchand J.A. on the application for leave to appeal the order *nisi* of foreclosure. I see no reasonable prospect of Mr. Parihar establishing that there was error on the part of Marchand J.A., and no prospect of him establishing that it would be in the interests of justice to grant leave in this case.

[10] Having reached that conclusion, Willcock J.A. dismissed the application to extend time and, as a result, dismissed the application in its entirety.

[11] If that were where matters remained, I would not hesitate to conclude that this application should be dismissed. As noted above, Mr. Parihar did not ground his argument in any alleged error in law or principle, or misconception of the facts in Willcock J.A.'s analysis of whether he should extend time. I am satisfied that the justice applied the relevant test properly. Moreover, as the issues were framed before Willcock J.A. and Marchand J.A., I can see no plausible error in their

assessment of the merits and, accordingly, no prospect that Mr. Parihar would succeed in an appeal of the Supreme Court orders.

[12] The issue that falls for consideration is the new argument on the merits advanced before us. As I have noted, Mr. Parihar acknowledged that this argument was entirely new. There may well be reasons to doubt whether we should entertain a new argument at this stage of the proceedings. I propose to consider it, although the fact that I do so should not be taken as an acknowledgment that it is properly before us, or an encouragement to litigants to seek the indulgence of this Court in advancing arguments that should have been advanced at first instance.

[13] While Mr. Parihar continues to maintain that he had "fixed" the problems arising from the bylaw contraventions caused by extensive unpermitted renovations and changes to his property, he says the Bank had no right under the mortgage to start foreclosure proceedings for two reasons. First, that he did not receive proper notice of the alleged defaults as required under the mortgage and the opportunity to cure any alleged defaults. Second, that if there were defaults, the Bank had the obligation to pay to remedy the contraventions and add the cost to the principal owing. Mr. Parihar points out that he has appealed his convictions for the bylaw infractions and has never failed to pay his mortgage on time.

[14] Respectfully, there is no merit to this argument. Under s. 13.2(3) of the Bank's Standard Mortgage Terms, Mr. Parihar promised "to comply with all laws and orders applicable to the Property, including those concerning zoning, land-use and environmental protection." Per s. 22.1(b) of the Standard Mortgage Terms, a default occurs if "[y]ou do not keep any of your… promises". If a default occurs, s. 22.2 states that the Bank "can, if [they] wish and subject to any applicable law, do any … of the following, ...: (a) … demand that you immediately pay the Outstanding Amount. (b) … take action in court …. (f) Foreclose …."

[15] Although Mr. Parihar insisted, even before us, that he had fixed the bylaw infractions by November 2020 and before the Bank commenced proceedings, it was evident that contraventions arose after that time and were outstanding when

proceedings started. Furthermore, at that time, Mr. Parihar had been convicted of bylaw infractions and, although an appeal was pending, it remains pending and the order has not been set aside. Justice Young did not misapprehend any of these facts in reaching her conclusion that Mr. Parihar was in default.

[16] Mr. Parihar, contends, however, that he was not given notice of his alleged default, nor an opportunity to cure the default. Conversely, Mr. Parihar was given written notice of his alleged defaults, in which they are enumerated in detail, before proceedings started. They were reiterated in the petition. It was a number of months after the notice was served before the matter came to court. From a practical perspective, Mr. Parihar had ample opportunity to attempt to resolve the issues before the order was made, if the Bank were willing. Further, there are no provisions obliging the Bank to provide an opportunity to cure the defaults.

[17] Mr. Parihar points to s. 15.2 of the Bank's Standard Mortgage Terms, which provides that: "[w]e may spend money to do anything you promised to do, …. Any money we spend because you did not keep a Promise will be added to the Outstanding amount …". He argues that this clause obliged the Bank to rectify any alleged defaults and simply add the money to the principal. The section offers no assistance to Mr. Parihar. It provides the Bank with an entitlement to do certain things, but not an obligation to do so. In any event, the section goes on to make it clear that money paid by the Bank relying on this section is immediately due and payable.

[18] In the result, this new argument is without merit. It does not provide any basis to conclude that the order under review rests on any error in law or principle, or misconception of facts, nor does the order denying leave. From a practical perspective, the fact that we, as a division, have considered the merits of this argument, effectively serves as the hearing of the appeal for which leave was denied. I point this out to dispel any suggestion that Mr. Parihar's position on the merits was not heard by this Court because he was late in filing an application book.

[19] Two last points. First, Counsel for the Bank advised us that the mortgage has matured and is now due and owing, in any event. This, of course, might be a relevant consideration in a leave analysis under the interests of justice, even if the proposed appeal had some merit. I do not think it necessary to weigh this fact in our consideration of whether the order denying an extension of time to seek to vary the refusal of leave to appeal should be set aside. The result of the Supreme Court orders may well expose Mr. Parihar to greater financial obligations than fall due as a result of the mortgage maturing.

[20] Second, registered against title to the property are the bylaw convictions. Mr. Parihar seemed to contend, if I understood him properly, that it was the Bank's obligation to remove that from title. This was said to follow from the proposition that the Bank was required to fix issues arising from the renovations. I can see no merit to this suggestion. The problems arising from the registration of the convictions on title is an issue between Mr. Parihar and the municipality, that will be resolved, if at all, between those parties, or by a successful appeal of the convictions which remains pending.

[21] For these reasons, I would dismiss the application to review and vary the order of Willcock J.A.

[22] I turn now to the cross application for a vexatious litigant order. Counsel for the Bank agreed to rely on her written submissions in respect of this matter. In my view, this matter can be disposed of summarily. Mr. Parihar does not have a history of bringing multiple unmeritorious proceedings in either this Court, or the court below, in which he seeks continually to relitigate matters already decided against him. At most, Mr. Parihar has made two subsequent efforts in an attempt to overcome the initial order refusing leave. It may be that Mr. Parihar has been

pursuing a single matter that lacks merit, but it cannot be said that he is abusing the court's processes. Accordingly, I would dismiss the application.

[23] I would dismiss both applications.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Mr. Justice Abrioux"