IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Heler v. Kelt Exploration Ltd.*, 2024 BCSC 1498

Date: 20240809
Docket: S26867
Registry: Fort St. John

Between:

Ewald Heler and Claudia Pamela Heler

Plaintiffs

And

Kelt Exploration Ltd. and British Columbia Energy Regulator

Defendants

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment

The Plaintiffs, appearing in person:	E. Heler C.P. Heler
Counsel for Kelt Exploration Ltd.:	N.M. Cooke
Counsel for British Columbia Energy Regulator:	K.E. Lajoie
Place and Date of Hearing:	Fort St. John, B.C. August 6, 2024
Place and Date of Judgment:	Fort St. John, B.C. August 9, 2024

Table of Contents

INTRODUCTION 3
BACKGROUND 3
LEGAL PRINCIPLES 8
ANALYSIS 11
Serious Question to be Tried, or Strong *Prima Facie* Case? 11
Irreparable Harm 15
Balance of Convenience 17
CONCLUSION, AND COSTS 17

Introduction

[1] The plaintiffs apply for a temporary or interlocutory injunction.

[2] They wish to restrain natural gas extraction activities to be undertaken by the defendant Kelt Exploration Ltd. on a nearby property.

Background

[3] The plaintiffs own a rural, farm property located on 265 Road in Rose Prairie, B.C. The property is about 35 kilometers north of Fort St. John. They purchased the property in late March, 2022, for $233,000. It was bare land, consisting of about 153 acres. Its dimensions are approximately 800 by 800 meters.

[4] In August, 2022 they moved onto the property. Initially, the plaintiffs constructed or moved a small building of about 240 square feet onto the property. Later, they moved a mobile home to the property. They now reside in the mobile home, with their three children.

[5] The plaintiffs are registered massage therapists in the Province of Alberta. They say that they are permitted to provide some spa or massage treatments or therapy in B.C. They say they provide such services using the small building on the property.

[6] They have a minor farm operation on the property. Currently they have six cows, two horses, ten sheep, two goats, 30 chickens, four dogs and seven cats.

[7] In his 7th affidavit, Mr. Heler states that when the plaintiffs purchased the property they were unaware of any energy resource activities in the area. He did not notice what the parties refer to as the “pad” on the property across the street from the entrance to his property. However in June 2022 he noticed persons associated with the defendant Kelt Exploration Ltd. on the pad. In July, 2022 he smelled what he describes as “toxic air”. He went to the pad to investigate. He spoke to Kelt’s technicians who were performing maintenance activities on the two natural gas wells located on the pad.

[8] I will refer to the area in which the gas extraction work is taking place as the "pad" or merely the "site".

[9] The complaints of the plaintiffs as to the effects of Kelt's activities at the site are set out in their pleadings and affidavits, and in their notice of application. I will refer to the contents of these documents later on.

[10] The defendant Kelt Exploration Ltd. has itself provided no affidavit evidence in response to the application. It is an Alberta company with a registered head office located in Calgary. Its counsel says in submissions that it is in the business of exploration, development and production of oil and gas. The plaintiff's evidence and the documents available support this. It appears that only gas exploration, development and production are relevant to this application.

[11] Kelt's counsel relies on the plaintiffs' materials, and an affidavit sworn by a legal assistant, attaching various documents, including permits for natural gas exploration and development work on the site of the pad, and reports Kelt prepared relating to the work.

[12] The permits relate to a company called Kelt Exploration (LNG) Ltd., about which there is no information. I infer it is a subsidiary of Kelt Exploration Ltd., or is an associated company. No distinction between these companies is made in the application materials. Accordingly, for purposes of these reasons, I will not distinguish between them, and will simply refer to them collectively as "Kelt".

[13] Kelt does not own the pad. It is situate on land owned by a couple by the name of Collins.

[14] Kelt was issued three permits for its operations:

1. February 25, 2019, application determination 100107182, issued to Kelt by the BC Oil & Gas Commission "for the purposes of exploring for, developing, and producing petroleum, natural gas, or both, drill, test, and operate" the well at surface location 05-31-086-18;

2. On December 22, 2022, application determination 10011542, issued by the BC Oil & Gas Commission; and

3. On January 26, 2024, application determination 100116464, issued by the British Columbia Energy Regulator. This permit was amended on February 2, 2024.

[15] The defendant B.C. Energy Regulator ("BCER") was formerly known as the B.C. Oil and Gas Commission ("OGC").

[16] Counsel for Kelt states that there are six gas wells at the site.

[17] The plaintiffs' mobile home is located approximately 80 meters away from the edge of the pad.

[18] The plaintiffs filed a Notice of Civil Claim ("NOCC") on June 17, 2024.

[19] In summary, the NOCC complains of Kelt's gas extraction activities at the site, both past and prospective. It is a lengthy and very detailed document, with 21 pages of single spaced text. It attaches various documents as appendices.

[20] In broad summary, the NOCC alleges:

a) Kelt's drilling and extraction activities relate to six gas wells, located about 140 meters from the plaintiffs' home;

b) The wells are described as "sour gas" wells. The gas contains H_2S (hydrogen sulphide), which is toxic;

c) Underground fracking activities at the site will take place in the summers, and drilling in the winters;

d) The activities will cause noise, and air pollution, including toxic emissions of H_2S and sulphur dioxide (SO_2), and diesel smoke from trucks;

e) Noise and air pollution were suffered by the plaintiffs and their family during drilling activity conducted by Kelt in relation to three wells at the site previously, during the period January 23 to March 6, 2024;

f) The previous activities resulted in loss of sleep, stress, and illness to the plaintiffs;

g) Dangerous “kickback explosions” could occur at the site;

h) BCER, a government agency, is largely funded by the oil and gas industry;

i) BCER has not and will not take appropriate measures to ensure the safety of the plaintiffs; and

j) The plaintiffs appealed the issuance of the second and third permits by BCER to the B.C. Energy Resource Appeal Tribunal (ERAT). Kelt and BCER argued that the plaintiffs have no standing.

[21] The NOCC does not refer to the first permit, issued February 25, 2019.

[22] The plaintiffs’ appeals to the ERAT remain extant. ERAT has yet to rule on the question of standing.

[23] The plaintiffs’ materials also refer to an application the plaintiff Ewald Heler made in February 2023 to the B.C. Surface Rights Board for mediation and arbitration services relating to Kelt’s anticipated activities at the site. Ewald Heler abandoned the application, as he was concerned about liability for Kelt’s mediation costs.

[24] The NOCC does not seek a permanent injunction. It seeks a temporary injunction prohibiting activity at the site, until or unless Kelt provides “a way that we and our animals are not closer than 2 km to the pad activity” and compensatory damages. The plaintiffs seek to be kept “out of harm’s way at all times of pad activity”.

[25] The plaintiffs are self-representing, and are not legally trained.

[26] As a legal basis for the claims, the NOCC refers to various statutes, such as the *Criminal Code*, R.S.C. 1985, c. C-46 (criminal negligence, common nuisance offences); the *Canadian Environmental Protection Act*, S.C. 1999, c. 33 [*CEPA*], and the *Canadian Charter of Rights and Freedoms* [*Charter*] (sections 7 and 15).

[27] There is no reference to civil law torts such as nuisance or negligence.

[28] However, it appears that the plaintiffs could be alleging the tort of private nuisance.

[29] There are references to “criminal negligence” in the NOCC, but there are no recognizable particulars of the tort of negligence pleaded.

[30] There is no indication as to what relief if any is sought against BCER, specifically.

[31] The plaintiffs filed a Notice of Application (“NOA”) seeking an injunction on June 24, 2024. Several amended NOAs were filed thereafter. The current amended NOA was filed July 18, 2024. I will refer to that as the NOA, in these reasons.

[32] On July 14, 2024, Kelt sent the plaintiffs an email message advising them that further activities will occur at the site, beginning with set-up activities to commence approximately August 8, fracking activities beginning August 18, and other activities until September 11. It says that “minor intermittent flaring” is possible. It says that after September 11, construction of “permanent facilities (like what is on site for other wells) will then take place”. The email does not say how long this construction will take. The email describes numerous required trucking operations associated with the planned activity. It says that Kelt has developed a noise mitigation plan to comply with BCER’s “Noise Control Best Practices Guideline”, and will install noise barrier walls.

[33] Similar to the NOCC, the NOA seeks orders that Kelt stop all work under the second and third permits, “until a court order settlement is agreed upon… and the plaintiffs and their farm are 100% guaranteed out of harm’s way”.

[34] The plaintiffs have filed several voluminous affidavits, all sworn by themselves, in support of their application. In general, the affidavits describe their acquisition of the property, the nature of the property, the pad location, their previous experience with pad activities and the harms they suffered, and their concerns for noise, air pollution, and safety in relation to further activities by Kelt at the site. They attach numerous documents to the affidavits, or refer to them in the NOA, such as information sourced from the internet relating to the detrimental health effects of excessive noise, and information concerning sulphur dioxide and hydrogen sulphide. They reference videos they posted to YouTube regarding the noise they experienced.

[35] The plaintiffs emphasize that they do not seek to stop extraction of gas at the site. At the hearing of the application, they state that they seek only for steps to be taken to preserve their family’s personal safety, and that of their farm animals. They seek to be moved to a hotel for the duration of the anticipated site activities, and for their farm animals to be temporarily moved to another location during that time. They also seek financial compensation, in the action. These objectives align generally with the claims set out in the NOCC and the NOA, it seems to me. It appears to me that the plaintiffs do not object to longer term operation of the wells. They do not allege harm resulting from that.

[36] The plaintiffs say they do not agree to provide an undertaking as to damages, because they say they do not seek to block the operation of the wells, in general.

Legal Principles

[37] I adopt the statement of legal principles I set out in *Teal Cedar Products v. Rainforest Flying Squad*, 2021 BCSC 605:

> [32] The test for injunctive relief is set out in the decision of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General*), [1994] 1 S.C.R. 311 [*RJR-MacDonald*]. The applicant must show that:
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> a) there is a serious issue to be tried;
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> b) the applicant will suffer irreparable harm if the relief is not granted; and
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> c) the balance of convenience favours granting the relief.
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> [33] The first matter involves the court making a preliminary assessment of the merits of the case brought by the applicant, to ensure that there is a serious question to be tried. Secondly, the court must determine whether the applicant would suffer irreparable harm; that is, harm which cannot be quantified monetarily, or which cannot be cured if the application were refused, often because the applicant cannot expect to collect damages from the other party. Finally, an assessment must be made as to the balance of convenience, which typically starts with consideration of which of the parties would suffer greater harm from the granting or refusal of the remedy, pending a decision on the merits. Many other factors may come into play, depending on the circumstances. […]
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> [34] As noted by Justice Voith in *Cermaq Canada Ltd. v. Stewart*, 2017 BCSC 2526 [*Cermaq*], these three matters are not inflexible considerations, and do not give rise to a series of independent hurdles that the applicant must meet. They are simply guides to coming to a just and equitable result. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances: *Cermaq*, at para. 53. The same principle was endorsed by the Court of Appeal in *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395, at para. 38.

[38] A mandatory injunction requires the defendant to take positive action of some kind. An applicant seeking a mandatory injunction must establish a strong *prima facie* case, rather than merely a serious question to be tried: *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5 [*CBC*] at para. 15.

[39] A strong *prima facie* case is one in which, upon a preliminary review of the case, the application judge is satisfied that on the law and the evidence presented on the application, there is a strong likelihood that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice: *CBC* at paras. 17–18.

[40] In *Taseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507 (leave to appeal ref'd 2019 BCCA 479) [*Taseko Mines*], Justice Matthews explained:

> [33] There is a more stringent "strong arguable case" standard which applies when granting an interlocutory injunction is tantamount to granting the relief sought in the main action or amounts to a final determination of the action. The justification for this higher standard is because of the potential unfairness in resolving an action at an interlocutory stage, and effectively disposing of the case prior to a trial, without a full adjudication on the merits: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 at para. 229. As stated in *RJR-MacDonald* at 338, this higher standard also arises when "the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial".

[41] Distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may have the effect of forcing the enjoined party to take positive actions: *CBC* at para. 16.

[42] Supreme Court Civil Rule 10-4(5) requires that unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages. As the Rule gives the court a discretion, the undertaking is not mandatory: *Fountain v. Parsons*, 92 B.C.L.R. (2d) 358, 1994 CanLII 1117 (BCCA) at para. 31.

[43] However, the undertaking as to damages is important. The undertaking provides an assurance to the court of proper intention in the obtaining of the injunction, protects to some degree against abuse of the remedy, and provides a commitment to make right any harm done as a result of the granting of the order; the order should not be made without the court formally relieving the applicant of the required undertaking: *Premium Weatherstripping Inc. v. Ghassemi*, 2016 BCCA 20 at para. 9 [*Premium Weatherstripping*].

[44] If no undertaking is made, then it follows that the financial loss or harm suffered by the respondent if the order is made may be irreparable: *Taseko Mines* at para. 110.

[45] Hearsay evidence is admissible on an application, as long as the application does not seek a final order. However, given the nature of an interlocutory or interim injunction order and its consequences, assiduous care in preparation of the application is the standard, including strict compliance with the requirements for all

hearsay evidence that would not be permitted to be stated at trial to be on information and belief, with the source identified; there is no room in interlocutory injunction practice for relaxation of that requirement: *Premium Weatherstripping* at para. 7.

Analysis

Serious Question to be Tried, or Strong *Prima Facie* Case?

[46] As noted in *CBC*, distinguishing between mandatory and prohibitive injunctions can be difficult. However, in this case, it is my view that what the plaintiffs seek is an order more in the nature of a mandatory injunction. Based upon the NOCC, the NOA, and their submissions on the hearing of the application, they seek to compel Kelt to arrange for them and their farm animals to be removed to some safe distance, during fracking and drilling operations. The evidence indicates that these operations are temporary. Thus, if the injunction is granted, Kelt would be required to take measures to satisfy the plaintiffs' demands. As noted, the plaintiffs do not seek to proceed to trial to obtain a permanent injunction, and expressly state that they do not seek to block the extraction of gas from the site. Their concerns relate to the activities required to put the wells into production. Thus, if the injunction is granted, the plaintiffs will substantially obtain the relief they seek in the lawsuit itself, leaving only their claims for financial compensation.

[47] As noted, as I see it, although not pleaded, if the plaintiffs have a cause of action, it would lie in the tort of private nuisance.

[48] The plaintiffs make no claim against the landowners.

[49] The legal arrangements between the landowners and Kelt is not in evidence. I must infer that Kelt is a lessee or licensee of some sort. The plaintiffs would need to establish that Kelt occupies or controls the land from which the nuisance emanates, or that Kelt is guilty of an independent tort, or directly caused the damage complained of: *Hoffman v. Monsanto Canada Inc*., 2005 SKQB 225 at para. 122 (Sask. Q.B.), aff'd 2007 SKCA 47, leave to appeal to SCC ref'd, [2007] S.C.C.A.

No. 347. The evidence suggests that Kelt controls, at least, the site of the pad, at times, for the purposes of its exploration and extraction activities.

[50] In *Chingee v. British Columbia*, 2016 BCSC 760, aff'd 2017 BCCA 250, I stated:

> [34] The tort of private nuisance consists of two elements. The plaintiff must establish a substantial, (meaning non-trivial) interference with the plaintiff's use or enjoyment of the plaintiff's land, and that the interference is unreasonable in all of the circumstances: *Antrim Truck Centre Ltd. v. Ontario (Minister of Transportation)* 2013 SCC 13, at paras. 19, 24, 28 [*Antrim*].
>
> [35] The reasonableness of the interference must be assessed in light of all of the relevant circumstances: *Antrim*, para. 25. Traditionally, the courts have assessed whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances: *Antrim*, para. 26. While the focus of the reasonableness analysis is on the character and extent of the interference with the claimant's land (para. 28), the nature of the defendant's conduct is not irrelevant. Where the defendant can establish that his or her conduct was reasonable, that can be a relevant consideration, particularly in cases where a claim is brought against a public authority. A finding of reasonable conduct will not, however, necessarily preclude a finding of liability (paras. 29, 30).

[51] In *Suzuki v. Munroe*, 2009 BCSC 1404, I stated:

> [36] The principles were also reviewed by the Supreme Court of Canada in *Tock v. St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181, at 1190 through 1192, and more recently in *St. Lawrence Cement Inc. v. Barrette,* 2008 SCC 64, at para. 77. There, the Court stated as follows (references omitted):
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> > At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct. Nuisance is defined as unreasonable interference with the use of land. Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance. The interference must be intolerable to an ordinary person. This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use and the utility of the activity. The interference must be substantial, which means that compensation will not be awarded for trivial annoyances.
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> […]
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> [39] The invasion complained of must be substantial and serious, and it must be clearly unacceptable according to accepted concepts of the day.

> [40] Negligence is not required to make out the tort of nuisance. The converse is also true: the existence of due care will afford no defence if the other ingredients of the tort are present.

[52] In the text by Allen M. Linden *et al*, *Canadian Tort Law*, 12th ed. (LexisNexis Canada, 2022) the authors state at 11.02:

> The onus of proof that the defendant caused an unreasonable interference with the use and enjoyment of the plaintiff's land rests on the plaintiff, but once that is shown, the defendant may then establish that the use of the land was reasonable.

[53] As made plain in *CBC* at paras. 17–18, I must assess the merits of the plaintiff's claims in a preliminary way, on the law and the evidence presented on the application.

[54] The plaintiffs have probably established a "serious question" to be tried. The threshold is a low one. The plaintiffs' complaints of noise and emissions of noxious fumes could potentially ground a claim in nuisance. Kelt acknowledges that noise and some emissions occur.

[55] However, the plaintiffs have not established a strong *prima facie* case. They have the onus of establishing that the interference with the use of their land is unreasonable. As the authorities state, many factors come into play in that assessment, including the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use, and the utility of the activity. The interference must be substantial. The defendant may establish that his or her conduct was reasonable.

[56] The plaintiffs have adduced no objective evidence that the interference is unreasonable. They offer their own emphatic and impassioned evidence in this respect. But there is no third party evidence with which I could assess whether the noise and noxious emissions complained of are in fact excessive, unusual, intolerable, or hazardous. There is no admissible expert evidence of any kind. The plaintiffs offer their own assessments of the hazards to human health of chemical emissions and noise. They rely on various published articles or reports to that effect,

none of which are admissible for the truth of their contents. In short, I have no means, on the evidence, to assess with any confidence whether the plaintiffs' claims could result in findings of nuisance after a trial.

[57] The plaintiffs contend that they were completely unaware of the existence of the pad when they bought their property in 2022, and unaware that Kelt had already been issued a permit in 2019 by the OGC, and had carried out activities on the site pursuant to that permit. However, the evidence is clear that the permit was issued well before the plaintiffs purchased the property. It may be that the plaintiffs or someone on their behalf did not conduct due diligence when they purchased their land.

[58] The plaintiffs emphasize the close proximity of their residence to the site. However, Kelt is not responsible for this circumstance. The plaintiffs purchased bare land, and located their mobile home on their land in 2022. They decided, as well, on the siting of their home within their acreage. It appears they could mitigate their concerns in part by relocating on their own property. I do not overlook their contention that their only road access point is near the Kelt site.

[59] The question of whether the interference is unreasonable would likely be influenced by the fact that Kelt's activities are lawful, and conducted pursuant to permits, which stipulate specific conditions, including limits on flaring of gas and H_2S emissions. The character of the area as a gas producing region would be relevant. The fact that the activities are subject to oversight by a statutory body would be relevant. These factors would probably make the plaintiffs' claims more challenging.

[60] As the onus lies with them, I conclude that the plaintiffs have not established a strong *prima facie* case in nuisance, on this application.

[61] The plaintiffs assert that Claudia Heler has suffered hearing damage, caused by the noise she endured during Kelt's previous activities at the site earlier this year. Their materials include the results of a hearing test she underwent recently on July 2, 2024. The test results are not admissible as opinion evidence. The test results

show some hearing loss to her right ear. However, the plaintiffs have not established that the hearing loss was caused by Kelt's activities. The only evidence is that the plaintiff Claudia Heler subjectively believes this to be true.

[62] The plaintiffs refer to various sections of the *Criminal Code*. These provisions do not ground civil claims, nor do the plaintiffs' references to the *Charter* and the *CEPA*. Whether the provisions of the *CEPA* could apply at all has not been established.

[63] The plaintiffs have also not pleaded a tort based on the rule in *Rylands v. Fletcher*.

[64] No argument was presented to me about the possible application of this source of civil liability. The application of the rule in *Rylands v. Fletcher* is notoriously uncertain and difficult. The plaintiffs do not allege damage to their property, as such, and so I conclude the rule probably has no application.

[65] In summary, the plaintiffs have not established a strong *prima facie* case. If, contrary to my view, they need only establish an arguable case, in the sense of a serious question to be tried, that is not frivolous or vexatious, this low threshold is probably met. However, the case as presented on this application is weak.

Irreparable Harm

[66] The applicants must establish that they will suffer irreparable harm if the injunction is not granted.

[67] As noted, "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.

[68] While "clear proof" of irreparable harm is not required, there should be a "sound evidentiary foundation" to establish irreparable harm: *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 at paras. 59–60.

[69] The plaintiffs say that the harm they will suffer to their health is irreparable. They also say that their business and farm operations are impacted, so they will suffer financial loss.

[70] I am not satisfied that the plaintiffs have established irreparable harm. I accept that if they remain on the property during the fracking and drilling operations, they are likely to suffer some degree of irreparable harm, in relation to their personal health and that of their children. On their evidence as to the conditions under which they lived during the previous operations, they would suffer significant sleep disruption, at least. I am unable to say whether emissions might be harmful. However it appears that these concerns could be eliminated by the plaintiffs and their children staying in a hotel for several weeks. The consequences to the farm animals are hard to assess, but there is no evidence that they would suffer.

[71] I accept that the plaintiffs' business affairs could be disrupted, and losses could occur. Business losses can be difficult to assess, but assessment of such losses is commonly done by the courts. The plaintiffs' expenses (such as the costs of temporary accommodation) can be easily quantified. In summary, if the plaintiffs succeed at trial their damages could be determined by the court.

[72] Kelt provided no evidence as to its financial status, except by noting that it has a policy of insurance having a limit of $2,000,000 per occurrence, from which damages will be paid if Kelt becomes legally obligated to pay for bodily injury or property damage. Its counsel asserts that Kelt has the resources to pay a potential judgment, but Kelt has not adduced evidence to support this assertion. On the other hand, there is no evidence to suggest that Kelt will not be able to pay a judgment. Nor is there any reason to suppose that a judgment in favour of the plaintiffs would exceed the insurance policy limit.

[73] In summary, as I have stated, the plaintiffs have not established irreparable harm, within the meaning of the authorities.

Balance of Convenience

[74] The balance of convenience does not tilt in favour of granting the injunction.

[75] While I would have preferred evidence from Kelt on this point, I can safely infer that interruption and interference with Kelt's business plans and operations would be costly to Kelt. It is apparent that Kelt has expended substantial money to date. The further work it plans to do is substantial. That is one reason for the plaintiffs' concerns, after all. I expect that Kelt's plans entail allocation of substantial business resources, either of its own, or subcontracted. This is suggested by the nature and scale of operations referred to in Kelt's email to the plaintiffs. I also infer that there could be seasonality factors to Kelt's operations, and that time is of the essence. In short, interference in Kelt's operations would probably be costly, and likely very costly.

[76] The plaintiffs do not offer an undertaking, probably for the very good reason that they cannot afford to pay damages, but the fact remains that Kelt's losses would be irreparable.

[77] The plaintiffs' claims as presented on this application are weak, legally, and certainly do not rise to the level of a strong *prima facie* case, on the evidence presented. They have not established irreparable harm.

[78] The plaintiffs do not seek a time limited (interim) injunction, nor are they really seeking to preserve the *status quo* pending a trial of their claims, by obtaining an interlocutory injunction. Rather, the injunction they seek is transparently for the purpose of forcing Kelt to pay up front for their costs of relocating temporarily.

[79] I am sympathetic to the plaintiffs' concerns, and their difficult circumstances. However, an injunction order can only be made on proper grounds, which have not been established.

Conclusion, and Costs

[80] The application is dismissed.

[81] BCER does not seek costs.

[82] Kelt seeks an order for costs, in any event of the cause, payable forthwith.

[83] I am not satisfied that such an order is appropriate. While I appreciate that Kelt had very little time to respond to the plaintiffs' application, at least some affidavit evidence from Kelt could have been of assistance to the court. In saying this I do not criticize counsel, as I recognize that counsel are limited by their instructions.

[84] Of course the final merits of the plaintiffs' claims have not been determined. I also take into account the reality of the plaintiffs' financial circumstances, and those of the defendant Kelt by contrast, as asserted by it. Finally, I take into account the hardship and inconvenience suffered by the plaintiffs in the past and in future, resulting from Kelt's operations.

[85] I order that costs are in the cause.

"Verhoeven J."