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INJUNCTIONS
and
SPECIFIC PERFORMANCE
The Honourable Mr. Justice Robert J. Sharpe
Release No. 1, November 2023

What's New in this Update:

Ex parte orders: appeals

The Nova Scotia Court of Appeal held that an appellate court will not ordinarily hear an appeal from an *ex parte* order as the appropriate procedure is to ask the first instance court to set aside the order. However, it was in the public interest to hear an appeal from a spent ex parte order restraining public gatherings contrary to Covid regulations given the public importance of the issues raised: *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2022 NSCA 64 (N.S. C.A.).

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Ex parte orders – setting aside

Although even innocent non-disclosure can justify setting aside a *Mareva* order, whether the failure of disclosure was deliberate is an important consideration: *Hunt v. Ubhi*, [2023] EWCA Civ 417 at para. 50.

Interlocutory injunctions – when strong case on the merits required

An Ontario court held that unvaccinated students seeking an interlocutory injunction to require a community college to permit them to attend classes despite a mandatory Covid-19 vaccination policy should have to show a strong case on the merits as the order would, as a practical matter, conclude their application: *Costa, Love, Badowich and Mandekic v. Seneca College of Applied Arts and Technology*, 2022 ONSC 5111 (Ont. S.C.J.), leave to appeal refused 2023 ONSC 443 (Ont. Div. Ct.)

Interlocutory injunctions – irreparable harm

The Federal Court of Appeal has held that harm must be directly suffered by the applicant to be considered and that harms suffered by third parties must be considered in the balance of convenience analysis: *Artic Cat, Inc. v. Bombardier Recreational Products Inc.*, 2020 FCA 116 (F.C.A.) at para. 32.

However, an Alberta decision held that "excessive formalism in the harm requirement at either the irreparable harm or balance of convenience stage of the injunction test is not conducive to justice" and that the Alberta Heath Service could rely on harm caused to its employees: *Alberta Health Services v. Johnston*, 2023 ABKB 209 (Alta. K.B.) at paras. 130-132.

No irreparable harm was found where the plaintiff's own conduct amounted to an implicit admission that damages would redress any harm caused if the defendant was ultimately successful at trial: *Avmax Aircraft Leasing Inc. v. Air X Charter Limited*, 2022 ABCA 252 (Alta. C.A.) at para. 77.

In an Ontario case, the applicant unions sought interlocutory injunctive relief from a mandatory vaccination program backed by threat of termination. The court refused an interlocutory injunction on the ground that the harm should not be characterized as forced vaccination but rather being placed on unpaid leave or terminated if vaccination was refused. As the labour grievance process could remedy the harm of loss of employment or loss of wages, "there was no remedial gap warranting the discretionary exercise of the Superior Court's

residual discretion" to grant an interlocutory injunction: *National Organized Workers Union v. Sinai Health System*, 2022 ONCA 802 (Ont. C.A.) at para. 35, affirming *Amalgamated Transit Union, Local 113 et al. v. Sinai Health System*, 2021 ONSC 7658 (Ont. S.C.J.). Compare *Falconer v. Commissioner of Police*, [2022] WASCA 157 at paras. 26-32, where an interlocutory injunction was granted.

Interlocutory injunctions – Indigenous rights

A majority of the British Columbia Court of Appeal found that a trial judge erred by granting an interlocutory injunction that interrupted the consultation process: "…it is [important] to allow consultation processes to be engaged and completed, rather than prematurely stopped and the process…judicially usurped". The Court added: "I do not think that it was open to the judge to require the parties to enter into, and then assume a supervisory role over, good faith negotiations": *British Columbia (Attorney General) v. Reece*, 2023 BCCA 257 (B.C. C.A.) at paras. 60 and 79.

Interlocutory injunctions – undertaking in damages

Trustees or liquidators in insolvency proceedings may be allowed to give a "capped" undertaking in certain circumstances where they can show why they should not be required to give the usual unlimited undertaking: *Hunt v. Ubhi*, [2023] EWCA Civ 417 at para. 29.

The Ontario Superior Court of Justice declined to require an undertaking as to damages in a post-judgment *Mareva* injunction because the amount of the judgment was known to the respondent, and he was still able to use his personal bank account to carry on with day-to-day financial dealings: *Da Silva Edgerly v. Edgerly*, 2022 ONSC 6170 (Ont. S.C.J.) at para. 37.

Interlocutory injunctions – jurisdiction where matter subject to arbitration or other jurisdiction

Where a dispute arises under a collective agreement providing for arbitration or under a matter falling within the jurisdiction of an administrative tribunal, the courts only retain residual jurisdiction to grant interlocutory injunctions in the event of a remedial gap. The residual discretion to grant injunctive relief to fill a remedial gap will not be exercised unless the administrative process is unable to provide an adequate alternative remedy. A "remedial gap" will only exist where there is "a real deprivation of ultimate remedy". The remedy available under alternate regime need not "be identical to remedies that are available in the Superior Court", or "the specific type of remedy that a party might want": *National Organized Workers Union v. Sinai Health System*, 2022 ONCA 802 (Ont. C.A.) at paras. 25, 27.

Mareva injunctions – sufficiency of evidence

The Alberta Court of Appeal has emphasized that given the extraordinary and *ex parte* nature of a *Mareva* injunction, judges should be cautious of accepting hearsay evidence, especially where better evidence is available, and set aside a *Mareva* injunction because of an absence of direct evidence and a failure to explain why none was provided. Although even innocent non-disclosure can justify setting aside a *Mareva* order, whether the failure of disclosure was deliberate is an important consideration: *Henenghaixin Corp. v. Deng*, 2022 ABCA 271 (Alta. C.A.).

Mareva injunctions – risk of dissipation

An Ontario court held that the inherent ease of dissipating cryptocurrency internationally does not of itself give rise to a risk of dissipation of assets, because otherwise *Mareva* injunctions would become routine in cases involving digital assets: "The question is not so much whether the cryptocurrency can be easily dissipated, but whether there is a risk that it will be dissipated to avoid judgment": *Kirshenberg v. Schneider*, 2023 ONSC 2809 (Ont. S.C.J.) at paras. 42-43; *Da Silva Edgerly v. Edgerly*, 2022 ONSC 6170 (Ont. S.C.J.) at para. 37.

Statutory injunctions

The appellate courts of British Columbia and Nova Scotia have encouraged a cautious approach to the issuance of injunctions under statutes that do not explicitly contemplate them, admonishing that they should not be available unless statutory enforcement mechanisms prove inadequate: *Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 (B.C. C.A.) at para. 34; *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2022 NSCA 64 (N.S. C.A.) at para. 75.

Injunctions to restrain protesters

An English court, dealing with a case involving environmental protesters who committed tortious acts against the claimant, held that while the protesters were "motivated by matters of the greatest importance" it is for Parliament, not the court, "to adjudicate on the important underlying political and policy issues raised" and that the claimant "is entitled to ask the court to uphold and enforce its legal rights, including its right to engage in a lawful business without tortious interference": *Shell UK Oil Products Ltd. v. Persons Unknown*, [2022] EWHC 1215 (Q.B.) at para. 57.

Injunctions to restrain mistaken trespass

An Ontario court declined to order an injunction despite the defendants admitting to trespass. The defendant homebuilders mistakenly built their garage so that it encroached slightly onto the plaintiffs' property. The defendants genuinely and reasonably believed the garage was on their property only, and the plaintiffs purchased the property after the garage was built but before either party noticed the encroachment, which did not occur several years after it was built. The court held that it would be oppressive to the defendants to order an injunction requiring them to demolish the garage and granted an order severing the encroachment and requiring the defendants to purchase the severance piece at fair market value: *Armstrong, et al. v. Penny, et al.*, 2023 ONSC 2843 (Ont. S.C.J.).

Interlocutory injunctions – oppression remedy

"[T]he overall purpose of interim awards under the oppression remedy is to preserve the rights of the parties pending hearing on the merits, to preserve the status quo to the extent possible and permit the corporation to continue to operate.": *Sharp v. Cook*, 2022 NLSC 147 (N.L. S.C.) at para. 24.

Anti-suit injunctions

The English courts have adopted the following principles:

> i) The court's power to grant an [anti-suit injunction] to restrain foreign proceedings, when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration, is derived from section 37(1) of the Senior Courts Act 1981, and it will do so when it is "just and convenient";
> ii) The touchstone is what the ends of justice require;
> iii) The jurisdiction to grant an [anti-suit injunction] should be exercised with caution;
> iv) The injunction applicant must establish with a "high degree of probability" that there is an arbitration or jurisdiction agreement which governs the dispute in question;
> v) The court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of a forum clause unless the defendant can show strong reasons to refuse the relief; and
> vi) The defendant bears the burden of proving there are strong reasons.

QBE Europe SA/NV v. Generali España de Seguros Y Reaseguros, [2022] EWHC 2062 (Comm.) at para. 10, referring to *AIG Europe SA and Ors v. John Wood Group Plc and Ors*, [2021] EWHC 2567 (Comm.) at para. 58, affirmed [2022] EWCA Civ 781 at para. 10.

Contempt - fines

The Ontario Court of Appeal held that "when determining a fit fine, the court should consider the economic circumstances of the contemnor, and the amount of fine that will have enough of an impact on the contemnor to induce future compliance with the court's orders": *Caledon (Town) v. Darzi Holdings Ltd.*, 2022 ONCA 807 (Ont. C.A.) at para. 17, quoting *The Corporation of the Township of King v. 11547372 Canada Inc. et al.*, 2022 ONSC 2261 (Ont. S.C.J.) at para. 26.

Injunction to restrain breach of contract – agreed damages clause

An English decision holds that the presence of an agreed damages clause as dispositive against the issuance of an injunction to restrain a breach of contract: "So clear is it that the parties consider that a breach is capable of sounding in damages, that they have a clause which deals with what damages are recoverable. […] To say that damages are not an adequate remedy when you have agreed a limitation of damages appears to be an illogical and unprincipled conclusion.": *London EV Co. Ltd. v. Optimas OE Solutions Ltd.*, [2022] EWHC 2525 (Comm.) at para. 12.

Specific performance for sale of land

An Alberta court held that uniqueness is not required where the dispute was whether the purchaser had taken possession under a lease or contract of sale as the agreement had been executed and the purchaser held an equitable interest in the property akin to the equitable right of redemption under a mortgage: *Mottram v. Gingerich*, 2023 ABKB 80 (Alta. K.B.) at paras. 57-58.

An Ontario judge refused to order the specific performance of a contract for the purchase and sale of a family home because the purchasers did not want to live there permanently, but only while building a new house: *Preiano v. Cirillo*, 2022 ONSC 4945 (Ont. S.C.J.) at paras. 150-153.

Specific performance- defence of hardship

It has been held in Australia that hardship must flow from the decree of performance "as opposed to an order for common law damages - not for hardship flowing from the enforcement of the contract at law. The defendant must show that a decree of specific performance would impose hardship amounting to oppression, outweighing the inconvenience to the plaintiff if the plaintiff were left to its remedy in damages" and that "specific performance would be highly unreasonable.": *Billabong Gold Pty Ltd. v. Vango Mining Ltd. [No. 2]*, [2023] WASCA 58 at para. 188.

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