

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Etemadi v. Maali*,
2021 BCCA 117

Date: 20210310
Dockets: CA47203; CA47209

Docket: CA47203

Between:

Koorosh Etemadi

Appellant
(Claimant)

And

Mehrsa Maali

Respondent
(Respondent)

And

**Soheila Samimi and Daryoush Etemadi also known as
Darioush Etemadi and also known as Dario Etemadi**

Respondents
(Respondents by Counterclaim)

- and -

Docket: CA47209

Between:

Koorosh Etemadi

Respondent
(Claimant)

And

Mehrsa Maali

Respondent
(Respondent)

And

**Soheila Samimi and Daryoush Etemadi also known as
Darioush Etemadi and also known as Dario Etemadi**

Appellants
(Respondents by Counterclaim)

Before: The Honourable Mr. Justice Goepel
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated December 9, 2020 (*Etemadi v. Maali*, 2020 BCSC 1908, Vancouver Docket E18120).

Oral Reasons for Judgment

Counsel for the Appellant, Koorosh Etemadi—CA47203
(via videoconference): S.L. Specht

Counsel for the Appellants, Soheila Samimi and Daryoush Etemadi—CA47209
(via videoconference): C.E. Drake

Counsel for the Respondent, Mehrsa Maali
(via videoconference): S. Stanislaus

Place and Date of Hearing: Vancouver, British Columbia
March 10, 2021

Place and Date of Judgment: Vancouver, British Columbia
March 10, 2021

Summary:

The parties disputed the division of property during divorce proceedings. The wife applied for an interim distribution of family property to fund the litigation. The chambers judge granted the application and ordered the husband to advance \$250,000. If he failed to advance the money within 30 days, the order provided for the sale of the former matrimonial home to fund the distribution and granted sole conduct of sale to the wife. The husband sought leave to appeal both the interim distribution and the order for sale. The husband's parents claimed an interest in the former matrimonial home and sought leave to appeal the order for sale only.

Held: Applications granted. Leave to appeal was not required for either order. The order for sale was made under Rule 15-8 of the Supreme Court Family Rules, which is not a limited appeal order, so it was appealable as of right. Interim orders under the Family Law Act ordinarily require leave to appeal; however, in this case, the interim distribution was connected to the order for sale so as to be appealable as of right. In the alternative, the orders were so closely linked as to make it in the interests of justice to grant leave to appeal the interim distribution.

GOEPEL J.A.:

APPLICATIONS

[1] On December 9, 2020, Justice Gomery ordered, pursuant to s. 89 of the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*], an interim distribution of family property in the sum of \$250,000 to the respondent Mehrsa Maali. The order provided for the sale of property on Homer Street (the “Homer Street Property”) to fund the distribution if not otherwise advanced within 30 days and provided sole conduct of the sale to Ms. Maali.

[2] The appellant in CA47203, Koorosh Etemadi (“Mr. Etemadi”), seeks leave to appeal both the interim distribution and the order for sale. The appellants in CA47209, Soheila Samimi and Daryoush Etemadi (“Dr. Etemadi”), seek leave to appeal the order for sale. Ms. Samimi and Dr. Etemadi are Mr. Etemadi’s parents.

[3] Ms. Maali opposes both applications.

BACKGROUND

[4] Mr. Etemadi and Ms. Maali married in 2006 in Iran. They separated in 2016. They have no children.

[5] In September 2017, Mr. Etemadi filed for divorce and division of family property. Ms. Maali filed a counterclaim in which she joined the parents, alleging that certain property claimed by the parents is, in fact, family property in which she is entitled to share.

[6] The litigation has been fiercely contested. The main contest concerns the extent of family property. The matter was originally set for trial in September 2019 but has been adjourned twice. A trial is presently scheduled for February 2022.

[7] In July 2020, Ms. Maali applied for an interim distribution of \$250,000 for legal fees. The legal basis for the application was said to be s. 89 of the *FLA* and Rule 15-8 of the *Supreme Court Family Rules*, which authorize the court in a family law action to order the sale of property.

[8] The parties filed 16 affidavits on the application and relied on a further 10 previous affidavits.

[9] The application primarily concerned a townhouse on Homer Street in Vancouver, which was purchased in 2009. The Homer Street Property is registered in the name of Mr. Etemadi. Mr. Etemadi and Dr. Etemadi allege that Dr. Etemadi holds a 50% beneficial interest in the property. In that regard, they provided evidence that the money for the purchase of the Homer Street Property came from the proceeds of sale of a property in respect of which Mr. Etemadi and Dr. Etemadi were co-owners. In the case of the Homer Street Property, title was taken in Mr. Etemadi's name only, but Mr. Etemadi and Dr. Etemadi contemporaneously with the purchase signed a co-ownership agreement agreeing that they owned the property equally. Justice Gomery held for the purpose of the application that only Mr. Etemadi's 50% interest should be considered as family property.

[10] In the proceeding, Ms. Maali alleges that property owned by Ms. Samimi (the "Strathmore Property") is family property. Justice Gomery concluded on the evidence before him that Ms. Maali's claim for the Strathmore Property faced substantial difficulties and, for the purpose of the application for an interim distribution, he did not consider the Strathmore Property to be family property.

[11] Mr. Etemadi opposed the application, claiming \$250,000 was unlikely to be awarded to Ms. Maali at trial and that he lived in the Homer Street Property with his new wife and their two young children. Dr. Etemadi asserted that, as the 50% beneficial owner of the Homer Street Property, the property could not be sold or refinanced without his consent.

[12] By way of further detail, the evidence indicated that Mr. Etemadi purchased the Homer Street Property for \$878,000 on June 11, 2009. Its assessed value in 2020 was \$2,046,000, leaving an increase in value in excess of \$1.1 million.

[13] Taking into account Dr. Etemadi's interest in the property, Justice Gomery found that only Mr. Etemadi's 50% interest should be considered family property for the purpose of an interim distribution. He valued that interest to be at least \$550,000 (50% of the increase in value of at least \$1.1 million).

[14] This finding was fundamental to the order ultimately made. Justice Gomery considered and rejected various arguments why 50% of the increase should not be paid out at this time by way of interim distribution. He found that it was in the

interest of justice that Ms. Maali receive an interim distribution of \$250,000 towards her ongoing legal costs.

[15] The chambers judge ordered Mr. Etemadi to advance \$250,000 to Ms. Maali. If he failed to do so within 30 days, Justice Gomery ordered the Homer Street Property to be sold with Ms. Maali having conduct of sale.

[16] On January 7, 2021, Mr. Etemadi filed a notice of leave to appeal. The following day, Dr. Etemadi and Ms. Samimi jointly filed a notice of leave to appeal. Each seeks to set aside the interim advance order and the order for sale of the Homer Street Property. In the alternative, all the appellants seek an order that Ms. Maali, Mr. Etemadi, and Dr. Etemadi jointly share conduct of sale.

[17] Mr. Etemadi has since moved out of the Homer Street Property, which has been listed for sale at \$2,198,000. On February 9, 2021, Justice Gomery stayed those portions of his order granting conduct of sale to Ms. Maali and ordering the Homer Street Property sold pending the outcome of these leave applications. The stay lapses April 12, 2021.

APPLICATION FOR LEAVE

[18] While the appellants have filed notices of application for leave to appeal, they have done so out of an abundance of caution. While acknowledging an order for interim distribution would be a limited appeal order under Rule 2.1 of the *Court of Appeal Rules*, for which they would need leave, they submit that the order for sale was made pursuant to Rule 15-8 of the *Supreme Court Family Rules*, which is not a limited appeal order, and one they can appeal as of right. They submit that in these circumstances, they do not need leave to appeal the s. 89 interim distribution order because the relationship between those two orders is such that there is no need to obtain leave to appeal.

[19] Alternatively, they submit that if leave is required, it should be granted. In that regard, they submit that the appeal raises important issues of significance to the practice, particularly as it relates to the involvement of third-party non-spouse owners whose property is being sold.

[20] Ms. Maali submits a s. 89 order for interim distribution is a limited appeal order under Rule 2.1 of the *Court of Appeal Rules* and that leave to appeal is

required. She submits that s. 97 of the *FLA* authorizes the sale of family property. She submits an interim distribution order is entitled to a deferential standard of review. She submits this appeal does not raise a point of significance for the practice and that it turns on the facts of this particular case. She submits that leave should be refused.

DISCUSSION

[21] An appeal does not lie to this Court from a “limited appeal order” without leave of a justice: *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 7(2). “Limited appeal orders” are defined in Rule 2.1 of the *Court of Appeal Rules*. Pursuant to Rule 2.1(c), an order granting interim relief under the *FLA* is a limited appeal order: *Lit v. Lit*, 2019 BCCA 158. An order for sale made pursuant to Rule 15-8 of the *Supreme Court Family Rules* is not a limited appeal order: *Kapoor v. Makkar*, 2020 BCCA 223 (Chambers).

[22] The purpose behind Rule 2.1 of the *Court of Appeal Rules* is to simplify the practice of seeking leave to appeal by providing certainty as to when leave is required: *Bentley v. The Police Complaint Commissioner*, 2012 BCCA 514 at para. 5. Accordingly, the categories of “limited appeal orders” in Rule 2.1 are interpreted restrictively. In *Yao v. Li*, 2012 BCCA 315, Justice Chiasson explained that the “amended *Act* and *Rules* are intended to set out an exhaustive list of circumstances where leave to appeal is required”: at para. 27. In *Clifford v. Lord*, 2013 BCCA 302 (Chambers), Justice Garson noted that:

[29] ... These authorities hold that the rule does not require the court to look to the underlying proceeding but simply to the jurisdictional basis for granting the order. These authorities hold that the purpose of Rule 2.1 is to bring certainty and clarity to the question of leave to appeal. ...

[23] Where the order does not state the jurisdictional basis on which it is founded, this Court must identify the jurisdictional basis: *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 104 (Chambers) at para. 12; *A.A.A.M. v. Director of Adoption*, 2017 BCCA 27 at paras. 30–32; *Tri-City Capital Corp. v. 0942317 B.C. Ltd.*, 2016 BCCA 407 (Chambers) at paras. 22–23.

[24] This application turns on the jurisdictional basis for Justice Gomery’s order. If the underlying notice of application specifies the jurisdictional basis of the order being sought, that will usually be conclusive as to whether leave to appeal is

required. In *Coburn and Watson's Metropolitan Home v. BMO Financial Group*, 2019 BCCA 360 (Chambers), Justice Butler explained:

[11] The present application is distinguishable from *Araya* because in this case, the underlying notice of application specified the jurisdictional basis for the order being sought. This application is, thus, very similar to the application considered in *Do Process LP v. Infokey Software Inc.*, 2014 BCCA 470 (Chambers). The applicant in *Do Process* sought leave to appeal from the chambers judge's dismissal of its application seeking a declaration that the defendants had waived privilege over documents relating to legal advice they received. The notice of application sought relief pursuant to Rule 7-1 of the *Supreme Court Civil Rules*. At para. 11, Justice Goepel found that, "[t]he fact the jurisdictional basis for the order under appeal is found in the express language of one of the enumerated Parts in R. 2.1(a) is conclusive of whether leave to appeal is required."

[12] I arrive at the same conclusion here. The primary focus of the application is the production of documents and the notice of application sought relief pursuant to Rule 7-1 of the *Supreme Court Civil Rules*. That is the jurisdictional basis of the order. The order appealed from is a limited appeal order and leave is required.

[25] In this case, the notice of application specified the jurisdiction for the application to be both s. 89 of the *FLA* and Rule 15-8 of the *Supreme Court Family Rules*. No mention was made of s. 97 of the *FLA*. In making the order for sale, the chambers judge made specific reference to Rule 15-8. In my opinion, the order for sale in this case was made pursuant to Rule 15-8, and the sale of the Homer Street Property can be appealed as of right.

[26] The question then arises as to whether leave remains necessary to appeal the order granting the interim distribution. In *Hiebert v. Miller*, 2018 BCCA 216, this Court reviewed the authorities which have considered applications for leave to appeal orders closely related to orders for which leave is not required:

[24] There are judgments of this Court to the effect that a notice of appeal engages our jurisdiction and once that jurisdiction is engaged in a cause, there is no need for a separate notice of appeal to address issues that arise in the cause, unless they are completely discrete: *Dunn v. Vicars*, 2009 BCCA 477 at para. 40, per Chiasson J.A. Leave is not required to appeal "components" of orders: *Tomic v. Tough*, 2013 BCCA 212 (Chambers). Nor is leave required to appeal orders that are "subsumed" in an order that may be appealed as of right: *Bentley v. The Police Complaint Commissioner*, 2012 BCCA 514 (Chambers), and see *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 138 (Chambers).

[25] In *Aldergrove Credit Union v. Hoessmann Estate*, 2013 BCCA 213 (Chambers), Mr. Justice Chiasson again addressed the issue of leave in proceedings related to pending appeals brought as of right (there

appeals were from an order *nisi* and an order approving the sale of property). He held:

[18] I recognize that many orders may arise out of one sitting of a court at which multiple issues are addressed. In this case and in *Tomic*, two separate orders were prepared. Where parts of orders deal with discrete issues, it may be that merely having a right of appeal for one order will not suffice, but where there is a relationship between an order of which there is an appeal as of right and an order that otherwise would require leave to appeal, there is no need to obtain leave to appeal. *Tomic* and this case illustrate the point. On this point, see also the discussion of Saunders J.A. in *Bentley*.

[19] In *Tomic*, two proceedings were dealt with by the Supreme Court judge. Orders were drawn in each proceeding. Each order dealt with an issue with respect to which leave to appeal was not required, as well as matters where leave is required. In the present case, two orders are being prepared. The order approving the sale is dealt with in a separate order. That is appropriate because the order will be filed in the Land Titles Office in order to effect the transfer of title. There remains a clear relationship between that order and the order dismissing the appeal from the order nisi. The fact they are expressed in different documents merely is a matter of form.

[20] If I am not correct concluding that leave to appeal the order approving the sale is not required, I would grant leave because whether that order can be sustained likely depends on whether the order *nisi* is sustained. That said, I am aware that once title is transferred to the purchaser, the appeal of the order approving of the sale likely would be moot: *Galway* at paras. 6-9. There may or may not be reasons to continue with the appeal of the order *nisi*. I stress that the division that hears this appeal will deal with these matters as it considers appropriate.

[Emphasis added.]

[26] In the present case, while the two orders are linked, the foreclosure order cannot be said to be a “component” of the partition order (as in *Tomic* and *Aldergrove Credit Union*), nor is it “subsumed” within the partition order (as in *Bentley*). The two orders are not effectively a single order. Therefore, it cannot be said that leave to appeal the foreclosure order is not required due to its connection to an order that is appealed as of right.

[27] However, that is not the end of the analysis. Where a party seeks to appeal two interconnected orders, one that requires leave to appeal and one that is appealable as of right, the relationship between the orders may militate in favour of granting leave to appeal to the former. This is the situation described in para. 20 of *Aldergrove Credit Union*.

[28] In *S.H.F.N. v. A.B.N.*, 2015 BCCA 314 (Chambers), Madam Justice Saunders addressed a situation more analogous to the case at bar. She concluded that leave was required in relation to one order the appellant sought to appeal (a protection order made pursuant to the *Family Law Act*)

but not another (an order dismissing a petition under the *Hague Convention*).

[29] She said, of the case requiring leave:

[10] Having said leave to appeal is required, should it be granted? The answer is yes, in my view. I have not been provided with reasons for judgment in respect to the protection order, but I am informed by the parties that the reasons of the judge are brief and refer to the result of the *Hague Convention* hearing. While it is rare for this court to interfere with an interim order dealing with the custodial arrangements for a child or children in family litigation (*T.N. v. J.C.N.*, 2013 BCCA 432). in these circumstances it seems that the protection order and the *Hague Convention* order given by Mr. Justice Affleck are intimately linked. That being so, I consider it plain that the interests of the children and the parties, and the interests of justice, favour the two matters proceeding together through our court.

[Emphasis added.]

[30] Where an application for leave to appeal is made in association with an appeal brought as of right, the court, in my view, should engage in the exercise described in *S.H.F.N.* by asking whether the intended appeal is so intimately linked with the appeal that proceeds as of right that the interests of justice favour the two matters proceeding together. In such a case, leave to appeal should be granted.

[27] In this case, I am satisfied that the relationship between the two orders is such that there is no need to obtain leave to appeal the interim distribution order. Both matters can proceed as of right.

[28] I should further say that if I wrong in that conclusion, I am of the view that the appeal of the interim distribution order is so intimately connected with the appeal that proceeds as of right, the interests of justice favour the two matters proceeding together. Accordingly, if necessary, I would grant leave to appeal the interim distribution order. In granting leave, I should also note that I am of the view that the appeal of the interim distribution order raises an issue of significance to the profession in regard to the rights of third-party owners of property potentially impacted by distribution orders.

DISPOSITION

[29] In the result, therefore, I order that both applications for leave to appeal, CA47203 and CA47209, stand as notices of appeal. I order the two appeals be heard together. I order the appeals be expedited and set for hearing on May 10, 2021. The appellants shall file the appeal record, joint appeal books, and factums

on or before March 31, 2021. The respondent's factum should be filed no later than April 21, 2021. The cost of these applications will be in the cause.

"The Honourable Mr. Justice Goepel"