

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Etemadi v. Maali*,  
2021 BCSC 395

Date: 20210209  
Docket: E181820  
Registry: Vancouver

Between:

**Koorosh Etemadi**

Claimant

And

**Mehrsa Maali**

Respondent

And

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

Respondents

Before: The Honourable Mr. Justice Gomery

## **Oral Reasons for Judgment**

Counsel for Claimant: S.L. Specht

Counsel for Respondent Mehrsa Maali: S. Stanislaus

Counsel for Respondents Soheila Samimi  
and Daryoush Etemadi: C. Drake

Place and Date of Trial/Hearing: Vancouver, B.C.  
February 9, 2021

Place and Date of Judgment: Vancouver, B.C.  
February 9, 2021

## **Introduction**

[1] This is fiercely contested family litigation. On December 9, 2020, I made an order pursuant to s. 89 of the *Family Law Act*, S.B.C. 2011, c. 25 ("FLA"), for the payment by Mr. Etemadi to Ms. Maali of \$250,000 as an interim distribution of family property. The order provides:

1. within 30 days the claimant will advance \$250,000 to the respondent as an interim distribution of family property (the "Advance");
2. the Advance is without prejudice to the parties' rights and will be taken into account in the division of family property and debt at trial;
3. if the respondent by counterclaim Dr. Daryoush Etemadi, also known as Darioush Etemadi and also known as Dario Etemadi, loans to the claimant the funds necessary for the Advance, he will be secured for the loan by an equitable charge against the claimant's interest in the property located at 2802 – 1483 Homer Street, Vancouver, BC (the "Homer Street Property"), in priority to any interest claimed by the respondent in this action;
4. if the claimant does not advance \$250,000 to the respondent within 30 days, the Homer Street Property will be sold and the respondent will have conduct of sale;
5. for the purpose of effecting a sale, the respondent or a realtor engaged by her may enter the Homer Street Property during daylight hours on weekdays and Saturdays on at least 48 hours' notice in writing or by email to the claimant;
6. any sale of the Homer Street Property will be subject to court approval;
7. the sum of \$250,000 from the net proceeds of sale of the Homer Street Property will be paid to the respondent as an interim distribution of family property and the balance will be paid to and held in trust by the claimant's solicitors pending further order of the court;
8. the costs of this application are reserved to the trial judge.

[2] I made this order in written reasons for judgment that are indexed at 2020 BCSC 1908. In these reasons I will adopt the terminology adopted in my written reasons.

[3] Mr. Etemadi did not make the \$250,000 payment. On January 7, 2021, he filed an application for leave to appeal the order to the Court of Appeal. Mr. Etemadi Sr. has also applied for leave to appeal the order. As contemplated in the order, Ms. Maali has retained a realtor and listed the Homer Street Property for sale.

[4] There is a dispute between the parties as to whether leave to appeal is actually required. That issue can only be resolved by a justice of the Court of Appeal in chambers. The appellants have not yet taken steps to set down an application to resolve that question and obtain leave to appeal if leave is required.

[5] Mr. Etemadi and Mr. Etemadi Sr. apply to stay the order until the appeal is resolved. Alternatively, they seek to vary the order.

### **The Stay Application**

[6] Section 224 of the *FLA* requires that the stay application be brought in this court. The well-known test in *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, has three components: there must be a serious question to be tried, the applicants must show that they will suffer irreparable harm if a stay is refused, and the balance of convenience must favour the granting of a stay.

### **Merits of the Appeals**

[7] The proposed grounds of appeal include error in the application of the proper legal test and factual foundation for an interim advance to Ms. Maali, particularly as to the amount awarded; error in the application of the proper legal test and factual foundation required for an interim sale of the Homer Street Property; error in ordering an interim sale when Ms. Maali did not, as part of her counterclaim, seek partition and sale; error in granting Ms. Maali sole conduct of sale; and error in my factual determinations in the identification of credibility as a significant issue.

[8] Mr. Stanislaus accepts that the merits test is not a high bar. He does not contend that there is not a serious question to be ventilated on appeal.

[9] I do not see how I might address the substance of the proposed grounds without embarking on a discussion that might be construed as an explanation or defence of my written reasons for judgment. The authorities are clear that this is something to be avoided.

[10] In these awkward circumstances I think the fairest course is to accept without analysis that the appeals are not doomed to fail.

### **Irreparable Harm**

[11] Mr. Stanislaus submits that a sale of the Homer Street Property does not pose a risk of irreparable harm to the appellants because the potential injury will be merely financial.

[12] It is clear from the authorities cited by Mr. Stanislaus that irreparable harm is assessed qualitatively rather than quantitatively and may result from potential consequences that cannot later be cured for various reasons, including difficulty in obtaining financial redress: *Negus v. Yehia*, 2018 BCSC 2319 at para. 55; *Chapman v. Chapman*, 2020 BCSC 1409 at para. 10; *M.N. v. C.G.F.*, 2020 BCSC 2072 at para. 17.

[13] In my view there is a risk of irreparable harm in this case. If the Homer Street Property is sold as contemplated by the order, the sale will be irreversible, even if the appeal succeeds. Moreover, a significant portion of the \$250,000 advanced to Ms. Maali in consequence of the sale will have been spent by the time the appeal is heard. There is a risk that money disbursed to Ms. Maali could not be recouped from her.

### **Balance of Convenience**

[14] The appellants suggest that it be made a term of the stay that the ordinary deadlines in the Court of Appeal be respected. Those deadlines would allow for the filing of appeal books in early March, the appellants' factums in early April, and the respondent's factum in early May. In the ordinary course, the appeal might be set for hearing in late June or, more likely, in September.

[15] In the meantime, this action is being vigorously litigated. Ms. Specht submits:

[74] In the next three months, the parties have multiple litigation events scheduled, including, but not limited to, three to four interim applications; three days of examinations for discovery; a further CPC; the leave to appeal application and potentially a full appeal; and once Mediate BC appoints a mediator, a mediation.

[75] The respondent has threatened further interim applications as well in the past week, such that there is no doubt the parties will continue to be frequent flyers in the courts halls (or telephone lines).

[16] The trial has been adjourned twice and is now set for 14 days beginning on February 7, 2022.

[17] In my written reasons for judgment, I made the following findings:

[75] Ms. Maali is at a distinct disadvantage in the litigation. She is litigating against three apparently well-funded adversaries in a case complicated by foreign elements and substantial uncertainty as to the facts. To make out her case, she requires full discovery that, to date, the respondents have been reluctant to provide. If she is to have a chance of success, either at trial or through the negotiation of a reasonable settlement, she requires energetic and capable legal representation. That costs money.

[18] The stay of the order will maintain Ms. Maali in the state of disadvantage I have described while the litigation carries on. Mr. Stanislaus observes that if a stay is imposed and later lifted, it will take some time to market and sell the Homer Street Property so that the interim distribution can be advanced to Ms. Maali. I accept that this is so.

[19] Mr. Stanislaus submits that taking into account the need for funds to retain experts, if the interim distribution is not advanced before August or September 2021, the trial date will be at risk. This is plausible.

[20] In short, the harm and inconvenience to Ms. Maali from a stay of the order is palpable, especially if the stay remains in effect for many months.

[21] At first blush, the potential harm and inconvenience to Mr. Etemadi Sr. from a refusal of the stay is financial. It is that the value of his investment in the Homer Street Property will be crystallized at a time when he maintains that the market for condominiums is suffering adverse effects from the COVID-19 pandemic and his share of the sale proceeds will be tied up in an account earning interest at a low rate while his entitlement is finally determined at trial. This risk is mitigated by several circumstances. Any sale pursuant to the order requires court approval to ensure that the Homer Street Property will not be sold at an under value. While Mr. Etemadi wishes to retain his investment, an eventual sale of the Homer Street Property following the trial is inevitable. There is no guarantee that the market will be better following the trial than it is now.

[22] The potential harm and inconvenience to Mr. Etemadi is much the same, with one additional element: Since I made the order, Mr. Etemadi and his family have moved out of the Homer Street Property and have found other accommodation. A sale of the Homer Street Property will not deprive them of a place to live.

[23] The additional element is the risk that at the end of the day Mr. Etemadi will have been deprived of access to funds advanced to Ms. Maali pursuant to an order that should not have been made.

[24] Balancing the harm and inconvenience on both sides, in my opinion a relatively brief stay is justifiable and a lengthy stay is not. I consider that the appellant should have the opportunity to test my judgment in the Court of Appeal if that can be accomplished within a few months. If the delay is longer, the actual prejudice to Ms. Maali resulting from the fact that she is litigating at a disadvantage will outweigh the potential prejudice to the appellants if the Homer Street Property is sold before the appeal is heard.

[25] It is realistic to think that the appeal could be expedited. Recently, in *iAnthus Capital Holdings Inc. v. Walmer Capital Limited*, 2021 BCCA 48, the Court of Appeal heard and decided an expedited appeal less than three months following the decision in this Court. The Court of Appeal website lists open hearing dates for full day appeals on 13 days during the month of March 2021.

[26] I conclude that the order should be stayed for a period sufficient to permit the parties to pursue the possibility of an expedited appeal. In my view, a stay that lasts until March 12, 2021, should suffice. At a hearing that week, I will determine whether the stay will continue or should lapse in order that the property may be sold will undue further delay. To be clear, in the absence of an early date reserved for the hearing of the appeal and realistic arrangements for the hearing of the appeal on that date, my present inclination would be not to continue the stay. If the necessary arrangements have been made, continuation of the stay will probably turn on the length of the further delay entailed by the appeal.

### **Disposition**

[27] For these reasons, I order as follows:

- a) Subject to the terms of this order, paras. 4 to 6 of the order of December 9, 2020, are stayed until March 12, 2021.
- b) If prior to March 12, 2021, leave to appeal is denied by a justice of the Court of Appeal, the stay will lapse.
- c) This hearing is adjourned to 9:00 a.m. on March 9, 2021 -- I will hear submissions as to that date if it is not convenient to counsel -- to consider whether the stay should continue after March 12, 2021.
- d) At the hearing on March 9, 2021, I will receive further evidence which will be limited to affidavits addressing developments since February 5, 2021. The burden will be on the applicants to establish that, in light of the steps taken to pursue the appeal and the further delay expected before it is heard, the stay should continue. I expect that an hour will suffice for the hearing.

[28] While the order of December 9, 2020, does not expressly say so, it should be obvious that if Mr. Etemadi procures the necessary funds and makes the \$250,000 advance required by the order, the Homer Street Property need not be sold pursuant to the order.

[29] In view of the conclusion I have come to, I need not address the applicant's alternative request for a variation of the order. I will observe that much of the argument advanced on this point had more the air of re-argument at the original application than submissions grounded in a material change of circumstances.

“Gomery J. “