Court File No.: CV-09-370855
Date: 2009/03/23

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
Metropolitan Toronto Condominium Corporation 626	)	*Robert Bell* and Katherine Menear, for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	*Chris G. Paliare* and *Matthew Milne-Smith*, for the Defendants
Bloor/Avenue Road Investment Inc., and Kevric Ontario Real Estate Corporation	)	
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** March 12, 2009

O'MARRA J.:

[1] This matter involves the continuing availability of parking spaces to approximately 40 residents of the plaintiff, Metropolitan Toronto Condominium Corporation 626 (MTCC 626). On February 13, 2009 an interim injunction was ordered to preserve the *status quo* until the matter could be determined. The defendants, Bloor/Avenue Road Investments Inc. and Kevric Ontario Real Estate Corporation the owner of the building and parking garage, have brought a motion under Rule 59.06(2) of the *Rules of Civil Procedure* requesting the court to set aside, varied or declared terminated the interim injunction made in this matter affecting its commercial interests for three reasons:

1. The plaintiff has not complied with an undertaking given to the court in the course of obtaining the interim injunction to seek a minor variance of By-law 492-80 from the Committee of Adjustment for the City of Toronto.

2. The plaintiff has conceded by not following through on its undertaking to seek the variance there is no serious issue to be tried with respect to the municipal by-law on which its claim is based.

3. The plaintiff has frustrated the defendants' efforts to resolve the matter in a timely fashion by not agreeing to an expedited trial timetable and it is taking advantage of the delay to the detriment of the defendants' commercial interests.

Factual Background

[2] On February 13, 2009 the plaintiff brought an application for injunctive relief pending the determination of the application of the City of Toronto By-law 492-80 to the allocation of parking spaces as between commercial and residential tenants of the building owned by the defendants and occupied by residents of the plaintiff condominium corporation. The building is a mixed use building with commercial tenants and residential condominium owners. The defendants are the owner and manager of 150 Bloor Street West, a 10-storey commercial building and parking garage with 121 parking spaces. The plaintiff, with a municipal address of 175 Cumberland Street, is a residential complex that occupies 15-storeys in the same high-rise building above 150 Bloor Street.

[3] The property was developed over 27 years ago originally as one development project consisting of two high-rise buildings and two parking garages. By-law No. 492-80 passed May 26, 1980 relating to the overall development dealt with a number of matters, one of which involved the availability of parking within the two buildings. Section 2 (7) of the By-law reads as follows:

> The owners or occupants of buildings A and B provide and maintain, for their exclusive use, at least 272 parking spaces in total, either on Lot A or on Lot B or on both such lots….

[4] Building A is called Renaissance Plaza, the building involved in this matter. Building B is called Renaissance Court. The Renaissance Plaza is located at 150 Bloor Street within which is occupied MTCC 626 with a municipal address of 175 Cumberland. The other building, Renaissance Court, is located at 162/164 Cumberland. In 1984 the developer entered into a reciprocal agreement with the plaintiff condominium corporation, registered on title as Instrument No. B856574, that provided in section 4.1 of the agreement that "the parties shall comply with all laws, rules, orders, ordinances, regulations and requirements of any government, or municipality, or any agency thereof having jurisdiction over the Renaissance Plaza and Renaissance Court".

[5] Several years later the ownership of the two buildings split. By-law No. 492-80 applies to both buildings, however, since the split in ownership the parking garages and the spaces therein have been dealt with by the owners separately. At 150 Bloor Street/175 Cumberland (Renaissance Plaza) the 121 parking spaces have been utilized by the residents and commercial tenants. There are 150 residences of which 55 residents have "assumption agreements" which have preserved the allocation of parking spaces for their use, while approximately 40 other residents have monthly contractual agreements which can be terminated on 30 days' notice by

the building's owner. Eight other spaces were utilized by MTCC 626 for visitor purposes. In total the residents and their visitors had use of 103 of the 121 spaces at the Renaissance Plaza.

[6] The defendants became the new owners of the building in 2008. Since acquiring the Renaissance Plaza the defendants have taken the position that unit holders without parking assumption agreements would no longer be entitled to park in the Renaissance Plaza parking garage. Notification that monthly parking agreements were to be terminated as of January 1, 2009 and thereafter tagged and towed caused a great consternation amongst the residents.

[7] The defendants who own 270,000 sq. ft. of commercial space in the building had reached an agreement with the Ontario Medical Association (OMA) to lease 80,000 sq. ft. commencing March 1, 2009. As part of its agreement the building owner is required to provide 27 parking spaces for the use of its tenant. The defendant is also seeking to lease the remainder of the unoccupied commercial space and to do so requires the availability of parking spaces for future tenants.

[8] On January 23, 2009 the plaintiff commenced an action claiming *inter alia*:

> An interim, interlocutory and permanent injunction restraining the defendants from i) breaching the terms of the reciprocal agreement (as defined herein) and violating By-law No. 492-80 (as defined herein), ii) tagging or towing unit holders or their visitors' vehicles from the parking garage at Renaissance Plaza or otherwise interfering with the quiet enjoyment of unit holders' parking at their homes; a declaration that 103 parking spaces be available in Renaissance Plaza for the exclusive use of unit holders.

[9] The plaintiff argued on the February 13, 2009 hearing in seeking injunctive relief that the serious issue to be tried involved the interpretation of the reciprocal agreement s. 4.1 requiring the parties to comply with all municipal by-laws and the application of By-law 492-80 to the allocation of parking spaces between residential and commercial use at Renaissance Plaza. It is the position of the plaintiff that the by-law requires that the defendants make available to the residents sufficient parking spaces for their exclusive use as "owners or occupiers of Building A". Although the by-law does not specify allocation of the 272 spaces as between the building A or B or within the buildings the plaintiff argued in paragraph 5 of its factum that:

> The parking allocation may be determined by way of variance to zoning before the Committee of Adjustment or re-zoning and then ultimately before the Ontario Municipal Board, where all interests can be considered, including the public interest, before specialized bodies with expertise in dealing with zoning and parking issues. The issue of parking allocation can be determined expeditiously if the route chosen is before the Committee of Adjustment.

[10] The defendants' position is that they would suffer significant commercial consequences in not being able to provide the necessary spaces to their tenant, OMA, or be able to offer parking spaces in lease agreements with potential tenants. The combined usage of the residential owners, 103 spaces and its new tenant, 27 spaces surpasses the capacity of the parking garage. Without access to more spaces the marketability of the remaining commercial space becomes limited. It is their position that the by-law relied on by the plaintiff does not convey private rights to the residential unit holders. The by-law only specifies the number of parking spaces required to exist within the two buildings, but not the allocation of those spaces between the owners and occupants.

[11] The plaintiff, in submissions, indicated that the most expeditious route to clarify any ambiguity in the applicability of the by-law would be by way of a minor variance application to the Committee of Adjustment for the City of Toronto. Such an application could occur as early as April 2009. Notwithstanding the defendants' position that the plaintiff condominium corporation does not have standing to make such an application with respect to their land and building, the plaintiff indicated that it had the opinion of an urban planning expert that it could make such an application under the *Planning Act, R.S.O. 1990, c. P.13*. Counsel for the plaintiff argued that pursuant to section 45(9.1) and (9.2) the Committee of Adjustment, if it agreed with the variance specifying allocation of spaces, could also require the owner of the land to enter into one or more agreements with the municipality reflecting any terms and conditions imposed in its decision. The agreement could then be registered against the land. The process to obtain clarification could take as little as 30 days.

[12] Plaintiff's counsel stated that he would undertake to the court that the condominium corporation would pursue the Committee of Adjustment application.

[13] The plaintiff also submitted that another way certainty could be achieved as to availability and allocation of parking spaces would be to make a re-zoning application to amend the by-law, a process that would take a much greater period of time.

The Endorsement

[14] On Friday, February 13, 2009 at the conclusion of the hearing, I advised the parties that I would release written reasons at a later date, however, due to the apparent urgency of the application I would provide brief reasons and endorsement, which were as follows:

1. The three part test to consider in determining whether an interlocutory injunction is warranted is set out in *R.J.R. MacDonald Inc. v. Canada (A.G.),* [1994] 1 S.C.R.:

    i) Is there a serious issue to be tried?

    ii) Will the applicant suffer irreparable harm if the injunction is not granted?

    iii) Does the balance of convenience favour granting the injunction?

2. I am satisfied on the materials before me and in hearing submissions of the parties that the necessary criteria have been met to warrant the imposition of an interim injunction in this matter.

3. There is a serious issue to be tried with respect to the application of the reciprocal agreement registered as Instrument No. B85674 and the interpretation of By-law 492-80 with respect to the allocation of residential and commercial parking spaces at Renaissance Plaza. In my view, the question of whether a serious issue exists is not unlike the question before a motion court on a summary judgment application in determining whether there is a genuine issue for trial. In this instance, there is such an issue that requires, in my view, a determination by a trier of fact.

4. Serious and irreparable harm is very real with respect to the deprivation for certain residents of parking spaces that have been available to them for many years at the place they reside. There are also issues of safety that I consider serious in the circumstances, particularly if the parking garage is operated to permit open use, as appears may be the situation, whether it is called public access or not.

5. On a balance of convenience, a temporary continuation of the *status quo* allowing a number of residents to continue to utilize the parking spaces, some of whom for 25 years is not outweighed by the current and immediate future demands of the respondents' commercial tenants in the short term.

6. An interlocutory injunction is granted on the following terms:

    1. The defendants are enjoined from breaching the terms of the reciprocal agreement and violating By-law No. 492-80 and from tagging and towing the unit holders' vehicles from parking spaces at Renaissance Plaza or otherwise interfering with the quiet enjoyment of the unit holder's parking.

    2. All residential unit holders parking in the facility shall be required to enter into a Parking Agreement with the defendant on showing proof of a pre-existing agreement and in full satisfaction of any outstanding arrears.

    3. The parties shall ensure that there is a process in place, as may be required, to ensure the accommodation of the parking requirements of the defendants' tenants, OMA, pursuant to their lease agreements, and the requirements of the residential unit holders at Renaissance Plaza.

    4. This interim order shall remain in place until the earlier of the determination of the matter with respect to an application for a variance to the zoning by-law before the Committee of Adjustment, or a re-zoning application, if required, or the trial of the action.

    5. Submissions as to costs may be made in writing.

Events and Correspondence Subsequent to the February 13 Endorsement

[15] Following the hearing and prior to the release of written reasons a stream of correspondence was sent to the court and exchanged between the parties that has given rise to this motion and, in my view, overtaken the need for separate written reasons beyond those cited above and in the discussion to follow with respect to the February 13 hearing. This judgment shall constitute the entirety of the reasons to be issued.

[16] I do not intend to summarize all of the letters that followed the February 13 hearing however, the detail of several of them are of importance in understanding the development of events that led to the within motion to set aside, vary or terminate the February 13, 2009 endorsement.

[17] On February 20, 2009, defence counsel, Mr. Milne-Smith wrote to Justice Colin Campbell of this court to arrange the scheduling of an expedited trial. He provided a proposed timetable which would have established a trial date as early as mid-April, time permitting in the court, and if the plaintiff agreed to it. He added "the defendants are willing to comply with any schedule that permits a speedy and efficient resolution of the narrow legal issues raised in this action."

[18] In a letter dated February 24, 2009, counsel for the plaintiff, Mr. Robert Bell wrote to Justice Campbell in response to the proposed timetable stating that the "plaintiff entirely disagrees with the defendants' proposed timetable or need for an appointment to schedule trial of the action."

[19] Plaintiff's counsel advised the court in the letter that they had met with their clients on February 23, 2009 and received instructions to pursue the variance before the Committee of Adjustment and to the Ontario Municipal Board, if necessary. Further, he attached to the letter a copy of a letter prepared by the solicitor for the City of Toronto, dated February 4, 2009, which I had excluded from the hearing on February 13, 2009 on a leave application by the plaintiff pursuant to Rule 39.02. It was excluded on the grounds that it was not in affidavit form and the defendants had no opportunity to examine the author on its contents. The City solicitor was in attendance at the hearing and indicated that the City would not seek to intervene as a party to the proceedings.

[20] The City solicitor's letter is mentioned because it was provided as an attachment to the correspondence to Justice Campbell and reflects support by the City solicitor for the plaintiff's position given at the hearing on February 13, 2009 that the issue of clarifying the application of the by-law and the allocation of parking spaces between the owners and occupiers of Renaissance Plaza could be achieved in very short order by an application to the Committee of Adjustment. Brendan O'Callaghan, Solicitor Planning and Administrative Tribunal Law wrote the following:

> If an application for variance were made immediately to the Committee of Adjustment, a decision would likely be rendered by April or May, 2009.

> The appeal period is 20 days and if appealed, would proceed to the Ontario Municipal Board. Given the Board's current calendar and scheduling practice, the appeal could be heard by the Fall of 2009 at the latest.

[21] Although the letter was not before the court on February 13 the information relating to the time frame and expeditious nature of the Committee of Adjustment route was made known to the court by plaintiff's counsel.

[22] On February 24, 2009 plaintiff's counsel sent a letter to my attention outlining his costs submissions wherein he reiterated that the variance application was being pursued:

> We appreciate the costs are not often awarded to a plaintiff on a successful injunction motion. However, in this case, the injunction has preserved the *status quo* with respect to the right to use parking spaces at the Renaissance Plaza pending a determination of the matter with respect to an application for a variance to the zoning by-law before the Committee of Adjustment, or a re-zoning application, if required, or the trial of this action. The plaintiff, as it advised the court at the hearing of the motion, is seeking a variance to the zoning by-law and/or a re-zoning application and is proceeding expeditiously with respect to same. If the matter is ultimately resolved at either the Committee of Adjustment or the re-zoning application then a trial may not be necessary and there may be no opportunity to recover costs of the successful motion on behalf of the plaintiff.

[23] On February 27, 2009 in another letter sent to my attention plaintiff's counsel outlined a number of conflicts that had developed between the parties with respect to identifying unit holders with monthly agreements who were entitled to park because parking agreements could not be produced or arrears had not been paid; the new parking rates set by the defendants exceeded the rates charged in neighbouring parking garages; and over the organization of valet parking versus self-parking needed to accommodate all persons using the parking garage. Further, the plaintiff requested the order that had yet to be taken out, include a specific parking fee rate and the order remain in place until a final determination including "any and all appeals to the OMB or the courts from a decision of the City council through zoning application or the Committee of Adjustment through the minor variation process." He concluded the letter stating:

> We have advised counsel for the defendants that our client will be pursuing variance. The defendants maintain this cannot be done and have sought a trial date on an expedited basis.

[24] A letter dated March 2, 2009 was faxed to my attention on Monday, March 3 wherein defendants' counsel advised that "based on information received last night from counsel to the plaintiff, the defendants intend to bring a motion to you for an order setting aside or dismissing

the injunction granted on February 13, 2009, or similar relief". The information received from plaintiff's counsel in an e-mail dated March 2, 2009 was as follows:

> We met with experts today. Given the position you have taken on behalf of Kevric with respect to variance, our client will pursue the more complex re-zoning process. We are working with urgency to commence the application to re-zone.

[25] The defendants initiated the motion to set aside or vacate the interim injunction on the grounds that the plaintiff had declared it was not going to comply with an undertaking given to the court to pursue the variance application. Rather, it would pursue the longer and more complex rezoning process. The defendants assert it was an acknowledgement by the plaintiff that there was no serious issue to be tried because the law needed to be changed to support their position. In response, the plaintiff brought a cross-motion to quash the defendant's motion, costs of the interim injunction hearing on February 13, 2009 and an order settling the interim injunction order to include specific parking rates and that the order would remain in place until the final determination of the matter including all appeals to the OMB or the courts.

March 12, 2009 Hearing

[26] At the outset of the hearing on March 12, 2009 I indicated that the motion to set aside or vary the interim injunction would take priority. I indicated to the parties that I had reviewed the correspondence and I was surprised by two aspects. The first cause for my surprise was that it appeared the plaintiff did not intend as of March 2 to seek a variance from the Committee of Adjustment. The reason for my astonishment was because I had specifically noted during the course of argument on February 13, 2009 that plaintiff's counsel had undertaken to the court that the condominium corporation would pursue the Committee of Adjustment process. Plaintiff's counsel had indicated its urban planning expert, Mr. Frank. Lewinberg had opined that a Committee of Adjustment application would bring certainty to the issue. That view was expressed in both his report and examination transcript filed in the proceedings. Further, the court was advised it would be the most expeditious process by which clarification could be obtained and it could be accomplished within 30 days. If there was an appeal it could be concluded by no later than the fall. Moreover, counsel had specifically argued that the provisions of the *Planning Act* section 45 (1), would permit the plaintiff and residents as owners "affected by any by-law" to apply to the Committee of Adjustment to obtain a variance. Under sections 45 (9.1) and (9.2) if the Committee imposed terms and conditions as a result of the variance it could require the owner of the land (the defendants) to enter into agreements with the municipality, which could be registered against the land on title.

[27] The second cause of my surprise raised in the correspondence was that the plaintiff did not appear to be prepared to expedite the trial of the matter.

Issues

[28] The issues raised on this motion are as follows:

1. Does the court have jurisdiction to set aside, vary or vacate the interim injunction order at this stage?

2. If the answer to No. 1 is "yes", should the injunction be set aside because the plaintiff has failed to comply with its undertaking?

3. Should the interim injunction be set aside because the plaintiff has conceded that there is no serious issue to be tried regarding their correct interpretation of By-law 492-80 upon which its claim is based?

4. Should the injunction be set aside because the plaintiff has failed to proceed promptly to trial?

1. Does the court have jurisdiction to set aside, vary or vacate the interim injunction order?

[29] Rule 59.06(2) permits the setting aside or varying of an order where there has been fraud or facts arising or discovered after the order was made.

[30] A judgment can be altered if "the integrity of the litigation process is at risk unless it occurs, or that there is some principle of justice at stake that would override the value of finality in litigation, or that some miscarriage of justice would occur if such reconsideration did not take place". (See: *Schmuck v. Reynolds-Schmuck* (2000), 46 O.R. 3rd 702 (S.C.J.) and *Lawyers' Professional Indemnity Co. v. Geto Investments Ltd.*, [2007] O.J. No. 2793 (S.C.J.)).

[31] In this instance, the order has not been entered and as such, the issue of finality does not apply. Moreover, it is a well-settled principle in law that a judge has the power to reconsider, alter or modify his or her decision until a formal order has been drawn up, passed and entered. In *Montague et al. v. Bank of Nova Scotia* (2004), 69 O.R. 3rd at para. 34, Goudge, J.A. observed the following:

> There can be no doubt that until a judgment is formally entered in the court record, the judge has a very broad discretion to change it. In *Holmes Foundry Ltd. v. Village of Point Edward; Caposite Insulations Ltd. v. Village of Point Edward*, [1963] 2 O.R. 404, 39 D.L.R. 2nd 621 (C.A.) Laidlaw, J.A. put it this way, at page 407 O.R.:
>
> > It is well settled in law that an order can always be withdrawn, altered or modified by a judge either on his own initiative or on the application of a party until such time as the order has been drawn up, passed and entered. I refer to *Re Harrison's Share* under a settlement, *Harrison v. Harrison*, [1955] 1 Ch. 260 at p. 275, [1955] 1 All E.R.185.

[32] Further, the jurisdiction is independent of the *Rules of Civil Procedure* as noted by Justice Sutherland in *Smith Bus Lines Limited v. Bank of Montreal*, [1987] 61 O.R. 2nd 688 at p. 702 where he stated the following:

> Such a jurisdiction is quite independent of the rules, and of the fact that once entered an order takes effect from the time of its pronouncement.

[33] I am satisfied that the court is not *functus officio.* Until judgment is formally entered the court has an inherent jurisdiction to set aside or amend its own order. Rule 59.06(2) is a codification of the jurisdiction.

2. Should the interim injunction be set aside because the plaintiff has failed to comply with its undertaking?

[34] At the outset it is important to bear in mind, as observed in *CIBA-Geigy Limited v. Novopharm Ltd.*, [1998] 2 F.C. 527 at para. 17:

> An interlocutory injunction is an extraordinary and drastic restraint on the liberty of action of the enjoined party, in circumstances where the merits of the other party's complaints have yet to be determined. That infringement on the liberty of action of the enjoined party is only justifiable where it is temporary, and meant merely to maintain the status quo until such time as the judicial process can be completed, a point made by a majority of the Supreme Court of Canada in *Wabasso Cotton Co. Ltd. v. Syndicat des Ouvriers*.

[35] The defendants contend that the plaintiff's undertaking to pursue a variance of the by-law to the Committee of Adjustment was unequivocal. On the other hand, the plaintiff, while not resiling from having provided the undertaking, maintains that it was given with respect to pursuit of the variance process or a re-zoning application. The plaintiff argues that the position it has taken with respect to pursuing the re-zoning application was in keeping with its undertaking as well as the endorsement provided by the court.

[36] On my review of the proceedings I am satisfied that counsel for the plaintiff gave an explicit undertaking to pursue a variance application to the Committee of Adjustment as the most expeditious manner to achieve clarification. It had undertaken to do so notwithstanding the unequivocal opposition by the defendants. Further, plaintiff's counsel reiterated the undertaking in its correspondence to the court and to the defendants following the hearing In addition to the correspondence noted earlier, in a letter dated March 5, 2009 tendered on these proceedings as an Exhibit to the Affidavit of Court Peterson, an associate of the plaintiff's law firm, sent by plaintiff's counsel to the defendants' counsel he stated the following:

> On instructions from our client, *we did undertake to the court on behalf of our client that a variance would be sought before the Committee of Adjustment and that could be done as early as April.* Pausing there, this

> is precisely what was in the City's letter which you have objected to throughout, as was reference to re-zoning. It was also clear in all of the submissions made on behalf of our client that we were aware your clients objected to this and we undertook on behalf of our client that it would, if need be, seek re-zoning.
>
> Opportunity was given after the injunction to agree to the Committee of Adjustment process, but rejected. Our client has every right not to feed into technical arguments and delay by Kevric with respect to that process and accordingly is pursuing re-zoning. This is entirely consistent with all submissions to the court and the injunction continues through the re-zoning process, in accordance with the court's order. (emphasis added)

[37] Even though the plaintiff provided an explicit undertaking to pursue a certain course of action, it would appear that its reading of the endorsement suggested that it had three courses of action it could choose from amongst to pursue.

[38] The endorsement indicated that the interim injunction would remain in place *until the earlier of the determination of the matter* with respect to an application for a variance or a re-zoning application, if required, or trial of the action. Plaintiff's counsel undertook to pursue the variance application to the Committee of Adjustment, and it reiterated that undertaking in all subsequent correspondence until it notified the defendants by e-mail March 2, and confirmed in its correspondence of March 5, that it was choosing to pursue the more complex re-zoning process. The rationale given in the letter of March 5 for the change in course was stated to have been because the defendants had not agreed to the process. However, the defendants' opposition to the variance application process was not a new development. It was well known to the plaintiff during the hearing on February 13 when it provided the undertaking to the court to pursue the most expeditious route. Plaintiff's counsel argues that the decision to pursue re-zoning is not a new fact that has arisen since the interim injunction and as such the defendants have failed to establish the necessary criteria under Rule 59.06.

[39] I do not agree. If the variance application was not pursued it would be a significant deviation from the undertaking given to the court. The expeditious nature of the approach was of great importance in the circumstances given the potential detrimental impact on the defendants' commercial interests. It was the reason for an endorsement requiring the *status quo* to remain in place until *the earlier of* the variance application, re-zoning application or trial. The rationale given by the plaintiff that the defendant would not cooperate in the variance application does not bear the heavy weight and consequence of failing to comply with an undertaking to the court.

[40] An undertaking is an unequivocal promise to perform a certain act. *The Rules of Professional Conduct* of the Law Society of Upper Canada deal with undertakings given by lawyers:

1. Undertakings 4.01(7)

> A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another lawyer in the course of litigation.
>
> 2. Commentary
>
> Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.

In this instance, the plaintiff's counsel gave an undertaking to the court on behalf of his client to pursue a specified course of action. As a result of that undertaking, the endorsement was written to undo the fettering effect of the interim injunction at the earliest opportunity.

[41] In *Towne v. Miller* (2001), 56 O.R. 3rd 177 at p. 180 Quinn, J. stated the following:

> Undertakings given by lawyers are matters of the utmost good faith and must receive a scrupulous attention.

[42] In *Boehringer Ingelheim (Canada) Ltd. v. Merck Frosst Canada & Co.,* [2001] O.J. No. 1433 Justice Lane held that where counsel had made certain assurances upon which the court relied to make an order granting an injunction failure to comply was a serious matter and nothing short of staying the entire order would be appropriate. Similarly, in *Re Leonor*, [1917] 3 W.W.R. 861 in the British Columbia Prize Court, the plaintiff's motion was dismissed when counsel failed to comply with an undertaking to file fresh evidence in the proceeding. The court had not dismissed the motion at an earlier stage as a result of the undertaking of plaintiff's counsel to do so. Instead of complying with the undertaking, the plaintiff filed a motion in another jurisdiction and obtained relief. In the course of dismissing the motion, the court stated that:

> It would be an unheard of thing for any court to allow a plaintiff to obtain and retain an advantage over the defendant because his counsel had broken his undertaking given to the court to avert the consequences of a dismissal of his motion.

[43] In this matter, the undertaking provided by plaintiff's counsel was a significant factor in fashioning the endorsement such that it would expire at the earliest opportunity which would have been, according to submissions made by plaintiff's counsel, on a variance application to the Committee of Adjustment. In contrast, the re-zoning process is one which could take, if not a number of years, certainly well beyond the time required to obtain a minor variation, including any appeal to the OMB. It is of concern as well that the plaintiff resisted the defendants' effort to expedite the trial.

Events Subsequent to March 12, 2009

[44] Late in the afternoon on Friday, March 13, 2009 another letter was sent to my attention by plaintiff's counsel with attachments to indicate the plaintiff had submitted on that date a minor variance application to the Committee of Adjustment and a zoning by-law application

with the City of Toronto Planning office. It would appear the plaintiff has realized counsel's undertaking bound it to a certain course of action and failure to comply with it would have resulted in an adverse outcome. In my view, if the undertaking had not been complied with the appropriate remedy would have been to set aside the interim injunction in its entirety. As noted in *Boehringer* where counsel has made assurances relied on by the court to make the order, a failure to comply shall result in a stay. In these circumstances, I am inclined to consider the actions of the plaintiff up to submitting the variance application as a baulk. However, it does not warrant the extreme consequence of setting the endorsement aside.

3. Should the injunction be set aside because the plaintiff has conceded that there is no serious issue to be tried regarding their correct interpretation of By-law 492-80 upon which its claim is based?

[45] The defendants argue that in seeking rezoning the plaintiff is seeking to change the law. If the law needs to be changed it means that there is no serious issue to be tried on the interpretation of the existing by-law. In my view the defendants are attempting to relitigate the issue raised and argued on the original hearing February 13. There is nothing new in the plaintiff's position. The plaintiff maintained that it would seek re-zoning, if necessary, in addition to the variance application process. Just as the plaintiff was aware that the defendants opposed the variance process, the defendants' knew of the plaintiff's intention to engage the re-zoning process.

[46] I am satisfied that the plaintiff in choosing to pursue the re-zoning amendment application does not in and of itself call into question the seriousness of the issue to be tried. As with the variance application, the plaintiff seeks clarification in the re-zoning application as to the allocation of the number of parking spaces for residents as owner occupiers in the Renaissance Plaza, Building A in referred to in By-law 492-80. The concern would have been justified, however, if the plaintiff had chosen to pursue re-zoning instead of the minor variance application or relied on it as a reason to delay a speedy trial in this matter. The resultant delay could have been inordinate and basis to set aside the interim injunction.

4. Should the injunction be set aside because the plaintiff has failed to proceed promptly to trial?

[47] Little more than one month has passed since the endorsement was rendered on February 13, 2009. Cases where stays have been ordered involve a much greater period of time between the granting of the injunctive relief and the motion to vacate. Usually in the order of a year or more. Generally, the party benefiting from the injunction has failed or resisted taking a number of steps in the trial process causing substantial delay in bringing the matter to a conclusion. (See: *Bell ExpressVu Ltd. Partnership v. Tedmonds & Co. Inc.*, [2001] O.J. No. 1558 (S.C.J.)).

[48] The defendants' concern in this instance was not premised on the actual passage of time between the hearings. Rather, it was based on a concern over the anticipated delay that would

have been the consequence of the plaintiff pursuing the more complex route to clarification of the by-law, instead of the variance application, combined with an apparent reticence to agree to an expedited trial, which the plaintiff has an obligation to do. As noted by Southey, J. in *Bourganis v. Glarentzos* (1978), 19 O.R. 2nd 327 at p. 328 a plaintiff who obtains an interlocutory injunction is under a duty to proceed with reasonable dispatch to bring the action to trial, failing which the injunction will be dissolved.

[49] The purpose of an interlocutory injunction is to ensure that the plaintiff's rights are not impaired by the time the matter goes to trial, but it is also to be of the briefest duration to ensure the harm to the defendants is minimized. There is no basis at this early stage to conclude that the injunction should be dissolved for unreasonable delay now that the plaintiff has embarked on a course to comply with its undertaking.

Conclusion

[50] The court must do that which is just and equitable in all of the circumstances of the case. While I have concerns the plaintiff was prepared to forgo the most expeditious route it gave assurances it would take in support of its request for an interim injunction it has chosen to do otherwise in a timely fashion. It would appear to that end the hearing of this motion had a salutary effect. Steps have been taken by the plaintiff following the hearing of this matter to embark on the appropriate course of complying with its undertaking to the court. It would have been a most serious matter to have breached the undertaking. Not to have complied would have undermined the validity of the endorsement and the consequence a stay.

[51] I am not prepared to set aside the endorsement and deny forty residents access to parking spaces where they live. Further, I am not prepared to amend the endorsement to include all appeals and reviews of the variance process. The trial of this matter should not be delayed pending administrative appeals and reviews. The plaintiff is to diligently pursue its variance application and proceed with dispatch to schedule an expedited trial in this matter. In addition, the order when taken out shall include reference to the plaintiff's undertaking given by Mr. Frank Potter, president of its board of directors, in his affidavit dated January 23, 2009 to compensate the defendants for damages if the order causes damage to the defendants for which they ought to be compensated.

[52] The defendants should not have needed to bring this motion, a factor that will be taken into account on the issue of costs. Counsel may make written submissions of no more that two pages in length, together with a draft bill of costs within 30 days of the release of this judgment.

O'Marra, J.

Dated: March 23, 2009

COURT FILE NO.: CV-09-370855
DATE: 2009/03/23

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Metropolitan Toronto Condominium Corporation 626

Plaintiff

- and -

Bloor/Avenue Road Investment Inc., and
Kevric Ontario Real Estate Corporation

Defendants

REASONS FOR JUDGMENT

O'Marra J.

Released: March 23, 2009