SUPREME COURT OF NOVA SCOTIA
Citation: McDonald v. Trenchard, 2011 NSSC 105

Date: 20110314
Docket: 1201-50701
Registry: Halifax

Between:

Rebekah Catherine McDonald (Trenchard)

Petitioner

and

Richard Thomas Trenchard

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: September 27, 2010, in Halifax, Nova Scotia

Counsel: Barbara Darby, for the Petitioner
Paul Thomas, for the Respondent

By the Court:

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Introduction

[1] Ms. McDonald (Trenchard) hereinafter referred to as Ms. McDonald, applied to have Mr. Trenchard found in contempt of court for not complying with the parties Corollary Relief Judgment, hereinafter referred to as the CRJ. In response, Mr. Trenchard seeks to rectify the subject clause of the CRJ. The parties' entire "Agreement and Minutes of Settlement" were incorporated in the parties' CRJ dated June 5, 1997. Subsequent, to the issuance of the CRJ, the parties agreed to vary the CRJ by orders issued February 7, 2003 and September 27, 2005. Each consent variation order contained language at Clause 5 and Clause 6 respectively, stating that in other respects, the CRJ remained in effect. The variation orders did not impact directly on clause 29.

[2] Mr. Trenchard now seeks to rectify Clause 29 of his May 30, 1997 Minutes of Settlement with his then spouse Rebekah Catherine Trenchard.

History of Proceedings

[3] The subject issue was first before the court on September 29, 2009, pursuant to an *ex parte* application for leave to apply for contempt filed on behalf of Ms. McDonald. Leave was granted that day. An interlocutory application was subsequently filed on behalf of Ms. McDonald on October 6, 2009.

[4] A hearing of the contempt application was scheduled for November 16, 2009. Both parties were represented by counsel on that day and as a result of discussions, a new hearing date in March 2010 was set. Due to the unavailability of a witness, the matter was rescheduled to September 27, 2010. The jurisdiction of the court to entertain Mr. Trenchard's request to offer evidence of the "true" meaning and "intent" of clause 29 emerged as a preliminary issue. The parties agreed to have this issue addressed first.

[5] On May 25, 2010 at a pre trial, it was agreed that Mr. Trenchard would not be required to make a formal pleading seeking rectification of the 1997 Minutes of Settlement, should the court decide it could consider such an application.

[6] The jurisdictional issue was argued on September 27, 2010. Follow up written submissions were received from counsel in October 2010.

Clause 29 of the CRJ

[7] As stated, clause 29 of the Minutes of Settlement was incorporated into the CRJ. It will therefore also be referred to as Clause 29 of the CRJ.

[8] Clause 29 of the CRJ deals with the life insurance that Mr. Trenchard agreed to maintain so that child and spousal support payments could be made if he died before his obligations ended. The clause also states that Ms. McDonald has the option to maintain or replace the subject policy at her expense when Mr. Trenchard's support obligations ended.

[9] Clause 29 of the CRJ reads as follows:

> Life Insurance
>
> 29. The Respondent shall maintain the existing life insurance, as shown on his Statement of Property sworn May 12, 1997, naming the Petitioner as irrevocable beneficiary for all policies for so long as there shall be maintenance payable pursuant to this Agreement or any renewal, extension or substitution thereof by agreement or court order. In the event the Respondent fails to maintain the payments on the policies the Petitioner may maintain them and the Respondent would then be required to pay increased spousal support to the Petitioner in an amount sufficient to cover these policy payments. At such time as the Respondent is no longer required to pay child or spousal support the Petitioner shall have the option of maintaining all existing policies or replacement policies at her expense. The Respondent shall sign any documents necessary to give full force and effect to this clause. The Petitioner acknowledges that the Respondent's parents are named as beneficiaries of $100,000.00 of the Respondent's life insurance and the Petitioner agrees that this coverage will continue until the present mortgage on their home is paid out at which time the Petitioner shall become the named beneficiary and owner of all the present policies.

[10] The contentious part of the clause is the requirement that:

> At such time as the Respondent is no longer required to pay child or spousal support, the Petitioner shall have the option of maintaining all existing policies or replacement policies at her expense.

[11] Mr. Trenchard's obligations to pay child and spousal support have ended. Therefore, it is argued that based on clause 29, Ms. McDonald has the option to maintain the life insurance policy at her expense. The court has been told that the subject life insurance policy has a $20,000 cash surrender value, which may be paid out to the policyholder upon voluntary termination. Mr. Trenchard argues that if his former wife takes over the insurance policy, she may simply cash the policy in and receive the $20,000 accrued during the time he maintained the insurance policy.

[12] Mr. Trenchard argues that such an outcome was not contemplated when the Minutes of Settlement were concluded, and therefore, the Minutes/CRJ must be rectified to ensure that the parties' intentions are honoured. Ms. McDonald opposes this application, mainly on the ground that the doctrine of *res judicata* applies to prevent the re-litigation of this matter. She argues that this issue has been judicially confirmed twice before when the variation orders were given, and that *res judicata* prevents it from being heard again. Ms. Darby, on behalf of Ms. McDonald, has asked the court to rule whether it has jurisdiction to even entertain the application of Mr. Trenchard. She argues that the court should not entertain the application for want of its jurisdiction to do. In her view, the matter of the efficacy of clause 29 has been decided.

[13] Mr. Thomas, on behalf of Mr. Trenchard, seeks to establish that the obligation reflected in this language was never the subject of agreement and the language was incorrectly placed in the text of the Minutes of Settlement and carried forward into the CRJ and affirmed in subsequent consent orders, with the use of "boiler plate" language and throughout the language was never scrutinized.

[14] This decision is in response to oral arguments of counsel made on September 27, 2010 on the jurisdictional issue. In the event that the court rules that the application for rectification may proceed, a hearing date will be set to consider all arguments.

Issues

[15] The issues are as follows:

(1) Does the law dealing with contempt and Rule 89 have application?

(2) Is the court being asked to interpret (a) a court order, or (b) minutes of settlement/ separation agreement or does it matter?

(3) If rectification can apply to court orders, does the court have jurisdiction to consider whether Clause 29 of the CRJ should be rectified? A related issue is whether the court's jurisdiction to do so is precluded by the principle of *res judicata*?

(4) If rectification can not apply to a court order may the court go behind the CRJ and consider rectifying the parties' separation agreement/minutes of settlement? A related issue is whether the court's jurisdiction to do so is precluded by the principle of *res judicata* ?

(5) Would the subject application of Mr. Trenchard be more appropriately framed as an application to correct an error in a court order as provided by current Rule 78.08?

(6) What impact on the court's jurisdiction does the passage of more than thirteen years have, i.e. the relevance of the doctrine of laches?

(7) Can the court's jurisdiction arise from its inherent jurisdiction to grant declaratory relief?

(8) Does s.17 of the *Divorce Act*, 1985, *c.3 (2nd. supp.)* dealing with applications to vary have application?

(9) Is s.16(1) of the *Matrimonial Property Act, R.S.N.S., 1989 c.275* relevant to determining ownership of the cash surrender value of the life insurance policy?

Issue 1 Contempt -R 89
Issue 2 Is the court interpreting a court order or an agreement ?
Issue 3 Does the court have jurisdiction to consider rectification regardless ?
Issue 4 Does the doctrine of *res judicata* oust the court's jurisdiction to consider rectification ?

[16] Issues 1-4 will be discussed together. These issues focus on the interrelated matters of contempt, rectification of the CRJ/Minutes of Settlement as a response to non compliance with the literal meaning of the CRJ and an assertion that rectification is not available because *inter alia* the core issue has been decided and the doctrine of *res judicata* therefore precludes the court from considering rectification.

[17] In the event of Mr. Trenchard's refusal to comply with the literal meaning of clause 29 of the parties' Corollary Relief Judgment, Ms. McDonald may seek a finding that he be found in contempt of court as provided by current R.89 (formerly R.55). This conclusion is not challenged by Mr. Trenchard.

[18] In the context of a contempt proceeding, Mr. Trenchard wishes to "justify/explain" his non-compliance with the parties' CRJ on the basis that the CRJ does not correctly reflect the underlying basis of the parties' Minutes of Settlement, since submerged in the parties' Corollary Relief Judgement.

[19] Herein, Ms. McDonald's action is based on the law governing contempt findings. R.89 of our rules of court provides for the procedure one must follow when seeking a finding of contempt. The court also has inherent jurisdiction to deal with contempt. Contempt is quasi-criminal in nature (see *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 at para 34). Consequently, it is essential that procedural and evidentiary rules, including the higher standard of proof be complied with. Notwithstanding the decision in *Pro Swing Inc.*, which blurred the distinction between criminal and civil contempt the Ontario Court of Appeal in *Chiang (Trustee of) v. Chiang*, (2009) 93 O.R. (3d) 483 maintained the distinction between contempt in criminal and civil law.

[20] The case of *Lamb v. Hoffman [2001] N.S.J. 393* involved a contempt application flowing from a husband's apparent refusal to transfer shares to his wife

as required by a matrimonial property order. More recently, our Court of Appeal considered contempt in the family law context in *Soper v. Gaudet*, *2011 NSCA 11*.

[21] Justice Farrar of our Court of Appeal in *Soper v. Gaudet*, *2011 NSCA 11* summarized the law at paragraph 23:

> In *Brown v. Bezanson*, 2002 SKQB 148, Justice Ryan-Froslie stated the fundamentals of a contempt proceeding at para. 12-14:
>
> > 12 A proceeding for civil contempt is available to redress a private wrong by forcing compliance with an order for the benefit of the party in whose favour the order was made. Sanctions for civil contempt are thus mainly coercive in nature. Their aim is to force compliance with the order. They may also be punitive where the circumstances warrant it.
> >
> > 13 The burden of proof in contempt applications is beyond a reasonable doubt and rests with the party alleging the contempt.
> >
> > 14 In a civil contempt proceeding the following elements must be proven beyond a reasonable doubt:
> >
> > 1. The terms of the order must be clear and unambiguous;
> >
> > 2. Proper notice must be given to the contemnor of the terms of the order;
> >
> > 3. Clear proof must exist that the terms of the order have been broken by the contemnor;
> >
> > 4. The appropriate mens rea must be present.

[22] Ms. McDonald must establish, beyond a reasonable doubt that Mr. Trenchard is in contempt, i.e. not complying with clause 29 of the parties CRJ. This is in contrast to the civil standard of proof i.e. proof on a balance of probabilities; which generally governs non criminal matters.

[23] The "*mens rea* " requirement of contempt was commented upon by Justice Cromwell, as he then was, in *T.G. Industries Ltd. v. Williams*, *2001 NSCA 105* at paragraph 25:

> 25. As was pointed out during argument, both the regulatory and factual contexts of Pioneer Concrete are readily distinguishable from the case before us. But that is beside the point . That case , along with Heatons and Stancomb, provide highly persuasive authority

> for the view that intention to disobey the court's order is not a necessary element of civil contempt.

[24] In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 902, Justice McLachlin, as she then was, held knowledge that an accused knew his or her act of defiance would be public and would bring the authority of the court into contempt can be inferred.

[25] Clearly, Ms. McDonald may bring her contempt application. This court has given her standing to do so. Mr. Trenchard argues by way of defence, that he may offer evidence that the CRJ reflects an error incorporated in the Minutes of Settlement in 1997. Answering the question of whether he may do so, is made more complicated by the quasi-criminal nature of the contempt proceeding.

[26] Given that *mens rea* is an element of the offence of contempt; the quasi criminal nature of contempt and the burden of proof not applicable in civil proceedings, evidence that the basis of the court order allegedly breached is an agreement signed in error is relevant. In my view, Mr. Trenchard should be permitted to offer this evidence. It may or may not negate the *mens rea* element of the contempt. It is also possible that Mr. Trenchard could be found not guilty of contempt but the court nevertheless agree that he is not complying with the CRJ. Related proceedings may be necessary to fashion a remedy for Ms. McDonald.

Res Judicata

-Position of Ms. McDonald

[27] As stated, Ms. Darby, on behalf of Ms. McDonald, argues *inter alia* that a consideration of the enforceability of the subject clause as written has been decided. She argues that a number of factors render the issue *res judicata* and she asks that the application be dismissed.

[28] Among the factors the court is asked to rely upon to conclude that the meaning of clause 29 is *res judicata* are the following:

1. The parties signed the Minutes of Settlement with the current clause in it.

2. The Minutes were incorporated in the parties' Corollary Relief Judgment, including Clause 29, i.e. the doctrine of rectification is not applicable to court orders.

3. The parties agreed that the CRJ was final and binding and a reconsideration/review is estoppel by the doctrine of *res judicata*.

4. The parties confirmed the CRJ in consent orders dated February 7, 2003 and September 27, 2005.

5. That the passage of time “laches” precludes the application.

- Position of Mr. Trenchard

[29] Mr. Thomas, on behalf of Mr. Trenchard, argued that many of the arguments advanced by Ms. Darby on behalf of Ms. McDonald, are more relevant to the

merits of the application to rectify the parties' Minutes of Settlement or subsequent order and not to whether the court has jurisdiction to hear the application.

[30] *Res judicata* includes issue estoppel; cause of action estoppel and abuse of process. As a concept, it bars proceedings when either the cause of action or the legal issue has already been determined and a final order issued.

[31] Mr. Thomas argues that the matter his client raises has not already been plead and adjudicated or plead differently, and his argument does not rely upon a point or issue of fact already decided. He argues that there have been, "no findings of fact and no adjudication. The Court merely signed the Order, primarily for enforcement purposes".

[32] The Minutes of Settlement have been determined but the meaning and effect of Clause 29 has not been. Its meaning is clear on its face, but a challenge to the apparently obvious has not been heard. A final decision on that issue has not been made. There has not been an adjudication which would render an application to rectify the parties' Minutes of Settlement or consequential consent orders adjudicated, as far as the meaning of clause 29 is concerned. In my view, the principle of *res judicata* is not a bar to considering the merits of Mr. Trenchard's response to Ms. McDonald's contempt application.

-Rectification

[33] Mr. Trenchard is asking the court to apply the doctrine of rectification, i.e. "to correct an error in translating an agreement into final documentary form"; an error which he says was carried forward from the Minutes of Settlement to the CRJ and two subsequent consent orders. No fraud or deceit is being alleged. Mr. Trenchard relies upon the doctrine of mistake as it exists in contract law.

[34] Specifically he seeks to rectify the parties' Minutes of Settlement and asks the court to change the parties CRJ to reflect the revised Minutes of Settlement.

[35] In his text, The Law of Contracts, 5 th edition, 2005 ; Canada Law Book Company, S.M. Waddams discusses rectification, describing it as " an equitable doctrine based on the simple notions of relief against unjust enrichment.." (at p. 232). He also emphasizes the importance of showing a common understanding on the matter in dispute and significantly the authour distinguishes between a mistake as to the terms of a contract and a mistake in assumption (at p. 236). Clearly there are significant challenges for a party seeking rectification of a contract , long since incorporated into a court order.

Issue 5 R.78.08 Correcting Errors in Orders (formerly R.15.07)

[36] Following oral arguments heard on September 27, 2010, the Court wrote counsel and asked for their submissions on the relevance and effect of R.70.08 - correcting errors in orders - to a resolution of the legal issue before it. The rule provides:

> Errors and extensions of time
>
> 78.08 A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order;
>
> (b) amend an order to provide for something that should have been, but was not, adjudicated on;
>
> (c) extend the time for doing something required to be done by an order that provides a deadline;
>
> (d) set a deadline for complying with an order that does not set a deadline.

[37] Ms. Darby responded that:

(1) the court file does not show a clerical mistake or error requiring correction - estoppel by record.

(2) evidence suggests the order did in fact reflect the three settlements reached by the parties; namely

(a) the original CRJ;

(b) the 2003 consent variation order; and

(c) the 2005 consent variation order.

(3) R.78.08 relates to the court correcting its own error.

Ms. Darby also added that *laches* prohibits the raising of this issue thirteen years after the fact.

[38] Mr. Thomas, on behalf of his client, argues that R.78.08 disposes of the argument that *res judicata* prevents a consideration of the merits of his client's position. Since the parties' agreement has merged into an order, the slip or omission that the inclusion of the subject language represents can be corrected.

[39] Of the four actions authorized by R.78.08 after a final order has been issued, only R.78.08(b) is potentially applicable. A judge may, "amend an order to provide for something that should have been, but was not, adjudicated on".

[40] I am persuaded that this R.78.08(b) has a limited application and this is to catch obvious over sights raised as part of an adjudication or over sights obvious from the pleadings. There is nothing inherently erroneous or obviously deficient about clause 29. Parties might agree to such a clause. In my view, this rule is not designed to be a back door to re-negotiating an agreement or a substitute for applying the principles of contract law to the Minutes of Settlement by seeking to vary the CRJ.

[41] The interpretation of this rule as advanced on behalf of Mr. Trenchard potentially opens up all clauses of the Minutes of Settlement for challenge on the basis that the CRJ does not reflect what was agreed to.

[42] I am satisfied this rule does not apply to the facts before me and does not assist Mr. Trenchard. It can not be the basis for Mr. Trenchard's response to Ms. McDonald's application.

Issue 6 Laches

[43] The doctrine of *laches* or delay by Mr. Trenchard in raising this issue with Ms. McDonald is a factor that may weigh against Mr. Trenchard when the court is asked to exercise what discretion it has in this matter. Certainty and confidence in the agreed upon outcome of litigation is very important for litigants. The parties' herein, were litigants many years ago. The Petition for Divorce was filed May 22, 1996; the Minutes of Settlement were signed May 28, 1997 and the Corollary Relief Judgment was issued June 5, 1997. The parties divorced June 5, 1997. The text of the subject clause has remained unchanged from the day the Minutes were signed.

[44] The Supreme Court of Canada in *Miglin v. Miglin*, 2003 SCC 24, when considering the efficacy of a separation agreement emphasized the importance of certainty in matrimonial matters. At paragraph 46, Justice Bastarache wrote:

> 46 Nevertheless, the language and purpose of the 1985 Act militate in favour of a contextual assessment of all the circumstances. This includes the content of the agreement, in order to determine the proper weight it should be accorded in a s. 15.2 application. In exercising their discretion, trial judges must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown with the parties' freedom to arrange their affairs as they see fit. Accordingly, a court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the Divorce Act. This is particularly so when the pre-existing spousal support agreement is part of a comprehensive settlement of all issues related to the termination of the marriage. Since the issues, as well as their settlement, are likely interrelated, the support part of the agreement would at times be difficult to modify without putting into question the entire arrangement.

[45] In *D.B.S. v. S.R.G.*, 2006 SCC 37 at paragraph 78, Justice Bastarache, on behalf of the court, stated:

> 78 In most circumstances, however, agreements reached by the parents should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents. However, as is the case with court orders, where circumstances have changed (or were never as they first appeared) and the actual

> support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it: compare C. (S.E.) v. G. (D.C.) (2003), 43 R.F.L. (5th) 41, 2003 BCSC 896.

[46] The significance of the passage of time since the Minutes and CRJ were issued must be the subject of further submissions following a hearing. The court is not prepared to rule on this issue at this time given the limited submissions of the parties' on this issue.

Issue 7 Declaratory Relief at Common Law

[47] In Meagher and Meagher, Civil Procedure Simplified, Butterworths, 1983 at p.299, the authours describe declaratory relief:

> Many disputes are settled more satisfactorily if the parties are able to ascertain their legal rights without being subject to any sanctions. This may be accomplished by applying for declaratory relief in an action. In some jurisdictions, a declaration may also be obtained on an originating application or motion. The subsequent declaratory judgment or order is declaratory of the legal rights of the parties, but is not accompanied by any sanctions or means of enforcement. An action for a declarations very similar to an application by way of stated case submitted to the court by agreement of the parties. Both proceedings must be based upon existing factual situations for the court will not consider hypothetical situations. As more procedural remedies are available to supplement an action for a declaration than on a *certiorari* application, frequently application for a declaration will made in preference to *certiorari* or other prerogative remedies. The remedy of declaration is now commonly used as a parallel method to *certiorari* for attacking an order or decision of an interior court or tribunal.

[48] Declaratory relief is an equitable remedy. It is discretionary. It is a flexible remedy, permitting it to be formulated in a number of ways and it can be available when other remedies are exhausted. (see Meagher and Meagher *supra* at p.299-300). For additional discussion of this remedy see , Jones and de Villars, Principles of Administrative Law, 4 th edition 2004 beginning at p. 692.

[49] Our Rules provide the procedure governing an application for declaratory relief.

Issue 8 *Divorce Act*: Application to Vary

[50] An application to retroactively vary the parties' CRJ may be entertained by the court pursuant to s.17 of the *Divorce Act supra*, if the application pertains to a support order therein and provided that a change of circumstances of the nature described in s.17(4) (in the case of child support) and as described in s.17(4.1)(in the case of spousal support) is found to exist.

[51] Section 17(4) provides:

> Factors for child support order
>
> 17.(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[52] Section 17(4.1) provides:

> Factors for spousal support order
>
> 17.(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[53] The challenge for Mr. Trenchard should he rely upon s.17 of the *Divorce Act* is to meet the threshold requirement, i.e. to demonstrate a change of circumstances permitting the court to entertain an application to vary.

Issue 9 *Matrimonial Property Act*

[54] Section 16 of the *Matrimonial Property Act*, R.S.N.S. 1989, c.275 provides as follows:

> Determination of question between spouses
>
> 16 (1) Either spouse may apply to the court for the determination of any question between the spouses as to
>
> (a) the ownership or right to possession of any particular property;
>
> (b) whether property is a matrimonial asset or a business asset,
>
> except where an application has been made and not determined or an order has been made respecting the property under this *Act*.

> Powers of court under subsection (1)
>
> (2) Where an application is made under subsection (1), the court may
>
> (a) make a declaration as to the ownership or right of possession in the property;
>
> (b) make a declaration as to whether the property is a matrimonial asset or a business asset;
>
> (c) where the property has been disposed of, order that a spouse pay compensation for the interest of the other spouse;
>
> (d) order that the property be partitioned or sold;
>
> (e) order that either or both spouses give such security, including a charge on property, that the court orders, for the performance of any order under this Section, and may make such other orders and directions as are ancillary thereto. R.S., c. 275, s. 16.

[55] The foregoing authority of the court applies to spouses. Ms. McDonald and Mr. Trenchard are former spouses.

Conclusion

[56] In summary I am satisfied that in response to the contempt application Mr. Trenchard may argue that the underlying basis of the order allegedly breached by Mr. Trenchard are Minutes of Settlement which do not reflect the agreement of the parties. Such an argument is relevant to an inquiry directed at determining whether the *mens rea* of contempt exists. It is possible that Mr. Trenchard may be found not guilty of contempt but nevertheless bound by the interpretation of the CRJ advanced by Ms. Trenchard.

[57] Whether the text of the Minutes of Settlement should be rectified is a separate issue. The meaning of Clause 29 has not been decided directly or indirectly and therefore the court is not precluded from considering it by the doctrine of *res judicata*.

[58] At this time I need not decide whether rectification of the contract would necessarily result in a change in the CRJ. Nor must I decide at this time whether the concept of rectification applies to the CRJ itself. The parties should be prepared to address these issues later. They should also be prepared to speak to the significance of the passage of almost thirteen years on what action the court may take.

[59] R 78.08, dealing with errors in orders is not applicable for the reasons given supra. I have concluded that *The Matrimonial Property Act* and *The Divorce Act* provisions dealing with variations of the CRJ do not have application.

[60] The parties are invited to also consider framing the matter as an application for a declaration of their rights. However it is for the parties to decide how to frame their cases.

J.