<u>SUPREME COURT OF NOVA SCOTIA</u>
Citation: *Yang v. Optimo Group Inc.*, 2023 NSSC 161

Date: 20230525
Docket: Hfx No. 514206
Registry: Halifax

Between:

RONG YANG

Plaintiff

v.

OPTIMO GROUP INC., IFORM WORKS INC., and ATBIN HOMES LTD., as trustee for SABERI EQUITY FUND LIMITED

Defendants

AND

Docket: Hfx No. 514207
Registry: Halifax

Between:

QIYING SHI

Plaintiff

v.

OPTIMO GROUP INC., IFORM WORKS INC., and ATBIN HOMES LTD., as trustee for SABERI EQUITY FUND LIMITED

Defendants

AND

Docket: Hfx No. 514211
Registry: Halifax

Between:

MINDONG CHEN

Plaintiff

v.

OPTIMO GROUP INC., IFORM WORKS INC., and ATBIN HOMES LTD., as trustee for SABERI EQUITY FUND LIMITED

Defendants

AND

Docket: Hfx No. 514212
Registry: Halifax

Between:

YUFENG ZHAI

Plaintiff

v.

OPTIMO GROUP INC., IFORM WORKS INC., and ATBIN HOMES LTD., as trustee for SABERI EQUITY FUND LIMITED

Defendants

INTERLOCUTORY INJUNCTION DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: April 26, 27, and May 2, 2023, in Halifax, Nova Scotia

Decision: May 25, 2023

Counsel: Michael Richards and Natasha Puka, for the Plaintiffs

Colin Piercey, Samuel Ward, and Graeme Hiebert, articled clerk, for the Defendants IFORM, ATBIN and SABERI

Defendant OPTIMO - not represented and did not participate

By the Court:

Introduction

[1] The four Plaintiffs are friends who each purchased building lots on the same street from the same builder with the intent to live near each other in custom built homes. The builder started work on the homes but stopped soon after. To the surprise of the four friends, the builder then sold the same lots to another party. At trial, the four friends will seek an order for specific performance requiring the builder to comply with the contract to build their homes and an order declaring the second sale of the lots to be void and invalid. In the motion before me, the four friends seek an interlocutory injunction to prevent the new purchaser from developing the lots until the trial is heard.

[2] Each Plaintiff filed a motion for an Order for an interlocutory injunction. On November 18, 2022, I ordered that the four motions be heard together. The hearing proceeded on April 26, 27, and May 2, 2023.

[3] The law of interlocutory injunctions requires that the four applicants establish that: (1) there is a serious issue to be tried; (2) whether each of them would suffer irreparable harm if the application were refused; and, (3) the balance of convenience favours them.

The Parties

[4] Rong Yang ("Ms. Yang"), Qiying Shi ("Mr. Shi"), Mindong Chen ("Mindong"), and YuFeng Zhai ("Mr. Zhai") (collectively the "Purchasers" or "Plaintiffs") filed separate Notices of Action and Statements of Claim naming the same Defendants.

[5] The Defendant, Optimo Group Inc. ("Optimo"), has failed to file a defence in this proceeding and did not participate in the motion hearing. The Defendants, Iform Works Inc. ("Iform"), Atbin Homes Ltd. ("Atbin Homes"), and Saberi Equity Fund Limited ("Saberi Equity") (the "Remaining Defendants") oppose the motion.

[6] The Plaintiffs testified with the assistance of a mandarin translator. English was not the first language of any of the witnesses. All of the witnesses had difficulty reading English.

Injunctions Sought

[7] The injunctions sought are to restrain the Remaining Defendants, and any persons acting under their direction, authority, or control, from carrying out any construction works, or construction related activities at residential building lots located at Samaa Court, located in the community of Bedford West, Halifax Regional Municipality, Nova Scotia (the “Properties”).

Facts

[8] The Plaintiffs were able to find four undeveloped lots for sale on Samaa Court in Bedford West.

[9] In October 2020, the Purchasers entered into Agreements of Purchase and Sale for New Construction (the “Agreements”) with Optimo, for the purchase of the Properties and the construction of fully detached, custom built homes (the “Homes”).

[10] The Purchasers each attest that they only agreed to enter into the Agreement because it provided each of them with the unique opportunity to (i) live on the same street as the remaining Purchasers; and (ii) to have a custom-built home. However, none of the Agreements was made conditional upon the completion of any or all the others.

[11] Following the deadlines for the Purchasers to complete the “buyer’s conditions” and for the lawyer review, the listing for the Property was updated to “Sold” before the end of October 2020. That change in the listing for the Properties remained visible as of September 2022.

[12] After entering into the Agreements, the Purchasers periodically visited the Properties to observe the construction of their respective Homes.

[13] Although the Purchasers initially observed Optimo complete construction of the foundations and start the framing, all construction activities appeared to cease at the end of December 2021.

[14] Since that time, the Purchasers did not observe any further construction on the Properties.

Amendments to the Agreements

[15] In April 2021, Optimo requested an increase to each Purchase Price to cover what Optimo claimed were cost increases for the construction of the Homes. Each Purchaser entered into an Amendment to the Agreement of Purchase and Sale, dated April 8, 2021, and agreed to increase the Purchase Price.

[16] In October 2021, Optimo requested an extension to the closing date, and on October 21, 2021, the Purchasers entered into a further Amendment to the Agreement of Purchase and Sale, extending the closing date to April 28, 2022 (Mr. Shi) and June 29, 2022 (for the other three).

Request for Termination

[17] In March 2022, Ms. Hammoud advised Mr. Chen that Hamid Nikkah, Optimo's principle, wanted to terminate the Agreements and Ms. Hammoud provided a Request for Termination form for each Property specifying that Optimo was seeking to terminate the Agreement because "Optimo has no funds to continue the house construction."

[18] The Purchasers each refused to sign the Request for Termination. Instead, each Purchaser attests that he or she has remained ready, willing, and able to complete the Agreement, to pay the Purchase Price and therefore to accept title to the Properties. In cross-examination, each Plaintiff stated that they would not pay the Purchase Price if the Home was not constructed.

Sale of the Properties to Atbin

[19] In March 2022, the Purchasers learned that Optimo had purportedly re-sold the properties to Atbin Homes, a home construction company.

[20] The Purchasers were never provided with an explanation for how Optimo sold the Properties to Atbin Homes when they had been previously sold to the Purchasers.

[21] The documents produced at the hearing established that Optimo's sale of the Properties to Atbin Homes occurred in February 2022, before Optimo had made the Request for Termination.

[22] Optimo never requested the Purchasers' consent for this sale, nor did Optimo advise the Purchasers that it intended to sell their Properties to Atbin Homes. The

Purchasers never agreed that their Properties could be sold and, instead, always remained ready, willing, and able to complete their obligations under the Agreements.

The Dealings between Optimo, Iform and Atbin

[23] Hamid Nikkhah is the Director, President and Secretary for Optimo. Navid Saberi is the President and sole Director of Iform and Saberi Equity. Farhad Atbin is the President and Director of Atbin Homes.

[24] On January 13, 2022, Hamid Nikkhah, Navid Saberi and Iform entered into a Pursuit of Mutual Business Interests Agreement ("MBIA"). Hamid Nikkhah and Navid Saberi signed the MBIA in their personal capacity, and Navid Saberi also signed on behalf of Iform.

[25] The MBIA states that Navid Saberi had been pursuing formwork business through Iform and that Hamid Nikkhah had been pursuing formwork business through Opimo and through a company named Civil Tech Construction Ltd. Hamid Nikkhah and Navid Saberi contracted to work together in continuing to pursue formworks business. This arrangement was facilitated through the terms and conditions of the MBIA.

[26] Paragraph 16 of the MBIA states:

> 16. Navid and Hamid agree that Hamid and Optimo shall be responsible to terminate all agreements of purchase and sale or similar agreements in respect of the Samaa lands, and thereafter a company to be selected by Navid shall enter into an agreement of purchase and sale with Optimo to purchase, at Optimo's cost and without any mark up, the real property owned by Optimo. Those lands identified by the following civic numbers on Samaa Court, Bedford, namely 94, 100, 104, 108, 112 and 116 (collectively, the "Samaa Lands"). Any indebtedness or other amounts outstanding in relation to the Samaa Lands, … In the event that any of the purchasers pursuant to the terminated agreements aforesaid pursue a claim against Optimo in relation to the termination of any of the agreements of purchase and sale or similar agreements in respect of the Samaa lands, then Optimo and Hamid shall:
>
> (a) take all reasonable steps to defend any and all such claims and to settle any claims,
>
> (b) provide details of the claim and the defence to Navid and Iform,
>
> and provided those steps were satisfied, then Iform would cover the reasonable legal fees incurred by Optimo in relation to such defence.
>
> [Emphasis added]

[27] For clarity, lots 94, 100, 104, and 108 Samaa Court are the Properties.

[28] Paragraph 17 of the MBIA states:

> 17. Navid and Hamid agree to work with the purchaser of the Samaa Lands to have the purchaser, using formworks services for a party hereto, or another contractor agreed to by the parties:
>
> (a) build a house on one of the lots (tentatively identified as civic 112, with a concrete design proposed) forming part of the Samaa Lands and following completion to sell the house and the land to Hamid at cost;
>
> (b) build a house on a second of the lots (tentatively identified as civic 116) forming part of the Samaa Lands and following completion to sell the house and the land to Insof (full name to be confirmed by Navid and Hamid) at cost + 10%;
>
> (c) <u>build houses on the other 4 Samaa Lands and offer them for sale, seeking to maximize profit</u>.
>
> [Emphasis added]

[29] For clarity, the "other 4 Samaa Lands" referred to in "(c)" are the Properties.

[30] On January 24, 2022, Hamid Nikkhah then executed a Director's Resolution on behalf of Optimo, which resolved that Optimo would convey the Samaa Lands (which include the Properties) to Saberi Equity or an assignee of Navid Saberi's choice.

[31] On January 24, 2022, Hamid Nikkhah also executed a Direction to Complete Deed in Blank (the "Deed Direction"). The Deed Direction authorized Navid Saberi to insert the name(s) of the Grantee to the Warranty Deed for the Samaa Lands.

[32] On January 24, 2022, Optimo executed a warranty deed to convey the Samaa Lands (which include the Properties) to Atbin Homes, in its capacity as trustee for Saberi Equity.

[33] On February 10, 2022, Navid Saberi executed a Deed of Transfer-Affidavit for Value. In the Affidavit, Navid Saberi made oath/affirmed that he was the duly authorized agent of Atbin Homes. The Affidavit includes the registration information for the Samaa Lands for registration, on behalf of Atbin Homes.

[34] On February 17, 2022, Iform and Atbin Homes entered an Assignment and Assumption of Purchase Rights Agreement ("Assignment Agreement"). The

Assignment Agreement was executed by Navid Saberi on behalf of Iform and by Farhad Atbin on behalf of Atbin Homes.

[35] In the Assignment Agreement, Iform assigned its rights to purchase the Samaa Lands to Atbin Homes. Under the Assignment Agreement, Atbin Homes agreed to assume all Iform's obligations and liabilities under the MBIA and to observe and perform those obligations in a manner provided in the MBIA.

[36] On February 17, 2022, Atbin Homes (referred to therein as "Atbin Corp") and Saberi Equity (referred to therein as "Saberi Corp") entered into a Declaration of Trust and Agency Agreement, executed by Farhad Atbin and Navid Saberi (the "Trust Agreement"). The Trust Agreement states among other terms and conditions that:

> a. Atbin Corp would take title as registered owner to the Samaa Lands and hold the Samaa Lands in trust for the use, benefit and advantage of Saberi Corp;
>
> b. Saberi Corp consented to Atbin Corp completing the registration of the Warranty Deed for the Samaa Lands as trustee;
>
> c. For the purposes of acquisition of title, Iform and Atbin Corp had entered into an Assignment, assigning the rights to the Property to Atbin Corp in trust for Saberi Corp; and
>
> d. The parties agreed to keep each other informed about matters pertaining to the Samaa Lands, their use, and development.

The Litigation and the Consent Injunctions

[37] The Plaintiffs commenced the present proceedings by Notice of Action and Statement of Claim filed on April 14, 2022. A Certificate of *Lis Pendens* was registered against title to each of the Properties on April 28, 2022. By Notice of Motion filed May 10, 2022, each Plaintiff sought an interlocutory injunction restraining the Defendants from carrying out any construction works, or construction related activities at the Property. By agreement of the parties, the May Motions were adjourned. The Purchasers filed new Notices of Motion, with hearing dates in November 2022, and the Remaining Defendants consented to Orders (the "Consent Orders") restraining the Remaining Defendants from engaging in construction works or construction related activities on the properties until the hearing dates for each of the November Motions. On November 2, 2022, counsel for the Purchasers and the Remaining Defendants appeared before me and a further Consent Order was executed extending the injunctions until the date of the present Motion.

[38] At the hearing of the Motion, counsel for the Remaining Defendants agreed that the November 2022 Consent Order continued in force until any Order resulting from this Decision is issued.

Issues

[39] The sole issue to be determined on this Motion is whether each Plaintiff has met the burden for demonstrating that an interlocutory injunction should be granted restraining Iform, Atbin Homes, Saberi Equity, and any persons acting under their direction, authority, or control, from carrying out any construction works or construction related activities at the Properties.

Legal Principles

[40] The motions before me are brought pursuant to *Civil Procedure Rule* 41 and Section 43(9) of the *Judicature Act*, RSNS 1989, c. 240 that provides the Court with the discretion to grant an injunction where it is "just and convenient that such an order should be made". *Rule* 41 does not establish specific criteria for granting an interlocutory injunction. The criteria for granting an interlocutory injunction have been stated as a tripartite analysis described by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada*, [1994] 1 SCR 311, at para. 43:

> 43 …First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits [the balance of convenience].

[41] Injunctions are discretionary and equitable remedies. Accordingly, while the above three-part framework guides the analysis, it is not exhaustive. The key consideration in each case is whether it is just and equitable in the circumstances to order an injunction. See *Marine Harvest Canada Inc. v. Morton*, 2018 BCSC 1302; Sharpe, "Injunctions and Specific Performance" (Toronto: Canada Law Book, looseleaf), at 2.17; *6056628 Canada Inc. v. 2350894 Ontario Inc.*, 2019 ONSC 1329.

[42] The Defendants submit that the Plaintiffs are not entitled to interlocutory injunctions for the following reasons:

(a) As a matter of law and equity, the Plaintiffs do not hold any title to, or have any interest in, any of the Samaa Properties, either legal or equitable, such that there is no serious issue to be tried;

(b) The remedy of specific performance as against Optimo is unavailable to the Plaintiffs because they have not met the heavy evidentiary burden on them to show that Samaa Properties are "unique", such that damages would not be an adequate alternative remedy (and given that Optimo, an insolvent company, cannot perform its obligations under the Agreements of Purchase and Sale); and

(c) The balance of convenience favours the Defendants because they continue to suffer damages arising from the injunction being in place including being prevented with the opportunity to complete construction and sale of the Samaa Properties in a timely manner.

Analysis

Part 1: Serious Question to be Tried.

[43] The first stage of the *RJR-MacDonald* test is to assess whether the moving party has raised a serious issue to be tried. The threshold is low and will be met unless the court concludes that a case is vexatious or frivolous: *Westfor Management v. Extinction Rebellion*, 2021 NSSC 93.

[44] Sopinka and Cory JJ., writing for the Court in *RJR-MacDonald*, stated, at para. 50:

> 50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.
>
> [Emphasis added]

[45] In *Sheetharbour Offshore Development Inc. v. Tusket Mining Inc.*, 2005 NSSC 307, Hall J. granted an interlocutory injunction to a purchaser, which restrained the defendant seller from selling the disputed property to a third party. In granting the injunction, the Court directed that the determination of whether there was a serious question to be tried was to be made "on the basis of common sense and an extremely limited view of the case on its merits" (para. 28). The Court reasoned that it was not the role of the application or motion judge to determine the strength of the case, as that was the role of the trial judge (para. 30).

[46] The British House of Lords in *American Cyanamid Co. v. Ethicon Ltd.,* [1975] A.C. 396 (U.K.H.L.), said, at pages 407 - 408:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing"(*Wakefield v. Duke of Buccleugh*).
>
> [Emphasis added]

[47] The Plaintiffs' say that the following are serious issues to be tried:

(a) Did the Agreements provide the Purchasers with an "interest" in the Properties, as that term is defined in the *Nova Scotia Land Registration Act*, SNS 2001, c.6 ("LRA")?

(b) Did the Remaining Defendants have actual knowledge of the Purchasers' interests?

(c) Are the Purchasers entitled to specific performance and in order to give effect to this claim, can the sale of the Properties to Atbin Homes be declared void and invalid?

Interest

[48] A significant issue in dispute is whether the Agreements created an "interest" as that term is defined under the LRA and therefore whether the Remaining Defendants had actual knowledge of the Plaintiffs' interests in the Properties.

[49] The Plaintiffs claim that at the time the Agreements were signed they obtained an equitable interest in the Properties. Their argument is based on the principal in *Lysaght v. Edwards* (1876), 2 Ch. D. 499 (Eng. Ch. Div.) that:

> [The] moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid…

[50] This principal has been cited with approval in *Roy v. Kloepfer Wholesale Hardware & Automotive Co.*, [1952] 2 S.C.R. 465 and *Clem v. Hants-Kings Business Development Centre Ltd.*, 2004 NSSC 114.

[51] The Remaining Defendants argue that the relationship between vendor and purchaser under an agreement of purchase and sale is something less than what was stated in *Lysaght*. They say that until such time as the Agreements are concluded, they are *in fieri* (pending), and no transfer of equitable title takes place. They rely on the decisions in *Robinson v. Harris,* (1892) 21 S.C.R. 390 and *Robinson v. Moffatt,* (1916) 31 D.L.R. 490 (Ont. C.A.) for this position.

[52] In response, the Plaintiffs say that the Remaining Defendants have misinterpreted the decision in *Robinson v. Harris*.

[53] I conclude that the Plaintiffs have met the burden of establishing whether the Agreements provide them with an "interest" as defined by the LRA is a serious issue to be tried on a full evidentiary record. It certainly cannot be said to be frivolous or vexatious.

Knowledge

[54] The purpose of the LRA is to "(a) provide certainty in ownership of interests in land; and (b) simplify proof of ownership interest in land." (Section 2)

[55] However, the LRA does not create a situation in Nova Scotia where only recorded interests in land are recognized. Instead, the LRA provides an explicit exception to the priority system, in instances where a registrant has actual knowledge of a pre-existing interest in the property.

[56] Section 49(1) of the LRA directs that a registered property interest will have priority over a prior interest, where:

> 49 (1) A recorded interest shall be enforced with priority over a prior interest where the subsequent interest was
>
> (a) obtained for value;
>
> (b) <u>obtained without fraud on the part of the owner of the subsequent interest;</u>
>
> (c) obtained at a time when the prior interest was not recorded; and

> (d) recorded at a time when the prior interest was not registered or recorded.
>
> [Emphasis Added]

[57] Fraud is defined under section 4(4) of the LRA as follows:

> (4) A person obtains an interest through fraud if that person, at the time of the transaction,
>
> (a) had actual knowledge of an interest that was not registered or recorded;
>
> (b) had actual knowledge that the transaction was not authorized by the owner of the interest that was not registered or recorded; and
>
> (c) knew or ought to have known that the transaction would prejudice the interest that was not registered or recorded.

[58] Section 49(1) of the LRA codifies the equitable principle that only a *bona fide* purchaser who acquires a deed from a seller without notice of a prior unregistered interest will be protected.

[59] Was Atbin Homes a *bona fide* purchaser for value without notice? The burden rests with Atbin Homes to prove that they did not have actual notice of the prior claim (*Cunningham v. Nova Scotia (Attorney General)*, [1996] N.S.J. No. 437 at para. 70. Additionally, *bona fide* purchasers cannot resort to willful blindness to avoid actual notice (*Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 (S.C.C.), para. 39).

[60] The Plaintiffs have provided the Court with evidence through the MBIA, the Assignment Agreement and the Deed Transfer Affidavit for Value, from which a trier of fact could conclude that the Remaining Defendants had knowledge of the earlier Agreements between Optimo and the Purchasers. Navid Saberi's affidavit acknowledges that, in addition to knowing of the existence of the Agreements, he knew additional details including a general idea of the purchase price and closing dates. His knowledge as sole director may be imputed to Iform and Saberi Equity. Similarly, by acting as agent for Atbin Homes when registering the Deed-Transfer Affidavit of Value, his knowledge may be imputed to Atbin Homes.

[61] There is evidence that Navid Saberi had knowledge of the Agreements. Whether Atbin Homes had actual notice of an interest in the Properties will require findings of fact based on credibility and the weight of the evidence at trial.

[62] For the requirements of this Motion, I am satisfied that the Purchasers have established that the Remaining Defendants' knowledge of the Plaintiffs' interests is a "serious issue to be tried".

Specific Performance

[63] The Defendants also assert that whether the Plaintiffs are entitled to specific performance of the Agreements does not represent a serious issue to be tried for the following reasons:

1. An order for specific performance against Optimo is these circumstances would be pointless. Optimo cannot and will never complete its obligations under the Agreements of Purchase and Sale. It is incapable of doing so. The Plaintiffs' attempts to force an insolvent company to build houses for them are frivolous.
2. There is no basis for an order for specific performance of any of the Agreements of Purchase and Sale as against any of the other Defendants. The Agreements of Purchase and Sale were between the Plaintiffs and Optimo. The Plaintiffs have no privity of contract with any of the Remaining Defendants.
3. Further, the remedy of specific performance would be unavailable to the Plaintiffs in these circumstances even if Optimo could perform its obligations under the Agreements of Purchase and Sale. This is because specific performance of an agreement of purchase and sale is typically only granted in the rare circumstances that the property claimed by the purchaser is somehow "unique". The Properties are not unique.

[64] Respectfully, the issue as to whether specific performance should be granted in this case is an issue for trial. The evidence before me does not establish that Optimo "cannot and will never" complete its obligations under the Agreements of Purchase and Sale. No evidence was obtained from Optimo or its principal, Hamid Nikkhah. Mr. Nikkhah entered into the MBIA with Mr. Saberi and could have been asked by the Defendants to provide affidavit evidence.

[65] There is no evidence that the company has been wound up or is no longer in good standing. Indeed, Mr. Nikkhah agreed in the MBIA that he and Optimo would "take all reasonable steps to defend any and all (claims by the Plaintiffs) and to settle any claims." While the evidence suggests that Optimo experienced funding problems that prevented it from completing the work agreed to with the Plaintiffs in

2021 and 2022, it is not determinable on the evidence before me that the company ceases to be. The fact that there is no privity of contract with the Remaining Defendants is not a barrier to the court making an order against Optimo and ordering the transaction between Optimo and Atbin Homes to be unwound if it finds that there was a breach of the provisions of the LRA.

[66] This argument was considered in *Winking Judge Pub Ltd. v. Donnelly Hospitality*, 2019 BCSC 336. That case concerned a dispute over a contract of purchase and sale for the assets of the Winking Judge Pub Ltd. ("WJ"). Donnelly sought to enforce the agreement and complete the transaction and applied for an interlocutory injunction preventing WJ from encumbering or disposing of assets that were the subject of the agreement. WJ argued that as a general principle, specific performance cannot be awarded where the underlying contract is incapable of being performed, and if Donnelly cannot succeed on its claim for specific performance, an injunction protecting that relief should be denied. Justice Abrioux concluded at para. 73:

> The issue as to whether specific performance should be granted can only be determined at trial. If the issue is as straight forward as WJ submits, then presumably a summary trial will be considered and, if successful from WJ's perspective, will result in the injunction being set aside.

[67] I agree with this reasoning.

[68] Similarly, it is not for me at this stage to make a determination of whether the Properties are "unique" and whether the Purchasers are entitled to specific performance. Whether a substitute home would be readily available and whether pecuniary damages would furnish an <u>adequate</u> equivalent for the loss of the bargain is an issue to be determined at trial. The evidence before me is sufficient to conclude that this a serious issue to be tried. I am not required to make a prolonged examination of the merits.

[69] I am satisfied that the Plaintiffs have met the low threshold of establishing that the right to the remedy of specific performance is a serious issue to be tried.

<u>Part 2: Irreparable Harm</u>

[70] At this stage the issue to be decided is whether a refusal to grant relief could so adversely affect the Purchasers' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the

interlocutory application. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms, or which cannot be cured. (*RJR-MacDonald*, *supra*, para. 63)

[71] Optimo has already transferred the lands to Atbin Homes. The Plaintiffs are concerned that, without an injunction, Atbin Homes may develop the Properties, and once that occurs, a Court may be unlikely to order demolition.

[72] As specified in the Plaintiffs' Affidavits, the Agreements provided them with the opportunity to have custom homes built on the Properties. If the Remaining Defendants are allowed to start construction work on the Properties, this would wholly thwart the Plaintiffs' rights to use and develop the Properties as they contracted for under the Agreements. In addition, it appears questionable at this stage that the Plaintiffs could recover any damages from Optimo.

[73] I cannot say that the Plaintiffs have fully established that the Properties are particularly singular or unique. On the other hand, I cannot say that they have not done so, either. That is a matter to be determined at trial.

[74] The Plaintiffs have established a "meaningful risk" of irreparable harm because by the time the trial is held, the Properties could be developed and sold to one or more purchasers. The ability of the Court to unwind that process would be problematic at least. In addition, there is a meaningful doubt that the harm can be cured by payment of damages. Both risks are sufficient in my view to satisfy the second stage of the test. *TBD Holdings Ltd. v. 101102382 Saskatchewan Ltd.*, 2021 SKQB 170, at paras 60-61.

<u>Part 3: Balance of Convenience</u>

[75] The courts have considered an indefinable array of elements that can be relevant at this stage of the *RJR-MacDonald* analysis. In particular, Sharpe, *supra*, at 2.14, sets out several questions that should be asked at that stage including:

> Apart from, and in addition to, the risks of monetary loss and gain, what will be the relative impact upon the parties of granting or withholding the injunction? Does the benefit the plaintiff will gain from preliminary relief outweigh the convenience to the defendant of withholding relief? Is the inconvenience to the defendant, should the injunction be granted, more substantial than the inconvenience the plaintiff will suffer if relief is withheld? "[W]hich of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits"? Would the injunction prejudice the public interest or the rights of

> parties not before the court? Would withholding the injunction result in an injustice?

[76] Justice Brown of the Ontario Superior Court of Justice in *Propurchaser.com v. Wifidelity Inc.*, 2017 ONSC 4905, stated that interlocutory injunctions are intended to preserve the *status quo* pending trial (para. 28):

> 28 As has been recognized in the jurisprudence in Canada, the proper purpose of an interlocutory injunction is to preserve or restore the status quo, not to give a party its remedy until trial: *Bailey v Medeiros*, 2015 ONSC 6733 at para 33. Interlocutory injunctions are meant to protect plaintiffs who might suffer irreparable harm before a trial, and be left with a meaningless remedy thereafter. They are granted with a view to preserving the status quo, ensuring that the subject matter of the litigation is not destroyed or irreversibly altered before trial, protecting the right of the plaintiff from being defeated by some pretrial act of the defendant: *S. Cohen Inc. v FD Apparel Limited*, 2017 ONSC 2734 at para 6, 2017 CarswellOnt 6700; *Chitel v Rothbart* (1982), 39 O.R.(2d) 513 (Ont. C.A.); *Third Chandris Shipping Co. v Unimarine SA* [1979] 2 All E.R. 972 at 978.

[77] This part of the injunction test requires me to consider which party will suffer greater harm from the granting or refusal of the injunction. Considering all the evidence, I find that the Plaintiffs would be greater inconvenienced by the denial of the injunction than would the Defendants by the granting of the injunction.

[78] The preservation of the *status quo* is a factor in determining the balance of convenience. The *status quo* means the position prevailing when the Defendants first embarked on the activities sought to be restrained: *Cyanamid*.

[79] Here the evidence is that the Defendants wish to change the *status quo*. The Properties remain as they were when Optimo ceased construction in December 2021. The evidence shows that the Defendants have and will continue to incur carrying costs with respect to the Properties. There is no evidence or assertion from the Defendants that this will cause the Defendants irreparable harm and cannot be compensated by damages. Further, there is evidence that Optimo may not be able to satisfy an award of damages. In this case, the *status quo* is preserved by granting the injunction.

Conclusion

[80] Having considered all the evidence and authorities, I reach the conclusion that it is just and equitable to grant the Plaintiffs' motions for an interlocutory injunction.

[81] Costs of the motion are set in the amount of $4,000 plus disbursements to be taxed or agreed upon and shall be payable as costs in the cause to the party successful at trial.

[82] Order accordingly.

Norton, J.