

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

10031695 MANITOBA LTD.)

(Plaintiff) Respondent)

- and -)

72230 MANITOBA LTD.)

(Defendant) Applicant)

AND BETWEEN:)

72230 MANITOBA LTD. and GLENN KARR)

(Plaintiffs by Counterclaim))

- and -)

**10031695 MANITOBA LTD. and
BONNIE WEST**)

(Defendants by Counterclaim))

A. M. Mariani
for the Applicant

E. N. Blouw
for the Respondent

Chambers motion heard:
October 24, 2024

Decision pronounced:
January 16, 2025

CAMERON JA

Introduction

[1] The defendant/plaintiff by counterclaim, 72230 Manitoba Ltd. (722), moves for leave to appeal the dismissal by the motion appeal judge of its appeal of the decision of the senior associate judge dismissing its motion

to set aside a pending litigation order (the PLO). The PLO was filed by the plaintiff/defendant by counterclaim, 10031695 Manitoba Ltd. (1003), against property owned by 722 (the property).

[2] As well, while not the subject of a formal motion during the proceedings before the senior associate judge, the motion appeal judge or this Court, 722 also moves for leave to appeal the decision of the motion appeal judge (see *10031695 Manitoba Ltd v 72230 Manitoba Ltd*, 2024 MBKB 76 [reasons]) denying its request to set aside a caveat filed by 1003 against the property in relation to the same litigation (the caveat).

[3] The parties agree, as do I, that the order dismissing the motion to set aside the PLO is an interlocutory order of a judge of the Court of King's Bench. Therefore, leave to appeal is required pursuant to section 25.2(1) of *The Court of Appeal Act*, CCSM c C240 [the *CA Act*].

[4] I would dismiss the motion for leave to appeal, including 722's request to set aside the caveat for the reasons that follow.

Background

[5] The owner of 1003 is Bonnie West (West). West and the owner of 722, Glenn Karr (Karr), had been married for approximately ten years. They separated in June 2021 and divorced in June 2022. In 2020, while West and Karr were still married, 1003 and 722 entered into two agreements regarding the property. The first was a lease agreement wherein 722 agreed to lease the property to 1003 for a period of five years (the lease). The second was an option agreement (the first option agreement) in which 722 granted 1003 an

option to purchase the property for \$850,000 at any time that 1003 had a valid lease for the property of which it was not in default.

[6] After several months of renovations, 1003 took possession of the property pursuant to the lease in June 2021. In April 2021, 1003 made an offer to purchase the property pursuant to the first option agreement (the offer). One of the issues in the litigation is the validity of the offer and whether 722 failed to comply with the terms of the first option agreement. While there are issues in the litigation regarding whether a second option to purchase agreement was entered into and the validity of two subsequent offers to purchase made by 722, it is the offer made pursuant to the first option agreement that is the subject of the PLO and the one which 1003 seeks to enforce.

[7] In March 2023, 1003 vacated the premises. The parties dispute whether 1003 defaulted on paying the rent and abandoned the property or whether 722 locked 1003 out. Either way, 722 terminated the lease on March 17, 2023.

[8] On March 24, 2023, 1003 filed the caveat against the property, claiming an interest in it on account of the first option agreement.

[9] On April 3, 2023, 1003 filed the statement of claim that is the subject of these proceedings. At the same time, it filed an *ex parte* motion for a PLO, which was granted by the senior associate judge on April 4, 2023 (see MB, *King's Bench Rules*, Man Reg 553/88, r 42.01(1) [*KB Rules*]).

[10] On April 24, 2023, 722 filed a notice of motion to discharge the PLO pursuant to r 42.02(1) of the *KB Rules*. While the notice of motion makes no

mention of discharge of the caveat, 722 attempted to raise the issue with the senior associate judge, who dismissed it. It was her view that an associate judge does not have the jurisdiction to remove caveats under the relevant legislation (see *The Real Property Act*, CCSM c R30, ss 163(1)-(3) [the *RPA*]).

Decision of the Motion Appeal Judge

[11] 722 appealed the decision of the senior associate judge to the Court of King's Bench. Despite the notice of appeal only being in relation to the PLO, 722 disputed and the motion appeal judge considered the validity of the caveat.

[12] Regarding the motion to discharge the PLO, the motion appeal judge agreed with the senior associate judge that there was full and fair disclosure by 1003 at the *ex parte* hearing. However, he disagreed with her that the property was sufficiently unique such that 1003 would be entitled to the equitable remedy of specific performance if it had established its claim.

[13] 722 claimed that it had received an offer to purchase the property. The motion appeal judge was of the view that damages would be an adequate remedy and that 1003's interests would be protected by holding fifty per cent of the sale price of the property in trust pending the outcome of the litigation. He was also of the view that it was a significant hardship to 722 to maintain a vacant property pending the litigation of the claim, which he thought would take several years.

[14] However, despite his “inclination to remove the PLO” (*reasons* at para 45), he noted that the caveat registered pursuant to the *RPA* remained a “significant obstacle” to the sale of the property (*ibid*).

[15] Citing this Court’s decision in *Forsythe v Labossiere*, 2022 MBCA 28 [*Forsythe*], the motion appeal judge noted that the Court did not have jurisdiction pursuant to section 163 of the *RPA* to discharge a caveat once proceedings had been commenced, absent an abuse of process. In this case, 1003 had filed a statement of claim regarding its interest in the property and the motion appeal judge found no abuse of process.

[16] Based on the above, the motion appeal judge found that there was “no point” (*reasons* at para 50) in discharging the PLO, as the caveat effectively prevented the sale of the property even if the PLO was removed. Thus, he dismissed the appeal of the dismissal of the motion to discharge the PLO.

Test for Leave to Appeal

[17] The requirement for leave to appeal an interlocutory order is set out in section 25.2(1) of the *CA Act*. It states:

Leave required for interlocutory appeals

25.2(1) Subject to subsection (2), an appeal must not be made to the court with respect to an interlocutory order of a judge of the Court of King's Bench unless leave to appeal is granted by a judge or the court.

for

Appels interlocutoires — autorisation requise

25.2(1) Sous réserve du paragraphe (2), il ne peut être interjeté appel devant le tribunal d'une ordonnance interlocutoire rendue par un juge de la Cour du Banc du Roi que si un juge ou le tribunal a accordé une autorisation d'appel.

[18] While there are exceptions listed in section 25.2(2) of the *CA Act*, none of them are applicable in this case.

[19] In *Knight v Daraden Investments Ltd*, 2022 MBCA 69 [*Knight*], Pfuetzner JA listed the criteria that an applicant must satisfy to obtain leave to appeal. They are “(1) first, the proposed ground of appeal must have arguable merit; and (2) second, the proposed ground of appeal must be of sufficient importance to warrant the attention of a full panel of this Court” (*ibid* at para 22) [emphasis in original].

Positions of the Parties

[20] While it proposes three grounds of appeal, 722's position is that the motion appeal judge erred in concluding that he did not have the jurisdiction to discharge the caveat and that he erred in finding that it effectively prevented the sale of the property even if the PLO was removed.

[21] Regarding the caveat, 722 argues that *Forsythe* is distinguishable. It also argues that *Forsythe* established that, in certain circumstances,

discharge of a caveat had in other cases been granted pursuant to other proceedings such as an injunction or summary judgment.

[22] It argues that the existence of the caveat and whether the removal of the PLO would “clear the path” (*reasons* at para 45) for the sale of the property were irrelevant factors in the determination of whether 722 had met the test for discharge of a PLO as set out in r 42.02(1) of the *KB Rules*.

[23] 1003 submits that the issue of discharge of the caveat was not properly before the senior associate judge or the motion appeal judge. It points out that neither the motion to discharge the PLO nor the appeal to the Court of King’s Bench mentions the caveat. Additionally, it notes that 722 had applied for discharge of the caveat on June 7, 2023, and that application has not been resolved. Therefore, it argues that consideration of the caveat in these proceedings breaches the principle of multiplicity of proceedings.

[24] I pause to note that at the hearing of this matter, 722 indicated that it had intended to withdraw its application to discharge the caveat in the Court of King’s Bench, thereby resolving the issue of multiple proceedings.

[25] In any event, 1003 argues that the motion appeal judge made no error when he concluded that, in these circumstances, he had no jurisdiction to discharge the caveat. Additionally, 1003 maintains that 722’s proposed grounds of appeal are not of sufficient importance to merit the attention of a full panel of this Court.

Analysis and Decision

The Caveat

[26] Applying the test for merit, I conclude that there is little merit in 722's argument that the motion appeal judge erred in law in finding that he was bound by this Court's decision in *Forsythe*. At issue in *Forsythe* was the jurisdiction of the Court to discharge a caveat under section 163(1) of the *RPA*, which states:

Application to discharge caveat

163(1) Except in the case of a caveat filed by the district registrar, the applicant or owner may, at anytime before the caveator has taken proceedings thereunder, apply to the court calling upon the caveator to show cause why the caveat should not be discharged.

Mainlevée de la notification d'opposition

163(1) Sauf dans le cas où le registraire de district dépose une notification d'opposition, le requérant ou le propriétaire peut, à tout moment avant que l'opposant ne forme recours pour faire valoir la notification d'opposition, demander au tribunal de mettre l'opposant en demeure d'exposer les raisons pour lesquelles mainlevée de la notification d'opposition ne devrait pas être accordée.

[27] In *Forsythe*, this Court reinforced its decision in *Bojkovic v Rentz Bros Inc*, 2010 MBCA 17 [*Bojkovic*], that the remedy in section 163(1) of the *RPA* is only available until proceedings under the caveat are commenced. In this case, a statement of claim has been filed.

[28] However, in *Forsythe*, Spivak JA mentioned that there were cases wherein other avenues were relied on to pursue a discharge of a caveat. She stated (*ibid* at para 36):

I do acknowledge, however, that there are cases where parties have pursued a discharge of a caveat by seeking a mandatory injunction (see *Di Castri* at section 14:1; *80 Wellesley St East Ltd v Fundy*

Bay Builders Ltd (1972), 25 DLR (3d) 386 (Ont CA); and *Kathryn Farms Ltd v 1572548 Alberta Ltd*, 2022 ABCA 21). As well, *North American Life Assurance Co v DME Foods Ltd*, 1994 CarswellMan 565 (QB), is an example of the use of r 14.05(2)(c)(v) of the *QB Rules* in the caveat context. It should also be noted that caveats have been discharged pursuant to a motion for summary judgment (see *Perfanick v Torre-De-Oro Inc et al*, 2010 MBQB 171; and *Kathryn Farms*).

[29] 722 argues that the above applies in this case. In support of its argument, it simply states that equity applies to allow for the Court to discharge the caveat, as the test for discharge of a caveat is the same as for discharge of a PLO. However, 722 has not developed this argument, nor was it fully developed before the motion appeal judge. As in *Forsythe* at para 37, the record would not permit a full panel of this Court to decide the matter on the other proceedings referred to above and it would be inappropriate to do so.

[30] Furthermore, I disagree with 722 that the argument it advances is of sufficient importance to be heard by a full panel of this Court. 722 argues that the law regarding discharge of caveats is unsettled in Manitoba based on the differing results in the cases of *Forsythe* and *Laba v 4027183 Manitoba Ltd*, 2014 MBCA 107 [*Laba*], where the Court allowed an appeal of an order refusing to discharge a caveat imposing an order discharging it.

[31] *Laba* is distinguishable. I would start by noting that it was a decision given from the bench and is of limited precedential value. In that case, the plaintiff filed a caveat claiming an interest in the property in question, pursuant to an agreement. However, the motion judge found that, on the plaintiff's own admission, there was no agreement regarding the land in

question. In other words, the only evidence relied on by the plaintiff to support the caveat was non-existent. It was on that basis that this Court granted an order discharging the caveat. No mention was made of *Bojkovic* or section 163(1) of the *RPA*.

Reliance on the Caveat to Dismiss the Motion to Discharge the PLO

[32] Discharge of a PLO pursuant to r 42.02(1) of the *KB Rules* is a discretionary decision. As such, it is entitled to deference absent reversible errors of fact or law or where the decision is so clearly wrong as to amount to an injustice (see *Perth Services Ltd v Quinton*, 2009 MBCA 81 at para 28).

[33] First, while I agree that it is arguable that the validity of the caveat was not properly before him, I am of the view that the motion appeal judge was entitled to consider the existence of it in his consideration of whether to discharge the PLO. In other words, the motion appeal judge, in exercising his discretion, was not limited to only considering the factors listed in r 42.02(1) of the *KB Rules*.

[34] However, having found that the criterion in r 42.02(1)(b) of the *KB Rules* had been met, as the interests of 722 could be adequately protected by another form of security, it is arguable that the motion appeal judge may have erred in the exercise of his discretion to the extent that his finding is inconsistent with the result. Having said that, it appears that the motion appeal judge found that granting such an order would be pointless or moot given the circumstances of this case.

[35] Regardless of whether the proposed grounds of appeal are of sufficient merit (which I question), I am of the view that they are not of sufficient importance to merit the attention of a full panel of this Court.

[36] In *Knight*, the factors to be considered regarding the importance of proposed grounds of appeal were identified to be (1) whether the grounds raised a novel or unsettled point of law, (2) whether the resolution of the issue will likely affect the determination of disputes between others, and (3) the significance of the order to the course or outcome of the proceedings (see para 25).

[37] In my view, while the decision of the motion appeal judge has the effect of hampering the ability of 722 to sell the property, this is mitigated somewhat by the fact that negotiations have been ongoing regarding the terms on which 1003 would be agreeable to the sale of the property by 722. The parties do not appear to be too far off.

[38] Furthermore, a decision regarding the PLO will not decisively determine whether 1003 has an interest in the property, nor will it change the fact that the sale of the property will continue to be affected by the caveat.

[39] Finally, I am of the view that the issues raised are specific to this litigation, do not raise a novel or unsettled point of law and are not of significance to the determination of disputes between others.

[40] The parties advised that trial dates have been set for March 2026. I would encourage them to focus on the steps required to ready the action to proceed on those dates.

Conclusion

[41] In the result, I would dismiss the motion for leave to appeal with costs to 1003.

JA