COURT OF APPEAL FOR ONTARIO

CITATION: 1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd., 2025 ONCA 56
DATE: 20250127
DOCKET: COA-23-CV-1378 & COA-24-CV-0016

Sossin, Madsen and Pomerance JJ.A.

DOCKET: COA-23-CV-1378

BETWEEN

1711811 Ontario Ltd. and
Olga Maria Paiva, operating as Adline

Plaintiffs (Appellants)

and

*Buckley Insurance Brokers Ltd., *Robert Buckley
*1730849 Ontario Ltd., *Corporation of the Town of Newmarket, Lake Simcoe Region Conservation Authority and *1979286 Ontario Inc.

Defendants (*Respondents)

DOCKET: COA-24-CV-0016

AND BETWEEN

*Buckley Insurance Brokers Ltd., *Robert Buckley
*1730849 Ontario Ltd., Corporation of the Town of Newmarket,
Lake Simcoe Region Conservation Authority and *1979286 Ontario Inc.

Plaintiffs by Counterclaim
(*Appellants)

and

1711811 Ontario Ltd. and
Olga Maria Paiva, operating as Adline

Defendants by Counterclaim
(Respondents)

Sara J. Erskine, for the appellants (COA-23-CV-1378) and respondents (COA-24-CV-0016), 1711811 Ontario Ltd. and Olga Maria Paiva, operating as Adline

Jonathan Rosenstein, for the respondents (COA-23-CV-1738) and appellants (COA-24-CV-0016), Buckley Insurance Brokers Ltd., Robert Buckley, 1730849 Ontario Limited, and 1979286 Ontario Inc.

J. Murray Davison, K.C. and Kiri McDermott-Berryman, for the respondent, the Corporation of the Town of Newmarket

Heard: December 18, 2024

On appeal from the judgment of Justice Howard Leibovich of the Superior Court of Justice dated November 23, 2023, with reasons at 2023 ONSC 6541, and from the costs order dated March 11, 2024, at 2024 ONSC 1470.

Sossin J.A.:

OVERVIEW

[1] This dispute involves an easement that has been the source of ongoing conflict between neighbours in Newmarket for over 15 years.

[2] Olga Maria Paiva's company, 1711811 Ontario Ltd. (the "Paiva appellants" or "Ms. Paiva"), owns a mixed commercial residential building in Newmarket, Ontario. Robert Buckley's company, 1730849 Ontario Ltd. (the "Buckley Group" or "Mr. Buckley"), owns an adjacent commercial building, which is subject to an easement in favour of the Paiva appellants. The easement consists of a tunnel

located on the Buckley Group's property recorded in a Grant of Right-of-Way in 1957 (the "1957 Deed"). Using this tunnel, and therefore use of the easement, is necessary for the Paiva appellants to access their loading dock.

[3] In 2014, Ms. Paiva launched proceedings against the Buckley Group and the Corporation of the Town of Newmarket (the "Town of Newmarket"), asserting that Mr. Buckley substantially interfered with her easement rights, and that this interference was enabled by the Town of Newmarket. She argued that Mr. Buckley made changes to the size of the tunnel and blocked the tunnel by parking there and allowing other tenants to park there. These changes allowed more shipping and receiving and garbage pickups from the tunnel.

[4] Mr. Buckley was allowed to make changes to the tunnel pursuant to a memorandum of understanding he signed with the Town of Newmarket on June 30, 2010, for the purpose of enabling development. Ms. Paiva asserted that neither Mr. Buckley or Newmarket consulted with her before signing the memorandum, and that Newmarket continues to license construction permits to Mr. Buckley that allow him to make changes that substantially interfere with her easement rights.

[5] Mr. Buckley counterclaimed and asserted that Ms. Paiva had intentionally interfered with his property rights by illegally parking on his parking pad. In response, Ms. Paiva asserted that her ability to park is ancillary to her easement

rights. Mr. Buckley argued that this dispute is due to Ms. Paiva's false belief that he has no right to use the tunnel and Ms. Paiva had not pointed to any actual interference with her ability to access her loading dock.

[6] The trial judge dismissed the Paiva appellants' claim as against Newmarket. With respect to the Buckley Group, the trial judge found that there was no substantial interference with the Paiva appellants' easement, but found that Mr. Buckley did substantially interfere with Ms. Paiva's right-of-way on the various occasions when he parked in the tunnel and allowed others to park in the tunnel. The trial judge held that a permanent injunction was warranted to ensure no vehicles parked in the tunnel blocking the Paiva appellants' access rights. The trial judge awarded costs in favour of the Buckley Group.

[7] The Paiva appellants appeal, principally on the basis that the trial judge erred in his finding of no substantial interference with the easement, and they also seek leave to appeal the award of costs against them.

[8] The Buckley group appeals the imposition of the permanent injunction and its scope.

[9] For the reasons that follow, I would dismiss both the appeals.

BACKGROUND FACTS

The easement

[10] The trial judge described the history of the easement in some detail, which I would adopt here:

> [10] Mr. Buckley's building, 247 Main St., runs from Main Street west to east down across an elevation change and then further across to the other (east) side of the Holland River. The building spans the river. Ms. Paiva's building, at 255 Main St., is two doors south of Buckley's building at 247 Main St. and also descends a level, but does not cross the river. On the west side of the Holland River, there is a tunnel through the lower level of Mr. Buckley's building that allows for vehicular traffic to pass through the middle of Mr. Buckley's building and access Ms. Paiva's building. The tunnel is the sole means of preserving access to Ms. Paiva's shipping/loading docks at 255 Main St.
>
> [11] The location of the easement rights regarding Ms. Paiva's building (building 255 Main St.) was set out in Mr. de Rijcke's report. Mr. de Rijcke was qualified on consent as an expert in investigating and determining the existence, location and boundaries of easements, rights-of-way, instruments, properties and boundaries of water. His report was accepted by the defence. He concluded that the land at 255 Main St., Newmarket, is the dominant owner of an easement in the nature of a right-of-way, in common with others entitled thereto, over a strip of land about 20 feet wide, extending north from the north boundary of 255 Main St. lands, to the south end of a lane leading further north to Timothy Street. The two walls of the easement are not perfectly parallel. The right-of-way can be seen in the yellow strip in Appendix A.
>
> [12] Mr. de Rijcke's report helpfully sets out the history of the various deeds that led up to the 1957 deed that granted the easement at issue.

[13] On September 6, 1933, an indenture between the then-owners on the land granted a right-of-way through the property that lies between 247 Main St. and 255 Main St. On June 9, 1954, the then-owners of 247, 253, and 255 Main St. agreed that the then-owner of 247 Main St., Charles Bondi, could erect a second story that could extend over the right-of-way over the easterly 20 feet of the westerly 100 feet of the lands in the rear of the building at 247 Main St., provided that the addition would cover the rights-of-way 12 feet above the existing grade and interfere in no other way.

[14] On August 12, 1954, the then-owner of 247 Main Street, Charles Bondi, sold 247 Main St. to Loblaws Groceterias Co., Limited ("Loblaws"). The indenture of sale provided that the conveyance to Loblaws of the lands was subject to the rights-of-way over the lands to a clearance of twelve feet from ground level.

[15] The second story erected on 247 Main St. extended over the rights-of-way in favour of each of 255 and 253 Main St.. The second story created the tunnel through Mr. Buckley's building directly to the shipping dock of Ms. Paiva's building at 255 Main St.

[16] The last deed that addressed the easement was Instrument 16344A dated December 18, 1957, from Loblaws to Frank Bondi. It provided:

> …their servants, agents, workmen and all other persons by them duly authorized, a free and uninterrupted right-of-way in common with all other persons entitled thereto for persons, animals, and vehicles, in, over, along and upon that certain parcel of land described as follows…

[17] The height of the easement is expressed as:

> The said right-of-way shall be limited upwards in height to the bottom face of the building erected by the grantor in the year 1957 where the said building extends over

> part of the said right-of-way as shown on sketch of survey dated November 18, 1957, prepared by WS Gibson & Sons, OLS, and attached hereto.
>
> [18] The maintenance of the right-of-way is expressed as follows:
>
> > The grantor for itself, its successors and assigns covenants and agrees with the grantee, his heirs, executors, administrators and assigns that the said grantor shall at all times maintain the said right-of-way in its present condition and location.
>
> [19] The property at 253 Main St., just north of 255 Main St., was granted the exact easement.
>
> [20] On October 31, 2006, Ms. Paiva purchased 255 Main St. In the fall of 2008, Mr. Buckley purchased the property at 247 Main St. On September 11, 2017, Mr. Buckley bought the property at 253 Main St.

[11] The parties do not appear to dispute the trial judge's descriptive account of the easement.[1]

Procedural Background

[12] The history of proceedings between the parties is lengthy and reflects the lack of trust and cooperation between the parties, and in some cases, the failure to abide by court orders.

[1] The Paiva appellants point out that the trial judge's later reference at para. 91 to the Paiva appellants using "the tunnel crossing 253 Main Street to reach their loading dock at 255 Main Street" is incorrect. That portion of the road is open air.

(1) Pollak J.'s order

[13] In April 2009, Ms. Paiva and her husband noticed construction work being done around the tunnel.

[14] Mr. Buckley sent Ms. Paiva a fax on May 12, 2009, stating that repairs to the tunnel would begin that day and that the tunnel would be blocked.

[15] Ms. Paiva brought an injunction on May 15, 2009, to block the construction.

[16] On May 20, 2009, Pollak J. issued a consent order that allowed the construction but that required Mr. Buckley to maintain the tunnel's width and height, which stated:

> 1. THIS COURT ORDERS that the clearance height and width of the right of way described as Parts 3, 4, and 5 on Plan 65R-7394 remains the same as existed prior to construction work on the laneway by the Respondents.
>
> 2. THIS COURT ORDERS there will be no material change to the right of way that will restrict access to 255 Main Street by delivery/courier cube-vans and smaller vehicles, as existed prior to the said construction work on the right of way by the Respondents.
>
> 3. THIS COURT ORDERS construction of the right of way by the Respondents will be carried out in a way to preserve vehicular access to 255 Main Street by delivery/courier cube-vans and smaller vehicles during business hours (9:00 a.m. to 5:00 p.m.), Monday to Friday.
>
> 4. THIS COURT ORDERS that the Respondents shall provide the Applicants with written notice not less than 24 hours in advance, of any interruption of the said vehicle access during business hours, which shall not exceed

> 120 minutes and shall not exceed one interruption per day.

(2) Himel J.'s order

[17] In 2012, Ms. Paiva brought a motion seeking to find Mr. Buckley in contempt of Pollack J.'s May 2009 order, and to enforce their right to have uninterrupted access to their building. Stitson J. made an interim order in December 2012.

[18] In May 2013, Himel J. heard the motion, and imposed a permanent injunction favourable to Ms. Paiva.

[19] In 2014, that injunction was set aside on appeal to this court, on the basis that there was no proceeding at the time underlying the motion for the injunction: see *1711811 Ontario Ltd. (AdLine) v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 DLR (4th) 643 ("*1711811 Ontario Ltd. (AdLine) (2014)*").

(3) O'Marra J.'s order

[20] On April 11, 2014, Ms. Paiva brought a new motion for an interim and interlocutory injunction. On consent, O'Marra J. made the following order:

> (a) The parties are not allowed to park in the laneway, except:
>
> > (i) while it is taking a delivery from or making a delivery to either the Adline Building or the Buckley Building; and
> >
> > (ii) parked as reasonably close to the laneway walls; and
> >
> > (iii) for no longer than 30 minutes; and

> (iv) after a delivery has been made no other vehicle can begin a delivery until any vehicle waiting to leave the area immediately south of the laneway has driven through the laneway northward; or 2) any vehicle waiting to access the area immediately south of the laneway has driven through the laneway southward.

[21] O'Marra J. also set out a detailed schedule, on consent, regarding when, irrespective of whether the above conditions were complied with, Mr. Buckley was allowed to receive deliveries. Justice O'Marra also required Mr. Buckley to provide Ms. Paiva with 72 hours notice for construction to the laneway structure. O'Marra J. further ordered that Mr. Buckley not perform any construction to the laneway structure that would have the effect of materially diminishing the size of the laneway.

(4) Akhtar J.'s July 16, 2015 order

Ms. Paiva brought a further contempt motion claiming that Mr. Buckley was not complying with the terms of O'Marra J.'s order. On July 16, 2015, Akhtar J. issued an order continuing the above restrictions on parking and the requirement that notice be given for any construction work. Akhtar J. also ordered:

> 1) Mr. Buckley shall reasonably advise all of the [Buckley Group] of the terms of this order.
>
> 2) Mr. Buckley shall be responsible for ensuring compliance with the terms of this order by all [the Buckley Group].

> 3) That garbage collection in the laneway is permitted so long as it occurs no later than 10:00 a.m. and so long as Ms. Paiva is notified; and
>
> 4) Mr. Buckley shall prohibit all [the Buckley Group] from using the fire door at the south end of the eastern wall of the laneway for any purpose other than emergency uses, including for garbage removal or shipping/receiving.

[22] Finally, in November 2017, Mr. Buckley brought a motion to stop the Paiva appellants from parking on the parking pad at 253 Main St. and to require Ms. Paiva and the Paiva appellants to pay for the easement's upkeep out of their own pocket. Ms. Paiva brought a cross-motion from obstructing or altering the right-of-way and requiring the removal of all obstructions and modifications to the 253 Main St. right-of-way. Due to procedural and scheduling delays, the trial was not heard until May 2023. On November 28, 2023, the trial judge released the judgment that is the subject of this appeal.

Decision Below

[23] The trial judge made findings with respect to the following: 1) the scope of the easement in favour of Ms. Paiva, 2) whether the record supported a conclusion that the Buckley Group engaged in substantial interference of the easement, 3) the liability of the Town of Newmarket, and 4) what remedy would be appropriate in the circumstances, including to address rights ancillary to the easement, such as parking.

(1) Scope of the easement

[24] The trial judge found that Ms. Paiva has the right to an uninterrupted right-of-way through the tunnel to her property. The language of this easement, recorded in the 1957 Deed, included “a free and uninterrupted right-of-way in common with all other persons entitled thereto for persons, animals and vehicles, in, over, along and upon that certain parcel of land described as follows…”. Accordingly, the trial judge found that this right-of-way means Ms. Paiva cannot be blocked from accessing her property apart from transitory interruptions that naturally occur when sharing a right-of-way with others. Given the width of the tunnel (20 feet), the trial judge also found that no one can park in the tunnel without causing at least a partial obstruction to access.

(2) Substantial interference

[25] The trial judge noted that substantial interference turns on the instrument creating the easement and the factual circumstances: see *Laurie v. Winch*, [1953] 1 S.C.R. 49; *MacKenzie v. Matthews* (1999), 180 D.L.R. (4th) 674 (Ont. C.A.); *Weidelich v. de Koning*, 2014 ONCA 736, 122 O.R. (3d) 545. The significance of the encroachment depends on its impact on the easement’s reasonable use. The dominant owner is entitled to every reasonable use of the right-of-way for its granted purpose.

[26] The trial judge found that Mr. Buckley did not substantially interfere with Ms. Paiva's easement rights by making changes to the height and dimensions to the tunnel that allowed more shipping and receiving. Supposing the Paiva appellants were entitled to use a tunnel with a minimum ceiling height of 12 feet (which was not explicit in the 1957 Deed), the Buckley Group's changes to the tunnel only appeared to lower the ceiling height by two inches. The trial judge rejected this as a substantial interference.

[27] Nevertheless, the trial judge found that the other physical changes to the tunnel (e.g., installing double steel exit doors, converting a window into a delivery bay, installing an emergency exit) were found to not be interferences per se, but rather the resulting increased use of the tunnel from those changes. Ms. Paiva submitted an affidavit detailing numerous incidents of trucks and construction materials in the tunnel since 2011.

[28] The trial judge found that only a handful of incidents over the past 13 years impacted Ms. Paiva's business. He did not view these isolated incidents as substantially interfering with Ms. Paiva's easement rights, but agreed that Mr. Buckley must provide the Paiva appellants with reasonable notice of construction and ensure that construction materials do not block access to the tunnel.

[29] However, the trial judge found that Mr. Buckley did substantially interfere with Ms. Paiva's right-of-way on the various occasions that he parked in the tunnel and allowed others to park in the tunnel. Since the tunnel is only 20 feet wide, parking in the tunnel will either block or partially block access to Ms. Paiva's loading dock and thus substantially interfere with her right-of-way. The trial judge found it was Mr. Buckley's responsibility to keep the tunnel clear of parked cars.

[30] The trial judge clarified that this interference does not include temporary parking associated with a truck receiving or delivering items, but permanent parking that goes beyond this. He explained that if cars are blocking access to Ms. Paiva's loading dock at the moment a vehicle is attempting to reach her dock, it is consistent with Ms. Paiva's easement rights to ask for those cars to move. He concluded that her easement rights do not include the right to ask for cars to move if there is only a risk that a future delivery person may not be able to access her loading dock.

(3) Liability of Newmarket

[31] The trial judge found the Town of Newmarket was not liable for any interference to Ms. Paiva's easement rights by issuing permits that allowed Mr. Buckley to make physical changes to the tunnel. Since the trial judge already reasoned that Mr. Buckley's increased use of the tunnel due to these physical

changes was not a substantial interference to Ms. Paiva's easement rights, he dismissed the claim against Newmarket.

(4) Remedy

[32] The trial judge found the appropriate remedy was an injunction preventing anyone from parking in the tunnel and an injunction requiring Mr. Buckley to remove any parked cars. Ms. Paiva sought damages for nuisance in the amount of $210,000 ($25,000 per year for 13 years) reflecting the alleged decrease in value of her property, but the trial judge found this was not an appropriate case for monetary damages for two reasons: first, although not "blameless", Mr. Buckley did not engage in deliberate, significant, and repeated interference with Ms. Paiva's easement rights; and second, the property appraisal evidence submitted by Ms. Paiva's expert was very subjective and fraught with difficulties.

(5) Ancillary right to parking

[33] Finally, the trial judge found that the easement granting Ms. Paiva a right-of-way through the tunnel does not include a right to park in the tunnel or on the adjacent parking pad. Ancillary rights to an easement must be necessary for the use or enjoyment of the easement, not just convenient or reasonable: *Fallowfield v. Bourgault*, 68 O.R. (3d) 417 (Ont. C.A.), at para. 11. Ms. Paiva failed to establish why anything more than transitory parking is part of the easement's demonstrated

purpose/necessary to allow vehicles to access their loading dock for shipping and delivery.

(6) Costs

[34] In a subsequent decision, the trial judge awarded $76,670.88 in costs to the Town of Newmarket, and $80,895.34 in costs and $20,284.83 in disbursements to the Buckley appellants. He found that the Buckley appellants were the more successful party but reduced their submitted costs amount to reflect the Paiva appellants' success in getting the parking injunction.

ISSUES

[35] Both the Paiva appellants and the Buckley Group brought appeals arising from the trial judge's decisions. Strictly speaking, therefore, these are companion appeals rather than an appeal and cross-appeal.

[36] The Paiva appellants raise the following issues in their appeal:

1) Did the trial judge err in interpreting the nature and extent of the easement?
2) Is the consent order of Pollak J. dated May 20, 2009, in full force and effect?
3) Did the trial judge misapply the test for substantial interference with easement rights?
4) Did the trial judge err in dismissing Paiva appellants' claim in nuisance against the Town of Newmarket?

5) Did the trial judge err in finding that the Paiva appellants do not have ancillary rights to parking?
6) If leave to appeal the costs decision is granted, did the trial judge err in principle in exercising his discretion in denying the Paiva appellants their costs of the action?

[37] The Buckley Group raises the following issues in their appeal:

1) Are the trial judge's reasons for the parking injunction inadequate?
2) Is the trial judge's parking injunction not carefully tailored, minimizing of burdens, and grounded in evidence?

ANALYSIS

Standard of review

[38] According to the Paiva appellants, this appeal raises issues that involve the application of legal tests and questions of law, which attract a correctness standard of review. Further, the appellants allege the trial judge misapprehended or failed to appreciate the evidence in the record, leading to an improper exercise of the trial judge's discretion, which should not be entitled to deference as a result: *Housen v. Nikolaisen*, 2002 SCC 33, 2 S.C.R. 235, at para. 35. Finally, the Paiva appellants argue that where the appeal raises questions of mixed fact and law, the standard of review is unreasonableness, while challenges to factual findings require errors that are palpable and overriding: *Housen*, at para. 36.

[39] The Buckley group argue the trial judge's interpretation and application of the grant of easement is entitled to deference.

[40] In this case, the divergence between the parties concerns how the errors are characterized, not the standard of review applicable to those errors.

[41] One point relating to the standard of review merits clarification. As this court has held, "[t]he construction of an easement is a question of mixed fact and law which means that, absent an extricable error of law, or a palpable and overriding error on a question of fact, an application judge's interpretation of a deed is owed deference on appeal": *Reddick v. Robinson*, 2024 ONCA 116, 493 D.L.R. (4th) 134, at para. 13, leave to appeal refused, [2024] S.C.C.A. No. 41230, citing *Yekrangian v. Boys*, 2021 ONCA 629, 462 D.L.R. (4th) 129, at para. 19; and *Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corp.*, 2020 SCC 29, [2020] 3 S.C.R. 247, at para. 101.

[42] Further, this court has reiterated that the principles of contractual interpretation, as set out in the Supreme Court decision of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, apply to the interpretation of an easement: *Reddick*, at para. 15, citing *Herold Estate v. Canada (Attorney General)*, 2021 ONCA 579, 157 O.R. (3d) 561, at para. 44.

The Paiva Appeal

(1) The trial judge did not err in setting out the scope of the easement and finding no substantial interference

[43] The parties agree that the trial judge properly instructed himself on the law regarding the construction of an easement, relying on this court's elaboration of the proper approach in *Raimondi v. Ontario Heritage Trust*, 2018 ONCA 750, 96 R.P.R. (5th) 175, at para. 11. That approach involves focusing on the text of the easement (where, as here, it is expressed in a written agreement). The court asks, "[w]hat is the agreement that the original parties made that now binds their successors?"

[44] In light of the trial judge's interpretation of the text of the easement in this case, he concluded, at para. 46:

> Ms. Paiva has the right to an uninterrupted access through her tunnel to her property at 255 Main St. This right-of-way means that Ms. Paiva cannot be blocked from accessing her property apart from transitory interruptions that naturally occur when sharing a right-of-way with others. Given the width of the tunnel, no one can permanently park on the laneway.

[45] After reviewing the extensive record of allegations made by the Paiva appellants, he found that over 13 years of alleged obstructions, "only a handful of instances" that impeded Ms. Paiva's easement rights. He concluded that these

incidents, whether viewed individually or cumulatively, did not constitute substantial interference.

[46] The Paiva appellants argue the trial judge erred by misconstruing the test of substantial interference and by misapprehending this evidence in the record.

[47] The Paiva appellants assert that, in interpreting the easement, the trial judge incorrectly interpreted the words in the easements granting “a free and uninterrupted right-of-way in commons with all other persons entitled thereto” to extend to the owner of 247 Main Street (now the Buckley Group) as one of the “other persons entitled to”. The Paiva appellants argue that, in coming to this conclusion, the trial judge failed to give the words their ordinary meaning in the context of the circumstances at the time of the grant, because they note that at the time the easement was granted, the owner of 247 Main Street (Loblaws) did not use the tunnel.

[48] I would reject this submission. It was open to the trial judge to adopt the interpretation to the easement which included the rights of access of the owner of the property. The trial judge referred to the principle, restated in *Raimondi* (at para. 17), that the “servient tenement” who owns the land over which the easement is granted continues to retain ownership rights and the right of access over that land. I see no error in applying this principle in the context of the easement before the trial judge.

[49] With respect to substantial interference, again, the parties agree that the trial judge stated the test properly, at para. 47:

> The test for an actionable encroachment is whether there is a 'substantial interference' with the use and enjoyment of the easement for the purpose identified in the grant: *Oakville (Town) v. Sullivan*, [2021 ONCA 1, 23 R.P.R. (6th) 175]; *Weidelich v. de Koning*, 2014 ONCA 736, 122 O.R. (3d) 545, at paras. 9-11; *Fallowfield*, at paras. 40 and 41. The dominant owner may only sustain a claim predicated on substantial interference with reasonable use.

[50] The trial judge confirmed that there is no "mechanical" way to determine what constitutes an unreasonable demand upon an easement or a substantial interference with the rights conferred by an easement. Each case depends upon both an interpretation of the easement and the factual circumstances.

[51] Applying this framework, the trial judge rejected the Paiva appellants' argument that modest changes that may have taken place to lower the height of the tunnel by two inches did not constitute substantial interference by the Buckley Group because the original easement did not stipulate a specific height for the tunnel and there was no evidence the changes prevented any vehicle from reaching the Paiva appellants' building. The trial judge concluded, at para. 73: "Mr. Buckley owns the tunnel. He is also required to maintain it. He is allowed to complete construction on the tunnel as long as he does not materially alter its dimensions. There is no evidence that he has done so."

[52] According to the appellants, the trial judge failed to apply the substantial interference test to the record before him and instead asked whether the Paiva appellants had evidence that the various obstructions caused by the Buckley Group's use of the tunnel affected the Paiva appellants' business (for example, due to a missed delivery or lost customer).

[53] I would not accept that the trial judge committed a palpable and overriding error in his assessment of substantial interference on the record. His conclusions on the record were open to him and are entitled to deference.

[54] For this same reason, I would reject the Paiva appellants' submission that they are entitled to monetary damages because of the nuisance generated by Mr. Buckley's conduct and the consistent pattern of Mr. Buckley's disregarding court orders. These allegations were addressed by the trial judge in his reasons.

[55] The trial judge rejected that Mr. Buckley "deliberately, significantly and repeatedly interfered with [the Paiva appellants'] easement rights" or that Mr. Buckley was engaged in a "campaign of harassment." Rather, the trial judge found Mr. Buckley had parked in the tunnel occasionally and permitted others to do so, which he concluded could be addressed through the permanent injunction.

[56] Further, while the trial judge found instances where the Buckley Group had breached court orders, it was up to him as to how these breaches factored into the analysis. The Paiva appellants refer to *Saelman v. Hill* (2004), 20 R.P.R. (4th) 118

(Ont. S.C.), a case in which modest monetary damages were awarded due to the defendant's unwillingness to abide by the terms of an injunction, to support their argument. However, nothing about that case, which is distinguishable on its facts, suggests that monetary damages are required where a breach of court orders is found.

[57] The trial judge specifically referenced the breach of court orders by the Buckley Group in his costs assessment and, in my view, it was not an error to address these breaches in that context, rather than in an award of monetary damages.

[58] Accordingly, I would reject these grounds of appeal.

(2) The trial judge's treatment of the order of Pollack J.

[59] The trial judge did not address any continuing relevance of the consent order issued by Pollack J. and the Paiva appellants contend this constituted an error as the terms of that consent order were still in effect (and were consistently breached by Mr. Buckley).

[60] In this court's decision setting aside the injunction imposed by Himel J., however, Gillese J.A., writing for the court, stated that the motion judge appealed from had failed to find the consent order of Pollack J. was still in effect:*1711811 Ontario Ltd. (AdLine) (2014)*, at para. 25.

[61] In these circumstances, I would conclude that the trial judge did not err in considering whether such an order was warranted afresh, and not in the context of the consent order issued by Pollack J.

(3) The trial judge did not err in dismissing the action against Newmarket

[62] The trial judge disposed of the action against Newmarket on the basis of the following conclusion, at para. 81:

> The plaintiffs' case against the Town of Newmarket is based on their assertion that permits issued in favour of Mr. Buckley allowed physical changes to the tunnel and permitted garbage pick-up with a resultant increase in the use of the tunnel by Mr. Buckley and allegedly a substantial interference with the plaintiffs' easement rights. For the reasons set out above, I have found that Mr. Buckley's increased use of the tunnel was not a substantial interference in the plaintiffs' easement rights. The case against the Town of Newmarket is dismissed.

[63] The Paiva appellants argue the dismissal of the Newmarket action was in error based on the trial judge's error in his application of the test for substantial interference under the easement.

[64] As I see no error with respect to the trial judge's conclusion on substantial interference, it follows that I also see no error with respect to the trial judge's dismissal of the action against Newmarket.

(4) The trial judge did not err in finding no ancillary rights to parking

[65] The trial judge found that the nature of the easement in this case means that the Buckley Group could not permanently park in the tunnel. The trial judge also considered and rejected the argument by the Paiva appellants that the easement instrument's reference to the grantee's "quiet possession of the said lands free from all encumbrances" included an ancillary right to parking as part of their right-of-way. He stated, at paras. 92-93:

> I do not find that parking is an ancillary right necessary to use their right-of-way. The plaintiffs have demonstrated the purpose of the right-of-way was to allow vehicles to access their loading dock for shipping and delivery. However, they have *not* demonstrated that parking, other than transitory parking, is part of the demonstrated purpose. The ability to park on the parking pad, while convenient, is certainly not necessary for the enjoyment of the right-of-way. [Emphasis in original.]

[66] The trial judge also found that the Paiva appellants failed to establish that they enjoyed a prescriptive easement to park.

[67] I am not persuaded the trial judge committed an error in reaching these conclusions.

(5) Leave to appeal costs

[68] The trial judge ordered that the Paiva appellants pay to the Buckley Group $80,895.34, including HST, and $20,284.83 in disbursements, including HST, and to pay to Newmarket $76,670.88, including HST and disbursements.

[69] Normally, the successful party would be entitled to costs. The Paiva appellants argue that in light of the permanent injunction ordered by the trial judge against the Mr. Buckley, they were the successful party.

[70] The trial judge disagreed, and explained his reasoning as follows, at paras. 13-14 of his costs decision:

> Both the [Paiva appellants] and the [Buckley Group] claim that they were the successful parties. While the [Paiva appellants] did obtain some success at trial by my ordering of the permanent injunction preventing anyone from parking in the laneway and requiring the [Buckley Group] to have those parked cars removed, the [Buckley Group] were overall the more successful party. I dismissed the [Paiva appellants'] claim for nuisance and for aggravating and punitive damages. I found against the [Paiva appellants] regarding their claim that they could park on the Buckley parking pad. Critically, the bulk of the trial was spent on the [Paiva appellants'] claim that Mr. Buckley had substantially interfered with the plaintiffs' easement right by changing the height of the tunnel and by overtaxing the tunnel with more traffic. I found against the [Paiva appellants] on these key issues, which were really the heart of the litigation.
>
> …
>
> The [Buckley Group] were the more successful party and they are entitled to their costs. The bill of costs are reasonable. However, I will reduce their costs by $20,000 to reflect the success achieved by the [Paiva appellants] for the parking injunction. I will also reduce their cost by $15,000, which was roughly the costs the [Buckley Group] are seeking for the contempt motion. I do so to reflect the fact that, as stated in my reasons, there were numerous instances when the [Buckley Group] were in breach of court orders. Breaching court orders cannot be condoned.

[71] There is no question that the trial judge instructed himself properly on the discretion to award costs and the factors which ought to be considered in exercising that discretion. While it would have been open to the trial judge to reach a different conclusion, and award costs to the Paiva appellants, there was no requirement for him to do so.

[72] I would reject the Paiva appellants argument that the trial judge committed an error of principle in making a "distributive" costs award. The Paiva appellants rely on *Armak Chemicals Ltd. v. Canadian National Railway Co.* (1991), 5 O.R. (3d) 1 (Ont. C.A.), at paras. 13, 19-20, where this court stated that distributive cost awards (which involve issue-by-issue assessments of success) are to be approached with caution.

[73] As this court has stated often since *Armak Chemicals*, as a general rule, "costs are not to be determined by considering success on an issue-by-issue basis": *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 381, at para. 10. Rather, they are to be based on the overall success achieved by a party. In my view, this is precisely what the trial judge did. As set out above, he concluded, "[t]he [Buckley Group] were the more successful party and they are entitled to their costs." (Emphasis added.)

[74] I see no error in how the trial judge exercised his discretion with respect to the costs award. I would grant leave to appeal that order, but dismiss the appeal.

The Buckley Appeal

[75] The Buckley Group's appeal is a narrow one – they submit that the trial judge failed to adequately justify or carefully tailor the parking injunction set out in para. 5 of the formal judgment which provides that the Buckley Group "are subject to a permanent, mandatory injunction, requiring them to indefinitely requiring them to remove any vehicle found to be parking in the Tunnel."

[76] I note that in the trial judge's reasons, he stated, at para. 97, "[t]he [Paiva appellants'] claim against Mr. Buckley is allowed only to the extent that an injunction will be granted preventing anyone from parking in the tunnel and requiring Mr. Buckley to have any cars parked removed." As para. 5 of the judgment reflects, however, the injunction is not a personal one against Mr. Buckley but rather one imposing an obligation on the Buckley Group to monitor the tunnel and ensure any cars parked there are removed.

[77] The Buckley Group challenge the injunction on several grounds. They argue that the trial judge erred when he gave no explanation for the injunction, and by failing to narrowly tailor the injunction or minimize its burdens. Further, the Buckley Group argues the injunction finds no basis in the evidence in the record.

[78] I disagree. The trial judge made it very clear throughout his reasons that parking in the tunnel will either block or partially block access to Ms. Paiva's loading

dock and thus substantially interfere with her right-of-way. In my view, the parking injunction seems adequately justified in this determination.

[79] The injunction is tailored. It includes parked vehicles but does not include transitory parking, and the Paiva appellants are only entitled to ask for cars to be removed if they are blocking the tunnel at the moment a vehicle is attempting to reach her loading dock.

[80] For these reasons, in my view, the Buckley Group's appeal fails.

DISPOSITION

[81] For these reasons, I would dismiss the Paiva appellants' appeal; grant leave to appeal costs but dismiss the appeal against the trial judge's costs award; and also dismiss the Buckley Group's appeal.

[82] I would make no order as to costs as between the Paiva appellants and the Buckley Group on the appeals.

[83] The Town of Newmarket is entitled to costs as against the Paiva appellants and I would fix those costs at $10,000, all inclusive.

Released: January 27, 2025 "L.S."

"L. Sossin J.A."
"I agree. L. Madsen J.A."
"I agree. R. Pomerance J.A."