

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre
Mr. Justice James G. Edmond

BETWEEN:

<i>BOYKO & SONS LTD. and DRB 2023 LTD.</i>	)	<i>M. L. Grande</i>
	)	<i>for the Appellants</i>
	)	
<i>(Plaintiffs) Appellants</i>	)	<i>C. P. McNicol</i>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	
	)	<i>Appeal heard and</i>
<i>WEST PANET PROPERTIES LTD.</i>	)	<i>Decision pronounced:</i>
	)	<i>November 4, 2025</i>
<i>(Defendant) Respondent</i>	)	
	)	<i>Written reasons:</i>
	)	<i>January 5, 2026</i>

BEARD JA (for the Court):

THE ISSUES

[1] The plaintiffs, Boyko & Sons Ltd. (Boyko) and DRB 2023 Ltd. (DRB 2023) (together, the plaintiffs), appealed the dismissal of their motion for both interim and interlocutory injunctions to prevent the defendant, West Panet Properties Ltd. (West Panet), from constructing a temporary and/or a permanent fence or wall on the east boundary of the “common area” (the permanent fence), as it is defined in the 2022 written lease between West Panet and Boyko (the lease). We allowed the appeal and referred the motion

for an interlocutory injunction back to the Court of King's Bench for a new hearing; we also granted an interim injunction to remain in effect until the determination of the interlocutory injunction motion or further order. We indicated that reasons would follow; these are the reasons.

[2] The issues to be determined are as follows:

- (i) Did the motion judge err in law by considering and dismissing the motion for an interlocutory injunction?
- (ii) Did the motion judge err in finding that there was no urgency in hearing the motion?
- (iii) Did the motion judge err in his interpretation and application of the test for granting an interim/interlocutory injunction set out in *RJR—MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC) (the *RJR* test)?

[3] The findings and conclusions in this decision are based on the evidence now before us. The proceedings are at a very early stage; West Panet had not filed a statement of defence before the motion was heard and there have been no cross-examinations on the affidavits. Given that the evidence may change as the matter progresses, these findings and conclusions are limited to the evidence that was available for this appeal.

[4] Regarding further proceedings, we adopt the statement from Sharpe J that “[t]he hearing of the interlocutory injunction proper following the granting of an interim order is a hearing *de novo*, not an appeal from or review of the interim order which is necessarily made on an incomplete

evidentiary record” (Robert J Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters, 2018) (loose-leaf updated 2025, release 1), ch 2, s 2:3 at 2-17; see also s 2:1 at 2-3).

BACKGROUND

[5] The following facts are not in issue. Boyko owns the land at 450 Panet Road (the Boyko property), which is adjacent to 474 and 494 Panet Road; West Panet purchased 474 and 494 Panet Road in 2021 (the West Panet property). There is a building on the Boyko property that includes a vehicle repair shop, a warehouse and two loading docks (the Boyko building). Boyko has operated a large vehicle repair shop from this location since 1975, repairing trucks, trailers and other heavy equipment (the repair business), while the business now owned by DRB 2023 has operated a freight haulage business from the same property since 1986, hauling primarily perishable food items (the haulage business).

[6] The two businesses have been family-owned and operated from their inception. Their operations are interrelated, as a significant part of the repair business consists of repairing the trucks and trailers owned by DRB 2023 or third parties and used in the haulage business. Both companies are co-managed by Larry Boyko (Mr. Boyko) and his brother, Gary Boyko, and employ their adult children. A third brother, David Boyko, died in 1996. As a result of estate planning changes in 2023, the adult children are taking an ownership interest in the businesses.

[7] The loading docks are located at the rear of the Boyko building, facing west. They are used by the trucks involved in the haulage business to access the Boyko building to be unloaded and reloaded, and by Boyko to carry

out the repair business. The only access to the loading docks is from Panet Road, but the Boyko property is not deep enough to permit large trucks and trailers (minimum seventy feet long) to enter from Panet Road and access the loading docks at the back of the Boyko building without driving onto the adjacent West Panet property. The Boyko property is also not large enough to park the trailers that are waiting to be unloaded and reloaded.

[8] There have been three owners of the West Panet property since 1975, including West Panet. When David Boyko set up the haulage business in 1986, the Boyko building was already on the Boyko property. The Boykos made arrangements with the then-owner of the West Panet property to park the trailers on his property to the north and west of the Boyko property and to drive onto his adjacent property to the immediate west of the Boyko property to access the loading docks. These arrangements were originally by a verbal agreement and then partially formalized in 1988 in a written agreement with a registered caveat and continued with the next owner of the West Panet property (the verbal lease). Without that access, there is no way for the trucks and trailers to access the loading docks for loading or repairs.

[9] In the summer of 2021, Mr. Boyko was approached by a West Panet representative, David Carefoot (Mr. Carefoot), who advised that West Panet was purchasing the West Panet property to build a commercial building and wanted to discuss the verbal lease and Boyko's use of a portion of the West Panet property. After considerable negotiations, Boyko and West Panet entered into the lease that included two separate areas for parking trailers (the leased premises) and the area adjacent to the west boundary of the Boyko property that was used to access the loading docks (the common area). The

lease was effective from January 1, 2022, for a term of five years, with an option to renew for two additional periods of five years each.

[10] West Panet went ahead with its construction plans (the plans), and the building is scheduled to open in May 2026. The plans designate the common area, up to the west boundary of the Boyko property, as additional parking and include a permanent fence along the boundary between the common area and the west side of the Boyko property. The permanent fence will cut off direct access between the Boyko property and the common area, so that trucks will not be able to use the common area to access the loading docks.

[11] There were unsuccessful discussions to resolve this issue and, on June 6, 2025, the plaintiffs filed a statement of claim for declarations that (i) West Panet's proposed action in constructing the permanent fence or other structure on the west boundary of the Boyko property that impedes the plaintiffs' use and operation of their businesses constitutes a breach of the lease; (ii) the purported removal of all of the common area from the lease is not permitted and is a breach of the lease; and (iii) West Panet's actions and/or omissions constitute an unlawful interference with the plaintiffs' economic interests.

[12] At the same time, the plaintiffs filed a motion for interim and/or interlocutory injunctions to prohibit West Panet from interfering with their access to the common area as needed to access the loading docks until trial.

[13] The motion was set for the uncontested motions list on June 9, 2025. It was adjourned to Friday, June 13, 2025, at which time the parties stated that they were arguing the motion for an interim injunction. The plaintiffs'

evidence consisted of affidavits sworn by Mr. Boyko and his son, Larry Boyko Jr. West Panet's evidence consisted of affidavits sworn by Andrew Hodgson (Mr. Hodgson), who is also a senior vice president of West Panet's parent company, Mr. Carefoot, a board advisor to West Panet's parent company, and Kris Kelsch (Mr. Kelsch), the construction site superintendent for the building project on the West Panet property. West Panet had not filed a statement of defence.

[14] At the end of the hearing on June 13, 2025, the motion judge gave reasons in which he dismissed the plaintiffs' motion for an injunction. Costs were addressed, and an order was signed in which the motion judge dismissed the motion for both interim and interlocutory injunctions. This was the plaintiffs' appeal from that order.

THE LAW AND THE STANDARD OF REVIEW

[15] In *People Corporation v Mansbridge*, 2022 MBCA 37, this Court explained that the *RJR* test, which applies to applications for both interim and interlocutory injunctions, requires the court to weigh the following factors (*People Corporation* at para 23):

- (a) has the plaintiff established that there is a serious question to be tried;
- (b) will the plaintiff suffer irreparable harm not compensated in damages if the injunction is not granted; and
- (c) which of the two parties will suffer greater harm from the granting or refusal of the remedy pending a decision on the merits [—referred to as the balance of convenience].

[16] Applying the standard of review and related principles set out in *Housen v Nikolaisen*, 2002 SCC 33, questions of law are determined on the standard of correctness, while both questions of fact and questions of mixed fact and law are determined on the standard of palpable and overriding error (see *ibid* at paras 8, 10, 26-28). In applying the law, a trial judge must consider each factor that makes up a legal test; the failure to do so is an error in the application of the law and, therefore, an error of law (see *ibid* at para 27). Further, a misdirection as to the law or the facts is an error of law. (See also *Hryniak v Mauldin*, 2014 SCC 7 at paras 80-84; *Canada (Director of Investigation and Research) v Southam Inc*, 1997 CanLII 385 at paras 35-45 (SCC).)

[17] Provided that a trial judge considers each factor and there is no misdirection as to the law or the facts, the application of the facts to determine the weight to be given to each factor is an application of the facts to the law, which, in the civil law context, raises questions of mixed fact and law (see *Housen* at para 28).

[18] Finally, where a legal test requires a trial judge to weigh a number of factors to arrive at a decision, the weighing of those factors and the ultimate decision is discretionary, and any conclusion is reviewed on a deferential standard that has been described in a number of ways, such as “clearly wrong” and “unreasonable” (*HL v Canada (Attorney General)*, 2005 SCC 25 at para 110). These standards and that of palpable and overriding error are, however, functionally equivalent (see *Hudson Bay Mining & Smelting Co Limited v Dumas et al*, 2014 MBCA 6 at para 35 [*Dumas*]).

GROUND OF APPEAL

- (i) *Did the Motion Judge Err in Considering and Dismissing the Motion for an Interlocutory Injunction?*

The Issue—Interlocutory Injunction

[19] The plaintiffs argue that the motion judge erred in law, breached their right to due process and misdirected his role by proceeding to determine and dismiss the entire motion, rather than addressing the issue of urgency and, having found none, then adjourning the hearing to the contested list for a full hearing following cross-examinations on the affidavits.

[20] In support of their position, the plaintiffs point to the Court of King's Bench of Manitoba, "Practice Direction: Re: Civil Uncontested List – Urgent Matters", as setting out the correct procedure to be followed for hearing urgent civil matters. They argue that the motion judge's failure to follow the practice direction and limiting them to half an hour each for argument are indicative of the unfairness of the process. (See Court of King's Bench of Manitoba, "Practice Direction: Re: Civil Uncontested List – Urgent Matters" (7 December 2015), online (pdf): <manitobacourts.mb.ca/site/assets/files/1152/practice_direction_-_civil_uncontested_list.pdf> (the practice direction) (attached as an appendix hereto).)

[21] West Panet argues that the practice direction is not law, and the failure to follow it does not invalidate the process. It states that, at the hearing, each party was allowed thirty-five minutes to argue with a limited reply by

the plaintiffs, and that the motion judge repeated several times that he had reviewed all of the material and considered all of the issues, so the process was not unfair. Its position is that he made no errors in coming to his decision not to grant an injunction.

Analysis—Interlocutory Injunction

[22] Sharpe explains that there are three kinds of injunctions pending trial: an *ex parte* injunction (which is not relevant here), an interim injunction and an interlocutory injunction (see s 2:1 at 2-3).

[23] Sharpe states that an interim injunction arises where the plaintiff argues that, due to urgent circumstances, it requires immediate protection pending a full hearing of its motion for an interlocutory injunction. An interim injunction is made on notice, but after limited argument and only for a limited time, to protect the plaintiff's position pending cross-examination on affidavits, filing reply material and having a full hearing. An interlocutory injunction is an order granted after a full hearing that restrains the defendant until trial or other disposition of the action.

[24] While the *RJR* test applies to all three forms of pre-trial injunctive relief, the evidence must be weighed in the context of the nature of the hearing and the quality of the evidence, including whether or not affidavit evidence has been tested by cross-examination.

[25] In this case, the motion was at a very early stage. The plaintiffs' statement of claim, their injunction motion and affidavits were filed on Friday, June 6, 2025, three days before the return date of Monday, June 9, 2025, while their brief and authorities were brought to Court on June 9, 2025. The motion

was adjourned to Friday, June 13, 2025. The plaintiffs filed further authorities on June 12, 2025. West Panet filed its affidavits, its brief and authorities on June 12, 2025, but the motion judge received them on June 13.

[26] There were no cross-examinations before the hearing, which took place in the afternoon of June 13, 2025, with the motion judge telling the parties that each had twenty to twenty-five minutes to argue. At the appeal hearing, counsel for all parties acknowledged that they had argued the motion before the motion judge as a motion for an interim injunction; there was no reference to that being a hearing for an interlocutory injunction.

[27] The plaintiffs' position is that the motion judge erred by committing a due process error in deciding a motion and granting relief that was not before him. Such errors are typically considered to raise questions of law (see Donald JM Brown with the assistance of David Fairlie, *Civil Appeals*, (Toronto: Thomson Reuters, 2025) (loose-leaf updated 2025, release 2) vol 2, ch 13 at s 13:40); *Asiwaju v Adetoro*, 2024 MBCA 47 at para 25; *Vale v Vale*, 2022 ONCA 278 at paras 26-28; *Wenzel v Wenzel*, 2017 MBCA 113 at paras 23-27).

[28] We are of the view that the motion judge erred by considering and dismissing the motion for an interlocutory injunction, which was not before him, rather than dealing with the matter as an interim injunction, which is what the parties argued. This resulted in an unfair procedure, which is an error of law. As a result, we set aside the order dismissing the motion for an interlocutory injunction and ordered that that motion be returned to the Court of King's Bench for a new hearing.

[29] A word about the practice direction. This Court addressed the legal effect of practice directions in *R v Giesbrecht*, 2019 MBCA 35 at para 149, stating:

[Practice directions] do not have the force of law like rules of courts . . . but, nevertheless, have legal implications for litigants in the sense that they represent the collective opinion of the Provincial Court as to how judges will exercise the implied power they do possess to manage and control proceedings before them[.]

(See also *R v Siwicki*, 2022 MBCA 53 at paras 46-48; *R v Gowenlock*, 2019 MBCA 5 at para 43.)

[30] While these authorities all deal with practice directions issued in the Provincial Court in relation to criminal procedure, we are of the view that these statements would apply equally to civil practice directions issued in the Court of King's Bench.

[31] Given that there is an expectation that litigants will adhere to practice directions, litigants should be able to have the same expectation of the courts. While a judge may not be required, in law, to follow a practice direction, the fact that they fail to do so without obtaining input from counsel would be a factor to consider in determining whether the procedure that was followed was procedurally fair.

(ii) *Did the Motion Judge Err in Finding That There Was No Urgency in Hearing the Motion?*

The Test for Urgency

[32] Urgency is a factor in determining whether to issue an interim injunction. Because it is determined by the motion judge on the facts, its

review on appeal raises a question of mixed fact and law and is reviewed on the standard of palpable and overriding error.

[33] In *6165347 Manitoba Inc et al v Vandal et al*, 2017 MBCA 81 [*Vandal*], Chartier CJA, for the Court, stated that the relevant considerations in determining whether there is urgency “will include: i) the seriousness of the issue raised; ii) the nature of the relief sought; iii) the irreparable harm or damages that may be suffered; and iv) whether the moving party has proceeded with due dispatch” (at para 8).

Analysis—Urgency

[34] The motion judge found that this was not an appropriate case to make a finding of urgency because any urgency had been caused by the plaintiffs’ delay in filing their claim and their failure to act with urgency.

[35] The plaintiffs argue that the motion judge erred by basing his finding on only one of the four factors set out in *Vandal*, and also in concluding that they did not proceed with due dispatch.

[36] West Panet’s position is that the motion judge did consider other *Vandal* factors, that he did not misdirect himself as to the facts, that his decision was discretionary and is entitled to deference, and that it was not so clearly wrong as to amount to an injustice.

[37] West Panet cites Sharpe for the proposition that “[a] plaintiff, once entitled to an injunction . . . , may lose that right on account of delay” (at s 1:21; see also s 1:22). Sharpe goes on to explain, however, that “it has for long been clearly established that delay alone will not be fatal” (*ibid* at s 1:21 at 1-51).

What is required is delay that constitutes acquiescence in the other party's conduct or caused the defendant to alter its position in reasonable reliance on the plaintiff's acceptance of the status quo (see *ibid* at s 1:21 at 1-51 to 1-52).

[38] West Panet cites two authorities in support of its position that an injunction should be refused due to delay; however, both are distinguishable on their facts. In *University of Regina Faculty Association v University of Regina*, 1999 CanLII 12709 at paras 62-63 (SKKB), the applicants became aware of the development in 1997, but they were accommodating the development until 1999, when their position changed. During that time, the respondents expended considerable time and money developing a business plan and obtaining a building design. In *4067712 Manitoba Ltd et al v Lakeland Golf Properties Inc et al*, 2004 MBQB 157 at para 32, one of the defendants proceeded through a public hearing process with the municipality for over a year to obtain approval to build a clubhouse on a golf course. While the plaintiffs were aware of that application, they took no steps to address the application or, once it was granted on October 17, 2003, to have it set aside. It was only in April 2004, when construction began, that the plaintiffs first voiced their opposition to the project, and construction had begun before they filed their claim and injunction motion.

[39] Unlike the above authorities, the evidence of both parties in this case shows that West Panet purchased the West Panet property with knowledge of the plaintiffs' claims to have the right to access that property, both to park trailers and to access the plaintiffs' loading docks. It was these claims that led to lengthy negotiations that were resolved by Boyko and West Panet entering into the lease. Further, Mr. Boyko voiced his concern about the effect of the permanent fence on their businesses immediately upon being shown the plans

in 2024 and at every subsequent meeting with West Panet and its contractor. Unlike in the authorities cited, the plaintiffs did not sit silently by until construction began, and they gave no indication that they were accepting the permanent fence. West Panet has proceeded with its plans in the face of those objections, knowing that the plaintiffs were threatening legal proceedings if the issue could not be resolved.

[40] The motion judge's reasons were brief. He stated that the plaintiffs were aware in 2024 that West Panet's plans would prevent DRB 2023 from carrying on the haulage business, but they "elected to take no further steps for over a year"; rather, they waited until West Panet started work on the new building before proceeding. He also found that the motion was "without merit", that the plaintiffs gave up any right to the claimed areas when they signed the lease and that they were trying to gain use of West Panet's property without any agreement or right to do so.

[41] On the issue of urgency, we are satisfied that the motion judge misunderstood the evidence in a material way. First, as noted earlier, West Panet was aware of the plaintiffs' use of what became the common area before it purchased the West Panet property in 2021, and of the plaintiffs' concern that their access continue. This led to the lease in 2022.

[42] Next, the motion judge's finding that the plaintiffs elected to do nothing for over a year, which led to the inference that the plaintiffs intentionally delayed filing their claim until after construction started, is not supported by the evidence. Regarding the one-year delay, in late March 2024, immediately after West Panet disclosed its plans, Mr. Boyko and Mr. Carefoot agreed that they had a conversation about the construction and, specifically,

the damaging effect that the proposed permanent fence would have on the plaintiffs' businesses; they also agreed that Mr. Carefoot said that he would advise the development company. Mr. Boyko said that Mr. Carefoot also said that he would "report back to [them] if there was a problem", but Mr. Boyko never heard back from him. Mr. Carefoot does not deny that he gave that undertaking. He only said that he does not recall saying that, but he agreed that they did not have any further conversations on that issue.

[43] Mr. Boyko's evidence of this conversation was confirmed by Larry Boyko Jr., who said that he was present at that meeting. Mr. Carefoot does not deny that he was there, only that he has no specific recollection of him being there.

[44] Mr. Boyko said that he next heard that the permanent fence was being put up from Mr. Kelsch in early April 2025. He became upset and expressed his disapproval to Mr. Kelsch, who said that he would convey that information to West Panet. Mr. Boyko was contacted by another representative of West Panet, who confirmed that a permanent fence would be built.

[45] At that point, Mr. Boyko contacted his lawyer and there were discussions between counsel to see if the matter could be resolved. Mr. Kelsch stated that, on May 8, 2025, a representative of West Panet was at the West Panet property and asked Mr. Boyko "if there was a way to sort this out." This continued with communications between the parties and between their counsel, including emails dated May 16 and 20, 2025, in which West Panet's lawyer expressed a preference to resolve the matter amicably, but also stated that the permanent fence was non-negotiable. Up until this

time, a temporary chain-link fence had been installed that permitted the plaintiffs to have continued access to the loading docks.

[46] On May 15, 2025, Mr. Hodgson (who had replaced Mr. Carefoot as the contact person for West Panet) advised Mr. Boyko that fencing would be installed along the west boundary of the Boyko property on June 16, 2025.

[47] Mr. Boyko replied on May 24, 2024 (which Mr. Hodgson acknowledged was actually 2025). In that letter, Mr. Boyko explained that he, his wife and their daughter had all been seriously ill, including him having surgery, his daughter being able to work only limited hours, and his wife passing away in April 2025. As a result, they decided to consider selling the Boyko property. There were some further negotiations, with West Panet providing an offer on June 3, 2025. Once it was clear that there would be no resolution, the plaintiffs commenced these proceedings three days later.

Decision—Urgency

[48] West Panet was not taken by surprise by the plaintiffs' claim and motion, as it had early and ongoing notice that the plaintiffs were objecting to the permanent fence and would be taking legal action if the issue could not be resolved. It can certainly not be said, on the available evidence, that the plaintiffs' conduct caused West Panet to alter its position in reasonable reliance on the plaintiffs' acceptance of the development plan. Further, the plaintiffs were not looking to shut down the construction of the entire development; they were only looking to continue their long-term access to a small corner of the West Panet property that was not integral to the development.

[49] Regarding the steps taken by the plaintiffs to resolve the issue and how that contributed to undue delay, we are of the view that court proceedings should be a step of last resort and that, consistent with judicial concerns about access to justice and appropriate use of court time and judicial resources, parties should be encouraged to attempt to resolve their differences by negotiation and agreement. In our view, the steps taken by the plaintiffs in this case to resolve the matter were reasonable and did not cause undue delay.

[50] When all of the available evidence is considered, we are of the view that the motion judge made a palpable and overriding error in concluding that the plaintiffs did not act with due dispatch in proceeding to enforce their rights.

[51] The plaintiffs objected strenuously to the correspondence regarding the sale discussions being filed by West Panet on the basis that it was inadmissible because it was evidence of settlement negotiations. The motion judge did not address this objection in his decision; rather, he relied on those communications to draw negative inferences about the plaintiffs' delaying until the last moment for tactical reasons. The motion judge erred in relying on the evidence without first addressing its admissibility. As there was no decision in this regard and, in our view, nothing material turns on that evidence at this time, we leave that issue to be determined at the new hearing, if it remains an issue.

[52] The motion judge went on to find that the matter is also without merit because the plaintiffs gave up their rights to the common area when the lease was signed. We are of the view that he made palpable and overriding errors in coming to this conclusion, which we explain below. We are, thus,

of the view that the motion judge made a palpable and overriding error in concluding, on the evidence before him, that there was no urgency.

[53] Having found no urgency, however, we are of the view that the motion judge erred by dismissing the motion for an interlocutory injunction, rather than adjourning it to the contested list, as explained earlier in these reasons. Instead, he made a final decision on the entire motion, applying the *RJR* test, which we will now address.

(iii) Did the Motion Judge Err in His Interpretation and Application of the Test in RJR?

Serious Issue to Be Tried

The Test for a Serious Issue to Be Tried

[54] The first factor under the *RJR* test is whether there is a serious issue to be tried. Earlier jurisprudence had required a plaintiff to establish a strong prima facie case, being whether the plaintiff would succeed based on the material before the court (see *ibid* at 335; see also *Sharpe* at s 2:6 at 2-21). That test was ultimately rejected in *RJR*, which adopted the test of whether the claim was neither frivolous nor vexatious. The Court explained the test as follows (*ibid* at 337-38):

What then are the indicators of “a serious question to be tried”? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. . . .

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.

[55] While the test of a strong prima facie case remains applicable in some limited cases, this is not one of them (see *ibid* at 338-40; *Lazy Bear Lodge Ltd v Manitoba*, 2025 MBCA 57 at paras 23-24).

[56] A frivolous and vexatious proceeding is one that is “without any probable justification at law, mala fide with a clear intent only to annoy or embarrass the opposing party” (*Bartmanovich v Manitoba Crop Insurance Corp*, [1995] 7 WWR 560 at para 8 (MBQB), 1995 CanLII 16101, quoting *57655 Manitoba Ltd et al v Iliffe et al* (1988), 57 Man R (2d) 276 at 278 (MBQB), 1988 CanLII 7358). The low level of this threshold is emphasized by the direction in *RJR* that, if the motion is not frivolous or vexatious, the plaintiff will have satisfied this factor even if the motion judge is “of the opinion that the plaintiff is unlikely to succeed at trial” (at 337-38).

[57] This low threshold is in contrast to the much higher test on summary judgment, which, as explained in *Hryniak*, is an alternative procedure to a full trial (see para 34). On a summary judgment motion, the court is required to determine whether there is a genuine issue that requires a full trial (see *ibid* at para 43). In order to do so, the court is applying the test that would apply at trial, being whether the issues have been proved on a balance of probabilities (see *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 at para 79).

[58] Importantly, a motion for summary judgment is heard after the pleadings have closed, there have often been cross-examinations on affidavits and, in some cases, *viva voce* evidence has been called. Further, a motion

judge is required to weigh the evidence to make findings of fact and, where appropriate, credibility, to determine whether the evidence is sufficient to resolve all of the issues without a full trial (see *Hryniak* at paras 49-51). This is a much different procedure and a much different test than determining whether there is a serious issue to be tried on a motion for an interim or interlocutory injunction.

Analysis—Serious Issue to Be Tried

[59] In this case, the motion judge determined that the issues to be tried related to the provisions in the lease regarding the leased premises, being two areas to park trailers, and the fact that a permanent fence would not prevent Boyko from accessing those areas or parking trailers there. He stated that “[t]he lease ha[d] nothing to do with the loading docks at the back of the Boyko property.” He also found that DRB 2023 was not a party to the lease, so it had no right to access the West Panet property. That is not, however, what the claim is about. The claim is about what is defined in the lease as the “common areas”, which is separate from the leased premises, including what rights attach to those areas and who is entitled to exercise those rights.

[60] The lease includes the following term:

- 2.1 [West Panet] hereby demises and leases the Leased Premises to [Boyko] for the Term, to have and to hold them during the Term, subject to the terms and conditions of this Lease. *[West Panet] grants to [Boyko] a non-exclusive license throughout the Term to the benefit or use (as may be appropriate) of those **Common Areas** which provide access to the Leased Premises or which are generally made available to all Tenants of the Premises, in common with*

other tenants of the Premises and with all others entitled thereto, subject to the terms and conditions of this Lease.

[emphasis added]

[61] Section 1.3 of the lease defines common areas as follows:

1.3 “**Common Areas**” means the areas of the Premises that are designated by [West Panet] (which designation may be changed by [West Panet] from time to time, but not so as to include any part of the Leased Premises) as common areas set aside by [West Panet] *for the common use of [Boyko], its licensees and invitees*, in common with others entitled to the use of such areas in the manner and for the purposes permitted by this Lease whether or not they are open to the general public[.]

[emphasis added]

[62] In our view, the evidence before the motion judge clearly sets out a serious issue to be tried on the interpretation of the common areas provisions of the lease, as well as Boyko’s right to access the common areas to operate the haulage business in 2022 and DRB 2023’s right to access the common areas following its incorporation.

[63] The motion judge also stated that “[a]ny right that the plaintiff[s] may have had to the claimed areas were given up when the lease was entered into.” This is a reference to the release of existing rights that was signed as a condition of the lease. The fact that the plaintiffs, or at least Boyko, had a claim against the West Panet property at the time of the lease, and the nature of that claim, were part of the surrounding circumstances known to the parties at the time that the lease was signed. As such, those rights will be relevant to the interpretation of the lease and, in particular, the common areas provisions

and the inclusion of the haulage business as a beneficiary of those rights (see *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 56-58).

[64] The motion judge also made the finding that “DRB [2023] [was] not a party to the lease and, therefore, [did] not have a right to access the [West Panet] property.” The evidence discloses that there are at least three ways in which there is a serious issue to be tried regarding DRB 2023’s rights.

[65] First, use of the common areas, by definition, refers not only to use by Boyko, but also by its “licensees and invitees”, which would arguably include DRB 2023. Second, in addition to a claim for breach of contract, the plaintiffs are claiming unlawful interference with economic interests, which is not dependent on DRB 2023 being a party to the lease (see *Ultracuts v Magicuts*, 2023 MBCA 71). Third, DRB 2023 was incorporated after the lease was signed, so it could not have been a party to the lease; however, at the time of the lease, the haulage business was being run by Boyko at that location. This raises the issue of what, if any, rights may have been acquired by DRB 2023, particularly given that there is provision in the lease for a change of ownership within the family (see paragraph 2.3(b)(iii)).

[66] For these reasons, based on the evidence that was available to the motion judge and taking into account the low threshold for establishing a serious issue to be tried, we are of the view that he misunderstood the issues to be tried and made a palpable and overriding error in concluding that the claim was without merit and that there was no serious issue to be tried. As stated, we are of the view that the evidence before us discloses a serious issue to be tried.

Irreparable Harm

The Test for Irreparable Harm

[67] The second factor to consider under the *RJR* test is that of irreparable harm. In *RJR*, the Court explained irreparable harm as including “harm which . . . cannot be quantified in monetary terms” (at 341). It went on to note that examples of irreparable harm include “where one party will be put out of business by the court’s decision” or it “will suffer permanent market loss or irrevocable damage to its business reputation” (*ibid*).

[68] Sharpe explained this factor as follows (at s 2:12 at 2-69):

In the context of preliminary relief, the test is a relative and flexible one which, it is submitted, necessarily involves an evaluation of the other factors. Indeed, it has been held that an interlocutory injunction may be granted even where “irreparable” harm has not been demonstrated. Similarly, attempts to make irreparable harm a condition precedent, and hence a threshold test, have been rejected.

[footnotes omitted]

[69] Sharpe further states (at s 2:7.30 at 2-48):

Typical cases in which irreparable harm is likely to be found are those where the act complained of would put the party out of business, prevent the gaining of livelihood or cause irrevocable damage to reputation or professional standing.

[footnote omitted]

[70] In *Dumas*, this Court stated that “[a]ll that [the plaintiff] had to show at this early stage of the litigation was a meaningful risk of irreparable harm” (at para 85).

Analysis—Irreparable Harm

[71] The motion judge found that the plaintiffs would not suffer irreparable harm because any harm could be compensated in damages. He also rejected the plaintiffs’ evidence of irreparable harm on the basis that it was speculative, and he stated that the work being done by West Panet would not change Boyko’s building, property or the leased premises in any way.

[72] While the evidence of harm is that of Mr. Boyko and his son, Larry Boyko Jr., their evidence was not, in our view, speculative. They have extensive experience in both businesses. These are multi-generational businesses that were started by Mr. Boyko’s parents. Mr. Boyko, now 74, has been working for Boyko since 1978 and in the haulage business since its inception in 1986, and he has controlled them for decades. Larry Boyko Jr. is the president of DRB 2023, however, he began working in the business as a teen and became involved on a permanent basis when he turned 18.

[73] They both explained that, without access to the common area, trucks cannot access the loading docks to be unloaded, loaded or repaired. This would shut down the haulage business completely and reduce Boyko’s revenue to a level insufficient to meet its ongoing financial obligations.

[74] It does not require an expert to conclude that permanently cutting off meaningful customer access to a business location will cause a meaningful risk of irreparable harm to the business and its reputation. In addition to losing

revenue, its employees (in this case, all of whom are long-term) would find work elsewhere, and its customers would quickly find other service providers, particularly in this case where the goods being handled consist of highly perishable product.

[75] This case can easily be distinguished from *Ramanand v De Paula*, 2012 MBQB 335, the case to which the motion judge referred for the proposition that proof of irreparable harm must be clear and not speculative. In *Ramanand*, the motion judge found the nature of the harm to be “an inconvenient annoyance [and that] the discomfort [from the noise of the neighbour’s air conditioner] does not threaten anyone’s mental or physical health at this time” (at para 45). Those are not the facts in the present case. While West Panet argues that *Ramanand* was quoted for the principle, not its application, care must be taken to read the principle in the context of its application. Further, the motion judge in *Ramanand* noted, citing *RJR*, that “a weak or speculative case on irreparable harm is not fatal to the granting of an interlocutory injunction; doing justice to the parties requires a cumulative assessment of the three considerations in [*RJR*]” (at para 42).

[76] We are of the view, based on the current evidence, that the plaintiffs have established that erecting a permanent fence, as proposed by West Panet, will end the haulage business at that location and significantly harm Boyko’s business, which shows a meaningful risk of irreparable financial harm to the plaintiffs and irreparable harm to their business reputations. Thus, it is our view that the motion judge made a palpable and overriding error in concluding that the plaintiffs have failed to establish a meaningful risk of irreparable harm.

Balance of Convenience

The Test for Balance of Convenience

[77] The Court in *RJR*, at 342-43, adopted the very concise description of this factor from *Manitoba (AG) v Metropolitan Stores Ltd*, 1987 CanLII 79 at para 36 (SCC), which states:

[T]he balance of convenience . . . which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

[78] In *RJR*, the Court stated that “[t]he factors which must be considered in assessing the ‘balance of inconvenience’ are numerous and will vary in each individual case” (at 342). The considerations relevant to the application of this factor were explained in *Sharpe* as follows (at s 2:14 at 2-85 to 2-89):

[T]he assessment of where the balance of convenience lies is significantly affected by the “extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial”. The questions of “irreparable harm” and balance of convenience are closely linked, but balance of convenience also relates to matters difficult to quantify in monetary terms. 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?

It seems clear that the other factors influence the weight to be given to balance of convenience. If the plaintiff's case looks very strong, he or she may well succeed, although the injunction would cause greater inconvenience to the defendant than withholding preliminary relief would cause the plaintiff. Where the plaintiff's case looks weak, the balance of convenience may tilt in favour of the defendant. On the other hand, where an assessment of the case is impracticable and the damages question balanced, an assessment of balance of convenience will be determinative. It is impossible to develop a precise calculus or calibration of such a question beyond restating the nature of the risk-balancing exercise that is involved.

[footnotes omitted]

Analysis—Balance of Convenience

[79] The motion judge found that West Panet would suffer the greater harm due to the significant construction costs that had been incurred and the financial harm that would occur from granting the injunction, while Boyko would suffer no harm from West Panet's development. He also found that DRB 2023 would still be able to operate, either in a manner that did not require the use of the common area or in another location.

[80] The plaintiffs' position is that the motion judge misapprehended or failed to consider the interdependence of the Boyko and DRB 2023 operations and the harm that would flow to both if they were denied immediate access to the common area. Further, his finding that they could move to another location or change the manner in which they did business on an interim basis, pending trial, was not reasonable. They argue that he also failed to appreciate that the common area constitutes only a very small part of the proposed

parking area and does not permanently affect the entire West Panet development.

[81] West Panet argues that the motion judge did not misapprehend the evidence or err in his decision. It argues that the motion judge weighed the evidence and came to a decision that is entitled to deference.

[82] We are of the view that the motion judge's analysis of the balance of convenience repeats the errors that he made in addressing the issues to be tried as set out in the statement of claim. He failed to understand the issues for trial, the interdependence of the operations of Boyko and DRB 2023, the relevance of the history of the use of the common area to the interpretation of the lease, and the separate claim by both plaintiffs for unlawful interference with economic relations. Further, in our view, his suggestion that the plaintiffs could continue to operate by changing the configuration of the Boyko building, changing locations or how they operate was, on the evidence available, not reasonable. If that were to occur, removing the fence after a trial would be unnecessary and pointless.

[83] The motion judge also misunderstood the harm that West Panet would suffer if it were unable to install a permanent fence. The common area consists of a very small portion of a back corner of West Panet's property that was earmarked for approximately 40 parking stalls, and the plaintiffs need only a portion of those to access the loading docks. No part of the new building would be located on this portion, and the development plans included a separate main parking area on another part of the West Panet property with 466 parking stalls. Further, the contractor only required temporary access to the common area to complete a sewer installation and asphalt work, which

would be finished by the end of October 2025; the new building was not scheduled to open until May 2026.

[84] The evidence is that the parties had been able to resolve their joint use of the common area until mid-June 2025, which permitted the construction to proceed without permanently terminating the plaintiffs' use of the common area. More importantly, the contractor only required temporary access to the common area to install a sewer line and asphalt work, suggesting that there was no requirement for a permanent fence. The plaintiffs had contacted West Panet, through counsel, to see if they could resolve the issue, but the reply was that West Panet would not consider any change in the location of the permanent fence.

[85] When one balances the harm to the plaintiffs against the harm to West Panet, it is clear that the harm to the plaintiffs greatly exceeds the harm to West Panet. In our view, the motion judge made a palpable and overriding error in finding that the balance of convenience favoured West Panet and the installation of a permanent fence.

Balancing the Factors

The Test for Balancing the Factors

[86] As noted in Sharpe, the *RJR* test is not to be applied mechanically, and the three factors are not separate, watertight compartments. Rather, they “relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another” (*ibid* at s 2:17 at 2-95) (footnote omitted) (see also *Apotex Fermentation Inc v Novopharm Ltd*, [1994] 7 WWR 420 at para 14 (MBCA), 1994 CanLII 16694). As was stated by the

Saskatchewan Court of Appeal in *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 120, “[t]he ultimate focus of the court must always be on the justice and equity of the situation in issue” (at para 26).

Analysis—Balancing the Factors

[87] The motion judge based his balancing and exercised his discretion to dismiss the motion for an interim injunction on his erroneous findings regarding the three factors to be considered. Given those errors, his final decision is not entitled to deference. In our view, when those factors, as determined above, are considered together, the only conclusion is that the motion judge’s decision to dismiss the motion for an interim injunction was clearly wrong and cannot stand. For this reason, we set aside the order dismissing that motion.

Other Findings

[88] The motion judge was dealing with a motion for interim and interlocutory injunctions in the context of a proceeding that claimed an injunction as relief at the trial, and in doing so, he made several findings of fact and mixed fact and law that appear to be final in nature. This is to be avoided, where possible, as it has the effect of tying the hands of the trial judge.

[89] Further, the motion judge made two other findings that bear comment. He found that “the plaintiffs [were] effectively trying to use this process to obtain the use of the neighbouring land that they [did] not own without any agreement or right to do so” and that the injunction “was brought

to improve the plaintiffs' bargaining position as part of the negotiation for [West Panet] to purchase the Boyko property." Negative comments about a party's motives can be harmful to that party's reputation, particularly when made in a business or professional context, and courts should be careful about making such findings without having access to all of the evidence. In this case, the pleadings were not closed, the evidence was very preliminary, and none of the evidence had been tested in cross-examination. There was certainly no clear, convincing and cogent evidence to support such findings, which would have been better left for consideration at a later date, when the record was more complete.

CONCLUSION AND REMEDY

[90] We are of the view that the motion judge's decision to dismiss the motion for an interlocutory injunction was procedurally unfair to the plaintiffs, given the very preliminary stage of the proceedings and the fact that that motion was not before him. We, therefore, allowed the appeal, set aside the order dismissing that motion, and ordered that the motion be sent back to the Court of King's Bench for a new hearing, which should be before a different motion judge.

[91] After considering the *RJR* test in the context of the evidence that was before us, we concluded that the motion judge erred in dismissing the motion for an interim injunction. We allowed the appeal and set aside the order dismissing that motion.

[92] The parties advised us that, following the dismissal of the motions by the motion judge, West Panet erected its proposed chain-link fence along the east boundary of the common area. Following our decision on the appeal,

the parties were unable to come to any agreement regarding a temporary resolution of the placement of a fence pending a further hearing, so the plaintiffs asked that we make an interim order.

[93] After submissions from counsel and considering the application of the *RJR* test to the evidence currently before us, as explained above, we ordered an interim injunction requiring West Panet to relocate the fence to give the plaintiffs access to the common area and the loading docks on the Boyko property in the same manner as before the fence was erected, pending further court order.

[94] We also directed that, if there is to be a hearing on the motion for an interlocutory injunction before the trial, the parties must set a date for that hearing as soon as possible and set a reasonable timeline to complete the steps necessary to proceed with that hearing.

[95] Finally, we granted costs to the plaintiffs on the motion and this appeal, under the tariffs and in any event of the cause.

_____ JA

_____ JA

_____ JA

APPENDIX

The Court of King's Bench of Manitoba, "Practice Direction: Re: Civil Uncontested List – Urgent Matters" (7 December 2015) is reproduced as follows:

PRACTICE DIRECTION

COURT OF QUEEN'S BENCH OF MANITOBA

RE: CIVIL UNCONTESTED LIST – URGENT MATTERS

Civil applications and motions which are considered by a moving party to be urgent should be set at first instance on the Civil Uncontested List. When the matter is called on the List, the first issue for the moving party to address will be urgency. If the presiding judge concludes that the matter is in fact urgent, the judge will adjudicate the merits of the matter at that time or schedule an appropriate time before him or herself to adjudicate the merits. If the presiding judge concludes that the matter is not urgent, the matter will be adjourned to the Contested List in the ordinary course.

In those situations where the nature of the potential immediate harm suggests some demonstrable merit to the moving party's position that the matter is urgent, but the matter cannot be adjudicated at that time, the presiding judge may grant interim relief and/or set early timelines for the filing of further material, with the matter next returnable on the Civil Uncontested List. When the matter next appears, the moving party will need to address the issue of urgency as a preliminary issue.

In those rare and exceptional circumstances where it is the moving party's position that a matter is of such urgency it cannot wait until the next sitting of the Civil Uncontested List, counsel may contact the Civil Motion Coordinator and/or the Trial Coordinator to discuss the possibility of alternative arrangements.

Coming into effect

This Practice Direction comes into effect immediately.

ISSUED BY:

“Original signed by Chief Justice Joyal”

**The Honourable Chief Justice Glenn D. Joyal
Court of Queen’s Bench (Manitoba)**

DATE: December 7, 2015