SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

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FAX COVER SHEET

Date: February 22 2011

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FROM: Laurie Pietras, Secretary to The Honourable Mr. Justice Strathy

TOTAL PAGES (INCLUDING COVER PAGE): 10

MESSAGE:

RE: Jain et al v. Valani et al
Court file no. CV-10-409007

Please see attached Endorsement released by Mr. Justice Strathy today.

CITATION: *Jain v. Valani*, 2011 ONSC 1156
COURT FILE NO.: CV-10-409007
DATE: 20110222

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **Hans Jain and Praskovia Jain**, Plaintiffs/Respondents

AND:

Yasmin Valani and Nazir Valani, Defendants/Moving Parties

BEFORE: **G.R. Strathy J.**

COUNSEL: *David Donnelly and Leemor Valin,* for the Plaintiffs/Respondents

Ted Frankel, for the Defendants/Moving Parties

HEARD: February 11, 2011

ENDORSEMENT

[1] This is a dispute between two neighbours. I will refer to the plaintiffs as the "Jains" and to the defendants as the "Valanis". The dispute concerns a gazebo built on the Valanis' property. The Jains claim that it is a nuisance because it causes flooding on their property. The Valanis move to stay this proceeding on the ground of issue estoppel. They say that the construction of the gazebo was approved by the Committee of Adjustment ("COA"), which allowed a minor variance and in so doing rejected the Jains' complaints about flooding. That decision was confirmed by the Ontario Municipal Board (the "OMB" or the "Board"). For the reasons that follow, I find that issue estoppel does not apply and the Jains may proceed with their action.

Background

[2] The Jains and the Valanis are neighbours in a residential area of North York. Their backyards abut and are separated by a fence on the property line. In August 2008, the Valanis built a gazebo and concrete patio in their backyard within a few feet of the property line. The Jains have claimed that this construction affected the drainage between the two properties and caused flooding and ponding on their property.

[3] The gazebo was built without a building permit. Its construction resulted in the lot coverage for the existing house and accessory buildings exceeding the maximum coverage permitted by the zoning by-law. It was therefore necessary for the Valanis to apply to the COA for a minor variance.

[4] The COA held a hearing on December 17, 2008. One neighbour sent a letter to the COA stating that she did not oppose the variance but she was concerned that the increased "foot print" of newly built homes was causing spring flooding of adjacent properties. The Jains also wrote a letter to the COA asserting that:

- the gazebo was too close to the property line and interfered with their privacy;
- their property had been damaged as a result of the construction of the gazebo; and
- the construction of the gazebo had altered the drainage and had caused flooding of their backyard.

[5] The Jains' letter was not received by the COA until after the hearing on December 17th. It is not clear from the minutes whether the COA received that letter after the hearing but before it made its decision. In any case, The minor variance was approved and the minutes from the hearing indicate that:

> Grounds for approval are that the variance is considered to be of a minor nature, is within the general intent of the Zoning By-law and Official Plan and is an appropriate development of the property.

[6] The Notice of Decision of the COA, which is dated December 17, 2008, but which was mailed on December 24, 2008, gives substantially the same reasons. No mention was made of the flooding issue or of the Jains' letter.

[7] In early 2009, the Jains appealed the decision of the COA to the OMB. Their submissions included that:

(a) the gazebo was built without a building permit, violated their privacy and impacted the enjoyment of their property;

(b) the gazebo did not comply with the set-back requirement and was too close to the property line;

(c) there was damage to their fence during construction; and

(d) the grading of the Valanis' lot had been raised, altering the drainage and causing ponding.

The Decision of the OMB

[8] A hearing was held by the OMB on March 27, 2009. Ms. Jain testified that the construction of the gazebo had altered the drainage pattern between the properties. She objected to the impact of the gazebo on her family's privacy and complained that the structure was too large and did not conform to the character of the neighbourhood. The board member preferred the evidence of a professional planner who testified on behalf of the Valanis, and who expressed the opinion that the gazebo was an appropriate development that was sensitive to the surrounding properties and did not offend or impact the existing character of the neighbourhood. The planner also testified that the ponding on the Jains' property had not been caused by the construction of the gazebo. The member accepted this evidence and found that the water may have originated on

the Jains' own property. The Jains' appeal was therefore dismissed. Oral reasons were delivered on the day of the hearing and were recorded in a memorandum issued May 8, 2009.

[9] The Jains requested a review of the OMB decision under s. 43 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28. This request was rejected by letter dated August 12, 2009. The OMB's Acting Chair found that:

- there was no new evidence to be presented that was not available at the time of the hearing;
- the request was really an attempt to re-argue issues that had been before the Board;
- there were no errors of fact and law;
- the Board member had accepted uncontradicted expert evidence; and
- persisting conflicts, such as compliance with building standards, were outside the OMB's jurisdiction.

The Jains' Statement of Claim

[10] The Jains commenced this action by statement of claim dated August 19, 2010. They claim that the Valanis have interfered with the use and enjoyment of their land and have created a nuisance by altering the original drainage swale and causing flooding and ponding. They claim damages for the cost of preventing the nuisance, the cost of remediating the damage, loss of property value and general damages.

The Valanis' Motion

[11] The Valanis move under rule 21.01(3)(d), rule 21.01(a) and (b), and rule 25.11(b) and (c) of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, to stay, dismiss or strike the claim on the basis of abuse of process or *res judicata*. More specifically, they argue issue estoppel and say that the Jains are re-litigating an issue that has been decided against them by the COA and the OMB.

The Submissions of the Parties

(a) *The Valanis' Position*

[12] The Valanis say that issue estoppel precludes the re-litigation of issues that have been determined in a prior proceeding: *McIntosh v. Parent* (1924), 55 O.L.R. 552, [1924] O.J. No. 59 (C.A.); *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46. Issue estoppel applies to issues previously determined by an administrative tribunal: *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267, [1994] O.J. No. 200 at para. 37 (C.A.), leave to appeal to S.C.C. dismissed, [1994] S.C.C.A. No. 152. This includes the OMB: *Universal Am-Can Ltd. v. Ontario (Municipal Board)* (2001), 21 M.P.L.R. (3d) 250, [2001] O.J. No. 3615 (Div. Ct).

[13] The Valanis acknowledge that even where the moving party establishes the conditions for issue estoppel, the court has the discretion to permit the proceedings to continue.

[14] The Valanis also rely on the court's inherent discretion to prevent an abuse of process where the continuation of the proceeding would undermine the integrity of the adjudicative process: *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 at paras. 37, 38 and 52.

[15] The Valanis rely in particular on *Casa Luna Furniture v. Ottawa (City)* (2009), 58 M.P.L.R. (4th) 143, [2009] O.J. No. 874 (S.C.J.), a decision I will discuss below.

[16] The Valanis say that the Jains' basic complaint relates to the impact of the gazebo on the neighbourhood and that this is a frequent consideration of the COA in a minor variance application: see *Toth v. London (City) Committee of Adjustment*, [2000] O.M.B.D. No. 495 at para. 11; *Vaughan v. Toronto (City) Committee of Adjustment*, [1999] O.M.B.D. No. 624, at para. 8. They say that the Jains' complaints in this action relate to grading, drainage, privacy and property damage, all of which were raised in the COA and the OMB and that they are simply attempting to re-litigate these issues, which is in itself an abuse of process.

[17] Mr. Frankel, on behalf of the Valanis, acknowledges that the Jains could not have claimed damages for nuisance from the OMB and that the OMB had no jurisdiction to award damages for nuisance. He says, however, that the effect of the decision of the COA and the OMB is that the Jains have no right to claim damages for nuisance arising from the construction of the gazebo.

(b) The Jains' Position

[18] The Jains submit that the only issue before the COA and the OMB was the issue of lot coverage and whether the Valanis should be granted a minor variance. The issue of damages for the alleged nuisance was raised for the first time in this proceeding. They say that in order for issue estoppel to apply, it is necessary that "the same question has been decided" in the earlier proceeding. It must have been a question that was "fundamental to the decision arrived at", as opposed to a collateral or incidental question: see *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 255.

[19] Alternatively, the Jains submit that this is a case in which the court should exercise its discretion to refuse a stay, notwithstanding that issue estoppel may apply, relying on *Danyluk v. Ainsworth Technologies Inc.*, above. They submit that the discretion should be broadly applied in the case of administrative tribunals for the reasons enumerated in the reasons of Binnie J. at paras. 62 and 71:

> In my view the discretion is necessarily broader in relation to the prior decisions of administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision makers.
>
> ...

> The focus of an earlier administrative proceeding might be entirely different from that of the subsequent litigation, even though one or more of the same issues might be implicated.

Discussion

[20] In *Minott v. O'Shanter Development Co.*, , 42 O.R. (3d) 321, [1999] O.J. No. 5 (C.A.), the Court of Appeal, per Laskin J., described the principles underlying the doctrine of issue estoppel, at 329:

> Issue estoppel prevents the relitigation of an issue that a court or tribunal has decided in a previous proceeding. In this sense issue estoppel forms part of the broader principle of *res judicata*. *Res judicata* itself is a form of estoppel and embraces both cause of action estoppel and issue estoppel. Cause of action estoppel prevents a party from relitigating a claim that was decided or could have been raised in an earlier proceeding. No question of cause of action estoppel arises in this case. Issue estoppel is narrower than cause of action estoppel. It prevents a party from relitigating an issue already decided in an earlier proceeding, even if the causes of action in the two proceedings differ.
>
> The overall goal of the doctrine of *res judicata*, and therefore of both cause of action estoppel and issue estoppel, is judicial finality. "The doctrine prevents an encore, and reflects the law's refusal to tolerate needless litigation." The policy considerations underlying issues estoppel were discussed in the leading Canadian case on the subject, *Angle v. M.N.R.* [at 267, S.C.R.].
>
> > The basis of issue estoppel as well as of cause of action estoppel has been variously explained; for example, that it is "founded on considerations of justice and good sense" (see *New Brunswick Railway Co. v. British and French Trust Corp. Ltd.*, [1939] A.C. 1 at p. 19); that it is "founded upon the twin principles so frequently expressed in Latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause" (*Carl Zeiss* case, [1967] 1 A.C. 853, *per* Lord Upjohn at p. 946, *per* Lord Guest at p. 933); that it is founded on "the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and. . . the right of the individual to be protected from vexatious multiplication of suits and prosecutions. . ." (Spencer Bower and Turner, *Res Judicata*, 2nd ed. (1969), p. 10).
>
> Issue estoppel has pervasive application and extends not just to decisions made by courts but, as this court's judgment in *Rasanen* affirms, also to decisions made by administrative tribunals. Whether the previous proceeding was before a court or an administrative tribunal, the requirements for the application of issue estoppel are the same. [Some references omitted].

[21] The decision of the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, above, sets out three requirements for issue estoppel:

(a) that the same question has been decided in earlier proceedings;

(b) that the earlier judicial decision was final; and

(c) that the parties to that decision or their privies are the same in both proceedings.

[22] The Supreme Court summarized the purpose of the law of issue estoppel at para. 18:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[23] Similar observations were made by the Ontario Court of Appeal in *Rasanen v. Rosemount Instruments Ltd.*, above, at para. 27. The Court of Appeal went on to describe, at para. 29, the nature of the inquiry that the court should make in determining whether the requirements of issue estoppel have been met:

> The proper inquiry in deciding whether the requirements have been met is whether the question to be decided in these proceedings is the same as was contested in the earlier proceedings and was, moreover, so fundamental to the decision that it could not stand without the determination of that question: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 254-55, 47 D.L.R. (3d) 544, per Dickson J.; *Spens v. Inland Revenue Com'rs*, [1970] 3 All E.R. 295 (Ch. Div.) at 301, per Megarry J., quoting Bower and Turner, supra, at pp. 181-182.)

[24] In *Angle v. Minister of National Revenue*, referred to by the Court of Appeal in *Rasanen*, above, Dickson J. stated at 255 that "[I]t will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment." He said that the question out of which the estoppel arises must have been fundamental to the decision arrived at in the earlier proceedings.

[25] In considering whether issue estoppel applies to this case, we should begin by considering the "question" or "issue" that was before the COA and the OMB on the Valanis' application. The jurisdiction of the COA with respect to minor variances is set out in s. 45(1) of the *Planning Act*, R.S.O. 1990, c. P.13:

> The committee of adjustment, upon the application of the owner of any land, building or structure affected by any by-law that is passed under section 34 or 38, or a predecessor of such sections, or any person authorized in writing by the

> owner, may, despite any other Act, authorize such minor variance from the provisions of the by-law, in respect of the land, building or structure or the use thereof, as in its opinion is desirable for the appropriate development or use of the land, building or structure, if in the opinion of the committee the general intent and purpose of the by-law and of the official plan, if any, are maintained. [Emphasis added].

[26] The test to be applied by the COA, therefore, has four parts:

(a) Is the variance minor?

(b) Is the variance desirable for the appropriate use of the land?

(c) Is the general intent and purpose of the by-law maintained? and

(d) Is the general intent and purpose of the official plan maintained?

[27] The decision of the COA reflected its application of the factors set out in s. 45.

[28] It is true that the COA and the OMB frequently consider the impact of the proposed variance on the surrounding neighbourhood in minor variance applications: see *Toth v. London (City) Committee of* Adjustment, above, at para. 11:

> Planning is not done in a vacuum. The Board must consider the surrounding neighbourhood and the impact on the neighbours, on any minor variance request. In this case, the impact on the neighbours and the community is too negative and unacceptable and not in the public interest.

See also similar observations concerning the impact on the neighbourhood: *Parvanyik v. Brantford (City) Committee of Adjustment*, [2004] O.M.B.D. No. 39 at para. 20; *Vaughan v. Toronto (City) Committee of Adjustment*, above.

[29] These considerations come into play, however, as secondary or collateral to the consideration of whether the variance is "minor" or whether the intent of the zoning by-law is maintained. The fundamental issue before the COA and the OMB in minor variance cases is whether, in terms of sound planning principles, the variance met the requirements of s. 45.

[30] In the context of this case, I conclude that the issue of the cause of flooding of the Jains' property was not fundamental to the decision of the COA or the OMB. The reasons of the COA do not even reveal that the alleged flooding was considered by that body. Although it was clearly considered by the OMB, it was not fundamental to the decision because it was only collateral to the statutory test. I therefore conclude that the doctrine of issue estoppel has no application to this case.

[31] There is an additional, and more substantive reason why issue estoppel does not apply. There was no claim for nuisance before either the COA or the OMB and neither body had any jurisdiction to adjudicate such a claim. This is acknowledged by the Valanis. It was incidentally

acknowledged by the Acting Chair of the OMB when he stated, in his letter rejecting the Jains' request for a review:

> Finally, the Request brings to the Board's attention that despite the efforts of the Applicant to install drainage pipes, a portion of the Appellants' yard remains unuseable. A decision has been rendered by the Board and any persisting conflicts regarding property standards such as drainage issues are outside the Board's jurisdiction. Authority to enforce provisions of the Toronto Municipal Code is with the Investigation Services Divisions of the City of Toronto. Your client has alternative remedies, such as building standards compliance, which it may pursue with the city.

[32] The Acting Chair clearly recognized that the OMB's decision did not immunize the Valanis from compliance with drainage provisions of the *City of Toronto Municipal Code*; still less could it immunize them from a common law action for nuisance arising out of the construction of the gazebo.

[33] In my view, *Casa Luna Furniture v. Ottawa (City)*, above, relied on by the Valanis, is distinguishable from the case before me. The plaintiff, Casa Luna, operated a store in Ottawa. The basement of the store was flooded in 2003, allegedly as a result of road work undertaken by a contractor on behalf of the city. An action was commenced against the city and the contractor in 2004, claiming damages for negligence, but the action was dismissed, on consent in 2008. In 2005, Casa Luna commenced proceedings against Ottawa in the OMB, claiming damages for injurious affection under the *Expropriations Act*, R.S.O. 1990, c. E.26. The claim was dismissed by the OMB as statute-barred. A new action was commenced in 2006.

[34] D.J. Power J. granted the defendant's motion for summary judgment dismissing the action. He held that the action was one for injurious affection, a matter within the exclusive jurisdiction of the OMB: see *Ghalioungui v. Mississauga (City)*, [2005] O.J. No. 1225 (S.C.J.). He also held that the doctrine of *res judicata* prohibited re-litigation of an issue determined by a court of competent jurisdiction and that it would be an abuse of process to re-litigate the issue.

[35] The distinction between this case and *Casa Luna* is readily apparent. In the latter case, the OMB had exclusive jurisdiction over the claim for injurious affection and had the ability to award damages for the very sort of wrong alleged in the subsequent litigation. In this case, the OMB had no jurisdiction over a common law claim for nuisance and no jurisdiction to award damages. A request for that relief is being made, for the first time, in this court.

[36] If the gazebo had been constructed entirely within the by-law, and caused a nuisance, there is no question that the Valanis could be held liable for the nuisance, in spite of the fact that the structure complied with the by-law. It would be passing strange if a structure that did not comply with the by-law could be immunized from civil suit by virtue of the granting of a "minor" variance. It would be equally strange if the approval of a minor variance by the OMB had the effect of authorizing the commission of a nuisance. It would be an extraordinary state of affairs, in my view, if an objector at an OMB hearing were to lose its civil rights, in this case the right to claim damages for nuisance, if its evidence and arguments against a minor variance were to be rejected.

[37] Had I found that issue estoppel applied, I would have exercised my discretion to refuse a stay: see *British Columbia (Minister of Forests) v. Bugbusters* (2001), 159 B.C.A.C. 169, [2001] B.C.J. No. 1903 at para. 32 (C.A.); *Minott v. O'Shanter Development Co.*, above, at para. 50. This was a case, to use the words of Binnie J. in *Danyluk*, where the focus of the proceedings before the COA and the OMB was entirely different than the focus of the Jains' civil action. The focus of the former proceedings was simply a planning question – a request by the Valanis for approval of a structure that fell outside the by-law – an appropriately named "minor variance". The focus had nothing to do with compensation of the Jains for a nuisance caused by the structure, which is the entire focus of this civil proceeding. It does not undermine the integrity of the adjudicative process of the COA or of the OMB to say that findings of fact made by these tribunals in relation to planning issues within their jurisdiction are not determinative of liability in subsequent civil proceedings. On the contrary, it simply recognizes the limits of the sphere of responsibility of these bodies.

[38] It would be entirely unjust, in my view, to deprive the Jains of a civil remedy simply because they objected to their neighbour's application for a minor variance.

[39] My decision is not a determination that the Jains' claim will succeed. I simply conclude that they should be permitted to pursue it.

Conclusion

[40] For the foregoing reasons, the motion is dismissed with costs in the amount of $11,500, all inclusive, an amount agreed upon by counsel.

G.R. Strathy J.

Date: February 22, 2011