

CANADA / JUDGMENT

Airside Event Spaces Inc. v. Langley (Township)

2022 BCCA 393

COURT

British Columbia Court of Appeal

DECIDED

18 November 2022

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2022 BCCA 393 Airside Event Spaces Inc. v. Langley (Township)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Airside Event Spaces Inc. v. Langley (Township),

2022 BCCA 393

Date: 20221118

Docket: CA47216

Between:

Airside Event Spaces Inc.

Appellant

(Petitioner)

And

The Township of Langley

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Fitch

(In Chambers)

On an application for contempt from an order of a judge of the Court of Appeal

for British Columbia made March 1, 2021 (Airside Event Spaces Inc. v.

The Township of Langley, 2021 BCCA 90 Vancouver Docket CA47216).

Oral Reasons for Judgment

Representative for the Appellant Company, appearing in person

(via videoconference November 18, 2022):

H. Nielsen

Counsel for the Respondent:

N. Lapper

R. Grant, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

November 3, 2022

Place and Date of Judgment:

Vancouver, British Columbia

November 18, 2022

Summary:

The Applicant seeks an order that the Respondent be found in contempt of court for its alleged non-compliance with a condition of a spent stay order. The stay was conditional on the Respondent's payment of rent to the Applicant; the order was in effect until this Court rendered judgment in the appeal, which occurred on August 9, 2021. Held: The application is dismissed. The stay order did not impose an independent obligation on the Respondent to pay rent; rather, payment of rent was a condition of the stay. Failure to pay rent could have resulted in the stay order being set aside, but the Applicant did not apply for this remedy while the stay order was extant. Finding the Respondent in contempt of court for failure to abide by a condition of the stay order would constitute an unjustified expansion of the contempt of court power. In any event, there is a reasonable doubt about whether the Respondent intentionally disobeyed the order. The Respondent is entitled to the benefit of that doubt. In addition, exercise of the Court's contempt power is discretionary and the circumstances of this case do not warrant such a finding.

FITCH J.A.:

I. NATURE OF APPLICATION

- [1] The applicant, The Township of Langley (the "Township"), applies for a declaration that Airside Event Spaces Inc. ("Airside"), be found in contempt of an order made by Justice Fisher on March 1, 2021.
- [2] Justice Fisher's order stayed the execution of a Supreme Court order that dismissed Airside's petition for relief from forfeiture. The stay of execution was conditional on: (1) Airside continuing to pay rent to the Township pursuant to the lease; and (2) the Township not re-leasing the premises or making alterations to the premises while the stay was in effect.
- [3] The Township says Airside failed to make the payments it should have in accordance with the first condition attached to the stay order. The Township claims to be owed approximately \$6,000 for payments that it says should have been made to them by Airside while the stay was in effect. The contempt application is therefore premised on Airside's alleged non-compliance with a condition of the stay order.
- [4] If a contempt finding is made, the Township seeks an order imposing fines on Airside's two directors, Howard Nielsen and Kayla Joy English. In the notice of application, the Township sought the imposition of \$5,000 fines on each of the directors or, alternatively, an order that each director be committed to custody for seven days. The position was modified in oral argument of the application. The Township submitted that a lesser fine may be appropriate and suggested that the directors be fined about one-third of the amount the Township says is owing to it, or \$2,000. The Township did not seek a committal order in the event a contempt of court finding is made. The Township also seeks an order that Airside pay the Township's costs of this application as special costs.
- [5] Howard Nielsen appeared on Airside's behalf in response to the application. Kayla Joy English did not appear in response to the application. Airside filed no affidavit evidence in response to the application.
- [6] For the reasons that follow, the application for a declaration that Airside is in contempt of court for disobeying the order of Justice Fisher is dismissed.

II. BACKGROUND

- [7] The underlying litigation arose out of a lease between Airside and the Township for premises located within the Langley Regional Airport (the "Premises"). Airside is a business owned by the Nielsen Family Trust, of which Howard Nielsen is the trustee. Mr. Nielsen learned that a hangar located at the airport was for sale, and that the Premises--on which the hangar is situated--was available for lease from the Township. A Nielsen family company purchased the hangar and entered into a lease with the Township for use of the Premises on November 15, 2013 (the Nielsen family company's interests were eventually transferred to Airside, with the Township's permission). The initial term of the lease was for 14 years, expiring on October 31, 2027.

- [8] Pursuant to the terms of the lease, Airside was obliged to pay Basic Rent plus Additional Rent for, among other things, property taxes and utilities.
- [9] On June 28, 2020, the Township gave Airside formal notice of alleged breaches of the lease, including unpermitted uses, unlicensed business operations, and unlawful construction activities. The Township demanded access to the Premises within two days and indicated that failure to cure the identified breaches by July 28, 2020, would lead to termination of the lease. On August 11, 2020, the Township wrote Airside advising that it was electing to terminate the lease and would be taking possession of the Premises as of August 26, 2020. Airside filed a petition for relief from forfeiture. The Township agreed not to lease the Premises to a third party until Airside's petition was decided.
- [10] On December 16, 2020, Justice Milman dismissed Airside's petition for relief from forfeiture with costs to the Township. He found that Airside failed to demonstrate the requisite degree of good faith in its dealings with the Township so as to be entitled to relief from forfeiture.
- [11] Airside filed a notice of appeal from Justice Milman's order on January 14, 2021.
- [12] On March 1, 2021, Justice Fisher granted an order staying the execution of Justice Milman's order until Airside's appeal was decided on its merits. Justice Fisher made the stay of execution conditional on Airside continuing to pay rent to the Township and on the Township refraining from re-leasing or making alterations to the Premises.
- [13] The order of Justice Fisher reads, in material part, as follows:
- IT IS ORDERED that the Appellant's application for a stay of execution of the order of Mr. Justice Milman made December 16, 2020 be granted until the within appeal is decided on its merits on the condition that the Appellant continues to pay rent to the Respondent and the Respondent refrains from re-leasing the premises located within the Langley Regional Airport at 17-5225 216th Street in Langley, British Columbia (the "Premises") or making alterations to the Premises other than emergency repairs.
- [14] The appeal was heard on June 21, 2021. Judgment was reserved. In written reasons delivered on August 9, 2021 and indexed as 2021 BCCA 306, the Court dismissed Airside's appeal.
- [15] As noted earlier, the factual basis for this application is Airside's alleged failure to comply with the condition of the stay order that it continue to pay rent to the Township until the determination of the appeal. The Township alleges that, as of August 9, 2021--the date upon which judgment was released--Airside had failed to pay a total of \$6,631.60 in rent owing under the lease. The majority of the arrears are said to have accrued during the currency of the stay order. The Township breaks down the amounts owing as follows:
- a) Basic Rent in the amount of \$767.37, which is the difference between the amount of rent paid (\$7,753.38) and the amount of rent owed under the lease (\$8,520.75).

- b) Additional Rent for property tax for 2021 pro-rated to August 9, 2021, in the amount of \$5,406.23, and for the cost of utility connections to August 9, 2021, in the amount of \$458.
- [16] To the extent that Airside made payments under the lease between March 1, 2021 and August 9, 2021, the Township says that it did so sporadically and was constantly late. Despite this, the Township did not move to have the stay order vacated for non-compliance with one of its conditions. Further, at the time of the appeal hearing, the Township did not take the position that the division should not hear the appeal due to Airside's failure to comply with the condition of the stay order that it continue to pay rent owed to the Township pursuant to the terms of the lease. While I understand that Airside was up-to-date on its payment of Basic Rent when the appeal was heard, it appears that Airside had not then met its obligation to pay the Additional Rent it owed to the Township.
- [17] The Township claims to have sent a demand letter to Airside on or about December 14, 2021, requiring payment of the rent outstanding by December 31, 2021. The Township claims that Airside never responded to the demand letter and has failed to pay the outstanding rent.

III. THE POSITIONS OF THE PARTIES

- [18] The Township seeks a declaration that Airside be found in contempt of the order of Justice Fisher made on March 1, 2021, for failing to pay all rent owing to the Township between March 1, 2021 and August 9, 2021. The Township submits that Airside's failure to pay rent constitutes a wilful contravention of the order of Justice Fisher.
- [19] Mr. Nielsen gave evidence on the hearing of the application that he was not personally served with the notice of application or materials in support. I need not resolve this issue to properly dispose of this application.
- [20] Mr. Nielsen submitted that Airside made efforts to continue paying rent but that it has no current ability to pay the amount the Township says is owing. He further submits that a contempt finding cannot be based on the breach of a spent order.

IV. ANALYSIS

1. Jurisdiction

- [21] I am satisfied that I have jurisdiction to find a party in contempt of court and sanction that party for disobeying an order made by this Court or a judge thereof.
- [22] Section 24(2)(b) of the Court of Appeal Act, S.B.C. 2021, c. 6 provides that the court may "exercise the powers of the Supreme Court in relation to matters of contempt of court". Section 30(d)(i) empowers a single justice to exercise the powers referred to in s. 24(2)(b): see *Langford (City) v. dos Reis*, 2016 BCCA 201 at para. 17 (Chambers), decided under s. 9(7) of the former Act (R.S.B.C. 1996, c. 77).

[23] The powers of the Supreme Court in relation to contempt are set out in Rule 22-8 of the Supreme Court Civil Rules, B.C. Reg. 168/2009:

- (1) The power of the court to punish contempt of court must be exercised by an order of committal or by imposition of a fine or both.
- (2) If a corporation wilfully disobeys an order against the corporation, the order may be enforced by one or more of the following:
 - (a) imposition of a fine on the corporation;
 - (b) committal of one or more directors or officers of the corporation;
 - (c) imposition of a fine on one or more directors or officers of the corporation.

2. Civil Contempt

[24] As explained in *Carey v. Laiken*, 2015 SCC 17 [Carey] at paras. 32-35, civil contempt has three elements which must be established beyond a reasonable doubt:

- a) The order alleged to have been breached must state clearly and unequivocally what should and should not be done;
- b) The party alleged to have been in breach must have had actual knowledge of the order; and
- c) The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.

[25] Intention to breach the order may be inferred from the circumstances of the case: *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316 at para. 15. In practice, "all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice": *Carey* at para. 38.

[26] The principles governing a contempt application are well-settled. They were summarized, albeit in a non-exhaustive way, in *Peel Financial Holdings Ltd. v. Western Delta Lands Partnership*, 2003 BCCA 551 at para. 18:

1. The proceedings are quasi-criminal in nature and the rules of *strictissimi juris* apply, meaning for example that the evidence supporting the motion must conform to the rules of admissibility at a trial; so no hearsay, opinion, conclusions and the like are receivable
2. The applicants bear the onus of proving the elements of contempt on the criminal standard, viz. beyond a reasonable doubt
3. If the order said to be breached is ambiguous, the alleged contemnor is entitled to the most favourable construction

[Citations omitted.]

- [27] As noted in *Carey*, contempt of court rests on the power of the court to uphold its dignity and process. Civil contempt grounded in disobedience of a court order is a very serious matter. It constitutes an affront to the court and a challenge to the rule of law: *Frith v. Frith*, 2008 BCCA 2 at para. 32. A contempt finding transcends the dispute between the parties. It strikes at the heart of the administration of justice.
- [28] At the same time, the contempt power is discretionary and should not routinely be used to obtain compliance with court orders: *Carey* at para. 36. It is a "heavy, blunt tool"--one to be used with restraint and as a measure of "last resort": *Morasse v. Nadeau-Dubois*, 2016 SCC 44 at para. 21; *Taherkhani v. Este*, 2020 BCCA 226 at para. 32, citing *Hokhold v. Gerbrandt*, 2016 BCCA 6 at paras. 31-32.
- [29] The primary purpose of imposing a sanction for civil contempt is coercive--to secure the contemnor's compliance with the court order: *Carey* at paras. 40-41.
- [30] When a party breaches a condition of a stay order, the typical remedy is to set aside the stay: see *Harder v. Poettcker*, 2016 BCSC 443 at para. 17; *Wolfson Law Professional Corporation v. Muti*, 2016 ONCA 694 at para. 2.
- [31] As counsel for the applicant acknowledged in oral argument, seeking a contempt finding in circumstances such as those that exist in the case at bar is unusual.
3. Application of General Principles to the Case at Bar
- [32] There are, in my view, a number of reasons why this application must be dismissed.
- [33] The first stems from a proper characterization of the order of Justice Fisher. In my view, payment of rent was a condition of the stay order. The order did not impose an independent obligation on Airside to pay rent, failing which it was in contempt of the order. Rather, the potential consequence to Airside for failing to comply with this condition of the stay order was that the order could be set aside on application of the Township. In this event, the Township would be at liberty to lease the Premises to a third party. Non-compliance with a condition of the stay order would trigger its own consequence: the order could be vacated. The Township did not, however, apply for an order vacating the stay order. Consequently, it did not avail itself of the remedy built into the order.
- [34] My assessment of this issue is in no way dependent on the fact that the stay order was spent by the time the contempt application was brought. Had the Township brought a contempt application while the stay order was extant, on grounds that, by failing to pay rent, Airside had breached a condition of the order, I am of the view that the application could not have succeeded. Again, this is because the stay order did not compel Airside to pay rent, but made the stay conditional on the payment of rent.

- [35] I am unaware of any case in which a party was found in contempt of court for breach of a condition attaching to a stay of execution. The applicant brought to my attention to *Baring v. Farm Credit Corporation*, 2019 BCSC 1965 at paras. 72 and 77. But the issue was not squarely before the court in that case and the remarks of Justice Gomery are dicta.
- [36] Conditions are attached to all manner of orders made by appellate courts. Making a contempt finding in the circumstances of the case at bar would, in my respectful view, constitute a significant and unwarranted expansion of the court's contempt power.
- [37] Setting aside my view that Airside is not in contempt of the stay order by failing to adhere to one of its conditions, I would have dismissed the application on two other grounds.
- [38] First, I would have entertained a reasonable doubt about whether Airside intentionally failed to do the act the Township says the order compelled. I note, in this regard, that Airside made substantial payments of Basic Rent to the Township during the currency of the order.
- [39] Second, the contempt power of the court is discretionary. It must be used cautiously and with great restraint. The scope of the discretion was not fully explored in *Carey*. Writing for the Court, Justice Cromwell merely identified, as one example, that when an alleged contemnor acts in good faith in taking reasonable steps to comply with an order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt: *Carey* at paras. 36-37.
- [40] If it were necessary to do so, I would exercise my discretion in this case to decline to make a finding of contempt. I would do so on grounds that a contempt finding in these circumstances would fail to respect the restraint with which the power should be used, particularly in circumstances where the Township had available to it, but declined to pursue, an alternative and efficacious remedy--to apply to vacate the stay order on grounds of non-compliance with its terms.
- [41] I need not address Mr. Nielsen's position that a contempt finding cannot be made for the breach of a spent order. The issue does, however, raise a conceptual problem. As noted earlier, the primary purpose of a civil contempt finding is to coerce a non-compliant party to respect the terms of a court order. This cannot be achieved in circumstances where the order is spent. The danger in these circumstances is that the sanction becomes either purely punitive or too closely tied to the interest of the moving party in obtaining enforcement of a judgment or, as in this case, payment of a debt the Township says is owed to it by Airside.
- [42] The second of these dangers is illustrated by the case at bar. The Township argued that a contempt finding in this case would encourage Airside to purge its contempt by paying the Township the rent it says Airside owes. In essence, the Township invokes a contempt proceeding to the end of leveraging payment of the civil debt said to be owed to it by Airside. Indeed, at the hearing of the application, the Township recommended that the sanction for contempt be tied to the amount of the alleged debt, though counsel submitted this was more a matter of finding a "principled basis" upon which to base the fine in the absence of

guidance in the jurisprudence as to an appropriate quantum.

- [43] As Justice Newbury noted in *Sorrenti* at para. 8, civil contempt proceedings grounded in alleged disobedience of a court order transcend the interests of the parties to the proceedings in which the order is made. As between the party in default and the state, the court is being called on to exercise a penal or disciplinary jurisdiction in the public interest.
- [44] Just as the contempt of court power cannot be reduced to a mere means of enforcing judgments (see *Vidéotron Ltée. v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065 at 1078, 1992 CanLII 29, citing *Daigle v. St-Gabriel-de-Brandon (Paroisse)*, [1991] R.D.J. 249, 1991 CanLII 3806 (Que. C.A.)), neither can it be reduced merely to the means through which one party can attempt to coerce payment of a debt allegedly owed to it by another party.
- [45] As it is unnecessary for me to further address these concerns to resolve the application before me, I would leave to another day a more detailed consideration of the conceptual problem identified herein.

V. DISPOSITION

- [46] For the foregoing reasons, the application for a declaration that Airside is in contempt of the order of Justice Fisher made on March 1, 2021, is dismissed.

"The Honourable Mr. Justice Fitch"

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