

CANADA / JUDGMENT

Alam v. Leung

2025 BCCA 13

COURT

British Columbia Court of Appeal

DECIDED

2 January 2025

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2025 BCCA 13 Alam v. Leung

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Alam v. Leung,

2025 BCCA 13

Date: 20250102

Docket: CA50058

Between:

Akm Alam

Appellant

(Respondent)

And

Sophie Leung and William Lien

Respondents

(Petitioners)

Before:

The Honourable Justice Riley

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
July 4, 2024 (Leung v. Alam, 2024 BCSC 1188, Vancouver Docket S240638).

Oral Reasons for Judgment

The Appellant, appearing in person:

A. Alam

The Respondent S. Leung, appearing
in person (via videoconference):

S. Leung

The Respondent W. Lien, appearing
in person (via videoconference):

W. Lien

Place and Date of Hearing:

Vancouver, British Columbia

January 2, 2025

Place and Date of Judgment:

Vancouver, British Columbia

January 2, 2025

Summary:

The appellant seeks an extension of time to file his appeal book and factum. The respondents oppose that application, and seek dismissal of the appeal as abandoned based on the appellant's failure to meet prior filing deadlines. Held: Application for extension of time granted, application to dismiss the appeal refused. This is the appellant's third application for an extension of time, and the matter is approaching a point where further failures to meet filing deadlines could be regarded as unacceptable. However, the appellant has demonstrated a bona fide intention to prosecute the appeal, the appeal has some merit, and the delays thus far have not caused sufficient prejudice to the respondents to warrant dismissal.

RILEY J.A.:

Introduction

- [1] These reasons address two applications. The first is made by the appellant Mr. Alam, who seeks an extension of time to file his factum and appeal book. This is the third application for an extension of time to file his appeal materials.

- [2] The second application is made by Ms. Leung and Mr. Lien, the respondents, who seek an order dismissing the appeal as abandoned due to multiple delays arising from Mr. Alam's non-compliance with filing deadlines.
- [3] The appeal itself relates to a judicial review decision indexed as *Leung v. Alam*, 2024 BCSC 1188, setting aside an order of the Residential Tenancy Branch ("RTB") and directing a new hearing before the RTB. The RTB proceedings related to a tenancy arrangement in which Mr. Alam was the tenant and Ms. Leung and Mr. Lien were the landlords. The RTB found that Ms. Leung and Mr. Lien improperly terminated the tenancy by not remaining or continuing to reside in the residence after the termination of the tenancy and ordered them to pay Mr. Alam compensation of \$43,300, representing 12 times the monthly rent plus, I believe, costs.
- [4] For the reasons that follow, Ms. Leung and Mr. Lien's application to dismiss is refused, and Mr. Alam's application for an extension of time to file the appeal book and appellant's factum is granted. I appreciate that this is the third extension of time, and the matter is quickly approaching a point where further failures to meet filing deadlines could be regarded as unacceptable. However, I find that Mr. Alam has a bona fide intention to prosecute the appeal, that his appeal has some merit, and that the delays thus far have not caused sufficient prejudice to the respondents to warrant dismissal even though the continued stress of prolonging the proceedings is not a matter that is entirely of no concern.

Background

- [5] On 30 March 2021, Ms. Leung and Mr. Lien purchased a house in Vancouver, B.C. that was, at the time of purchase, being rented to Mr. Alam. Ms. Leung and Mr. Lien gave notice to Mr. Alam, who challenged the notice and refused to vacate the property. Following several RTB decisions, Mr. Alam was ordered to vacate the property, and he did so on 23 July 2021. Ms. Leung and Mr. Lien claim to have moved into the property the following day, 24 July 2021, and lived in the house for around 13 months, before letting it to a new tenant on 25 August 2022.
- [6] On 26 June 2023, Mr. Alam filed a notice of dispute with the RTB, alleging that Ms. Leung and Mr. Lien had not properly occupied the property as they claimed, and seeking compensation equivalent to 12 months of rent. Arbitrator Wang of the RTB found in favour of Mr. Alam and awarded him \$43,300 (the "Merits Decision"). Ms. Leung and Mr. Lien filed an application for reconsideration to the RTB on 18 January 2024, claiming they had new evidence that had not been available in the original hearing. On 19 January 2024, Arbitrator Grande of the RTB dismissed their application for reconsideration, finding the evidence was not new and could have been made available prior to the original hearing (the "Review Decision"). On 30 January 2024, Ms. Leung and Mr. Lien filed an application for judicial review of the RTB's decisions.

- [7] On 4 July 2024, the chambers judge released her reasons in the judicial review, which, as noted above, are indexed as *Leung v. Alam*, 2024 BCSC 1188. She found that the outcome of the Merits Decision was (i) patently unreasonable as the evidence before Arbitrator Wang was "manifestly insufficient" to support the finding that Ms. Leung and Mr. Lien had failed to comply with the stated purpose in the notice to end tenancy (paras. 41-42), and (ii) procedurally unfair as the arbitrator blindly followed procedural rules with a desire to complete the hearing "as quickly as possible" rather than ensuring all evidence necessary for a fair decision was available before a decision was rendered (paras. 29-37, 43).
- [8] The chambers judge also found that the Review Decision was both patently unreasonable and procedurally unfair. She found it was patently unreasonable because it reached conclusions that were not based on the evidence before the arbitrator. She found it was procedurally unfair for failing to provide adequate reasons for its conclusions. The Review Decision "simply compounded the original problem" in the Merits Decision (para. 55).
- [9] Based on these findings, the chambers judge set aside both the Merits Decision and the Review Decision and remitted the issue back to the RTB for a new hearing (paras. 56-57).
- [10] On 6 August 2024, Mr. Alam filed a notice of appeal to this Court, along with an accompanying no fees application.

Procedural History of this Appeal

- [11] It is important to review the procedural history of this appeal in order to discuss whether either application before me should be granted.

First Extension Application - 7 October 2024

- [12] On 7 October 2024, Mr. Alam filed his first application for an extension of time to file his appeal materials. In the accompanying affidavit, Mr. Alam noted the reasons for the extension were the "complexities of legal content and for accuracy of submissions" and "a few extra days is what he required". I heard that application in chambers on 17 October 2024, and determined that it was in the interests of justice to grant Mr. Alam an extension to 28 October 2024 to file his appeal materials.

Second Extension Application - 29 October 2024

- [13] On 29 October 2024, one day after the deadline provided by the first extension, Mr. Alam filed a second application for an extension of time to file his appeal materials. The second application requested an extension to 15 November 2024, for his appeal record, and 15 December 2024, for his appeal book and factum. His reasons for this second application were that he was in the hospital on 28 October 2024 (the deadline for filing his appeal record) and therefore had to submit it online. He claims he had difficulties filing his materials with the registry online and needed more time to improve them. Mr. Alam provided a prescription issued by a doctor for pain medication, which was accepted by

Justice Bennett as establishing some evidence of the reason for the delay (Justice Bennett's oral reasons of 14 November 2024 at para. 31). Mr. Alam also made oral arguments at that hearing that he was attempting to access legal supports from Access Pro Bono (para. 32).

[14] Justice Bennett granted Mr. Alam's application and made several points worth repeating in these reasons. First, in response to the prejudice claimed by the Ms. Leung and Mr. Lien, Justice Bennett concluded at para. 33 that "[t]here is no specific financial prejudice or developments that have been said to occur as a result of the extension." Second, Justice Bennett compared this case to others where multiple extensions had led to an eventual dismissal of an application for an extension of time. In those cases, the extensions had led to a delay of around six months. As the delay in this case had only been about six weeks, Justice Bennett concluded that the prejudice was not significant enough to merit a dismissal of the application. Third, following the conclusions of both Justice Abrioux (in granting a no fees application), and myself (in granting the first extension of time application), Justice Bennett concluded that Mr. Alam's case has "at least some merit" (para. 35).

[15] Mr. Alam filed the appeal record on 14 November 2024, one day before it was due.

Third and Current Extension Application - 16 December 2024

[16] On 16 December 2024, Mr. Alam filed his third application for an extension of time to file his appeal book and factum. Two days later, on 18 December 2024, Ms. Leung and Mr. Lien filed their application to dismiss the appeal as abandoned for non-compliance with the Rules.

[17] In this most recent application, Mr. Alam provides three reasons for the extension. First, he submits that he has encountered "unforeseen personal emergencies involving significant health issues" relating to both him and his son. These include his son undergoing eye surgery from 3 to 6 December 2024, which required his attention at multiple hospital visits. He also submits that he had a car accident on 8 December 2024, that resulted in injuries and further delay. I will say Ms. Leung and Mr. Lien point out Mr. Alam's son is 42 years old and has other family members. That is relevant but it does not change the fact that the son had to go to the hospital and Mr. Alam felt it advisable to attend the hospital on multiple occasions between 3 and 6 December 2024, right around the time that he would have been expected to be finalizing his appeal book and his factum.

[18] Second, Mr. Alam submits that he has faced "non-cooperation" from Ms. Leung and Mr. Lien, alleging that they have refused to accept service of his appeal record and transcript despite repeated attempts. This issue was discussed at length at the hearing before me today. I do not find it particularly convincing in terms of being an explanation for the current delays which do not have to do with the appeal record or the transcript, but, rather, the preparation of the appeal book and the factum. Mr. Alam says that he did waste a day, having to drive to the respondents' address for service to deliver these documents. I can accept that, but the bottom line is that there is a process in place in the Rules for delivery of documents, and I am satisfied that Mr. Alam can comply with it.

- [19] Third, and finally, Mr. Alam submits that the Canada Post strike, that took place between 15 November and 17 December 2024, further complicated the timely service and communication necessary for completing his materials. I do not see any direct link between the Canada Post strike and the preparation and filing of Mr. Alam's appeal book and factum, and, in any event, the Canada Post strike is now over so it will not be a cause of any future concern or delay in relation to this matter.
- [20] The evidence relating to all of these things is provided for in Mr. Alam's affidavits #4 and #5 (16 December and 27 December 2024 respectively).

Cross Application for Dismissal of the Appeal - 18 December 2024

- [21] As I said earlier, two days after Mr. Alam's third application for extension of time to file his appeal book and factum, Ms. Leung and Mr. Lien filed an application to dismiss the appeal as abandoned pursuant to s. 36(c) of the Court of Appeal Act, S.B.C. 2021, c. 6, which states that a justice can make such an order "if a party fails to comply with this Act or the rules or an order or direction of the court, a justice or the registrar".
- [22] Ms. Leung and Mr. Lien submit that Mr. Alam has repeatedly failed to comply with the mandatory deadlines imposed by the Court, which will result in a nearly three-month delay by the time of this hearing on 2 January 2025. Further, they submit that Mr. Alam has not provided valid justification for the delays.
- [23] Ms. Leung and Mr. Lien also submit that the continued delays are causing prejudice to them, including (i) "considerable emotional and practical strain", and (ii) obstructing the RTB from upholding the chambers judge's order by scheduling a new hearing. Ms. Leung and Mr. Lien allege that these delays "demonstrate an intentional effort to delay proceedings." I will address that last point. I am not satisfied that there is a basis upon which I could infer that Mr. Alam is, at this point, intentionally delaying the proceedings. The missed deadlines, while they are a cause of some delay and are no doubt frustrating to the respondents, have not been of such an order of magnitude as to suggest an intention to put this matter off indefinitely. By way of an example, I refer to Mr. Alam's submission today that, if he were given a further five days, until next Monday, to file and serve his appeal book and factum, he could have it done. That, to me, does not suggest an intention to put the matter off indefinitely. Rather, it speaks to or suggests complications encountered by Mr. Alam in being able to meet the deadlines that have been already imposed upon him.

Law

Applications for Extensions of Time

- [24] Rule 41 of the Court of Appeal Rules, B.C. Reg. 120/2022, provides that a party may apply to a justice to extend any time limit provided for in the Rules or the Court of Appeal Act.

- [25] The criteria that this Court applies in assessing an application for an extension of time -- including extensions of time in respect of filing deadlines -- are found in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-261 (C.A.), 1987 CanLII 2608; see also *Tan v. Tan*, 2024 BCCA 312 at paras. 9-11 (Chambers). The factors, modified to suit the circumstances of this case, can be summarized as follows: (i) whether the applicant has a bona fide intention to take the steps necessary to prosecute the appeal; (ii) whether the respondents were informed of the applicant's intention; (iii) whether the respondents would be unduly prejudiced by the extension of time; (iv) whether there is merit in the appeal; and (v) whether the interests of justice would be served by granting the extension (the "Davies factors"). The fifth factor -- the interests of justice -- is an overriding consideration that encompasses and embraces the other four, and is therefore the decisive factor. The burden is on the applicant to establish that the Davies factors are met: *Rapton v. British Columbia (Motor Vehicles)*, 2011 BCCA 71 at para. 19 (Chambers).
- [26] While the Davies factors will be applied less stringently where the extension sought is for filing deadlines, as opposed to an extension of time to actually commence the appeal, this relaxed standard is not a static one: *Jeremic v. Jeremic*, 2011 BCCA 442 at para. 12 (Chambers). One ought to expect that successive or serial applications for extensions of time will be met with increasing levels of scrutiny.

Applications for Dismissal

- [27] In the case of applications for dismissal, two parallel tests have developed in this Court: (i) the Davies factors described above, and (ii) the analysis developed in *Frew v. Roberts* (1990), 29 B.C.L.R. (3d) 34 (C.A.), [1990] B.C.J. No. 2175, which asks if the delay is inordinate, unexplained or inexplicable, and whether it will prejudice the other party: at 37.
- [28] Some justices of this Court have reasoned that the test in *Frew* should only be applied to cases where the delays have been more than a year, without any steps having been taken, and the appeal has either been placed on the inactive list or dismissed as abandoned. When the delay at issue has been less than a year, courts should instead apply the Davies factors. Authority for this proposition can be found in *Redpath v. Redpath*, 2008 BCCA 400 at paras. 13-15 (Chambers); see also *British Columbia (Attorney General) v. Malik*, 2012 BCCA 58 at para. 24 (Chambers), reconsideration refused 2012 BCCA 175. In this case, where the delay sought is significantly less than a year, I will apply the Davies factors.
- [29] The Davies factors have been described as a "compendious guide" for the analysis of both applications for dismissal and applications for extension of time: *Verlaan v. Von Deichmann*, 2006 BCCA 389 (Chambers) at para. 22. Therefore, the two applications currently before this Court are really opposite sides of the same coin, and an analysis using the Davies factors is appropriate to address both.

Analysis

- [30] As I indicated at the outset, I conclude, on balance, that the interests of justice favour granting Mr. Alam's extension of time application and refusing Ms. Leung and Mr. Lien's application to dismiss.
- [31] First, I do not accept Ms. Leung and Mr. Lien's submission that Mr. Alam is intentionally seeking to delay the proceedings. While there is no question that he is struggling to complete his appeal materials within the court-ordered timeframes, Mr. Alam has demonstrated a continuing intention to proceed with the appeal. He filed his appeal record by the deadline of 15 November 2024, as required. He has presented evidence supporting his explanations for the delay subsequent to that, including health issues and, to a lesser extent, some distractions relating to service. I am persuaded that these factors have created some additional difficulties that have impeded Mr. Alam's ability to complete his appeal materials.
- [32] Second, regarding the merits of Mr. Alam's appeal, all of the preceding justices who have engaged with this case have concluded that his appeal has at least some merit, and I agree. As Justice Bennett noted in her oral reasons relating to the second extension of time, the arguments on appeal are not straightforward and Mr. Alam was successful initially at the RTB. It is not required of me to undertake a full assessment of the merits of the appeal at this stage, and the presence of some merit -- or a confidence that it is not bound to fail, as each previous justice has found -- is sufficient to meet this Davies factor.
- [33] Third, I will address prejudice. I acknowledge that legal proceedings can be stressful, and that delay in the proceedings can add to this stress. However, in this case, granting Mr. Alam this extension of time for a matter of five days to file his appeal book and factum will not cause significant ongoing financial or continuing legal prejudice to Ms. Leung and Mr. Lien. While there is always some prejudice from prolonging legal proceedings, I do not find that there is prejudice enough, in this case, to merit dismissal.
- [34] Therefore, I find that it is in the interests of justice to grant the extension of time to Mr. Alam, and to refuse Ms. Leung and Mr. Lien's application for dismissal.
- [35] I would, however, note that successive applications for extension of time are not to be encouraged. Every time an appellant is unable to meet a court-ordered deadline, they increase the risk that the Court will ultimately conclude their appeal is not being prosecuted diligently and ought to be dismissed. As Justice Bennett noted in her reasons addressing Mr. Alam's second application for extension at para. 34:

"There is no rule against multiple extensions, but where multiple extensions have been granted and missed, this can be a factor weighing against granting an extension: see *McClaghry v. McClaghry*, 2018 BCCA 91 at paras. 17-18 (Chambers), confirmed on review 2018 BCCA 130.

[36] In McClaughry, the applicant had been granted and missed at least four extensions of time, and had delayed the proceedings by roughly six months. Following this decision, Mr. Alam will have received three extensions, and the total time of delay will be approximately three months. It would not be in Mr. Alam's interests to proceed with the understanding that he can continue to apply for extensions without risk of dismissal.

Disposition

[37] I grant Mr. Alam's application for an extension of time to file his appeal book and factum until 6 January 2025.

[38] I dismiss Ms. Leung and Mr. Lien's cross applications.

"The Honourable Justice Riley"

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