

CANADA / JUDGMENT

Almasri v. Saska

2018 BCCA 351

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 351 Almasri v. Saska

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Almasri v. Saska,

2018 BCCA 351

Date: 20180912

Docket: CA45059

Between:

Badia Almasri

Respondent

(Claimant)

And

Laszlo Saska, Terezia Rehak and 0774925 BC Ltd.

Appellants

(Respondents)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated

January 23, 2018 (Almasri v. Saska, 2018 BCSC 432, Victoria Docket E151434).

Oral Reasons for Judgment

The Appellant appearing in person:

L. Saska

Counsel for the Respondent:

K.J. Hauer

Place and Date of Hearing:

Victoria, British Columbia

September 11, 2018

Place and Date of Judgment:

Vancouver, British Columbia

September 12, 2018

Summary:

The appellant seeks a review of a decision refusing leave to appeal a costs order. Held: Application dismissed. The chambers judge made no error in concluding that the proposed appeal lacked merit and declining to grant leave to appeal.

- [1] HUNTER J.A.: The applicant Laszlo Saska wishes to appeal an order for costs made at the conclusion of a nine day trial. His application for leave to appeal the costs order was dismissed by a justice of this Court in chambers. Mr. Saska now applies for a review of this decision under s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77.
- [2] The background to this application is somewhat convoluted. I do not propose to review it in detail, but will summarize the litigation history to the extent necessary to address this application.
- [3] Mr. Saska and Ms. Almasri were parties to a divorce proceeding initiated by Ms. Almasri in which property division, spousal support, child support and parenting responsibilities were at issue. The trial took place in the Supreme Court of British Columbia before Madam Justice Holmes. Judgment was pronounced on October 10, 2017. Mr. Saska filed a Notice of Appeal of this judgment and a subsequent order clarifying certain matters, but the appeal was dismissed as out of time. The only matter not finally disposed of is the costs of the litigation.

- [4] Justice Holmes addressed costs in a subsequent order dated January 23, 2018 and indexed as 2018 BCSC 432. Ms. Almasri was seeking special costs on the basis that Mr. Saska's conduct "in and leading up to these proceedings" was deserving of rebuke. Justice Holmes first considered whether costs should be awarded to Ms. Almasri. The parties disagreed on who had been successful in the litigation. The trial judge's conclusion on this point was as follows:
- [8] By the usual analysis of success in litigation, which I must apply in this application, Ms. Almasri succeeded on most, though not all, of the parenting issues, because the orders she sought were granted.
- [9] Ms. Almasri achieved substantial success in the litigation, and I cannot accept Mr. Saska's position that the substantial success was his own.
- [5] The judge went on to consider the respondent's application for special costs. She directed herself that special costs can be ordered "when a party's litigation conduct can be characterized as reprehensible": at para. 11. She then described the conduct at issue in para. 13 of her judgment:
- Mr. Saska used numbered companies to obscure one of the transfers, and to attempt to insulate the property from Ms. Almasri.
 - Before and during the trial, Mr. Saska was consistently reluctant, and in his evidence he sometimes failed entirely, to give any information about those numbered companies, attempting to give the impression that he could not speak for them, or had no information to offer, when such was clearly not the case.
 - Mr. Saska was unwilling to acknowledge control of one or more of the numbered companies, or to give Ms. Almasri information about them, making her task next to impossible in the litigation and in the process that led to it. This also increased the length and complexity of the trial by, among other things, increasing the number of issues required to be addressed by the parties and the Court.
 - Mr. Saska demonstrated an obdurate refusal to acknowledge facts that he evidently believed would weaken his position in the litigation. Some of these were not, in fact, material to the litigation, although that may not have been apparent at the time, since the issues evolved during the trial, partly because of the challenges I have referred to. One example was his position concerning the date of the marriage, which I found was approximately two years before the public celebration that Mr. Saska testified, and maintained, was the only marriage between him and Ms. Almasri.

- Mr. Saska pitted Ms. Almasri's interests against those of the children, although this was not made an issue in the litigation, by transferring the shares of a numbered company to the children and his godmother in one of the fraudulent conveyances. As I said, the children were not made parties to the litigation, but the conflict in interests he created by that transfer nonetheless underlay some of the issues in the trial.
 - Ms. Rehak, though generally polite, was evasive and sometimes, in the sense known to law, contemptuous in her attitude as a witness. She sometimes refused, on a continued basis and despite warnings about contempt of court to disclose information about her finances, including the location of the fraudulently conveyed assets. ·
 - Mr. Saska transferred family property three days before an order of this Court restricting the disposition of assets. Although the order was not in place at the time of the transfer, I find that he knew that such an order was likely to be granted.
- [6] The judge expressed her conclusion in this way:
- [14] I agree with Ms. Almasri that these forms of conduct fall well within the spectrum of conduct that, in this context, the law characterizes as reprehensible. They had the effect of prolonging the litigation and the trial, and making them considerably more complex.
- [7] Although the trial judge considered that special costs were appropriate, she also recognized that courts must exercise caution in granting orders for special costs. After observing that the reprehensible conduct she had identified "related entirely to the issues in the trial concerning property and, less directly, support" but did not extend to issues relating to parenting responsibilities, she concluded that the appropriate order was to grant Ms. Almasri special costs for one-half of the proceedings and ordinary costs for the other half.
- [8] Subsequent to this decision, but prior to the entry of the order, Justice Holmes became aware of this Court's decision in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, to the effect that special costs could be awarded only for reprehensible conduct during the litigation and not for pre-litigation conduct. She requested further submissions from the parties and on April 17, 2018 issued a Supplementary Ruling on Costs in reasons indexed at 2018 BCSC 614. In this Supplementary Ruling, the judge confirmed her costs decision, concluding as follows:
- [6] Taking into account Mr. Saska's and Ms. Rehak's conduct in the litigation only, I conclude that the order for special costs for one-half of the action should stand. Much of the conduct described in paragraph 13 of my reasons on costs was conduct in the litigation. The conduct described in the first bulleted sub-paragraph was not. However, for all of the other bulleted sub-paragraphs, the conduct was either entirely or substantially litigation conduct.
- [7] The order for special costs for one-half of the action will stand. That order is payable by Mr. Saska and Ms. Rehak.

- [9] Mr. Saska seeks to appeal this decision. By the combined operation of s. 7 of the Court of Appeal Act and Rule 2.1 of the Court of Appeal Rules, an order granting costs is a limited appeal order which may only be appealed with leave of a justice of this Court.
- [10] Mr. Saska sought leave to appeal the costs decision and the matter was heard by Justice Savage of this Court in chambers. Justice Savage reviewed the circumstances, including the judgment of Justice Holmes and the applicable authorities, and declined to grant leave to appeal. He pointed out that leave to appeal costs alone will generally not be granted unless a question of principle is involved, citing *Neufeld v. Foster*, 2000 BCCA 485 at paras. 14-15. He was not persuaded that Mr. Saska had identified a question of principle that would justify the grant of leave.
- [11] Mr. Saska now seeks an order from this Court discharging Justice Savage's order and granting him leave to appeal the costs order.
- [12] A review application under s. 9(6) of the Act is not a rehearing of the original application. This Court will only discharge or vary a discretionary order of a single justice in Chambers if the justice committed an error in principle or misconceived the facts: *Lungu v. British Columbia (Human Rights Tribunal)*, 2016 BCCA 136 at para. 8.
- [13] In this case, the chambers judge correctly summarized the factors that must be considered in deciding whether to grant leave to appeal a costs order. Costs are a discretionary matter, and leave to appeal a costs order alone will not be granted unless an error in principle has been identified. Similarly, the decision by a justice of this Court to decline to grant leave to appeal a costs order is a discretionary order, and this Court will not interfere with such a decision unless an error in principle can be identified in the decision to refuse leave. The hurdle for an applicant for review of such a decision is a high one.
- [14] Mr. Saska raises a number of arguments to support leave to appeal. Most relate to the original costs order rather than the order refusing leave. Mr. Saska challenges the view of the trial judge that Ms. Almasri had been substantially successful in the litigation and was therefore entitled to her costs. He argues that the trial judge should have applied a mathematical calculation to compare the results obtained by Ms. Almasri to her claim in order to determine success in the litigation.
- [15] Justice Savage considered that the reasons of Justice Holmes adequately explained why Ms. Almasri was the successful litigant. I agree. Trial judges have considerable discretion in determining who is entitled to costs of litigation. I would not give effect to this objection.
- [16] As to the special costs order, Justice Savage referred to the conduct identified by the trial judge as reprehensible and concluded that it was open to the trial judge to reach that decision. I can see no error in that conclusion.
- [17] Mr. Saska argues that the special costs order should not have extended to Ms. Rehak, as most of the impugned conduct was his own. He argues that the basis for the special costs order against Ms. Rehak appears to be that she refused to disclose where the funds were that she

received from the fraudulent conveyance, although directed by the trial judge to answer the question. Mr. Saska argues that "not liking one answer from Ms. Rehak" is not a proper foundation for a special costs order, and relies on the immunity of witnesses from suit based on their testimony as well as Mr. Rehak's right to freedom of expression under the Charter of Rights and Freedoms.

- [18] The refusal to answer a question concerning the location of the proceeds of a fraudulent conveyance involves more than "not liking one answer". In the context of the issues in this case, it represents conduct worthy of rebuke and it was open to the trial judge to treat it in conjunction with other conduct of Ms. Rehak that she observed as reprehensible.
- [19] The immunity from suit of a witness has no application to this circumstance. Ms. Rehak was not being sued for testimony she gave. She was a party to the litigation. Like any party, she was exposed to a costs order for a defence that was on balance unsuccessful, and was at risk of a special costs order if her conduct in the litigation, including her testimony, was found by the trial judge to be reprehensible.
- [20] Similarly, freedom of expression is not engaged by this costs order. The Charter of Rights and Freedoms has no application to this case. I do not consider that the chambers judge made any error in failing to give effect to these arguments.
- [21] Finally, Mr. Saska argues that both he and Ms. Rehak were not given appropriate notice of the issue to be addressed when the trial judge asked for further submissions on the Smithies judgment. The argument is that the memorandum from Supreme Court Scheduling requesting further submissions stated the question as "whether the order for special costs for one-half of the trial should continue to stand" whereas the original order had referred to "special costs in respect of one-half of the proceedings" and the ultimate order referred to "one-half the costs of this action."
- [22] In response to the memorandum from Supreme Court Scheduling, Mr. Saska filed a 30-page submission primarily directed to rearguing whether there should be any award of costs to Ms. Almasri, as well as any special costs. In the end, Justice Holmes did not make any new orders, but rather confirmed the costs order she had previously made. I am satisfied that Mr. Saska was aware of the issue being raised by the trial judge and had ample opportunity to address it.
- [23] In my opinion, the chambers judge dealt with this application appropriately. I can see no error in principle in his conclusion that the appeal lacked sufficient merit to justify the granting of leave.
- [24] For these reasons, I would dismiss the application to discharge the order refusing leave to appeal the costs order.
- [25] BAUMAN C.J.B.C.: I agree.
- [26] MACKENZIE J.A.: I agree.

[27] BAUMAN C.J.B.C.: The application to discharge Justice Savage's order is dismissed.

"The Honourable Mr. Justice Hunter"

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