

CANADA / JUDGMENT

Berthin v. Berthin

2020 BCCA 376

COURT

British Columbia Court of Appeal

DECIDED

29 December 2020

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2020 BCCA 376 Berthin v. Berthin

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Berthin v. Berthin,

2020 BCCA 376

Date: 20201229

Docket: CA46998

Between:

Wayne Douglas Berthin

Appellant

(Plaintiff)

And

Helen Claire Berthin

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Hunter

(In Chambers)

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

August 11, 2020 (Berthin v. Berthin, 2020 BCSC 1188, Victoria Docket S162376).

Counsel for the Appellant, appearing via teleconference:

K. Hauer

Counsel for the Respondent, appearing via teleconference:

N. Lott

M. Browne, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

November 19, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 29, 2020

Summary:

The chambers judge ordered the appellant to pay special costs after his action alleging fraud by the respondent was dismissed by consent. The judge made findings to support the award on the basis of affidavit evidence. The appellant seeks leave to appeal the special costs order, arguing the judge erred by holding a "shadow trial" on the issue of costs. Held: Application for leave to appeal is dismissed. The chambers judge applied the correct legal test and properly determined there was no evidentiary foundation for the fraud allegations. It was within his discretion to award special costs. No question of principle extending beyond the interests of the parties has been raised and it is not in the interests of justice to further prolong this litigation.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] The appellant Mr. Berthin applies for leave to appeal an order that he pay special costs of the underlying proceeding to the respondent Mrs. Berthin. Leave to appeal is necessary because by virtue of s. 7 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, and Rule 2.1(f) of the Court of Appeal Rules, B.C. Reg. 297/2001, an order for costs may only be appealed to this Court with leave.
- [2] Mr. and Mrs. Berthin were married in 1978, separated in 2010, and began what the chambers judge referred to as their "unenvious litigation odyssey" in 2011, when Mrs. Berthin commenced a family law action. In 2015, an order for the sale of the parties' residential property, known as the "Kiowa property", was made. Initially Mr. Berthin had conduct of sale, but in May of 2015, Mrs. Berthin was granted sole conduct of sale by consent. In the summer of 2015, an offer was made by Mr. and Mrs. Sherrod and accepted in the amount of \$860,000. Shortly before the sale completed, the Sherrods requested a holdback in the amount of \$10,000 to pay for the removal of chattels and debris from the property. Mrs.

Berthin agreed, and the sale was completed and a vesting order made transferring title in the property to the purchasers.

- [3] These seemingly unremarkable events have spawned what the chambers judge counted as no fewer than 19 reported decisions of either the Supreme Court of British Columbia or this Court in which Mr. Berthin has attempted to reverse the transaction based on alleged improprieties concerning the \$10,000 holdback. There have been ten discrete judgments in this Court addressing this sale and Mr. Berthin's claims concerning the holdback and the registration of the vesting order. I will outline briefly the principal events that led to the order sought to be appealed.

Litigation Background

- [4] The action in which Mr. Berthin has been ordered to pay special costs arose directly from the sale of the Kiowa property. I will review the circumstances of that sale and describe the claim that arose out of it, in order to explain the context of the order sought to be appealed.

Sale of the Kiowa Property

- [5] The genesis of the sale of the Kiowa property was a separation agreement made between the parties without the benefit of legal assistance in 2011. The Berthins disagreed on whether the separation agreement was valid and enforceable. After a 15-day trial in 2014, Justice Steeves issued judgment on January 21, 2015 determining that the agreement was enforceable, over the objections of Mr. Berthin. Mr. Berthin filed a notice of appeal to this Court (the "Trial Appeal"). At this point, neither party had sought an order for sale of the Kiowa property.
- [6] Prior to the January 21 order being entered, Mr. Berthin applied for "directions, clarification and reconsideration" of that order. He sought certain directions concerning the financing of a new residence for Mrs. Berthin and, in the alternative, an order for sale of the Kiowa property. This application was heard by Steeves J. on March 6, 2015. In resolving the application, Justice Steeves made the order for sale of the Kiowa property requested as an alternative by Mr. Berthin, with Mr. Berthin having sole conduct of sale. That order was incorporated into the formal order of January 21, 2015, and thus was included in the Trial Appeal.
- [7] On May 22, 2015, an order was made on consent transferring sole conduct of sale to Mrs. Berthin. The Kiowa property was duly listed for sale, and an offer from Mr. and Mrs. Sherrod was made and accepted on July 20, 2015. To this point, Mr. Berthin had not indicated that he was opposed to the sale of the Kiowa property, nor had he sought a stay of the order. However, two days after being notified of the acceptance of the offer (at above asking price), Mr. Berthin applied for an order staying the order for sale pending determination of the Trial Appeal. That application was heard on August 7, 2015 by Steeves J., who dismissed it. Mr. Berthin filed an appeal from this decision (the "Stay Appeal").

- [8] Mr. Berthin then applied in this Court for a stay of the order for sale pending determination of the Trial Appeal, but that application was dismissed by Garson J.A. on September 8, 2015. As Mr. Berthin had refused to sign the property transfer documents, Mrs. Berthin was required to apply for a vesting order from the Supreme Court, which she did successfully on September 10, 2015. An appeal on short leave was dismissed on September 11, 2015. Mr. Berthin filed an appeal of that order (the "Vesting Order Appeal").
- [9] On September 15, 2015, the Kiowa property was transferred to the Sherrods. Mr. Berthin attempted to file a certificate of pending litigation ("CPL") on the property to block the vesting of title, but the Registrar refused to accept the CPL. Mr. Berthin filed an appeal from that decision (the "CPL Appeal").
- [10] In March 2016, in reasons indexed at 2016 BCCA 104, this Court allowed the Trial Appeal, holding that the settlement agreement on which the January 21 order was based was vague and unenforceable. The January 21 order, which included the order for sale, was set aside and the matter remitted to the Supreme Court. By that point, the Kiowa property had been transferred to the Sherrods, although other financial issues remained to be resolved.

The Fraud Action

- [11] On June 6, 2016, Mr. Berthin commenced this action, seeking amongst other things "an order setting aside the registration of the vesting order for fraud and failure of consideration" (the "Fraud Action"). This led to an application in August 2016 by Mrs. Berthin to dismiss the action as disclosing no reasonable cause of action. That application was heard by Johnston J., who dismissed the Fraud Action on November 30, 2016, and subsequently ordered Mr. Berthin to pay special costs. Mr. Berthin filed an appeal of this judgment (the "Summary Dismissal Appeal").

The Vesting Order Appeal

- [12] The Vesting Order Appeal was dismissed by this Court on October 25, 2016, with reasons indexed at 2016 BCCA 425. In dismissing the appeal of the vesting order, Fenlon J.A. held that "it is now too late for the orders vesting the property in the Sherrods to be undone": para. 19.

The Stay Appeal

- [13] The Stay Appeal was dismissed on September 6, 2016 as moot: 2016 BCCA 362.

The CPL Appeal

- [14] The CPL Appeal was dismissed by this Court on May 12, 2017 with reasons indexed at 2017 BCCA 181. In giving the reasons of the Court, Saunders J.A. made the following comments:

[14] As I see this matter, and notwithstanding Mr. Berthin's success in his first appeal of the trial order, there is no possibility that Mr. Berthin can obtain title to the property, given there was no certificate of pending litigation registered before the trial order and no stay of the vesting order before title transferred under it to Mr. and Mrs. Sherrod. The appeals from the order for sale and the vesting order have been dismissed and leave to appeal to the Supreme Court of Canada has been denied. This means, in my view, that the appeals must be dismissed as moot because the issue of Mr. Berthin having an interest in land which may be claimed in proceedings to support a certificate of pending litigation has been overtaken by the now unassailable order vesting title to the property in the Sherrods.

[Emphasis added.]

The Summary Dismissal Appeal

- [15] The appeal of the order dismissing the Fraud Action was allowed by this Court, primarily on the basis that by dealing with the application under Rule 9-5, the chambers judge was required to accept the pleaded facts as true: 2018 BCCA 57. The judge was said to have fallen into error:
- [22] because he assessed the pleading against the requisite elements of the tort of civil fraud, rather than equitable fraud relied on by Mr. Berthin. The error occurred no doubt in part because the notice of civil claim unhelpfully failed to use the phrase "equitable fraud". However, counsel for Mr. Berthin made submissions at the hearing based on equitable fraud and in my view the facts and averments pleaded are capable of supporting that cause of action.
- [16] This Court also set aside the order for special costs, with Fenlon J.A. commenting as follows:
- [30] The judge ordered special costs against Mr. Berthin primarily because he found the allegations of fraud and collusion to be reprehensible and deserving of rebuke. That assessment was inextricably linked to the conclusion that the facts did not support the claim in fraud. It follows from the reinstatement of that part of the claim that the order for special costs must also be set aside. Whether such costs may properly be awarded following the disposition of the fraud claim remains an open question.
- [17] Following this judgment, Mr. Berthin attempted to amend his claim to pursue the return of the property through a claim for equitable fraud. The application for an amendment was dismissed, and an appeal to this Court dismissed in March 2019 with reasons indexed at 2019 BCCA 157. During this period, Mr. Berthin offered to settle his claim with Mrs. Berthin and the Sherrods, but his offer was rebuffed.
- [18] Thus by the spring of 2019, the vesting order vesting the property in the Sherrods had been confirmed and Mr. Berthin's attempts to recover the subject property had run their course. What was left was the Fraud Action, which had been reinstituted by this Court's 2018 judgment and was set for trial during the assize of October 21, 2019. About a month prior to

the scheduled start date for the trial, Mr. Berthin filed a somewhat unusual application seeking an order dismissing his action. Mrs. Berthin was agreeable to the action being dismissed, but advised that she would seek special costs. This was the application that was heard by Justice Gaul on October 23-25, 2019.

The Chambers Judgment

- [19] At the outset, the chambers judge confirmed the parties' agreement that the Fraud Action should be dismissed, and identified the issue before him as whether Mr. Berthin should pay the defendants' costs, and if so whether those costs should be assessed as ordinary "party and party costs" or "special costs". He concluded that Mr. Berthin should pay costs to the defendants, a conclusion I do not understand to be in issue. The dispute was the scale of costs.
- [20] The issue was Mr. Berthin's allegation in his pleadings that Mrs. Berthin and the Sherrods had engaged in fraudulent conduct in arranging for the \$10,000 holdback and then in registering the vesting order in relation to the subject property. The chambers judge summarized the impugned pleadings in this way:
- [8] On 6 June 2016 Mr. Berthin launched the present civil action against Mrs. Berthin and the Sherrods seeking amongst other things, "an order setting aside the registration of the vesting order for fraud and failure of consideration". One of the principal claims in the action was that Mrs. Berthin and the Sherrods made a collateral agreement whereby the Sherrods would pay less than the full purchase price for the Kiowa Property. In the Statement of Facts portion of the Notice of Civil Claim, Mr. Berthin alleges:
19. In doing the above [making the collateral agreement] and causing the property to vest when she knew the full purchase price set out in the vesting order had not been paid, Ms. Berthin committed a fraud. The Sherrods were participants in the fraud, and in particular they colluded with Ms. Berthin to circumvent the payment provisions of the vesting order.
- [Emphasis added (by Gaul J.)]
- [9] On the same day as he started his lawsuit against the defendants, Mr. Berthin also had a CPL registered on the title to what was by then the Sherrod's Kiowa Property.
- [10] Mr. Berthin's 29 June 2016 response to the defendants' demand for particulars included the following:

In negotiating the collateral arrangement, the Sherrods may have led the Defendant Helen Berthin to believe that the \$10,000 was a necessary and bona fide holdback against which they would draw down the reasonable and necessary costs to remove chattels and debris if the plaintiff failed to remove these from the property on his own after closing. However, after closing the Sherrods obstructed the plaintiff from removing chattels and debris so as to create a pretext for keeping the full \$10,000. Furthermore, the sum of \$10,000 greatly exceeded the actual costs, if any, incurred by the Sherrods in the removal of chattels and debris and the Sherrods never

accounted for the sum.

Prior to closing, the Sherrods instructed their solicitors, Mullen Demeo, to prepare a statement of adjustments showing the \$10,000 shortfall in the purchase price as a "holdback" knowing that same was fraudulent, and the statement of adjustments did not accurately reflect the purchase price ordered by the court.

The Defendant, Helen Berthin, instructed her solicitors, McKimm & Lott, to prepare a letter requesting the registration of the vesting order knowing that the payment terms in the vesting order had not been fulfilled and would not be complied with on closing. The Defendant Helen Berthin did so in order to facilitate the fraudulent registration of the vesting order.

The Sherrods instructed their solicitors, Mullen Demeo, to complete a Land Title Act Form 17 with the vesting order and letter of McKimm & Lott attached to it, and to submit these documents for registration to the Land Title Office, knowing that the payment terms in the vesting order had not been complied with and would not be complied with. The Sherrods did so in order to facilitate the fraudulent registration of the vesting order.

[Emphasis added (by Gaul J.)]

[11] On 28 July 2016 Mr. Berthin filed an Amended Notice of Civil Claim. In doing so he maintained his allegations that Mrs. Berthin and the Sherrods had committed fraud in registering the vesting order for the Kiowa Property. The amended prayer for relief included "an order setting aside the registration of the vesting order for fraud and / or failure of consideration and restoring title to Mr. Berthin and Ms. Berthin subject to Mr. Berthin's family law claims. The new paragraph 19 in the Statement of Facts claimed:

19. In doing the above [making the collateral agreement], and causing the property to vest when they knew the full purchase price set out in the vesting order had not or would not be paid, Ms. Berthin and the Sherrods committed a fraud. In particular, Ms. Berthin and the Sherrods colluded to circumvent the payment provisions in the vesting order.

[Emphasis added (by Gaul J.)]

[21] In assessing the significance of this pleading, the chambers judge was aware that while unproven allegations of fraud will regularly lead to an order for special costs, they do not necessarily have that result, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9. He then reviewed the affidavit material that had been filed and came to certain conclusions. The conclusion Mr. Berthin contests most vigorously is the conclusion that "prior to the sale closing, Mr. Berthin knew, through his counsel, that the Sherrods would be holding back \$10,000 because of the debris at the property that needed to be cleaned up": para. 32. There was evidence before the chambers judge to support that conclusion, but Mr. Berthin says on this application that the judge should not have made findings on disputed facts in the absence of a full trial. This is a central plank of his leave application.

- [22] Having decided that Mr. Berthin knew about the holdback through counsel prior to the sale, and also finding that "Mrs. Berthin did not intentionally or unintentionally misrepresent anything to anyone when she agreed to the \$10,000 holdback", the chambers judge stated that "to suggest there was skullduggery or fraudulent conduct on the part of Mrs. Berthin or the Sherrods is not only patently wrong, it is inexcusable": para. 33.
- [23] The judge's conclusion on this point is expressed in this way:
- [31] Mr. Berthin's claim that Mrs. Berthin and the Sherrods acted in a fraudulent manner when they had the vesting order filed and that it amounted to misleading the Registrar of Land Titles was groundless and scandalous, and in my respectful view amounts to the "reprehensible conduct" referenced in the jurisprudence.
- [24] Justice Gaul also concluded that the sole reason Mr. Berthin had framed his pleadings to conclude a claim based on fraud was to obtain a certificate of pending litigation. He found that "the serious allegations Mr. Berthin made against the defendants were without foundation" (para. 40) and expressed his conclusion in this way:
- [41] In conclusion, I find that the serious allegations of fraud and collusion that Mr. Berthin made against Mrs. Berthin and the Sherrods were clearly without foundation or merit. Moreover, Mr. Berthin's allegations cast an unjustified veil of inappropriate behaviour over Mrs. Berthin and the Sherrods. I find he recklessly did so as well with respect to the lawyers who were advising the defendants and assisting them with the conveyance of the Kiowa Property. All of this in my view constitutes unacceptable behaviour that calls for an award of special costs.
- [42] In my opinion, Mr. Berthin's unjustified assertion that Mrs. Berthin and the Sherrods had colluded and committed fraud could only have been for the purposes of obtaining the registration of a CPL against the Kiowa Property, something he had been pursuing for an extended period of time. In my view, the allegations were included in Mr. Berthin's pleadings solely for the purpose of improperly securing the CPL. This was clearly an improper motive on Mr. Berthin's part and amounts to an abuse of the court's process that warrants a judicial rebuke.

Test to be Applied

- [25] The general test for granting leave from a limited appeal order requires the applicant to show that there is some important issue involved both to the parties and to the public in general, that the appeal has some practical utility and some merit, and that granting leave would not cause prejudicial delay in the proceedings. For an appeal of a costs order, the test is more onerous as a result of the highly discretionary nature of such an order: *Yung v. Jade Flower Investments Ltd.*, 2012 BCCA 168 at para. 19 (Chambers). Generally, leave is not granted unless a question of principle is involved: *Neufeld v. Foster*, 2000 BCCA 485 at para. 14 (Chambers).

[26] Where leave is sought to appeal a costs award alone after the underlying litigation has concluded, the leave judge should take into account the following considerations:

- (1) whether the proposed appeal raises a question of principle that extends beyond the parameters of the particular case;
- (2) whether the question of principle is of significance to the practice; and
- (3) whether the proposed grounds for appeal are arguable.

(Gichuru v. Pallai, 2019 BCCA 282 at para. 10 (Chambers); Tsai v. Li, 2020 BCCA 264 at para. 15 (Chambers).)

[27] The overarching consideration is the interests of justice: Price v. Robson, 2017 BCCA 419 at para. 48 (Chambers), citing Hanlon v. Nanaimo (Regional District), 2007 BCCA 538 at para. 2 (Chambers).

[28] On this application, the appellant contends that the chambers judge erred both as a matter of principle and in respect of the test he applied in awarding special costs, in that he:

- (a) conducted a shadow trial and adjudicated the substantive issues as though there was a trial on the merits, doing so, moreover, on a totally inadequate evidentiary record; and
- (b) ignored and failed to turn his mind to the issue of whether there was an evidentiary foundation or material which contained reasonable evidence on which the plaintiff could have founded his plea.

[29] I would not give effect to the second allegation. In my view, the chambers judge addressed the evidentiary foundation for the plea and found it wanting. He considered the evidence before him and came to certain conclusions adverse to the appellant. This is a highly fact-specific issue, not a question of principle, and does not meet any of the tests for granting leave.

[30] The first allegation has been framed as a matter of principle, and requires more considered assessment.

The Shadow Trial Theory

[31] In most cases where special costs are awarded, they will be awarded by a judge after the conclusion of a trial or hearing. The judge will have made findings of fact on the merits of the case, and will have been in a position to assess the conduct of the parties during the litigation. This case is somewhat different, in that the appellant abandoned his case before the trial began. Mr. Berthin argues that this distinction is significant. He relies in particular on a judgment of Justice Adair in Lim v. Zhu, 2019 BCSC 88, and particularly on passages in which Justice Adair made the following statements:

- [150] Because the parties settled, there will never be an adjudication of the facts, or findings about which party's evidence was credible and reliable, or about whether parties conspired with one another, or a determination about whether a particular remedy was (or was not) justified. The court should not now be expected to conduct a shadow trial to declare winners and losers for the purposes of a costs award.
- [32] Mr. Berthin seeks to rely on this approach with this submission:
42. Leave is required to appeal costs alone. But costs are supposed to be of secondary importance. They are supposed to be incident to a determination of the rights of the parties. They are not to be made themselves the subject matter of the litigation.
43. Here, costs were made the subject matter of the litigation. And there was a 3-day shadow trial held on the matter of costs. This was after the plaintiff consented to the dismissal of his action and offered to pay the defendants' costs at Scale B. The rights of parties were adjudicated in the shadow trial, for the purpose of and as an incident to determining costs. This was an error.
44. Instead of trying the matter, the judge should have applied the correct test and determined whether there was an evidentiary foundation for the plea.
48. There is an established body of law in Ontario discouraging such "shadow trials" on costs, and for good reason. However, the jurisprudence in this province is less developed and has not considered the matter as fully.
- [33] In my opinion, this submission misconceives both the basis of Justice Adair's judgment and the task undertaken by the chambers judge. It is true that there is jurisprudence in Ontario discouraging costs applications when cases have settled (although the term "shadow trial" appears to be unique to the reference in *Lim v. Zhu*). But the basis for this discouragement is that the parties have settled the case, and the Court is not prepared to embark on determining who was more successful in the settlement. That did not happen here. In this case, the defendants declined to settle, and the case was simply dismissed, at which point the defendants' entitlement to costs was triggered, subject to the court's discretion.
- [34] This distinction is apparent when Justice Adair's judgment is examined more closely. In *Lim*, a complicated case with claims and counterclaims, some of the parties (referred to as the Original Plaintiffs) sought leave to discontinue before trial. The remaining parties arrived at a settlement just before the trial was to begin. There was accordingly no adjudication of disputed facts at a trial.
- [35] The settlement included provision for payment of the costs "as awarded by the court upon application". Two applications for special costs were made. The settling parties sought special costs against the paying party. The defendants sought special costs against the discontinuing plaintiffs.

- [36] Justice Adair handled these two applications differently. She declined to order costs for or against the settling parties, following the Ontario jurisprudence to the effect that "[w]here parties have settled, the court has not declared a 'winner' and a 'loser', and the default position where there is a settlement should be an order that there is no order as to costs": para. 153, citing *Waterloo North Condominium Corporation No. 161 v. Redmond*, 2017 ONSC 1304. But she did award costs against the discontinuing Original Plaintiffs, as the discontinuance triggered an entitlement to costs. She then considered the pleadings and the context of the litigation, concluding that special costs were not warranted.
- [37] In reviewing the principles applied in *Lim v. Zhu*, I should not be taken as commenting on the correctness of the judgment or the application in this jurisdiction of the Ontario jurisprudence on which Mr. Berthin relies. That can be addressed if a case is brought to this Court by parties based on a settlement agreement, rather than a dismissal of an action without settlement. My conclusion is that neither *Lim* nor the Ontario jurisprudence provides any support for the submission advanced by the appellant.
- [38] As to the submission that "the judge should have applied the correct test and determined whether there was an evidentiary foundation for the plea", that is what Gaul J. did in this case. This determination required a review of the evidence before the judge, and the application of the discretion a judge must exercise in considering whether the conduct of the party is sufficiently reprehensible to require an order for special costs.
- [39] A more appropriate analogue to this case can be found in the decision of Myers J. in *O'Connell Electric Ltd. et al v. British Columbia Hydro and Power Authority et al*, 2006 BCSC 1632. In this case, Myers J. awarded special costs against a plaintiff who discontinued a claim prior to trial some five years after it had been commenced. The claim was framed in unlawful conspiracy. Fraud was not expressly pleaded, but Myers J. was satisfied that underlying the causes of action were allegations of dishonest conduct. He concluded that the threshold issue was whether the plaintiff had a sufficient factual basis upon which to make the allegations of fraud, dishonesty or conspiracy. The determination of this issue required a consideration of the evidence filed before him, in circumstances where there had been no formal adjudication of the merits of the claim at a trial. Myers J. concluded that there was "no proper evidentiary basis" for the claim in unlawful conspiracy, and awarded special costs.
- [40] The plaintiff in *O'Connell* applied for leave to appeal the special costs order. That application was dismissed by Smith J.A. in *O'Connell Electric Ltd. v. British Columbia Hydro and Power Authority*, 2007 BCCA 58 (Chambers). Justice Smith pointed out that the decision to order special costs was an exercise of discretion, and cited the following comment of Finch J.A. (as he then was) in *Albion Securities Co. v. Milne*, 2000 BCCA 274, another case where leave to appeal a special costs order was dismissed:

- [13] The appeal is from a discretionary order made by a judge who was fully familiar with the circumstances of the case by virtue of the fact that she was the case management judge. The issue of whether special costs should be granted and, if so, on what terms was apparently fully argued before her and she held, in the somewhat unusual circumstances of this case, that the order she made was justified. It was clearly an exercise of her discretion taking into account all the circumstances of the case.
- [41] In summarizing the basis for the special costs order in O'Connell, Justice Smith made these comments:
- [13] [The chambers judge] awarded special costs of the entire action on the basis that the allegations of moral wrongdoing permeated all of the appellants' claims. In my view, it was within his discretion to do so.
- [42] In the case at bar, the judge concluded that "the serious allegations Mr. Berthin made against the defendants were without foundation" and Mr. Berthin "had ample information at his disposal to conclude that Mrs. Berthin and the Sherrods had not colluded or committed any fraud": para. 40.

Disposition

- [43] The premise behind the leave application is that the chambers judge erred in reviewing the affidavit material before him and coming to conclusions necessary to determine whether there was a proper foundation to support the claims of fraud, whether taken as civil fraud or equitable fraud. In my view, the authorities are consistent that to respond to a claim for special costs, a judge is required to assess the conduct of the party, including the pleadings filed, in light of the affidavit material properly before the court. This is the type of discretionary judgment that is within the province of the judge hearing the application.
- [44] The real complaint of the appellant is not that the judge failed to determine whether there was an evidentiary foundation for the impugned pleadings, but that he concluded there was no foundation for the claim of fraud.
- [45] In my opinion, this is not a case in which leave to appeal should be granted. The circumstances are highly case-specific, and further review of this dispute is unlikely to yield a decision of value to other litigants or the general law. I do not consider that the submissions of the appellant raise a question of principle that would extend beyond the interests of these parties. The chambers judge has found that there was no foundation for Mr. Berthin to allege fraud against Mrs. Berthin or the Sherrods in connection with the holdback on the sale of the subject property. It is not in the interests of justice to prolong this matter further.
- [46] The application for leave to appeal is dismissed.

"The Honourable Mr. Justice Hunter"

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