

CANADA / JUDGMENT

Berthin v. Berthin

2020 BCSC 1080

COURT

Supreme Court of British Columbia

DECIDED

22 July 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1080 Berthin v. Berthin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Berthin v. Berthin,

2020 BCSC 1080

Date: 20200722

Docket: 11 1523

Registry: Victoria

Between:

Helen Claire Berthin

Claimant

And

Wayne Douglas Berthin

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Claimant:

N.W. Lott

Counsel for the Respondent:

K. Hauer

Place and Date of Hearing:

Victoria, B.C.

July 7, 2020

Place and Date of Judgment:

Victoria, B.C.

July 22, 2020

- [1] The parties are former spouses who have engaged in litigation spanning the years 2011 to 2020. On this application, the claimant Ms. Berthin seeks a declaration and related relief that the obligation to pay the costs awarded to the respondent Mr. Berthin on the successful appeal of the trial decision, was resolved in a settlement reached by the parties in 2017.

Background

- [2] On April 13, 2011 the claimant commenced this action. On January 21, 2015 judgment was rendered in the claimant's favour after trial. The respondent successfully appealed. On March 7, 2016 the B.C. Court of Appeal ordered a new trial. On September 26, 2016 the respondent was awarded costs of the appeal in the sum of \$23,370.68.
- [3] The respondent registered a judgment for those costs against title to the claimant's condominium at Parklands Drive, Victoria, British Columbia (the "Parklands Drive Property") on April 6, 2017. He renewed the judgment on March 10, 2019.
- [4] In October 2017 the parties settled this action without a second trial. The terms of the settlement were in writing between counsel and were incorporated in a consent order dismissing the action, made December 13, 2017 (the "Consent Order").
- [5] The Letter of Offer from counsel for the respondent stated:

Mr. Berthin's offer of 12 October 2016 is revoked and replaced with following offer of a comprehensive settlement between the parties of BCSC Action No. 11 1523 (Victoria Registry):

There is no spousal support payable by either party.

Chattels have been divided to the parties' mutual satisfaction.

Mr. Berthin releases all claims to Ms. Berthin's pension.

Ms. Berthin releases all claims to Mr. Berthin's corporate shares.

Mr. Berthin releases all claims to the Parklands Drive Property.

Mr. Berthin will not have any claim to the proceeds of the sale of Kiowa held in trust. This money will be paid to your client.

Mr. Berthin pays off the two joint lines of credit and removes Ms. Berthin from same.

The parties otherwise keep the assets and debts in their own name.

The parties bear their own costs in BCSC 11-1523.

The respondent Mr. Berthin reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding

[6] Then counsel for the claimant accepted the offer on the terms set out (the "Settlement Agreement").

[7] The relevant portions of the Consent Order of December 13, 2017 provided:

THIS COURT ORDERS that

- (1) All claims for spousal support are dismissed.
- (2) Each party will retain for their own exclusive use and benefit all property in their name or under their possession or control.
- (3) For greater certainty, and without limiting the generality of paragraph 2:
 - (a) Mr. Berthin will have no entitlement to or interest in Ms. Berthin's Public Service Pension Plan identified as number 14240351.
 - (b) Ms. Berthin will have no entitlement to or interest in Mr. Berthin's corporate shares in 662375 B.C. Ltd. and RealtyServer System Inc., or in the shares held by Mr. Berthin at the time of separation in Global Skladu America Inc.
- (4) Mr. Berthin will have no entitlement to or interest in the property located at Parklands Drive, Victoria BC and legally described as:
- (7) Except as otherwise provided, each party is responsible for the debts in their own name.
- (8) All other claims in this action are dismissed.
- (9) The parties will bear their own costs in this action.

The Appeals in Question

[8] There are four appeals relevant to this application. The first previously referred to was that of March 7, 2016 ordering a new trial (the "First Appeal"). The second appeal on September 6, 2016 was partially allowed by consent, and dismissed as moot in so far as it concerned the stay of the sale of the matrimonial home (the "Second Appeal"). The third appeal related to a vesting order for the family home (the "Third Appeal"). The fourth appeal addressed the denial of the respondent's application to set aside the vesting order on the grounds that its enabling order had been overturned in the First Appeal (the "Fourth Appeal"). On October 25, 2016 the respondent's Third and Fourth Appeals were heard together and dismissed. The

claimant therefore succeeded and was entitled to the costs of the Third and Fourth Appeals.

- [9] In the matrimonial action, the respondent had advanced a claim to the claimant's Parklands Drive Property based on tracing funds from the sale of the family home. Because of the settlement, the respondent released his claim to the Parklands Drive Property and removed from title the Certificate of Pending Litigation ("CPL").
- [10] On November 19, 2019 the claimant filed appointments in the Court of Appeal to assess costs in the dismissed Third and Fourth Appeals of the respondent.
- [11] In or about December of 2019 the parties could not agree on who was entitled to costs on the Second Appeal. The panel resolved that issue in ruling on February 6, 2020 that each party should bear their own costs in the Second Appeal. At no time did the claimant or her counsel advise the Court of Appeal that there was a settlement that resolved costs and that the settlement was intended to include the costs of appeals from the Supreme Court action.
- [12] The claimant's costs in the Third and Fourth Appeals were assessed by the Registrar by consent on April 3, 2020, and cost certificates were taken out. Neither at the assessments nor at any other time did the claimant advise the court that the assessments were moot because she had agreed to waive those costs in the settlement.

Position of the Claimant

- [13] The claimant submits the settlement was an "overall settlement" of this action and that any "objective reasonable bystander" would reach that conclusion as the terms are clear. Further, that the reference to each party bearing their own costs "in this action" includes steps taken in the Court of Appeal.

Position of the Respondent

- [14] The respondent asserts this application is an abuse of the court's process as the litigant is pursuing inconsistent rights given that, after the settlement in 2017, the claimant pursued costs in the Court of Appeal that arose from the settled action. The respondent also submits that interpreting a consent order is a form of contractual interpretation, and that applying the principles of contractual interpretation results in the conclusion the settlement applied only to the Supreme Court action, not the appeal to the Court of Appeal.

Issues

- [15] There are two issues on this application:
 - (1) Is the application an abuse of the court's process?
 - (2) Does the correct interpretation of the Settlement Agreement and Consent Order mean the settlement of costs were restricted to the Supreme Court action or did the settlement include the appeal costs?

Is the Application an Abuse of the Court's Process?

- [16] The respondent submits the claimant is now saying the Settlement Agreement and Consent Order provisions that each party should bear their own costs of the action includes any appeals. However, the claimant after the settlement pursued costs in the Court of Appeal contrary to her present assertion.
- [17] The respondent states this pursuit of inconsistent rights is an abuse of process. In *Este v. Esteghamat-Ardakani*, 2018 BCCA 290, the court stated:
- [92] Donna submits the trial judge erred in applying the law on inconsistent pleadings "to automatically equate inconsistent pleadings with abuse of process, without consideration of the context and circumstances of the case." She says, correctly, that not every instance of inconsistent pleadings will amount to an abuse of process: *Pan Afric Holdings* at para. 37.
- [93] Cases concerning inconsistent pleadings fall along a spectrum. At one end are cases in which the courts find that, properly interpreted, no inconsistency exists: *Stewart v. Clark*, 2013 BCCA 359 at para. 48, 49 B.C.L.R. (5th) 1; *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 at para. 26, 29 B.C.L.R. (5th) 211. In the middle are cases in which an inconsistency is found, but the court declines to characterize it as an abuse of process because it was not advanced "deliberately or with full knowledge of the facts": *Walsh v. Mobil Oil Canada*, 2013 ABCA 238 at para. 94, 364 D.L.R. (4th) 508. At the other end are cases in which a party knowingly took inconsistent positions: *Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247 at para. 28, 34 B.C.L.R. (5th) 226. Of note is that in both *First Majestic* and *Pepper's Produce*, the following passage from *Mystar Holdings Ltd. v. 247037 Ltd.*, 2009 ABQB 480 at para. 49, 10 Alta. L.R. (5th) 260, is quoted with approval:

In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.

[Emphasis in original.]

- [94] The principle that a litigant is not entitled to knowingly advance inconsistent positions is longstanding
- [18] The respondent argues a party cannot claim entitlement to costs in one proceeding and then claim an agreement before the first claim constituted a waiver of her entitlement to those costs. He notes that the claimant's conduct is suggestive that she never understood the October 2017 settlement to embody a waiver of costs at the appellate level.
- [19] The claimant submits there has been no abuse of process as at the time of the settlement in October 2017, she knew of the costs judgment registered on her property and understood it would be released as part of the settlement as otherwise she would not have agreed to the settlement. She deposes she was not aware it had not been released until the spring of 2019; at which time she requested her counsel ask that it be removed.

- [20] The claimant notes as well that other costs issues arising in related proceedings involving the purchasers of the family home were addressed this year in the Court of Appeal, and that in January of 2020 her counsel advised the respondent's counsel the \$23,370.60 was to be released. Counsel for the claimant notes that only on the respondent's counsel's response was it evident those costs were still in issue; hence the claimant brought this application.
- [21] Counsel for the claimant concedes that if the costs award in favour of the respondent is found to have been released by the settlement then the costs awarded to the claimant in the two other appeals should be released as well. Counsel for the claimant candidly acknowledged he had not previously considered this issue.
- [22] In *Walsh v. Mobil Oil Canada*, 2013 ABCA 238, the Alberta Court of Appeal stated:
- [94] The argument on abuse of process must also fail. As noted in *Niagara North Condo Corp 125 v. Waddington*, 2007 ONCA 184, 222 OAC 66, abuse of process is a doctrine designed to provide a remedy in a variety of situations, including to prevent the unfairness of re-litigating the same issue against the same party in circumstances where issue estoppel does not apply. It is clear that a party is proscribed from deliberately arguing diametrically inconsistent facts in various actions, knowingly advancing irreconcilable positions which are not articulated as alternative claims. In this case, it cannot be said that the positions taken by the appellant were not intended to be in the alternative, or that irreconcilable positions were advanced deliberately or with full knowledge of the facts. Moreover, there can be no concern here of Mobil's involvement in re-litigation. The co-existence of the two pieces of litigation in these circumstances is not an abuse of process.
- [23] Given the above circumstances I am not satisfied the claimant was "deliberately arguing diametrically inconsistent facts" or "knowingly advancing irreconcilable positions deliberately "
- [24] I conclude abuse of process has not been established.
- [25] I turn then to whether the Settlement Agreement and Consent Order included a release of costs from the First Appeal.

Interpretation of the Settlement Agreement and Consent Order

- [26] The claimant relies on several authorities for her interpretation of the word "action".
- [27] In *Dymond v. Wilson*, [1936] B.C.J. No. 27, [1937] 1 D.L.R. 286 (B.C.C.A.), the Court of Appeal was asked to consider the expression "action pending" in the 1934 Administration Act Amendment Act. The court found it was not restricted to proceedings in only one court. Martin J.A. stated:
- [4] We derive much benefit on that view from the case which Mr. Whittaker cited to us, *Johnson v. Refuge Assurance Company, Limited*, [1913] 1 K.B. 259, and the expression of that sound judge, Lord Justice Kennedy, at p. 264, where he says that the word "action" when used in its natural meaning "refers to any proceeding in the nature of a litigation between a plaintiff

and defendant." Now that exactly covers this point in principle, and not only that, but we have a further striking confirmation of the view that the language applies to this Court, in that, after reading carefully the whole of our Court of Appeal Act to see what assistance can be derived from it to support this view, I was rewarded by finding in section 10 the very expression used in an exact equivalent, viz., "In any cause or matter pending before the Court of Appeal" Well, that really settles the question, because the words "action" and "cause" even in the statute mainly relied upon (Supreme Court Act, Sec. 2) are mutually inclusive ad hoc. Therefore since we have the precise expression in the very Act establishing this Court it is impossible for us to say that this present action which is "pending" in it should not be continued: the statute to my mind clearly contemplates its continuance because it is "litigation" in the shape of an appeal inter partes that has been duly brought within our jurisdiction.

- [28] In *Walker (Re)*, 2010 BCSC 489, the applicant applied for a declaration that the Trustee in Bankruptcy erred in disallowing his costs claim against his former solicitor in her bankruptcy. He was successful in taxing her account and in the resulting appeals and was awarded costs of nearly \$45,000. Section 70(2) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, provides that "one bill of costs" shall be payable by a bankrupt. That is, a bill of costs of a barrister or solicitor is given preferred status. At issue was whether the costs given priority related solely to the hearing before the Registrar on a review of the solicitor's account as allowed by the Trustee, or should have included costs incurred in the appellate and execution proceedings brought to enforce the Registrar's judgment.
- [29] Wong J. held that "one bill of costs" included "appeals and execution proceedings connected with [the] original judgement" in recognition that in bankruptcy the first judgment creditor who acts is entitled to priority for costs for that action given a creditor who encumbers the assets of a debtor "effectively preserves them for all of the creditors in an intervening bankruptcy".
- [30] Wong J. also referred to *Hampton Lumber Mills Ltd. v. Joy Logging Ltd.* [1977] 2 W.W.R. 289 (B.C.S.C.), and noted:
- [54] an action or suit does not come to a conclusion when a trial judge renders his decision; as long as a right of appeal exists the matter has not been finally determined, and an action is still alive until all avenues of appeal have been exhausted. During the appeal period and until the final judgment of the last appeal Court is entered, the rights and liabilities as between the parties have still not been finally determined: *Hampton Lumber Mills Ltd. v. Joy Logging Ltd.*, [1977] 2 W.W.R. 289.

- [31] In Hampton Lumber Mills, \$356,000 was by agreement deposited as security for any amount recovered by the respondent in the "pending suit". The respondent recovered \$9,118.65 plus interest and costs. The respondent filed a Notice of Appeal. The petitioner sought payment to it of the balance of the monies while the respondent objected submitting payment out should not occur until all possibilities by way of appeal were complete. The agreement for the deposit of funds included in the undertakings given:
2. From such funds there by paid any net settlement amount or the amount necessary to satisfy any judgment and costs recovered by Joy against Hampton in the said suit, less the amount of any counterclaim and costs recovered by Hampton and less the amount of any funds which may have been paid into Court which are applied in satisfaction of Joy's claim. *[Italics in original.]*
- [32] The applicant argued the funds on deposit were security only until the end of the pending suit.
- [33] Ruttan J. reviewed the issue in detail:
- [13] The suit does not expire with the decision given by the trial Judge, final though it may be, until the time for appeal has run out. "Determination of liability" in the pending suit must mean "final determination". Counsel for the respondent referred me to the decision of the Supreme Court of Alberta in *Green v. G.T.R.*, [1917] 3 W.W.R. 251. That case depended upon whether or not an action had been "determined" within the meaning of the Workmen's Compensation Act, 1908 (Alta.), c. 12, s. 3(4) and it was held that a common law action was not determined so long as the right of appeal is open to the plaintiff and he has taken advantage of it. At p. 253 the trial Judge quoted from the words of Lord Alverstone C.J. in *Isaacson v. New Grand (Clapham Junction) Ltd.*, 5 Workmen's Compensation Cases at p. 35: "Therefore upon the action being dismissed, the plaintiff must preserve his rights in some way or other. If he acquiesces in the dismissal of his action and does not appeal, then the proceeding goes on to a claim for compensation under subsec. 4 of sec. 1, but if he appeals, and his appeal is successful, then the result is that the action is not dismissed. In that case it is not 'determined in such action that the injury is one for which the employer is not liable in such action' at that stage . . ."
- [15] Mr. Fox agrees that "determination" would include any appeals, but insists that the word "pending" when attached to "suit" limits the deposit agreement to the trial in the Court where the suit was pending at that time. He submits it qualifies "suit" and limits it to the action in the Supreme Court. As stated above, I cannot agree with this narrow definition, and I am supported in this conclusion by two further appellate decisions referred to me by counsel. In *Dymond v. Wilson*, 51 B.C.R. 206, it was held by our Court of Appeal that the word "action" includes an appeal. It was also held that the words "action" and "cause" in the Court of Appeal Act of British Columbia, R.S.B.C. 1924, c. 52, s. 10 includes appeals, or causes pending appeal, for the purpose of their continuance pending substitution of parties in case of death. I would only add that "suit" should be considered synonymous with "cause"

or "action" [Emphasis added.]

- [20] I respectfully agree that, whether it be civil or criminal, the action, cause, prosecution, is still alive, still pending until all avenues of appeal have been exhausted.
- [21] The answer to the question propounded by the applicant, therefore, is no. The applicant is not entitled to repayment of the balance of the funds paid to its said solicitors pursuant to the agreement until the issues in dispute are finally resolved, if necessary, by appeal.
- [34] In *Hunter v. Hunter*, [1979] B.C.J. No. 1395, on March 30, 1976 a Decree Nisi was granted and a reference was directed to the Registrar respecting spousal support. As well an order for costs was made. The solicitor for the petitioner did not present a bill of costs to the Registrar until August 14, 1978. Counsel for the respondent objected to the bill of costs including matters after the Decree Nisi and Order Absolute. He argued that the petitioner did not obtain an order for costs at the time the reference was completed and confirmed by the Court. The Registrar adjourned the taxation to consider the objection and then a year later taxed the presented original bill of costs. Following *Dymond*, Lander L.J.S.C. concluded the costs of the reference and its confirmation were included in the order for costs.
- [35] Accordingly, the claimant submits the terms of the settlement were clear: the respondent had released his claim for costs, including for appeals, and as a result the judgment registered against the Parklands Drive Property must be released.
- [36] The respondent submits that interpreting the Consent Order is a species of contract interpretation. In *Shih v. Shih*, 2017 BCCA 37 Kirkpatrick J.A. for the Court stated:
- [34] The interpretation of the Consent Order is a species of contract interpretation. As stated in *Sattva Capital Corporation v. Creston Moly Corporation*, [2014] 2 S.C.R. 633, most cases of contract interpretation involve questions of mixed fact and law. As this Court stated recently in *Tully v. Haber*, 2016 BCCA 399 the standard of review is:
- [9] ... In respect to the legal principles, the standard is correctness but in respect to matters engaging context or evidence, the deferential standard applies, always recognizing that the task of the judge in respect to interpreting the agreement, as to which a consent order is a species, is to search for the common "intent of the parties and the scope of their understanding" (para. 47 *Sattva*).
- [37] The respondent also notes a consent order is a formal expression of an agreement between the parties, referring to *Shackleton v. Shackleton*, 1999 BCCA 704, where Saunders J.A. addressed the nature of a consent order:
- [12] A consent order is a formal expression of an agreement between the parties. Where parties intend to finally dispose of the issues between them, a consent order will operate as a final judgment: *Campbell v. Campbell*, [1955] 1 D.L.R. 304 (B.C.S.C.). For the same reason that courts enforce settlement agreements, to provide certainty to parties settling disputes, consent orders are not easily altered. Subject to statutory provisions otherwise a consent

order may be set aside or altered in substance only in circumstances which justify the same treatment to the underlying contract [Citations omitted.]

Shackleton was cited with approval in *Pawluck v. Pawluck*, 2019 BCCA 167 at para. 21.

- [38] A consent order is an agreement to be interpreted under general principles of contract and consistent with sound commercial principles and good business sense: *Pacific Destination Properties Inc. v. Granville West Capital Corporation*, 2009 BCSC 982 at para. 60, cited with approval in *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2011 BCCA 90 at para 21.
- [39] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada noted the inherently fact-specific nature of contractual interpretation (at paras. 50-55). Interpreting contracts is no longer overwhelmed by technical rules of construction but rather a practical, common sense approach is taken to determine "the intent of the parties and the scope of their understanding" (at para. 47). That includes having regard to the surrounding circumstances or factual matrix in which the contract was made (at para. 46). The meaning of words is often derived from a number of contextual factors, including the purposes of the agreement and the nature of the relationship created by the agreement (at para. 48).
- [40] The respondent submits the Letter of Offer did not simply refer to "costs" as that would have left open the question of what costs were being waived, hence the letter specifically stated "costs in BCSC 11-1153", a reference to the matrimonial court file number and the court level. In addition, the Consent Order referred to the costs in "this action". He further submits that in common parlance and in this court, there are references to a "Court of Appeal action" as compared to an action in this court. For example, in *Grosz v. Royal Trust Corporation of Canada*, 2019 BCSC 2195:
- [42] issues with respect to service of materials in the Court of Appeal action should not affect the plaintiff's ability to respond to the applications before this Court. As such, I do not accept this is an appropriate basis on which to adjourn the applications.

And in *Bartch v. Bartch*, 2018 BCSC 1583

- [21] Where there is a separation agreement in place, the court does not have the ability to order an interim distribution of family property, despite having done so multiple times in this Action. This was a key issue in the Court of Appeal action regarding the Interim Distribution Order which has now been decided.
- [41] At issue is the interpretation of the Settlement Agreement and resulting Consent Order. What did the parties intend when the Letter of Offer was accepted and then incorporated into the Consent Order? The authorities referred to by the claimant do not directly address the issue whether the words "this action" used in a consent dismissal order regarding costs includes costs in the Court of Appeal.

- [42] The Letter of Offer's first paragraph referred to the offer made as a "comprehensive settlement between the parties of BCSC Action No 11 1523." Its application to that action was repeated in paragraph 9, stating "[t]he parties bear their own costs in BCSC 11-1523" and in the Consent Order "[t]he parties will bear their own costs in this action". [Emphasis added]. It is clear the Letter of Offer related to BCSC Action No. 11 1523 and not the appellate proceedings. Adding words to the effect it did not relate to the appellate matters was not required. The Letter of Offer was not ambiguous.
- [43] The Settlement Agreement and the Consent Order do not address the appellate proceedings and in particular, the issue of costs awarded in the Court of Appeal. It is significant that neither party raised nor specifically addressed that issue given the appeals had already been decided when the Settlement Agreement was made. As noted, the claimant knew of the costs ordered against her in the Court of Appeal and that judgment for those costs was registered against her title to the Parklands Drive Property at the time of settlement. Had the claimant intended to secure the release of the costs awarded against her that could have been addressed.
- [44] Paragraph 5 of the Letter of Offer states that the respondent "releases all claims to the Parkside Drive Property." This is reflected in paragraph 4 of the Consent Order which states that the respondent "will have no entitlement to or interest in the property " The claimant submits those clauses also included release of the costs judgment. Such an interpretation is incorrect in light of the factual matrix of this case.
- [45] The respondent had advanced a claim against the Parklands Drive Property in the matrimonial proceedings. There was a CPL registered on the title of the property to protect that claim, and the CPL was released on settlement. The costs judgment on the other hand, related to the respondent's successful claim for costs of the First Appeal. A judgment registered on title is a mechanism for obtaining security for a judgment and for providing notice to others. It does not represent a claim to the property against which it is registered. The costs judgment therefore does not constitute an "entitlement to or interest in" the Parklands Drive Property as contemplated by para. 4 of the Consent Order when para. 5 of the Letter of Offer and the context surrounding the settlement are taken into account. This is supported by my above finding that the Consent Order and Settlement Agreement did not address the issue of costs in the appellate proceedings.
- [46] The application of the claimant is dismissed with costs to the respondent.

"The Honourable Mr. Justice Punnett"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/10/2020BCSC1080.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/berthin-v-berthin-2020-bcsc-1080>

Prepared on 25 October 2026 · Esheria