
CANADA / JUDGMENT

Besic v. Kerenyi

2012 BCCA 187

COURT

British Columbia Court of Appeal

DECIDED

1 May 2012

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2012 BCCA 187 Besic v. Kerenyi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Besic v. Kerenyi,

2012 BCCA 187

Date: 20120501

Docket: CA039008

Between:

Elvis Besic

Respondent

(Plaintiff)

And

Zoltan Kerenyi

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Lowry

The Honourable Madam Justice Bennett

The Honourable Madam Justice A. MacKenzie

On appeal from: Supreme Court of British Columbia, April 12, 2011

(Besic v. Kerenyi, Vancouver Docket S053622)

Counsel for the Appellant:

J. B. Mann

Counsel for the Respondent:

P. S. Boles

Place and Date of Hearing:

Vancouver, British Columbia

March 27, 2012

Place and Date of Judgment:

Vancouver, British Columbia

May 1, 2012

Written Reasons by:

The Honourable Madam Justice A. MacKenzie

Concurred in by:

The Honourable Mr. Justice Lowry

Dissenting Reasons by:

The Honourable Madam Justice Bennett (P. 13, para. 35)

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

- [1] Mr. Kerenyi, the defendant in the underlying damages action, appeals an order striking his appearance and statement of defence for failure to pay a costs order on an interlocutory application. Mr. Besic commenced the action on June 30, 2005. In his statement of claim he alleged that Mr. Kerenyi assaulted him during a soccer match on July 2, 2003, resulting in a broken jaw, abrasions, mental distress, dizziness and other losses, including loss of earning capacity and loss of income earning opportunity.
- [2] Mr. Kerenyi filed an appearance to the action on August 4, 2005 and a statement of defence on April 24, 2006. In his statement of defence, he pleaded that Mr. Besic's injuries "were caused, or alternatively contributed to, by the Plaintiff's own negligence" and that "the Plaintiff voluntarily assumed the legal and actual risk of injury and damage when voluntarily participating in the soccer game."
- [3] Mr. Kerenyi failed to serve either document on counsel for Mr. Besic, who only became aware of the pleadings after conducting a search of the registry file. Mr. Kerenyi subsequently changed his address and failed to file or deliver a notice of the change.

- [4] On March 5, 2007, the respondent's counsel forwarded a notice to produce and a demand for discovery of documents to the address for delivery previously provided by Mr. Kerenyi, but received no response. Years later and after many attempts, she located Mr. Kerenyi and served him with an appointment for an examination for discovery scheduled for March 1, 2011. Mr. Kerenyi failed to attend at the appointed time and place. He called counsel's office between February 28 and March 1 to say he would not be appearing.
- [5] In response to Mr. Kerenyi's non-compliance, the respondent's counsel applied on March 8, 2011 to strike Mr. Kerenyi's appearance and statement of defence. The application came before Master Baker. Ms. Clark, a paralegal but appearing only in her capacity as Mr. Kerenyi's friend, attended by phone on behalf of Mr. Kerenyi, and sought an adjournment of the application to March 11, 2011. She claimed that the notice of application served on Mr. Kerenyi was unfiled and had a return date of March 11, 2011. Later that day, she informed the respondent's counsel that she had been mistaken and that the notice of application had the return date of March 8, 2011.
- [6] On March 11, 2011, the matter came before Mr. Justice Wong. Mr. Kerenyi was present. Counsel for the respondent advised Wong J. of Ms. Clark's mistake regarding the return date on the notice of application and of Mr. Kerenyi's lack of explanation for his non-attendance at both the March 1, 2011 examination for discovery and the March 8, 2011 hearing of the application to strike.
- [7] After hearing submissions, Wong J. scheduled a new hearing date for Mr. Basic's summary trial application and ordered Mr. Kerenyi to comply with several conditions, including the preparation of a list of documents within seven days of such a demand; attendance at the next scheduled examination for discovery; and the provision to Mr. Basic's counsel of a notice of any change of address within seven days. He further ordered, "Failure to comply with any of these matters, the term will be that without more, your appearance and statement of defence will be struck". Mr. Justice Wong also awarded Mr. Basic costs of \$1,756 to be paid within seven days, and dispensed with Mr. Kerenyi's approval of the form of the order.
- [8] Mr. Kerenyi did not comply with the March 11, 2011 order in one substantive respect. He did not pay the costs ordered within the requisite time frame, or at all. He complied with the other conditions of the order, although it took him more than seven days to prepare the list of documents. By way of letter dated March 25, 2011, counsel for the respondent informed Mr. Kerenyi that she would be proceeding with the application to strike his pleadings, which application was renewed on March 30. On March 30, Mr. Kerenyi filed an application to "amend" the March 11, 2011 order and dismiss the costs award. He did not proceed by way of appeal but rather filed and served this application for what counsel for the respondent characterized as "relief unknown in law."

[9] The cross-applications came on for hearing before Wong J. on April 12, 2011. Counsel for the respondent challenged the application brought by Mr. Kerenyi on the basis that the relief sought was beyond the jurisdiction of the court, and further contended that the application should not be entertained because Mr. Kerenyi was in breach of a court order. Mr. Kerenyi advised Wong J. that he had complied with the terms of the March 11, 2011 order but was unable to pay the costs award because he "[did not] have that money available". In submissions, he admitted he had punched Mr. Besic once, but said Mr. Kerenyi had physically and verbally abused him, and that he had to protect himself.

[10] In granting Mr. Besic's application, the chambers judge said:

Mr. Kerenyi, as you may recall I adjourned the other matter when it first appeared before me when Ms. Boles asked me to strike your pleadings, and I gave you another chance. You did comply ultimately with it. But you still haven't paid the costs which I ordered to be paid within seven days. And I think basically this has to come to an end. ...

I gave you an opportunity to say what you wanted to say. The authorities are quite clear that non-compliance I don't have a discretion to do anything more [sic]. There was a disobedience of a court order. And accordingly what I formally adjourned generally on the application to strike I am going to accede to it today. And also costs of today's appearance.

[11] The resulting order of April 12, 2011 provides:

that the Appearance and Statement of Defence of the Defendant, ZOLTAN KERENYI be struck and that the proceeding continue as if no Appearance and Statement of Defence had been filed by the Defendant, ZOLTAN KERENYI;

This order alone is the subject of the current appeal.

[12] Mr. Kerenyi then retained counsel and, on May 6, 2011, filed a notice of appeal of the April 12, 2011 order. On November 10, 2011, he filed an application for an extension of time to file and serve his appeal record and transcripts from the proceedings below. This application was granted on December 8, 2011: 2011 BCCA 503.

[13] In the interval, on September 7, 2011, Mr. Besic brought a summary trial application for the assessment of damages. Madam Justice Russell heard the application. On September 28, 2011, Russell J. awarded Mr. Besic damages of \$73,104.80 and costs: 2011 BCSC 1277. Costs were taxed on October 24, 2011, and certified in the amount of \$22,371.85. Both judgments were registered against real property held in Mr. Kerenyi's name.

[14] The order granting Mr. Kerenyi an extension of time to file his appeal materials included a condition that he post security for the full amount of the damages award and the costs judgment, plus post judgment interest on both orders to the date of the reasons, within 14 days following the publication of the reasons. Mr. Kerenyi has complied with that condition.

[15] Mr. Kerenyi raises two grounds of appeal:

1. The chambers judge erred in law by failing to exercise his discretion before striking Mr. Kerenyi's appearance and statement of defence.
2. In the alternative, if the chambers judge did exercise his discretion, his order was clearly wrong, thus leading to an injustice.

Applicable Law

- [16] An order to strike a party's pleadings for non-compliance with a court order has been described as "a Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence" (*Muscroft v. Eurocopter S.A.*, 2003 BCCA 229, 12 B.C.L.R. (4th) 321 at para. 4, per Southin J.A.), and "a blunt tool, to be used sparingly" (*House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483, 72 B.C.L.R. (4th) 269 at para. 28, per Saunders J.A.).
- [17] Considerations relevant to the exercise of the court's discretion to strike out pleadings include: (i) whether non-compliance with the court order was wilful or intentional, or whether the offending party had an explanation for his or her non-compliance (*TG Industries Inc. v. Williams*, 2001 NSCA 105, 196 N.S.R. (2d) 35 at para. 17, and *Eisele v. B.A. Blacktop Ltd. et al*, 2004 BCSC 521, 15 C.P.C. (6th) 235 at paras. 18-23); (ii) whether the scope of the remedy is disproportionate or excessive to the "delict" (*House of Sga'nisim* at para. 26); and (iii) whether a second chance should be provided to remedy the breach (*Neeld v. Pezamerica Resources Corp.*, [1985] B.C.J. No. 2356 (C.A.) at paras. 28-29). This is not an exhaustive list; there may well be other relevant factors to consider. Ultimately, the question is whether a lesser remedy would suffice.

Analysis

- 1) Did the chambers judge err in law by failing to exercise his discretion prior to striking the appellant's appearance and statement of defence?
- [18] Counsel for Mr. Kerenyi submits the chambers judge erred in law by stating that he had no discretion with respect to striking Mr. Kerenyi's pleadings as a result of Mr. Kerenyi's failure to comply with the costs provision of the March 11, 2011 order, and by failing to consider the relevant factors noted above for the granting of such an order.
- [19] The appellant is proceeding on the basis that it is the Supreme Court Civil Rules that provide the foundation for the judge's April 12, 2011 order striking the appellant's pleadings. Counsel emphasizes that the relevant Rules are discretionary, not mandatory.

Rule 22-7 provides:

- (2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may

...

- (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
- (e) make any other order it considers will further the object of these Supreme Court Civil Rules.

...

- (6) If a person, without lawful excuse, refuses or neglects to comply with a direction of the court, the court may make an order under subrule (5) ... (g).

[Emphasis added.]

Subrule (5) (g) provides:

- (g) if the person is a defendant, ... the court may order the proceeding to continue as if no response to civil claim ... had been filed.

[Emphasis added.]

[20] On April 12, 2011, when the judge struck out the appearance and statement of defence saying, "There was a disobedience of a court order" and "I don't have a discretion to do anything more", he was referring to his order of March 11. It was on March 11, 2011 that Wong J. exercised his discretion under the Supreme Court Civil Rules set out above by ordering that, as set out in the entered order, "failure to comply with any of the terms will result in the Appearance and Statement of Defence being struck".

[21] Mr. Justice Wong had a further discretion whether to enforce the March 11, 2011 order. However, his decision in this respect was informed by the authorities to which he was referred by the respondent's counsel, most notably Mr. Justice Chiasson's ruling in *Larkin v. Glase*, 2009 BCCA 321, 96 B.C.L.R. (4th) 94, cited in *McGinn v. McGinn* (22 February 2010), *Penticton* 5151 (B.C.S.C. per Ker J.). *Larkin* emphasizes the seriousness of a party's disobedience of a court order:

[7] A court order must be obeyed until and unless it is reversed. Refusal to obey court orders strikes at the heart of the rule of law, at the core of the organization of our society. If court orders can be disregarded with impunity, no one will be safe. Our free society cannot be sustained if citizens can decide individually what laws to obey and what laws to disregard. Madam Justice McLachlin, as she then was, stated in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901 at 931:

Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.

Mr. Glase must understand that if he can select what laws to obey, others may do so as well, to society's and his personal detriment.

Larkin establishes that it is within the court's discretion to refuse to hear a party that is in breach of a court order.

- [22] Viewed in this light, Wong J. did not err as alleged in the first ground of appeal. The primary exercise of his discretion occurred in making the first order of March 11, 2011, which he then enforced on April 12, 2011 in accordance with the authorities to which he was referred. Thus, I would not give effect to the first ground of appeal.
- 2) In the alternative, if the chambers judge did exercise his discretion, was his order clearly wrong, thus leading to an injustice?
- [23] The authorities regarding the standard of review for discretionary matters were canvassed by Mr. Justice Tysoe in *Dhillon v. Pannu*, 2008 BCCA 514, 86 B.C.L.R. (4th) 88:
- [26] ...The appellate standard of review in respect of discretionary orders has been expressed in slightly varying ways. One of the expressions of the standard of review is contained in the authority primarily relied upon by the plaintiff on this appeal, *House of Sga'nisim v. Canada (Attorney General)*, 2007 BCCA 483, 286 D.L.R. (4th) 557 ("Chief Mountain"):
- [20] In order to succeed on an appeal of an order made in the exercise of discretion, this Court must be satisfied that the trial judge erred in the exercise of his discretion in that no weight or not sufficient weight has been given to relevant considerations: *Friends of the Old Man River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-77, 88 D.L.R. (4th) 1. In other words, this Court will not interfere with the exercise of discretion simply because we might have exercised the discretion in a different fashion.
- [27] In the relatively recent decision of *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 123, the Supreme Court of Canada adopted the expression of the standard of review contained in *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1375, 37 B.C.L.R. (2d) 145, that an appellate court should interfere with the exercise of discretion by a judge only if he "misdirects himself or if his decision is so clearly wrong as to amount to an injustice".
- [28] An appellate court should not substitute its opinion in place of the opinion of the trial judge or chambers judge under the guise that the judge did not give sufficient weight to a relevant consideration. It is incumbent upon an appellant to demonstrate error on the part of the judge, and an appellate court should not interfere with the exercise of discretion by a judge simply because the judge failed to mention a relevant consideration: see *Garda v. Osborne* (1996), 72 B.C.A.C. 101 at para. 31, and *E.T. v. K.H.T.* (1996), 27 B.C.L.R. (3d) 347, 83 B.C.A.C. 267 at para. 29 (Lambert J.A. dissenting in the result). If the judge's decision is not so clearly wrong as to amount to an injustice, it must be manifest from the judge's reasons that he or she misdirected himself or herself, or gave no weight, or insufficient weight, to a relevant consideration.

[24] The oral reasons given by Wong J. with respect to both the order of March 11, 2011 and that of April 12, 2011 are brief. In these circumstances, the appellant relies on *McKim v. Oakley* (1995), 10 B.C.L.R. (3d) 277 at para. 63, 63 B.C.A.C. 132:

If the standard stated by Laskin C.J.C. in *MacDonald v. R.* (1976), 29 C.C.C. (2d) 257 (S.C.C.), at p. 263, is applied the duty of an appellate court where the reasons are silent in whole or in part is to review the record to determine whether there is a rational basis for concluding that the trial judge erred in appreciation of a relevant issue, or in appreciation of evidence that would affect the propriety of his verdict.

[25] In my view, upon consideration of the record before the Court, it is apparent that Wong J. properly exercised his discretion in making the order of March 11, 2011 and enforcing it on April 12, 2011, given the history of delay caused by Mr. Kerenyi in these proceedings.

[26] Mr. Kerenyi, who complied with the other terms of the March 11, 2011 order, was clearly aware of the existence, nature and reasons for the costs award when it was made. After the amount of the costs award was settled, Wong J. engaged in a discussion with Mr. Kerenyi in which he provided the following explanation: "Well, what it is is when the other side has to spend money to get you here and to get this put in an orderly fashion, costs and time was incurred and you're penalized in the amount of \$1,756." And later, "I have to penalize you because of the delay." Mr. Kerenyi's knowledge of the costs provision was subsequently confirmed by the preparation and filing of his application to "amend" the order of March 11, 2011 and dismiss the costs award. Indeed, counsel for Mr. Kerenyi on appeal conceded that by no stretch could he argue that the matter came on for hearing on April 12, 2011 without Mr. Kerenyi knowing the contents of the order with which he had to comply.

[27] As observed by the respondent's counsel, Mr. Kerenyi provided three separate assurances to the court on March 11, 2011 that he would comply with his obligations in the litigation. He said, "I'd like to assure you that once I'm aware of anything that's required for me, I try to comply [to] the best of my knowledge." And later, "I'm going to follow all the rules, of course, as long as I'm aware of them." Lastly, he said, "I'm here right now. I guess that proves it, that I am taking this matter seriously. And I can promise that I -- I will follow all the -- all the rules and regulations."

[28] In light of Mr. Kerenyi's knowledge of the costs provision and the reason for its imposition, as well as his assurances of compliance, I cannot accept the appellant's argument that the March 11, 2011 order and its subsequent enforcement was a "Draconian" or disproportionate remedy.

[29] Nor can I accept the argument that Mr. Kerenyi was denied a "second chance" to comply with his obligations. Rather than acceding to the respondent's application to strike Mr. Kerenyi's pleadings on March 11, 2011, the chambers judge warned him of the prospect of dismissal upon non-compliance with the terms of the order issued that day.

- [30] Having thus warned Mr. Kerenyi, Wong J. was entitled to enforce the order of March 11, 2011, particularly in the context of the ongoing delays in the litigation and in the absence of an acceptable explanation as to why Mr. Kerenyi did not pay the costs award. Mr. Kerenyi raised the issue of his inability to pay on April 12, 2011, saying "unfortunately I don't have that money available." However, no further oral submissions were made on this point. Nor was the issue of Mr. Kerenyi's financial circumstances raised on March 11, 2011 or in the affidavit filed in support of his application to "amend" the March 11 order, which largely focused on his compliance with the other terms of the order.
- [31] Before Wong J., Mr. Kerenyi advanced two additional reasons for his non-compliance with the order of March 11, 2011. He indicated that the terms of such order were impossible to comply with, which argument appears to have been directed at the requirement to produce certain documents pertaining to his employment within seven days. He further asserted that he did not know the correct amount to pay due to an error in the draft order.
- [32] It was open to Wong J. to reject the excuse offered by Mr. Kerenyi that he did not know the correct amount to pay. The discrepancy between the costs ordered of \$1,756 and the costs in the draft order of \$1,750 is trivial. It was also open to the judge to reject Mr. Kerenyi's bare statement that he did not have the necessary funds available, particularly given that Mr. Kerenyi owns property and is presently employed. Mr. Kerenyi made no attempt to pay any part of the costs award, nor did he provide any indication of attempts made to borrow the money. In my view it was open to the judge to conclude that Mr. Kerenyi's failure to comply with the costs provision was intentional. Mr. Kerenyi was unapologetic about his non-compliance and demonstrated a desire to contest the imposition of the costs provision.
- [33] The chambers judge was in the best position to evaluate Mr. Kerenyi's history of delay in the litigation and to conclude that an order striking Mr. Kerenyi's pleadings upon further non-compliance was the appropriate remedy in the circumstances. Mr. Justice Wong engaged in a proper exercise of discretion in imposing such order, which he was subsequently entitled to enforce. Upon review of the record in this matter, it is my view that he neither misdirected himself, nor gave insufficient weight to relevant considerations. The resulting orders cannot be said to be clearly wrong.

Disposition of the Appeal

- [34] Neither of the two stated grounds of appeal has any merit. I would dismiss the appeal and direct that the security paid into court by Mr. Kerenyi pursuant to the order of Madam Justice D. Smith, specifically \$73,104.80 for damages and \$22,371.85 for costs, plus post judgment interest on both, be paid out to Mr. Besic upon the removal of the registration of certificates of judgment for damages and costs respectively. Mr. Besic is awarded his costs of the appeal.

"The Honourable Madam Justice A. MacKenzie"

I agree:

"The Honourable Mr. Justice Lowry"

Dissenting Reasons for Judgment of the Honourable Madam Justice Bennett:

[35] I have had the opportunity to read the draft reasons of my colleague Madam Justice MacKenzie. With respect, I do not agree with her conclusion. In my view, for the reasons articulated below, the learned chambers judge erred when he struck out Mr. Kerenyi's appearance and statement of defence.

Facts

[36] In her reasons, MacKenzie J.A. sets out the steps Mr. Besic's counsel took to move the litigation along. Despite counsel's efforts, the litigation sat idle for some period of time. Mr. Kerenyi was located and a notice of intention to proceed was served upon him in February 2011. He eventually appeared before Wong J. on March 11, 2011. Counsel for Mr. Besic set out the history of the matter from the plaintiff's perspective.

[37] Mr. Kerenyi was not represented by counsel throughout the proceedings below. He offered explanations for his inadequate response to service of notices to produce, appointments for an examination for discovery, and other court documents. He submitted, in accordance with an affidavit he swore on March 7, 2011, that he believed the defendant Canlan Investments Corp. ("Canlan") was defending the action. On March 3, 2006, Canlan filed a motion to dismiss Mr. Besic's action for failure to comply with the Rules. In March 2008, Mr. Besic discontinued the action against all defendants except Mr. Kerenyi.

[38] Mr. Justice Wong asked Mr. Besic's counsel what she required from Mr. Kerenyi, and she requested a list of documents, his tax returns from 2002-2005, and an examination for discovery. Mr. Justice Wong made the following orders:

1. the Defendant shall provide a List of Documents within seven days which may include access to the Defendant's Air Canada personnel file, income tax returns and Notices of Assessment for the years 2002 - 2005 inclusive;
2. the Defendant shall attend the next scheduled Examination for Discovery breached [sic] by the Plaintiff;
3. the Defendant shall provide notice of change of address within seven days of it changing;
- ...
6. failure to comply with any of the terms will result in the Appearance and Statement of Defence being struck;

- [39] Counsel for Mr. Besic then sought costs thrown away in the amount of \$1,756, which Wong J. granted. Mr. Kerenyi told Wong J. that he "did not understand the charge". Mr. Justice Wong explained to Mr. Kerenyi that Mr. Besic had incurred costs to get Mr. Kerenyi to court, and that he had to be penalized for the delay. Mr. Justice Wong dispensed with Mr. Kerenyi's approval of the order as to form.
- [40] A reading of the March 11, 2011 transcript reveals that Wong J. first pronounced term 6 of the order before adding the requirement that Mr. Kerenyi pay \$1,756 in costs Mr. Besic incurred in attempting to move the litigation forward. Accordingly, it could easily have been unclear to Mr. Kerenyi at the hearing that a failure to pay the costs could result in the striking of his statement of defence and appearance. However, that is how the order read when entered.
- [41] Mr. Kerenyi complied with all of the terms of the order, except payment of the costs thrown away. He brought a motion to set aside the costs order which was scheduled to be heard at the same time as Mr. Besic's application to strike Mr. Kerenyi's appearance and statement of defence.
- [42] The parties appeared before Wong J. on April 12, 2011 on the above-noted motions, but Mr. Besic's counsel advised Wong J. that he should not hear Mr. Kerenyi's motion because he failed to comply with the March 11, 2011 order to pay costs. Mr. Kerenyi told the court he did not have the money to pay the costs but filed no affidavit to this effect. He repeated what he said on March 11, namely that he did not understand the basis for the costs award.
- [43] After permitting Mr. Kerenyi to explain his situation, the chambers judge said this:

THE COURT: Mr. Kerenyi, as you may recall I adjourned the other matter when it first appeared before me when Ms. Boles asked me to strike your pleadings, and I gave you another chance. You did comply ultimately with it. But you still haven't paid the costs which I ordered to be paid within seven days. And I think basically this has to come to an end.

...

THE COURT: ... The authorities are quite clear that non-compliance I don't have a discretion to do anything more [sic]. There was a disobedience of a court order. And accordingly what I formally adjourned generally on the application to strike I am going to accede to it today. And also costs of today's appearance.

- [44] Thus, both the appearance and the statement of defence were struck.

Discussion

- [45] Mr. Kerenyi ultimately complied with the Rules, as Wong J. ordered. He apparently failed to comply with the order to pay costs thrown away because he could not produce the money (although failure to depose this excuse lessens its weight). He also did not understand why he was required to pay the costs. His response was not to ignore the court's order, but rather

to bring a motion to amend or delete the costs order. Mr. Besic's counsel relied on this Court's decision in *Larkin v. Glase*, 2009 BCCA 321, to argue that the chambers judge had no jurisdiction to hear the application by reason of non-compliance.

- [46] The striking of a statement of defence alone has been called "a Draconian remedy only to be invoked in the most egregious of cases because it deprives the litigants of a trial on the evidence" (*Muscroft et al v. Eurocopter S.A. et al*, 2003 BCCA 229 at para. 4). The striking of an appearance goes further yet. It removes the defendant as a party of record and disentitles him or her to further participate as of right in the litigation, including in any assessment of damages that would, in the absence of a statement of defence, follow default judgment on liability (*Ngo v. South Pacific Development*, 2006 BCCA 182 at paras. 18-20). A judge hearing the damages assessment arguably has discretion to permit a party who is not a party of record to participate in the assessment (*Matthes v. Manufacturers Life Insurance Company*, 2008 BCSC 6 at paras. 44-57). To my knowledge, this Court has not had occasion to consider that particular issue.
- [47] The striking of a statement of defence and/or an appearance is also a discretionary remedy that may only be set aside in the event of misdirection or if the decision is so clearly wrong as to amount to an injustice (*Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1375). The chambers judge said on April 12, 2011, "The authorities are quite clear that non-compliance I don't have a discretion to do anything more" [sic]. With respect, even considering the March 11 and April 12 applications together, this statement amounts to misdirection. The chambers judge retained discretion to decline to strike the statement of defence and appearance.
- [48] If the chambers judge relied on *Larkin* to conclude that he had no jurisdiction to hear the matter further, that reliance was misplaced. *Larkin* stands for the proposition that an appellate court has the discretion to refuse to hear an appeal if a related court order has been defied absent a stay pending appeal. It does not stand for the proposition that a court has no jurisdiction to hear an application if there is non-compliance with a court order.
- [49] In my respectful view, the chambers judge fell into reversible error by misdirecting himself that he had no discretion to allow Mr. Kerenyi's appearance and statement of defence to stand. The non-compliance at issue related only to the "costs thrown away" order. Mr. Kerenyi was complying with all other terms of the order designed to move the litigation along. In striking the appearance and statement of defence, the chambers judge did not consider the implication of Mr. Kerenyi's purported inability to pay the \$1,756 in the short time allotted.
- [50] Mr. Kerenyi was charged criminally with assault as a result of this incident and was acquitted on December 9, 2004, apparently on the basis of self-defence. We have not been provided with the trial judge's reasons for the acquittal. Mr. Kerenyi may have a defence to this action, not by reason of the acquittal itself, which involves a more stringent standard of proof, but in terms of a substantive defence to the tort of assault.

[51] This is not one of "the most egregious of cases" in which it is appropriate to strike Mr. Kerenyi's statement of defence, much less to go further and strike his appearance as well. I would permit the appearance and statement of defence to stand, set aside the damages assessment award, and remit the matter to the Supreme Court for trial.

"The Honourable Madam Justice Bennett"

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Prepared on 29 October 2026 · Esheria