
CANADA / JUDGMENT

Booty v. Hutton

2009 BCCA 375

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 375 Booty v. Hutton

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Booty v. Hutton,

2009 BCCA 375

Date: 20090828

Docket: CA022525; CA037153

Docket: CA022525

Between:

Charlein Booty

Respondent

(Petitioner)

And

Gordon Stanford Hutton (also known as Gordon Hutton)

(Allen Hutton, Agent)

Appellant

(Respondent)

- and -

Docket: CA037153

Between:

Gordon Stanford Hutton and

Allen Gordon Hutton

Appellants

(Plaintiffs)

And

Charlein Booty

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Tysoe

(In Chambers)

On appeal from: Supreme Court of British Columbia,

November 20, 1996 (Booty v. Hutton, Docket A932373) and

September 22, 2004 (Booty v. Hutton, Dockets A932373 and S016658)

Appearing on his own behalf and as agent for the Estate of Gordon Stanford Hutton:

A. Hutton

Counsel for the Respondent:

D. H. Unterman

Place and Date of Hearing:

Vancouver, British Columbia

July 24, 2009

Place and Date of Judgment:

Vancouver, British Columbia

August 28, 2009

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

- [1] Allen Gordon Hutton ("Mr. Hutton Jr."), on his own behalf and as agent for the estate of his father, Gordon Stanford Hutton ("Mr. Hutton Sr."), has brought two applications in relation to the estates of Mr. Hutton Jr.'s grandfather and uncle. The first application is to reinstate an appeal from an order of Madam Justice Boyd dated November 20, 1996, that was dismissed as abandoned in 1998. The second application is for an extension of time to appeal from two orders made by Mr. Justice Shabbits on September 22, 2004.
- [2] The respondent, Charlein Booty, has brought a cross motion that I will address briefly near the end of these reasons for judgment.
- [3] Charles George Hutton, who was the father of Mr. Hutton Sr., Charlein Booty, and James Vernon Hutton, died on April 17, 1976. In his will, he named Mr. Hutton Sr. and Mr. Vernon Hutton as executors. The will bequeathed the sum of \$40,000 to Ms. Booty's daughter and left the residue of the estate to the testator's three children in equal shares.
- [4] Mr. Vernon Hutton died in 1992.
- [5] In 1993, Ms. Booty commenced a proceeding, A932373, by way of petition, for an order that Mr. Hutton Sr. pass his accounts as executor of the estate.
- [6] On July 12, 1993, Master Patterson ordered a reference to the registrar for an accounting by Mr. Hutton Sr. of his father's estate. The accounting never took place "due to the failure of [Mr. Hutton Sr.] to provide accounts in accordance with Rule 32(13) or otherwise" (registrar's report of August 24, 1994).
- [7] During the hearing of an application on August 29, 1995, Boyd J. characterized the actions of Mr. Hutton Sr. to be a "flagrant, arrogant display of a lack of respect for the administration of justice".
- [8] Ms. Booty brought on an application for judgment against Mr. Hutton Sr. in October 1996. In reasons for judgment issued November 20, 1996, [1996] B.C.J. No. 2286 (S.C.), Boyd J. drew negative inferences against Mr. Hutton Sr. for his failure to cooperate and produce documents, noting at para. 27 that he had "managed to avoid compliance with almost every Court order for production for the last few years". On the basis of her conclusion that there was no prospect of the accounts of the estate ever being passed, Boyd J. granted judgment in favour of Ms. Booty in the amount of \$40,000 (the "1996 Judgment"). The figure of \$40,000 was half of the amount that Mr. Hutton Sr. had himself deposed was in the various estate accounts maintained by Mr. Hutton Sr. at the time of the death of his brother, Vernon Hutton, in 1992.

- [9] A notice of appeal, CA022525, from the 1996 Judgment was filed on behalf of Mr. Hutton Sr. on November 21, 1996, but no other steps were taken in the appeal. Through the mechanism set out in s. 25 of the Court of Appeal Act, R.S.B.C. 1996, c. 77, the appeal was placed on the inactive list in November 1997 and was dismissed as abandoned on May 21, 1998. One of the two applications brought by Mr. Hutton Jr. is to reinstate this appeal pursuant to s. 25(6) of the Court of Appeal Act.
- [10] Mr. Hutton Jr. caused three applications to be brought on for hearing on September 22, 2004. The first application, in proceeding A932373, was made under Rule 52(2) of the Supreme Court Rules of Court for an order setting aside the 1996 Judgment. The other two applications were made under Rules 26 and 46 of the Supreme Court Rules of Court in an action, S016658, brought in the names of Mr. Hutton Jr. and Mr. Hutton Sr. (who had passed away earlier in 2004) against Ms. Booty. Both of these applications were for orders requiring Ms. Booty to produce documents; one for documents relating to her father's estate and the other for documents pertaining to the estate of her brother, Vernon Hutton.
- [11] Mr. Justice Shabbits gave oral reasons dismissing all three applications (the "2004 Orders"). He held that Rule 52(2), which lists an application to vary or set aside a judgment as one of the types of applications that must be heard in chambers, did not authorize him to set aside the 1996 Judgment. In the course of his reasons, Shabbits J. said the following:
- [34] Mr. Hutton appears in person so perhaps I should set out what to me seems fairly obvious. It is for the Court of Appeal to review trial judgments and chambers judgments and for the Court of Appeal to determine whether matters should be retried, whether judgments should be set aside, or whether appeals from a judgment ought to be dismissed.
- [12] Mr. Justice Shabbits considered that the application to have Ms. Booty produce documents relating to her father's estate was for the purpose of supporting Mr. Hutton Jr.'s contention that the 1996 Judgment should be set aside. He dismissed the application because, in his opinion, matters relating to the estate of Charles George Hutton were for the Court of Appeal to consider.
- [13] In the third application, Mr. Hutton Jr. was seeking production of an alleged last will and testament of Vernon Hutton that Mr. Hutton Jr. maintained was in the possession of Ms. Booty. Ms. Booty denied that she was in possession of this alleged will. Mr. Justice Shabbits dismissed the application on the basis that it was misguided and that the proper procedure was to utilize Rule 61(46)(a) of the Supreme Court Rules of Court or to apply for probate of a will of Vernon Hutton that was known with certainty to exist.
- [14] In early 2005, Mr. Hutton Jr. applied in each of the two actions to review and set aside or vary the 2004 Orders. On January 12, 2005, Mr. Justice Holmes adjourned the applications generally to be heard before Shabbits J. Over three years later, on June 5, 2008, Shabbits J. heard the two applications and dismissed them (the "2008 Orders").

- [15] Mr. Hutton Jr. filed notices of application for leave to appeal from the 2008 Orders (Dockets CA036259 and CA036260). He unsuccessfully applied before Madam Justice Rowles on August 14, 2008, for orders dispensing with the requirement to serve the notices of application on Ms. Booty. Madam Justice Rowles commented in her reasons for judgment that the applications for leave appeared to have no merit.
- [16] The applications for leave to appeal from the 2008 Orders came on for hearing on October 14, 2008, before Mr. Justice Frankel, who refused leave to appeal.
- [17] On November 17, 2008, Mr. Hutton Jr. filed applications to review the orders of Frankel J.A., outside the seven-day period prescribed by Rule 34 of the Court of Appeal Rules. He made applications for extensions of time, which were heard by Mr. Justice Donald on January 19, 2009, together with Ms. Booty's application under s. 29 of the Court of Appeal Act for an order that Mr. Hutton Jr. be prevented from bringing further proceedings in this Court without first obtaining leave, on the basis that he had commenced vexatious proceedings in this Court without reasonable cause or, in the alternative, orders for security for costs in the Supreme Court and in this Court.
- [18] In reasons for judgment issued on January 30, 2009, and indexed as 2009 BCCA 29, Donald J.A. granted the extensions of time, dismissed the application under s. 29 and ordered the posting of security of \$3,921.99 for costs in the Supreme Court and \$2,500 for costs in this Court.
- [19] In his reasons for judgment, Donald J.A. granted the extensions of time because, despite his agreement with Madam Justice Rowles' view of the merits of the appeals, the delay was not inordinate. He dismissed the application under s. 29 because he could not say that Mr. Hutton Jr.'s conduct in this Court had yet reached the level of vexatious conduct.
- [20] Mr. Hutton Jr.'s next step was to apply for a review of the order of Donald J.A., seeking to vary it by deleting the aspects relating to the posting of security for costs. On March 24, 2009, in reasons for judgment indexed as 2009 BCCA 136, his application was dismissed by a division of this Court.
- [21] Mr. Hutton Jr. then turned his focus to the 2004 Orders and to the 1996 Judgment itself, and made the applications presently before the Court.

Application to Reinstate Appeal CA022525

- [22] As with applications for an extension of time and applications to restore an appeal to the active list, the ultimate question on applications to reinstate a dismissed appeal is whether it is in the interests of justice to do so. The factors to be considered in assessing the interests of justice on a reinstatement application include the following:
- (a) the length of the delay and, in particular, whether the delay has been inordinate;
 - (b) the reason for the delay and, in particular, whether the delay is excusable;

- (c) whether the respondent has suffered prejudice as a result of the delay; and
- (d) the extent of the merits of the appeal.

See *Hannigan v. Hannigan*, 2006 BCCA 167, 33 C.P.C. (6th) 205 at paras. 12-13.

- [23] The test on an application to reinstate a dismissed appeal is more stringent than the test on an application to restore an appeal to the active list. Mr. Justice Lambert expressed the increased stringency of the test in the following terms in *Canada (Attorney General) v. No Strings Enterprises Ltd.*, 2001 BCCA 671:
- [7] The test for reinstatement of a dismissed appeal under s.s. (6) of s. 25 is significantly more rigorous than the test for restoring an appeal to the active list under the earlier subsections of s. 25. It is not sufficient to determine whether the appeal has any prospect of success and if it is demonstrated that the appeal has some prospect of success to restore the appeal. There has to be a significant proper reason why no steps have been taken. It has to be in the overall interest of justice as it affects both parties that the appeal be reinstated. In my opinion, having regard to the arguments, there was no sufficient justification on Mr. Kennedy's part for letting so much time pass without taking any formal steps to prosecute this matter.
- [24] In the present case, the delay in bringing on the reinstatement application was 11 years from the dismissal of the appeal. It is beyond question that the delay has been inordinate.
- [25] Mr. Hutton Jr. has not offered an explanation for the delay. As he is not trained in the law, Mr. Hutton Jr. may initially have been unaware of the proper procedures. However, he was told by Mr. Justice Shabbits in 2004 that it is the Court of Appeal that sets aside judgments, and he did not take steps to reinstate the appeal for almost five more years. In my opinion, the delay is not excusable.
- [26] Ms. Booty has not put forward any particulars of prejudice she has suffered as a result of the delay, but as Madam Justice Saunders commented in *Greither v. Greither*, 2005 BCCA 339 at para. 20, there is always some prejudice in a delay in pursuing an appeal. Where the delay is inordinate and inexcusable, a rebuttable presumption of prejudice arises: see *Busse v. Robinson Morelli Chertkow*, 1999 BCCA 313, [1999] 10 W.W.R. 692 at para. 18. In the case at bar, the presumption of prejudice has not been rebutted.
- [27] I turn now to the merits of the appeal. In his submissions, Mr. Hutton Jr. says that Ms. Booty had told him that she received her share of her father's estate, but Ms. Booty deposed when she commenced the proceeding in 1993 that she did not receive any portion of the residue of the estate. Mr. Hutton Jr. points to what he says is proof that his aunt received her share of the estate; namely, a statement of an account with Teachers' Investment and Housing Co-operative showing a deposit on May 5, 1977 of \$54,948.98, an amount which Mr. Hutton Jr. says is roughly equal to two-thirds of the cash residue in the estate as shown on a form filed with the Province of Saskatchewan relating to the calculation of succession duties.

- [28] I do not consider this to be proof that Ms. Booty was paid her share of the residue of the estate. First, the figure on the succession duty document relied upon by Mr. Hutton Jr. (\$82,734.14) does not represent the cash in the residue of the estate but, rather, shows the estimate of the one-third share in the residue of the estate due to each of Vernon Hutton, Mr. Hutton Sr. and Ms. Booty (the overall value of the estate was subsequently re-declared in a lower amount, thus reducing the estimated one-third share in the residue). Secondly, the account with Teachers' Investment and Housing Co-operative was in the name of Mr. J. Hutton (who was presumably James Vernon Hutton), and the account was not shown to have been a joint account at the time of the deposit. The statement of the account does not represent proof that Ms. Booty was paid any of her share of residue of the estate.
- [29] In *Fred Walls & Son Holdings Ltd. (Re)*, 2003 BCCA 132, 11 B.C.L.R. (4th) 315, Mr. Justice Hollinrake made the following comments about the required level of merits when contrasted with the other factors under consideration:
- [22] In my opinion, the bar as to the level of merits of the appeal on a motion such as this must reflect the delay, the reason for that delay and the prejudice to the respondent. Here, the appellants say that on the merits they can meet a test of a substantial likelihood of success on the appeal. The first thing I should observe here is that, in my opinion, the bar as to the merits of the appeal must be at the high end on these facts. In my opinion, the appellants cannot meet that test or even come close to it. I conclude this because, in my opinion, the merits of the appeal are if not wanting at best minimal, and it can properly be said the appeal has little or no chance of success.
- Similarly, in the present case, there is not a substantial likelihood of success on the appeal. In my view, the prospects of success are minimal in the sense that there is little or no chance of the appeal being allowed.
- [30] Taking all of the factors into account, it is my conclusion that it is not in the interests of justice to reinstate this appeal.

Application for Extension of Time in Appeal CA037153

- [31] The 2004 Orders were made in two proceedings: the one in which the 1996 Judgment was granted in favour of Ms. Booty and the other in which Mr. Hutton Sr. and Mr. Hutton Jr. sought production of documents by Ms. Booty. The notice of appeal and notice of application for leave to appeal in CA037153 state that Mr. Hutton Jr. is seeking to appeal from both of the 2004 Orders. As with the original application before Shabbits J., Mr. Hutton Jr. wants production of the documents relating to his grandfather's estate to demonstrate that the 1996 Judgment is a "travesty". Although Mr. Hutton Jr. should have properly initiated a separate appeal proceeding in respect of each of the 2004 Orders, I will overlook this technicality for the purpose of this application.

[32] The time period for bringing an appeal or an application for leave to appeal is 30 days from the day on which the order appealed from was pronounced (s. 14 of the Court of Appeal Act). As the 2004 Orders were pronounced on September 22, 2004, and the time for bringing appeals from them expired on October 22, 2004, the extension Mr. Hutton Jr. seeks is almost five years.

[33] The questions to be considered on an application to extend the time for bringing an appeal were summarized in the well-known decision of *Davies v. Canadian Imperial Bank of Commerce* (1987), 15 B.C.L.R. (2d) 256 (C.A.):

- (a) was there a bona fide intention to appeal during the period for bringing the appeal?
- (b) when was the respondent informed of the intention?
- (c) would the respondent be unduly prejudiced by an extension of time?
- (d) is there merit in the appeal?
- (e) is it in the interests of justice that an extension be granted?

The final question is ultimately the test to be applied, as informed by the answers to the other questions, because "it encompasses the other four questions and states the decisive question" (Davies at 260).

[34] There is no evidence as to when Mr. Hutton Jr. first formed an intention to appeal the 2004 Orders. The most that can be said is that he initially applied in the Supreme Court to vary or set aside the 2004 Orders approximately three months after they were pronounced.

[35] There is similarly no evidence as to when Ms. Booty was informed of Mr. Hutton Jr.'s intention to appeal from the 2004 Orders.

[36] Ms. Booty has not provided any evidence of undue prejudice in the event the extension of time is granted.

[37] In my opinion, appeals from the 2004 Orders would be bound to fail in all three of their aspects.

[38] An appeal from the order refusing to set aside the 1996 Judgment would be bound to fail because an order of a judge of the Supreme Court may only be set aside in limited circumstances. A chambers order may only be reconsidered if a party to the application failed to attend and had not been guilty of wilful delay or default (Rule 52(5)) or if it was an order of a continuing nature and there had been a material change in circumstances or if there were grounds to reopen the hearing of an application or a summary trial. None of the limited circumstances in which a chambers order may be reconsidered are present in this case. As held by Shabbits J., Rule 52(2)(d) does not give jurisdiction for a reconsideration of an order, and it merely stipulates that an application to vary or set aside a judgment must be heard in chambers.

- [39] An appeal from the order dismissing the application for production of documents relating to the estate of Charles George Hutton would be bound to fail because the 1996 Judgment brought the proceeding to an end. The Supreme Court was functus in that proceeding and had no jurisdiction to order production of the requested documents.
- [40] An appeal from the order dismissing the application for production of documents relating to the estate of James Vernon Hutton would be bound to fail because, as held by Shabbits J., the proper procedure to obtain disclosure of a testamentary document believed to be in the possession of another person is set out in Rule 61(46). Unless there is a specific provision dealing with production of documents, such as Rule 61(46), an action cannot be utilized for the purpose of obtaining production of documents.
- [41] The procedures for document discovery set out in Rule 26 are incidental to a matter in question between the parties in an action, and are not available at large. Rule 26 is only available if there is an action in connection with a dispute between the parties, and the document in question is relevant to the matter in dispute.
- [42] Similarly, Rule 46 is not a free-standing remedy. Rule 46(1) authorizes the court to make an order "for the detention, custody or preservation of any property that is the subject matter of a proceeding or as to which a question may arise". There must first be a dispute between the parties regarding the property in question. In addition, Rule 46 is not designed to deal with the production of documents.
- [43] Having considered the relevant factors, I conclude that it is not in the interests of justice to extend the time to appeal from the 2004 Orders.

The Cross Motion

- [44] Ms. Booty has brought a cross motion in which she made six requests for declarations or orders. The six requests can be divided into two categories: a renewal of her application under s. 29 of the Court of Appeal Act for what is commonly referred to as a vexatious litigant order, and the other dealing with security for costs.
- [45] The end of the court day was approaching when the submissions with respect to Mr. Hutton Jr.'s applications were nearing completion. There was insufficient time to deal with the vexatious litigant application and counsel for Ms. Booty asked that it be adjourned generally. He proceeded, however, with submissions dealing with security for costs.
- [46] As mentioned above, Donald J.A. ordered the posting of security for costs in appeals CA036259 and CA036260. The costs in the Supreme Court related to the two applications before Shabbits J. and the one application before R. Holmes J., and were in the aggregate of \$3,921.99. Counsel for Ms. Booty advised that the Registry allowed Mr. Hutton Jr. to proceed with the application to have a division of the Court review the order of Donald J.A. without requiring him to post security for the \$3,921.99 amount of costs (or the security of \$2,500 for costs in this Court). Counsel requested me to make an order prohibiting Mr. Hutton Jr. from

taking any further steps in these two appeals, including a review application, or any other proceeding relating to Ms. Booty until he has posted security for the \$3,921.99 amount of costs in the Supreme Court.

- [47] The jurisdiction to require the posting of security for trial costs is found in s. 10(2)(b) of the Court of Appeal Act (see *Cadinha v. Chemar Corporation Inc.* (1995), 17 B.C.L.R. (3d) 347, 43 C.P.C. (3d) 357 (Chambers)), which allows a justice to make interim orders to prevent prejudice "[i]n an appeal or other matter before the court". I am unaware of any authority that would permit me to make an order for security for costs in one appeal and to stay proceedings in another appeal until the security is posted.
- [48] In my opinion, it would not be appropriate to make an order requiring the posting of security for costs in the Supreme Court before an application to review the order can be made. I think the Registry is correct in its view that a stay of proceedings pending the posting of security for costs does not apply to prevent an application for a review of the order that imposed the stay of proceedings.
- [49] There is no point in ordering the posting of security for costs in these two appeals because I am declining to make the orders that are necessary to enable the appeals to proceed.

Conclusion

- [50] I dismiss both of the applications made on behalf of the appellants, with costs to the respondent. I adjourn the respondent's application generally.

"The Honourable Mr. Justice Tysoe"

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