

CANADA / JUDGMENT

Brule v. Rutledge

2014 BCCA 197

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 197 Brule v. Rutledge COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Brule v. Rutledge, 2014 BCCA 197 Date: 20140526 Docket: CA041660 Between: Christian Brule Appellant (Plaintiff) And Donald G. Rutledge, Leslie Rutledge, Robert C. Gardner, Golden Ram Mining, Inc., Brian K. Briggs and Highcroft Investments, LLC Respondents (Defendants) Before: The Honourable Mr. Justice Goepel (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated February 18, 2014 (Brule v. Rutledge, Vancouver Docket S117407). Counsel for the Appellant: D.J. Barker Counsel for the Respondent Gardner: J.D. Shields Counsel for the Respondent Briggs: R.W. DuMerton Counsel for the Respondents Rutledge: C.H. Sweet Place and Date of Hearing: Vancouver, British Columbia May 1, 2014 Place and Date of Judgment: Vancouver, British Columbia May 26, 2014 Written Reasons by: The Honourable Mr. Justice Goepel Summary: The appellant's claim was dismissed at trial on a no evidence motion. The respondents each apply for security for costs of the appeal. Held: application dismissed. The appellant does not have the financial means to post security for costs. It cannot be said that the appeal is without merit; the trial judge arguably used the wrong test when he used the word "would" in the test applied on the no evidence motion. In these circumstances, an order for security for costs is not in the interests of justice. Reasons for Judgment of the Honourable Mr. Justice Goepel:

Introduction

- [1] The claim of the appellant Christian Brule arose from a venture to acquire a mine. His claim against the respondent Brian Briggs is for breach of a finder's fee agreement and an alleged partnership agreement. His claim against the respondents Donald and Leslie Rutledge and Robert C. Gardner concerns allegations of breach of a confidentiality agreement, breach of a duty of confidence, breach of a duty of trust and inducing breach of contract. The appellant claims damages for unjust enrichment against all the respondents.
- [2] The matter came on for trial in February 2014. At the close of the appellant's case, the trial judge dismissed the action on a no evidence motion pursuant to Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 12-5(4). The appellant has appealed the dismissal of his claims.

- [3] The respondents now each apply pursuant to the provisions of s. 24(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, for security for costs of the appeal. Each seeks an order that the appellant post security in the amount of \$12,625.60. They ask that the appeal be stayed until the security is posted and that they be at liberty to apply for dismissal of the appeal if the security is not posted within a specified time limit.
- [4] In determining whether to award security for costs of an appeal, the ultimate consideration is whether the order would be in the interests of justice. This Court has identified four relevant considerations. As Ryan J.A. (in Chambers) explained in *Lu v. Mao*, 2006 BCCA 560:
- [6] In determining whether security for costs should be ordered, the ultimate question to be answered is whether the order would be in the interests of justice. In this regard, Madam Justice Rowles in *Ferguson v. Ferstay* (2000), 81 B.C.L.R. (3d) 90 at para. 7; 2000 BCCA 592, (in Chambers) identified the following as relevant considerations:
- (1) appellant's financial means;
 - (2) the merits of the appeal;
 - (3) the timeliness of the application; and
 - (4) whether the costs will be readily recoverable.
- [5] In *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285, Justice Lowry (in Chambers) explained the applicable principles:
- [9] The jurisdiction to order security for costs of an appeal is found in s. 24 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. The appellant against which such an order is sought bears the onus of showing why security should not be required: *Kedia v. Shandro Dixon Edgson*, 2007 BCCA 57 at para. 4 (C.A. Chambers), *Smith J.A.* Generally, the considerations are the appellant's ability to post security and the likelihood of costs awarded being recovered from it, as well as the merits and the timeliness of the application: *Southeast Toyota Distributors, Inc. v. Branch* (1997), 45 B.C.L.R. (3d) 163 (C.A.); *Milina v. Bartsch* (1985), 5 C.P.C. (2d) 124 at 125 (B.C.C.A. Chambers), *Seaton J.A.*; and *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A. Chambers), *Esson J.A.* ...
- [12] An appellant which is without the financial ability to post security will not for that reason alone be precluded from pursuing a meritorious appeal. But adverse financial circumstances will generally not defeat an application for security where an appeal is virtually without any merit. A successful plaintiff should not be required to respond to an unmeritorious appeal when there is no real prospect of recovery: *Richland Construction Inc. v. Manningwa Developments Inc.* (1996), 71 B.C.A.C. 311 at paras. 12-13 (C.A. Chambers), *Finch J.A.* (as he then was).

- [6] In response to this application the appellant has deposed that he has been on social assistance throughout most of 2013. He indicates he is currently surviving on monies borrowed from family members while he looks for employment. He says he has no savings and no ability to post security for costs.
- [7] The respondents have an application for special costs pending in the Supreme Court. In the material filed in support of that application, Mr. Gardner has indicated that his legal bills to date exceed \$350,000. In the course of the hearing I was advised that similar sums are being sought by the other respondents in the court below.
- [8] In his affidavit, the appellant indicated that he had made arrangements to borrow the funds necessary to order the transcripts of the trial. At the hearing it was disclosed that the funds to purchase the transcripts were in fact advanced by Mr. Brule's counsel.
- [9] Based on the material which has been filed on this application and the representations made at the hearing, there is little question that the appellant does not have the financial means to post security for costs. His financial situation is such that costs would not be readily recoverable against him if the appeal is unsuccessful. The application has been brought in a timely manner.
- [10] Having determined that the appellant does not have the ability to post security for costs and that costs will not be readily recoverable if his appeal is unsuccessful, the merits of the appeal become an important factor in determining whether to order security for costs. If the appeal is bound to fail or does not have obvious merit, an order for security for costs will usually follow. Where an applicant fails the merits test, an order requiring security for costs will not create an injustice: *Buchy v. Villars*, 2008 BCCA 237. In such circumstances the appellant's financial circumstances are not depriving him of bringing a meritorious appeal. On the other hand, if the appeal "has some possibility of success", is not "virtually hopeless" or "appears to have some merit", then it is in the interests of justice that security for costs not be awarded if the effect of the order will be to deprive the appellant of the right to appeal: *Aikenhead v. Jenkins*, 2002 BCCA 234; *Jenkins v. Swallow Frames & Cycles Ltd.* (1997), 97 B.C.A.C. 81; *Roberge v. Huberman*, 2000 BCCA 457.
- [11] The issue on the appeal will be whether the trial judge was correct when he dismissed the appellant's claim at trial on the no evidence motion. A no evidence motion under Rule 12-5(4) raises a question of law. In *Birkenhead Resort Ltd. v. Bemister*, 2001 BCCA 178, Mr. Justice Hall reflected on difficulties that can arise in attempting to apply the rule:
- [3] Mr. Justice Esson's concluding comments in the above passage highlight the difficulty faced by both counsel and the judiciary in many cases that have involved a consideration of this sub-rule. The subtle analyses and distinctions that are often required pose a problem for counsel advising clients at trial and on appeal. Likewise, it is difficult for the judiciary in their endeavour to decide on which side of the line, often a rather shadowy line, a particular case may fall.

- [12] In *Tran v. Kim Le Holdings Ltd.*, 2010 BCCA 156 [Tran], this Court set out at para. 2 the test to be applied when a no evidence motion is brought: ... The test to be applied when a no evidence motion is brought has been described in Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 2d. ed. (Toronto: Butterworth's, 1999) at p. 139: The trial judge, in performing this function, does not decide whether he or she believes the evidence. Rather the judge decides whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge must conclude whether a reasonable trier of fact could find in the plaintiffs favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it. [Emphasis added.]
- [13] In this case, the trial judge appears to have applied a different test. He held at para. 80 that "in order for a no evidence motion to succeed the plaintiff must show there is no evidence on which a reasonable trier of fact, properly instructed, would find for the plaintiff". As he went through the individual claims he repeated the test as "would find for the plaintiff" at paras. 98, 105, 108, 119, 122, 128, 146, 151, 158 and 161. [Emphasis added.]
- [14] The trial judge may have applied the wrong test. "Would" has a different meaning than "could". The use of the word "would" appears to imply a weighing of evidence against the civil standard of balance of probabilities. This is impermissible on a no evidence motion: *Tran*; *Roberge v. Huberman*, 1999 BCCA 196.
- [15] Given the trial judge's iteration of an arguably inappropriate test, it cannot be said that this appeal is bound to fail or is virtually hopeless. Whether a correct application of the test would have also led to the dismissal of the action is a matter for the division that hears the appeal. While the appeal may not succeed, it cannot be said to be without merit.
- [16] In these circumstances, given the appellant's lack of financial means, an order for security for costs is not in the interests of justice.
- [17] The applications for security for costs are dismissed. "The Honourable Mr. Justice Goepel"

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