

CANADA / JUDGMENT

Chung v. Shin

2018 BCCA 103

COURT

British Columbia Court of Appeal

DECIDED

1 March 2018

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2018 BCCA 103 Chung v. Shin

OF APPEAL FOR BRITISH COLUMBIA

Citation:

Chung v. Shin,

2018 BCCA 103

Date: 20180301

Docket: CA44243

Between:

Hyunjin Chung also known as Hyunjin James Chung also known as

James Chung, Dae Shik Chung also known as David Chung, Dae Shik Chung

doing business as Geolica Vision, the said Geolica Vision, Kyung Ja Chung

Appellants

(Petitioners)

And

Jung Yup Shin

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Savage

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 16, 2017 (Chung v. Shin, 2017 BCSC 64, Vancouver Registry S163472).

Oral Reasons for Judgment

Appellant appearing In Person:

Dae Shik Chung aka David Chung

Counsel for the Respondent:

L.K.L. Li

Place and Date of Hearing:

Vancouver, British Columbia

March 1, 2018

Place and Date of Judgment:

Vancouver, British Columbia

March 1, 2018

Summary:

Applications to review a costs decision of the Registrar and for a no fee order in the context of an unsuccessful appeal. Held: applications dismissed. There was no basis to interfere with the Registrar's decision. Because the applicant was ordered to post security for costs, the appeal and application lacked merit, fees had already been paid, and the timing of the application, granting a no fee order would be inappropriate.

[1] SAVAGE J.A.: In this application, Mr. Chung seeks (1) to review an order of the Registrar setting costs, and (2) a no fees order pursuant to Rule 56.

[2] A brief chronology of this matter is as follows:

- March 16, 2017 - an order for security for costs against Mr. Chung was granted, with a stay of the appeal, pending the posting of security. The underlying appeal concerned the review of an arbitrator's award.
- April 24, 2017 - an application brought by Mr. Chung to extend time to file his motion book to have the March 16, 2017 order reviewed was heard by Mr. Justice Willcock. The stay was partially lifted to allow Mr. Chung to file the appeal record, appeal book, and factum.
- September 6, 2017 - the hearing of the appeal to review (vary or discharge) an order requiring security for appeal costs and costs of the underlying petition. The application for fresh evidence and a variation was dismissed on October 17, 2017 (reasons indexed as Chung v. Shin, 2017 BCCA 355).

· December 12, 2017 - the hearing of the appeal from an order dismissing leave to appeal from an arbitrator's award (indexed as *Chung v. Shin*, 2017 BCSC 64). Judgment was rendered orally, dismissing the appeal. The Court ordered that costs of the proceedings be awarded to the respondent (reasons indexed as *Chung v. Shin*, 2017 BCCA 445).

· January 30, 2018 - Registrar sets costs at \$9626.95.

[3] During the course of hearing the review of the stay application, this Court referred to evidence of a pattern of conduct causing delay and cost:

[36] In this case, the chambers judge referred to "a significant pattern of conduct causing delay and cost." There was evidence before the chambers judge of what the respondent referred to as expense-causing tactics throughout this litigation, including evidence that Mr. Chung had transferred land to his parents for nominal consideration shortly after a judgment had been obtained by Mr. Shin against him. This transfer led to a fraudulent conveyance action which in turn, provided the basis for the security that has been lodged in respect of the arbitration award, interest and costs.

[4] With respect to the Registrar's assessment of costs, I have reviewed the Bill of Costs presented and the amounts allowed by the Registrar. There is nothing unusual about the amounts awarded, although the costs are somewhat higher than they might normally be because of the variety of applications I itemized earlier.

[5] The main argument of Mr. Chung appears to be that these costs are different and higher than set costs awards with respect to other matters in other courts. I do not think those other costs provide any guidance to the appropriate costs in this Court, which vary based on the matters referred to in the schedule of fees, the number and kind of applications, and other matters specific to appeal proceedings in this Court. The schedule of fees is set following a consultative process. In my view, there is no merit to this argument.

[6] Concurrent with the application to review the order of the Registrar setting costs is a no fees application made pursuant to Rule 56.

[7] Generally, where an applicant has been ordered to post security for costs in respect of an appeal, it will be inappropriate to subsequently grant a no fees order: *Cannaday v. Sun Peaks Resort Corp.*, [1998] B.C.J. No. 2372 at para. 4 (C.A.). Mr. Justice Donald, for the Court, stated:

[4] I agree with Mr. Justice Finch's disposition of the issue when he said that a declaration of indigency would be inappropriate in a case where the appellant has been ordered to post security for costs (why relieve against filing fees and at the same time require the payment of a much larger amount as security for costs?)

[8] Based on the above excerpt from *Cannaday*, Mr. Justice Lowry, writing for the Court, in *J.J. v. Coquitlam School District No. 43*, 2010 BCCA 182, held the converse is also true: an appellant declared to be indigent will not be ordered to post security for costs. Mr. Justice Lowry reasoned as follows:

- [6] In my view, the converse must be so. It would not be appropriate to order an appellant who has been granted indigent status to post security for costs. Where indigent status has been granted, it can only have been on the basis the appellant is impecunious and there is sufficient merit in the appeal that it cannot be said to be bound to fail. It could not then be appropriate to order the appellant to post security.
- [9] The fundamental reason that a security for costs order and indigent status are mutually exclusive is because one application requires the appeal to lack merit, while the other requires the appeal to have merit. A security for costs order requires the judge to consider the merits of an appeal. Security for costs will only be granted if the appeal fails the merit test. If the appeal is meritorious, then security for costs will not be ordered. The application for indigent status in order to obtain a no fee order requires that the appeal must have merit.
- [10] In this case, security for costs of both the trial and the appeal were awarded:
- [17] In my view the test for security for the appeal costs is met. There is nothing with respect to Mr. Chung's financial means that would preclude making such an order. The application is timely. There are multiple awards of costs in related proceedings that have gone unpaid. In my view the merits of the appeal are not strong, as the grounds of appeal are either fact driven, or seem to raise new issues not argued before the arbitrator or judge below. The appellant has not established that the interests of justice require that security not be ordered.
- [Emphasis added.]
- [11] This determination was upheld on appeal (indexed as *Chung v. Shin*, 2017 BCCA 355) where a division of the Court held as follows:
- [25] The merits of this appeal were properly considered by the chambers judge, who characterized the merits as "not strong". Before us, the appellants advanced a merits argument related to an award by a Korean arbitration tribunal that the appellants say raises an issue estoppel in relation to the Canadian arbitration. The respondent argued that the parties were not the same in the two arbitrations and that the Korean arbitration panel expressly found it had no jurisdiction over the respondent Mr. Shin.
- [26] The appellants' submission before us did not address the limited appeal rights under s. 31 of the Arbitration Act. In my opinion the view of the chambers judge that the merits of this appeal were not strong is not undermined by the additional arguments raised by the appellants.
- [27] The chambers judge held that the appellants had failed to meet the onus of establishing that the interests of justice required that security for the respondent's appeal costs should not be ordered. I can see no error in his consideration of this matter. I would dismiss the application to vary or discharge the order requiring the appellants to post security for the appeal costs.

- [12] The awarding of security for costs, and the ancillary finding that the appeal lacked merit, precludes a no fee order from being granted to Mr. Chung in the context of this appeal.
- [13] While this suffices to dispose of the no fee application, several other points are germane. Generally, a no fees application cannot be granted after the fees for an appeal have been paid: *Anani v. Uniglobe Travel (Western Canada) Inc.*, 2004 BCCA 563 at para. 26 (Southin J.A. in Chambers). Presumably, appeal fees have been paid as the various materials were filed over the course of the proceedings in this Court.
- [14] If Mr. Chung somehow seeks a no fee order for this application only (as the language of Rule 56 appears to permit), it is my view that his past payment of fees - and the overall finding that his appeal lacked merit, leading to security for costs against him - would prevent him from receiving a no fee order.
- [15] I also note the timing of the no fee application presents conceptual problems. It is one thing to assess the merits of an appeal that has not yet been heard - the low threshold generally - but the exercise seems fictive when the appeal has already been dismissed. At that point, either the appeal had no merit (because it failed), or the Court would be required to perform an assessment of how meritorious the appeal would have appeared pre-hearing, or to assess the arguments on appeal in order to determine how meritorious the appeal actually was as argued.
- [16] This would improperly invite a judge of the Court to perform a line-drawing exercise to determine how meritorious a failed appeal was, in order to make a finding of merit in the no fee application. In this case, the fact that fees were already paid in the context of a dismissed appeal - such that access to justice was not impaired - should, in my view, be dispositive of the application.
- [17] The no fees application is dismissed.

"The Honourable Mr. Justice Savage"

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Prepared on 29 October 2026 · Esheria