

CANADA / JUDGMENT

Eng v. Wong

2020 BCCA 72

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 72 Eng v. Wong COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Eng v. Wong, 2020 BCCA 72 Date: 20200214 Docket: CA45131 Between: Edward Eng and Frank Eng Appellants (Plaintiffs) And David Wong Respondent (Defendant) Before: The Honourable Madam Justice Saunders (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated February 2, 2018 (Eng v. Wong, New Westminster Docket S162429). Oral Reasons for Judgment Appearing in person on behalf of the Appellants: E. Eng Counsel for the Respondent: Z. Ng Place and Date of Hearing: Vancouver, British Columbia February 13, 2020 Place and Date of Judgment: Vancouver, British Columbia February 14, 2020 Summary: The application is to remove the appeal from the inactive list. All filings other than the notice of hearing have been timely and the appellant continued to demonstrate his intention to pursue the appeal, including through communications with respondent's counsel, during the period which ran out his time to file the final document. Held: Application allowed. Although the merits of the appeal are weak, given the resources expended to date, given the fact this is the first indulgence sought by the appellant, and considering the purpose of s. 25 is to address dormant or lifeless appeals, the interests of justice are better served by advancing the appeal to a decision on the merits rather than pushing it to a rules based dismissal.

- [1] SAUNDERS J.A.: Mr. Eng, the appellant, applies for an order removing the appeal from the inactive list. David Wong resists the application. The case was put on the inactive list under the authority of s. 25 of the Court of Appeal Act, R.S.B.C. 1996, c. 77.
- [2] Throughout the proceedings, Mr. Eng has been a self-represented litigant. Mr. Wong is represented by counsel before us, Mr. Ng.
- [3] The order appealed was made February 2, 2018, on Mr. Eng's application for judgment under the summary trial rule, Rule 9-7 of the Supreme Court Civil Rules. By that order, Mr. Eng's claim was dismissed and special costs were awarded against him. As I understand the pleadings that I have reviewed, the appeal record that has been filed, and the reasons for judgment, the claim depended on Mr. Eng's assertion that Mr. Wong had become the agent for the purchaser of property he had leased from the previous owners. The judge rejected that proposition.

- [4] Mr. Eng filed his notice of appeal on March 1, 2018, within the time required. By his notice of appeal, he contends that: the judge ought not to have relied upon evidence in affidavits and should have heard viva voce evidence, and that there should be a new trial on his claims; in respect to one of his claims, Mr. Wong had not raised a defence and he is entitled to a judgment in the amount of \$250; the award of special costs should be set aside; and he is entitled to his costs.
- [5] Subsequent to filing the notice of appeal on March 1, 2018, and serving it, Mr. Eng filed transcripts on April 18, 2018, the appeal record on April 26, 2018, the appeal book on May 24, 2018, and his factum on May 28, 2018, all within the time required.
- [6] Mr. Wong filed his appeal book on June 25, 2018, and his factum on June 27, 2018.
- [7] The order of the Supreme Court of British Columbia was filed on July 3, 2018, at the same time as Mr. Eng's reply factum.
- [8] On February 26, 2019, Mr. Eng filed a certificate of readiness and a letter requesting a "pre-hearing conference". Such a pre-hearing conference has not proceeded, and it appears to me that at least some of the matters Mr. Eng hoped to address at such a pre-hearing conference, such as a determination whether affidavits of Mr. Wong and his employee are false and untrue, would be totally inappropriate to discuss in a pre-hearing conference.
- [9] Mr. Eng contends that he communicated by facsimile on April 30, 2019, with Mr. Ng, sending a copy of the certificate of readiness and the letter requesting the pre-hearing conference.
- [10] Mr. Eng deposes that he received a phone call in May 2019 from the Court of Appeal registry in which a hearing date in early September 2019 was suggested. He deposes that he said that was "fine" and that later, on July 30, 2019, he filed a letter with the registry proposing a hearing date in January 2020 and requesting a lawyer be provided under the pro bono program.
- [11] In August 2019, the Court of Appeal registry referred Mr. Eng to a lawyer through the pro bono program. Mr. Eng deposes that he contacted that lawyer who told him to ask the registry about the hearing schedule, and that he tried to call the Associate Registrar three times and left a message for her to call back when there was no answer. Mr. Eng learned that hearing dates were available from the 3rd to the 21st of February and March 2020.
- [12] Mr. Eng deposes that on September 24, 2019, Mr. Eng sent an email to the lawyer notifying the lawyer he was waiting to hear from Mr. Ng to confirm hearing dates.
- [13] On September 26, 2019, the appeal was placed on the inactive list. Since this date, Mr. Eng has been in contact with the lawyer he expects to represent him. His request to Mr. Ng to remove the appeal from the inactive list was denied.

- [14] Before us, Mr. Eng contends that the reason for the delay was the confusion about how to set down a hearing date and his efforts to obtain counsel.
- [15] He says there is some merit to his appeal and that he has been trying to advance his appeal throughout the appeal proceedings.
- [16] On behalf of Mr. Wong, Mr. Ng points to the delay from the initial filing of the notice of appeal and observes that under s. 25 of the Act, the Registrar was required to put the case on the inactive list when two months had elapsed after filing the certificate of readiness without the filing of a notice of hearing. That ignores, of course, the communications with the registry suggesting a hearing date in September. He contends that in the circumstances, the delay in setting the matter for hearing is one that the court should not countenance through removing the appeal from the inactive list. In support of this submission, Mr. Ng refers to *Kar Recovery, Ltd. v. KDA*, 2004 BCCA 503. Mr. Ng compares the timeline in *Kar* to the timeline before us and urges us to come to the same conclusion.
- [17] I am not persuaded that this case is of the same character as *Kar*. In that case, Madam Justice Ryan said she was not persuaded the appellant had maintained an interest in pursuing his appeals throughout the span of time elapsed from his filing of the notice of appeal to the application before her, and that he "allowed them to languish". That is not the case before us. It is clear that Mr. Eng's desire to advance the appeal continued unabated and that Mr. Ng was advised of this continuing intention.
- [18] The purpose of s. 25 is to purge the court of old and lifeless appeals: *Knight's Mineral Exploration & Co. Ltd. Partnership v. Corcoran & Co.* (1987), 29 B.C.L.R. (3d) 1, or as held by Chief Justice McEachern in *Rowan v. Dunwoody & Co., A Partnership*, 1999 BCCA 755, to prevent dormant appeals from sleeping too long, not to foreclose reasonable access to the appeal process. As listed in *Kar*, factors often considered are the extent of the delay, the explanation for the delay, the existence of any prejudice arising from the delay and the likelihood of success on appeal.
- [19] In this case, apart from the prejudice inherent from any delay and the unresolved nature of the case, no other prejudice from the delay is asserted by Mr. Wong. The narrative reveals inattention to the imperative of establishing the hearing date, but does reveal a continuing attempt by Mr. Eng to obtain a hearing date at which counsel could represent him. The delay is neither short nor long and is a neutral factor. The factor weighing most heavily against reactivating the appeal is the merits of the case. I have reviewed both the reasons for judgment and the appellant's factum. From them I conclude that the appeal is most unlikely to succeed. That is, I consider the merits of this appeal to be very weak.

- [20] How does this balance out? I recognize that considerable resources have been expended by both parties to the appeal in complying with their filing requirements, and that this is the first indulgence sought by Mr. Eng. In the circumstances, and bearing in mind the overall purpose of the section, it seems to me that this is a case in which the interests of justice are better served by advancing the appeal to a decision on the merits, rather than pushing it to a rules based dismissal.
- [21] I would allow the application, with the direction that Mr. Eng file a notice of hearing within two weeks of today's date, on the condition that failing the filing of a notice of hearing within that time, the appeal will be returned to the inactive list effective the expiration of the two weeks allowed by this order.
- [22] Costs of this application will be payable by Mr. Eng in any event of the cause and will be payable forthwith. "The Honourable Madam Justice Saunders"

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Prepared on 25 October 2026 · Esheria