

CANADA / JUDGMENT

Gadhri v. Dhanoa

2017 BCCA 370

COURT

British Columbia Court of Appeal

DECIDED

20 October 2017

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2017 BCCA 370 Gadhri v. Dhanoa COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Gadhri v. Dhanoa, 2017 BCCA 370 Date: 20171020 Docket: CA44609; CA44610 Docket: CA44609 Between: Harmadan Singh Gadhri Appellant (Plaintiff) And Simranjeet Singh Dhanoa, 0760815 B.C. Ltd. and 078528 B.C.Ltd. Respondents (Defendants)

- and - Docket: CA44610 Between: Sarbjeet Gadhri Appellant (Plaintiff) And 0760815 B.C. Ltd. Respondent (Defendant) And Harmadan Gadhri Appellant (Defendant by way of Counterclaim) And Raj Kumar Gupta Respondent (Defendant by way of Counterclaim) Before: The Honourable Mr. Justice Groberman (In Chambers) On appeal from: an order of the Supreme Court of British Columbia, dated June 30, 2017 (Gadhri v. Dhanoa, 2017 BCSC 1121, New Westminster Registry No. 134046) Oral Reasons for Judgment Counsel for the Appellant: D. Gautam Counsel for the Respondent: D.A.T. Moseley Place and Date of Hearing: Vancouver, British Columbia October 20, 2017 Place and Date of Judgment: Vancouver, British Columbia October 20, 2017 Summary: Following a trial, the judge awarded special costs against the plaintiff. Pending assessment of those costs, she ordered the plaintiff to deposit \$300,000 as "security for costs". The plaintiff sought leave to appeal the order for deposit of the money. Held: leave to appeal granted. The order was not an order for security for costs in the ordinary sense - it did not stay proceedings. In essence, the plaintiff was now defending, and the order was a form of execution before costs had been certified. Such an order constitutes a departure from current practice, and merits analysis by the Court.

- [1] GROBERMAN J.A.: This is an application for leave to appeal from an order of a trial judge granting what she called "security for costs". The post-trial order required the plaintiff to deposit \$300,000 in court pending assessment of special costs awarded in favour of the defendant.
- [2] The order is not an order for security for costs in the usual sense. It did not stay the proceedings pending the filing of the security; indeed, the plaintiff has no interest in having the proceedings below continue. At this stage, all that remains to be done in the trial court is for special costs to be assessed. The plaintiff is, effectively, defending itself from costs claims at this stage of proceedings rather than pursuing any claim.

- [3] The order below amounts to a partial execution on a judgment for costs before a certificate of costs has been issued. On the face of it, such an order is contrary to a practice that has existed for many, many years not only in British Columbia but in other common law jurisdictions. In general, a party may not enforce a costs judgment until the amount of costs has been established, either by a judgment or a certificate of costs.
- [4] The judge below did not analyze in any detail why this case called for a departure from established practice. Indeed, her judgment does not suggest that the parties brought case law on pre-judgment execution to her attention, and it appears that she did not realize how extraordinary the order is.
- [5] As the order represents a departure from established practice, it raises an issue of significance to the profession. Further, there is at least some merit in the argument that the order should not have been made. Those two factors argue in favour of granting leave.
- [6] There are three other considerations that must be brought to bear on this leave application. They are: the importance of the appeal to the parties; the prospect that this interlocutory appeal would delay proceedings below; and the overriding interests of justice.
- [7] With respect to the interests of the parties, it is not apparent to me that granting leave to appeal, in and of itself, would be of much assistance to the appellant and it certainly would not be of assistance to the respondents.
- [8] While I recognize that the appellant does not wish to post security as required by the order, no stay of the order is sought today. Mr. Gautam says that a stay application will be brought in the near future. I cannot predict whether a stay might eventually be granted, nor what the terms of a stay would be. It is curious, to say the least, that no stay is being sought at this point. In the circumstances, it is questionable whether granting leave will be of importance to the parties. The assessment of special costs may well be accomplished before this Court hears and decides the appeal. If no stay is granted, the appeal may well be meaningless to the parties.
- [9] On the question of delay of the proceedings below, there does appear to have been some delay resulting from a misinterpretation of the trial judge's order. That said, it seems to me that the existence of an appeal, if leave is granted, should not delay the assessment of costs below. Mr. Moseley has expressed the fear that Mr. Gautam's clients might seek to delay the assessment of costs based on the existence of the appeal, and has expressed fear that the registrar might accede to such a request. I see no basis on which an appeal of the order for the furnishing of security or the deposit of \$300,000 should in any way delay the assessment of costs. It is for the registrar of the Supreme Court to determine the pace at which the proceedings below proceed, and I am not purporting to bind the registrar. But I cannot think of any reason why granting leave to appeal should result in any delay.

- [10] The final issue that I must consider is that of general considerations of justice. The issue that Mr. Moseley raises is a serious one. He says that the plaintiff has delayed proceedings below and has flouted court orders. He asserts, in particular, that the plaintiff has failed to comply with the time lines set by Registrar Neilson in the costs assessment proceeding. Relying on *Dickie v. Dickie*, 2007 SCC 8, and other cases, the respondents say that this Court ought not to entertain an appeal while a party is flouting existing court orders. Mr. Gautam contends that there has been no flouting of court orders, but only an error in the interpretation of the order of the trial judge.
- [11] I am concerned that the assessment is not proceeding as it should be. I agree entirely with Mr. Moseley that neither the language of the trial judge's order nor any proceedings in this Court ought to be used as an excuse for non-compliance. This Court must not encourage non-compliance with orders of the courts below. There is an element of interest of justice, therefore, that militates against the granting of leave.
- [12] I am satisfied, however, with Mr. Gautam's assurance that his client is intent on proceeding according to a new schedule which is to be established by the registrar. I am also content with his assurance that his client will not simply ignore the order for deposit of \$300,000. Either there will be a timely application for a stay of the order, or the order for security will be fulfilled.
- [13] I am of the view that leave ought to be granted because of the importance of this issue to the profession. Further, in my opinion, it is essential that if this kind of order is to be made, either routinely or in a particular case, it be done on a principled, rather than an ad hoc basis.
- [14] In the circumstances, I am, with some reluctance, granting leave to appeal.
- [15] I will turn then to the issue of security for costs. [submissions by counsel re. security for costs]
- [16] GROBERMAN J.A.: I am making an order that the appellant must either file an application for a stay of the order for posting security for costs below, or comply with that order before October 30, 2017. If the appellant neither applies for a stay of the order below nor complies with it by that date, the appeal will stand stayed, subject to the ability of a judge in chambers to extend that period on application. If the appeal is stayed it will be open to the respondents to apply to have the appeal dismissed for failure of the appellant to comply with the order.
- [17] I am also ordering that the appellant file in this Court security for costs of the appeal in the amount of \$7,500. That amount is to be posted within 30 days of today's date. In the event that the security is not posted, the running of time as against the respondent will be suspended. I am also directing that the appellant will not be entitled to set down for hearing any application for a stay of the order below until such time as the \$7500 security for appeal costs has been posted. "The Honourable Mr. Justice Groberman"

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