

CANADA / JUDGMENT

Goel v. Dhaliwal

2022 BCCA 87

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 87 Goel v. Dhaliwal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Goel v. Dhaliwal,

2022 BCCA 87

Date: 20220216

Docket: CA48015

Between:

Parshotam Goel and Surjit Singh Heer

Appellants

(Plaintiffs)

And

Jagraj Singh Dhaliwal, Paramjit Kaur Dhaliwal, the Deceased Mohan Singh Sangha, and Kamal Kaur Sangha and Jasmin Sangha

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Voith

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated December 7, 2021 (Goel v. Dhaliwal, 2021 BCSC 2382,

Vancouver Docket S153411).

Oral Reasons for Judgment

Counsel for the Appellants/Respondents on Cross Appeal (via videoconference):

D. Gautam

Counsel for the Respondent/Appellant on Cross Appeal, Jasmin Sangha (via videoconference):

W.D. McEwan

Place and Date of Hearing:

Vancouver, British Columbia

February 14, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 16, 2022

Summary:

A certificate of pending litigation ("CPL") on a disputed property was removed under s. 215 of the Land Title Act on the basis that the appellants had failed to claim an interest in land. The appellants now apply for a stay of that order pending appeal. The appellants argue that the judge's rulings on the CPL were inconsistent with her refusal to strike the claim and that their pleadings are sufficient to establish a proprietary interest in the property. Held: Application dismissed. An application to cancel a CPL does not bear the same elevated and cautious standard that applies to applications to strike pleadings. The judge's rulings on the CPL were not inconsistent with her refusal to strike the claim. Moreover, the pleadings fail to establish a claim for an interest in land. The only relief sought is monetary in nature. Finally, there are no meaningful factors that operate in favour of the appellant's application for a stay. Notably, the appellants have failed to demonstrate that they would suffer irreparable harm. The interests of justice weigh against granting the application.

[1] VOITH J.A.: The appellants apply for an order pursuant to s. 18 or s. 10(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, for a stay of the order of Justice MacDonald, dated December 7, 2021, ordering the removal of a certificate of pending litigation, pending the outcome of this appeal.

[2] The respondent, Ms. Jasmin Sangha, asks that the motion be dismissed, with costs.

Background

- [3] The underlying litigation in this matter arose out of a joint venture between four of the defendants, Mohan Singh Sangha, Kamal Kaur Sangha, Paramjit Kaur Dhaliwal and Jagraj Singh Dhaliwal (collectively, the "four defendants"), and the plaintiffs (now appellants) Parshotam Goel and Surjit Singh Heer. Each family owned a contiguous parcel of land in Surrey, which they intended to develop jointly.
- [4] The four defendants entered a joint venture agreement ("JVA") and a cost sharing agreement ("CSA") with the appellants, which were signed in May 2007. The agreements were for the purpose of subdividing and developing adjoining parcels of land into residential lots.
- [5] Lot 39 was one of the residential lots created through the joint venture. It was originally registered in the name of Mr. Goel, but it was transferred to Mr. and Mrs. Sangha. After the JVA was entered into, Mr. and Mrs. Sangha transferred title to Lot 39 to their daughter, Jasmin Sangha. In the underlying action, it is alleged this transfer constituted a breach of contract. That breach of contract was admitted by the four defendants. Ms. Sangha is also a defendant in the action, but not a party to the two agreements.
- [6] As a result of the transfer of Lot 39 to Ms. Sangha and other disputes, the appellants commenced an action in 2014. That original action was discontinued but a new notice of civil claim was filed in 2015 (the "2015 Pleading").
- [7] The four defendants applied to stay the action in favour of arbitration pursuant to the terms of the JVA and CSA and s. 15 of the Arbitration Act, R.S.B.C. 1996, c. 55 (which was repealed and replaced in 2020). On December 10, 2015, Justice Maisonville granted the stay of proceedings in favour of arbitration.
- [8] The arbitration is now largely complete, but some matters remain outstanding. Notably, the arbitrator has held that he had no jurisdiction over Ms. Sangha or over the equitable claims advanced by the appellants (these include claims for a constructive trust, a resulting trust, and unjust enrichment). The arbitrator did, however, make a ruling on Lot 39. In his award, the arbitrator determined that Lot 39 had been wrongfully transferred to Ms. Sangha in 2012, and he granted relief in favour of the appellants for breach of the JVA. That relief took the form of a damages award.
- [9] However, there is a dispute as to the date on which the arbitrator valued Lot 39. On November 25, 2020, the appellants filed a petition in the Supreme Court of British Columbia seeking, among other things, a review of the arbitrator's award and an order that the arbitrator's ruling in relation to Lot 39 be set aside. That petition has not yet been heard.
- [10] Several applications were then brought before MacDonald J. on November 12, 2021. Her reasons for judgment are indexed as 2021 BCSC 2382.

- [11] First, Ms. Sangha sought to strike the claim against her in the 2015 Pleading under R. 9-5(1) of the Supreme Court Civil Rules and to dismiss the claim under R. 9-6. Ms. Sangha also sought to have the certificate of pending litigation ("CPL") registered against Lot 39 cancelled without her having to post any security.
- [12] Second, the appellants sought to have the stay of proceedings ordered by Maisonville J. on December 10, 2015, vacated, to the limited extent of permitting them to pursue their claims for an equitable interest in Lot 39.
- [13] The judge dismissed aspects of both applications. She determined that it was premature to order the stay of proceedings lifted. She concluded that the stay should not be lifted until the completion of the arbitration and the appellants' petition for review of the arbitrator's award had been heard.
- [14] The judge also declined to strike the claims made against Ms. Singh in the 2015 Pleading under R. 9-5 or to dismiss those claims under R. 9-6. Neither of those conclusions is challenged on this application though the appellants have appealed the judge's decision not to lift the stay of proceedings and the Ms. Singh has cross-appealed the judge's refusal to strike or dismiss the claim against her.
- [15] With respect to the application to cancel the CPL, the judge, relying on *Chen v. Jin*, 2019 BCSC 567, noted that the registration of a CPL under s. 215(1)(a) of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], must be grounded in a claim to an interest in land. If the pleadings do not satisfy this pre-condition, the CPL should be cancelled. Moreover, the pleadings, in relation to a constructive trust claim, must also explain why damages cannot provide adequate relief.
- [16] The judge also said:
- [62] In *Nouhi*, Justice Matthews explained that a CPL based on a constructive trust must satisfy two criteria:
- [26] The first is that there must be referential property, i.e. the plaintiff must demonstrate a substantial and direct link, a causal connection or a nexus between the claim and the property upon which the remedial constructive trust is to be impressed: *BNSF* at paras. 57 and 60. The second is that the plaintiff must demonstrate that a monetary award is inadequate, insufficient or inappropriate in the circumstances: *Kerr v. Baranow*, 2011 SCC 10 at para. 50; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 92; *Li v Li*, 2017 BCSC 1312 at para. 227.
- [17] The appellants argued that they had an interest in property justifying the CPL based on their claims for a constructive trust, resulting trust, or unjust enrichment. After examining the 2015 Pleading, the judge found that that pleading did "not provide a proper factual foundation to establish an interest in land." She was of the view that the appellants' pleadings, and the relief sought, constituted "a claim for a monetary, rather than an in rem, remedy." Finally, she concluded that because the "equitable claims, as pleaded [arose] in

respect of amounts owing under the JVA and the CSA they are claims for monetary damages."

- [18] Thus, the 2015 claim, as pleaded, did not meet the pre-conditions to register a CPL as set out in s. 215 of the LTA. The judge therefore cancelled the CPL.
- [19] The judge explained that because the CPL was not cancelled pursuant to ss. 256 or 257 of the LTA, no security was required. Instead, cancellation "follows from the practical fact that the registration of an invalid CPL cannot continue": *Bilin v. Sidhu*, 2017 BCCA 429 at para. 43.
- [20] The appellants have appealed the cancellation of the CPL. Accordingly, they apply for a stay of the order cancelling the CPL pending the appeal.

Law and Analysis

Legal Framework

- [21] The authority to order a stay is found in ss. 10(2)(b) and 18(1) of the Court of Appeal Act:

Powers of a Justice

10 (2) In an appeal or other matter before the court, a justice may do one or more of the following:

- (b) make an interim order to prevent prejudice to any person

Stay of proceeding

18 (1) After an appeal or application for leave to appeal is brought, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal has been taken are stayed in whole or in part.

- [22] Granting a stay is a discretionary order: *The Owners of Strata Plan LMS 2768 v. Jordison*, 2013 BCCA 206 at para. 5. The onus is on the applicant to meet the three-part test for granting a stay, which is described in *Manitoba (Attorney General v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at 127-29, 1987 CanLII 79, and re-affirmed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117:

- (1) that there is some merit to the appeal in the sense that there is a serious question to be determined;
- (2) that irreparable harm would be occasioned to the applicant if the stay was refused;
- (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

- [23] The factors to be considered in granting a stay were also canvassed in *Bea v. The Owners, Strata Plan LMS 2138*, 2010 BCCA 463 at para. 19, quoting *Roe v. McNeill*, 49 B.C.A.C. 247, 1994 CanLII 2105:

The relevant factors to consider on whether to grant a stay are these:

1. A successful plaintiff is entitled to the fruits of his judgment. He should not be deprived of them unless the interests of justice require that they be withheld from him until the defendant's appeal is decided (*Voth Bros. Construction (1974) Ltd. v. National Bank* (1987), 12 B.C.L.R. (2d) 44).
 2. The court's power to grant a stay is discretionary and should be exercised only where it is necessary to preserve the subject matter of the litigation or to prevent irreparable damage or where there are other special circumstances (*Contact Airways Ltd. v. DeHavilland of Aircraft of Canada Ltd.* (1982), 42 B.C.L.R. 141 at 142).
 3. In the exercise of its discretion the court may weigh the interests of the parties, the balance of convenience and any prejudice that may arise and grant the stay on terms it considers appropriate (*Rogers Foods (1982) Ltd. v. Federal Business Development Bank* (1984), 57 B.C.L.R. 344 at 347).
 4. A first step to consider on a motion for a stay is to determine whether an appeal is without merit or has no reasonable prospect of success (*Rogers* at 347 and *Mikado Resources Ltd. v. Dragoon Resources Ltd.* (1990), 46 B.C.L.R. (2d) 354 at 357).
- [24] The merit threshold is "a low one," as a court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious. It has been said that "a prolonged examination of the merits is generally neither necessary nor desirable": *RJR-MacDonald* at 337-38.
- [25] The question of whether a stay should be granted "depends principally on whether the applicants have discharged their onus to demonstrate irreparable harm": *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2015 BCCA 6 at para. 8. "Irreparable" "refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR-MacDonald* at 341.
- [26] The final question, the balance of convenience, involves a weighing of the interests of the parties and a balancing of the potential harm to each party: *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, 2013 BCCA 146 at paras. 36-37 (Chambers).
- [27] The ultimate question is whether granting a stay is in the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607 at para. 9.
- [28] Finally, s. 215 of the LTA applies to any person who has commenced an action for an "interest in land." This was explained in *Wai v. Chung*, 2020 BCSC 34:
- [19] Pursuant to s. 215(1)(a) of the LTA, the registration of a CPL must be grounded in a claim to an interest in land. Where the pleadings fail to establish an interest in land, the CPL should be cancelled on the basis that it does not meet the necessary precondition: *Chen* at para. 12, citing *Xiao* at paras. 19 and 27. In *Xiao*, the court stated at para. 27: "the correct test to be

applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the Land Title Act is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered." The decision of Masuhara J. in Drucker predated these decisions.

- [20] Under the current approach the focus is on the plaintiff's pleadings. An interest in land must be established through the pleadings; a mere assertion with no proper factual foundation is insufficient: Chen at para. 27. As stated by Justice Holmes, as she then was, in *Bajwa v. Singh*, 2016 BCSC 916 at para. 20: "If the claim could not give rise to an interest in land, the CPL will be ordered to be cancelled because, essentially, it was improperly registered from the start."

Analysis

- [29] As noted, the merits threshold is a low one. The appellants' primary submission is that the judge's rulings were inconsistent and her finding that the appellants had not advanced a claim for an interest in land cannot stand. Specifically, they point to the refusal of the judge to strike their claim under R. 9-5(1)(a) or (d) while concurrently finding that the 2015 Pleading did "not provide a proper factual foundation to establish an interest in land."
- [30] In my view, this submission is without merit. In *Xiao v. Fan*, 2018 BCCA 143 the Court said:
- [27] Accordingly, the correct test to be applied in an application to cancel a CPL that is alleged to be non-compliant with s. 215 of the Land Title Act is simply whether the pleadings disclose a claim for an interest in land. In such an application, no evidence is to be considered. If the merits of the claim for an interest in land are challenged, a defendant should apply for a summary dismissal of that part of the claim under Rule 9-6(4), where evidence may be considered, and the test to be applied is whether there is a bona fide triable issue of fact or law. If that part of the claim is dismissed, a defendant may then apply to have the CPL cancelled under s. 254.
- [31] An application brought under R. 9-5(1)(a) is, as the judge noted, subject to significant limitations. A claim will only be struck if, assuming the truth of the facts pleaded, it is plain and obvious that the pleading discloses no cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. Expressed differently, the applicant must show the claim is "certain to fail": *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980. Further, pleadings are to be interpreted "generously", and they should not be struck if they are inadequate in their present form but could be amended to disclose a cause of action: *Imperial* at para. 21; *Cimaco International Sales, Inc. v. British Columbia (Attorney General)*, 2010 BCCA 342 at para. 40.
- [32] An application to strike brought under R. 9-5(1)(d) asks the question of whether the pleading constitutes "an abuse of the process of the court".

- [33] In this case, the judge made reference to each of these principles. She observed that the appellants intended to amend their pleadings and she said:
- [51] I must be cautious at this stage in the proceedings not to take steps which would negatively affect the right of the plaintiffs to advance their claim against Ms. Sangha to the extent it has not been advanced through the arbitration. The plaintiffs should have the right to come before this Court to argue that issues remain outstanding: *Tresoro*.
- [52] I have already found that after the arbitration process is fully concluded, including reasons for judgment following the hearing of the petition, the plaintiffs may apply to partially lift the stay. To allow the parties to revisit this issue post-arbitration, I should leave the pleadings intact. If an application to partially lift the stay is made, and the plaintiffs make an application to amend their 2015 notice of civil claim, the arguments made before me may be advanced at that time.
- [34] As the Court in *Xiao* observed, an application to strike a CPL can also be brought under R. 9-6(4) where the "merits of the claim for an interest in land are challenged". In such circumstances the court considers evidence and the parties are able to file affidavit material. The application before the judge did not, however, proceed on this basis.
- [35] An application to cancel a CPL, on the other hand, proceeds on a different footing and addresses different questions than an application brought under R. 9-5(1)(a). It simply asks the question "whether the pleadings disclose a claim for an interest in land": *Xiao* at para. 27. No elevated standard is brought to bear on this issue. Further, the question of whether a party's existing pleadings can be salvaged through further amendments does not arise.
- [36] In my view, the real question, going to the merits of the application before me, is whether the 2015 Pleading advances an interest in land. This is the lens that the judge applied to the question before her. The appellants rely on the following paragraphs of Part 1 of the 2015 Pleading:
49. The Sanghas' remaining lots from the Lands consist of lots 27, 28 and 39 and are legally described as:
- PID: 027-295-931
- Lot 27 Section 8 Township 2 NWD Plan BCP32622
- PID: 027-295-940
- Lot 28 Section 8 Township 2 NWD Plan BCP32622
- PID: 027-295-877
- Lot 39 Section 8 Township 2 NWD Plan BCP32622
- (collectively the "Remaining Sangha Lots").

51. As a consequence of the Sanghas and Dhaliwals' failure to sell all of their lots or contribute their share of capital funds to the joint venture project, the defendants have each been unjustly enriched to the plaintiffs' detriment by the amount of the Heer payments to the Joint Venturers' creditors, the amount of the Goel and Heer over-contributions of capital and opportunity costs for those contributions and by the defendants' under-contributions.
52. The unjust enrichment has been to the defendants' benefit and to the benefit of each of the Remaining Dhaliwal Lots and Remaining Sangha Lots.
53. Mr. Goel and Mr. Heer claim an estate or interest in the Remaining Sangha Lots and the Remaining Dhaliwal Lots on the basis of a constructive or resulting trust and pursuant to the JVA and CSA.
- [37] The following points arise from these paragraphs:
- i) Paras. 51 and 52, on their face, advance monetary claims; and
 - ii) Para. 53 squarely advances a claim or interest in the Remaining Sangha Lots, including Lot 39.
- [38] It is, however, also necessary to turn to Part 2 "Relief Sought" of the 2015 Pleading. Paragraph 1 of Part 2, where the plaintiffs' claim is advanced, consists of nine subparagraphs. Only two are potentially relevant. In subparagraph (a) the plaintiffs/appellants seek "specific performance of the JVA, CSA and Collateral Interest Contract".
- [39] Based on counsel's submissions, I understand that it is the JVA that is relevant. The terms of the JVA, however, contemplated that the various lots held by the various parties would be sold. Accordingly, when the appellants seek "specific performance of the JVA", they are, in real terms, seeking an order that Lot 39 be sold. They do not seek any interest in the land itself.
- [40] Similarly, in subparagraph (e), the appellants, as an alternative to other forms of relief, seek "a declaration that the Remaining Sangha Lots are held on a constructive or resulting trust for the plaintiff's benefit for the amounts owing under the JVA, CSA and Collateral Interest Contract or to make restitution to the plaintiffs" (underlining added).
- [41] Once again it is apparent, from the words that are underlined, that the relief being sought is monetary in nature. Further, there is nothing in the 2015 Pleading that suggests or explains why a monetary remedy would be inadequate or insufficient for the claims being advanced. This is, as the judge noted, necessary to maintain a constructive trust claim. Each of the foregoing conclusions is consistent with the judge's findings. It follows that I do not consider that there is any merit to this aspect of the appellants' appeal. That conclusion, without more, is dispositive of the appellants' stay application.
- [42] Even if, however, I were mistaken with respect to the foregoing conclusion, the same result would ensue as the appellants are unable to establish that the remaining branches of the Metropolitan Stores test militate in their favour.

- [43] In relation to the issue of irreparable harm, the respondent argues that the appellants have failed to file any evidence to address the issue of irreparable harm and that this is "critical" to their ability to seek a stay: *A. Lassonde Inc. v. Island Oasis Canada Inc.*, [2001] 2 F.C. 568 (FCA) at 579, 2000 CanLII 29582.
- [44] Nevertheless, the appellants advance two argument that they say operate independently of any evidence. First, they argue that the value of Lot 39 will "fluctuate" and that accordingly a monetary award will not provide an adequate remedy. I disagree and return to the point that the intention of the parties under the JVA was to sell all of the lots they developed. There may be some disagreement about when Lot 39 should have been sold, or on what terms that sale would have occurred, but such issues are commonplace in commercial litigation and such uncertainty does not mean that a plaintiff's loss is "irreparable" in nature or that the loss they claim cannot be remedied by an award of damages: *RJR-MacDonald* at 341.
- [45] Second, the appellants argue that if a stay is not granted their appeal will become moot, giving rise to irreparable harm. There are cases where irreparable harm may arise because an appeal would become moot if a stay is not granted. This, however, is a fact or circumstance-specific issue: see, for example, *Romspen Investment Corporation v. Chemainus Quay and Marina Complex Ltd.*, 2012 BCCA 292 at para. 15 (Chambers). Without wishing to express a firm view on the issue, it is not clear to me why the appellants would not be able to maintain a claim, for example, in unjust enrichment, if the CPL on Lot 39 is removed and Ms. Sangha thereafter sells her property.
- [46] Further, I consider that the balance of convenience favours the respondent. The parties do not start on an even footing. A successful party is entitled to the fruits of their judgment: *Bea* at para. 19. A CPL is an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the underlying issues can be resolved: *Berthin v. Berthin*, 2018 BCCA 57 at para. 32. In this case, the appellants filed a CPL against Lot 39 approximately seven years ago. Further, I am at this point assuming, for the purposes of argument, that the appellants have met the low merits standard required to obtain a stay. The weakness of their position on the merits, however, informs the balance of convenience. These various considerations all operate in favour of the respondent. There are no meaningful factors, that I have not already identified, that operate in favour of the appellants.
- [47] Finally, I am of the view that the interests of justice weigh against granting the stay the appellants seek.
- [48] I should note that the respondent placed significant emphasis on the extent to which the issues and rulings in the arbitration proceeding fully address the appellants' claims in relation to Lot 39. This is in large measure the basis for the respondent's position that aspects of the 2015 Pleading should be struck as an abuse of process of the court. Because this issue will be advanced in the respondent's cross appeal, I do not consider it necessary or prudent to address it directly.

Disposition

[49] The appellants' application for a stay is dismissed.

"The Honourable Mr. Justice Voith"

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