
CANADA / JUDGMENT

Grewal v. Grewal

2017 BCCA 261

COURT

British Columbia Court of Appeal

DECIDED

23 June 2017

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2017 BCCA 261 Grewal v. Grewal

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Grewal v. Grewal,

2017 BCCA 261

Date: 20170623

Docket: CA44333

Between:

Harbans Singh Grewal

Respondent

(Plaintiff)

And

Harminder Singh Grewal and Zora Singh Grewal

Appellant

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Garson

The Honourable Mr. Justice Willcock

On appeal from: an order of the Supreme Court of British Columbia, dated

February 28, 2017 (Grewal v. Grewal, 2017 BCSC 1004,

New Westminster Registry No. S110167)

Oral Reasons for Judgment

Appellant appearing In Person

Harinder Singh Grewal

Respondent appearing In Person

Harbans Singh Grewal

Counsel for the Applicant Singleton Urquhart, LLP

J.R. Singleton, Q.C.

E. Guevara

Counsel for the Applicant MacAdams Law Firm:

D. MacAdams, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 23, 2017

Place and Date of Judgment:

Vancouver, British Columbia

June 23, 2017

Summary:

Application to quash appeal dismissed.

Introduction

- [1] NEWBURY J.A.: On January 5, 2017, Mr. Justice Verhoeven issued a consent order giving effect to an agreement reached between Harinder Grewal ("Harinder") and one of his brothers, Harbans Grewal ("Harbans"), to have certain funds released from trust (the "January 5 Order"). On February 28, 2017, Verhoeven J. made an order (the "February 28 Order"), setting aside or 'vacating' that order on the basis that the two brothers had made "very inadequate and incomplete" disclosure when they had applied ex parte for the January 5 Order.

- [2] Harminster later brought an appeal from the February 28 Order. In the present application, Singleton Urquhart LLP ("Singleton"), the law firm that represented Harbans between 2008 and 2012, seeks to have that appeal quashed on either of two grounds:
- a) the February 28 Order is not an "order" against which an appeal lies under s. 6(1)(a) of the Court of Appeal Act, R.S.B.C. 1996, c. 77; and
 - b) the findings of fact made in the February 28 Order are not reviewable by this court.
- [3] The application requires us to consider the scope of what constitutes an appealable "order" under the Act, whether the February 28 Order falls within the meaning of that term, and whether the claim is "so devoid of merit or substance" that it would be an abuse of this court's procedure to allow it to continue.

Background

- [4] The underlying litigation involves three brothers: Harbans, Harminster, and Zora. Harbans is the plaintiff; Harminster and Zora are both defendants. The details of the dispute between these parties, which apparently relates to a berry farm [Lam affidavit at p. 18, line 7], need not be canvassed here. It is sufficient to say that the litigation has been long and protracted, dating back to 2008.
- [5] On January 5, 2017, Harbans brought an ex parte application, joined by Harminster, before Mr. Justice Verhoeven seeking a consent order. The two brothers said they had "settled their differences" and had reached an agreement to divide certain trust monies held by Singleton. These funds had been posted by Harbans as security for costs. Pursuant to their agreement, Harbans was to receive \$150,000, and Harminster to receive \$190,000. No counsel appeared at the hearing, which the judge correctly described as "exceedingly short". [2017 BCSC 1004 at para. 3.] Having set out the terms of their agreement, the two brothers assured the chambers judge that there was nothing further he needed to know about the matter. The judge took their representations as a "clear implication" that they were the only persons interested in the trust monies held by Singleton. As the judge would later discover, however, that was not the case.
- [6] At the end of the hearing, Verhoeven J. issued an order giving effect to the agreement. The order was entered that same day.

The February 28 Order

- [7] Singleton - joined by another firm, MacAdams Law Firm ("MacAdams"), formerly counsel for Harminster - applied before Verhoeven J. to set aside the January 5 Order on the basis of non-disclosure. In reasons for judgment indexed as 2017 BCSC 1004, the chambers judge recounted the various ways in which the disclosure made by the two brothers had been inadequate.

- [8] Following the January 5 Order, it soon came to light that Harminder and Harbans had not served notice on their brother Zora. Counsel for Zora appeared before the Court and stated that had notice been given, counsel would have opposed the application because Zora had in hand a judgment against Harminder for \$30,000 as well as considerable claims for costs - five in total. Mr. Justice Verhoeven concluded that it was therefore clear that Zora should have been, but was not, given notice of the application.
- [9] Mr. Justice Verhoeven added that this was not the only matter that ought to have been, but was not, brought to his attention at the January 5 proceeding. The brothers had failed to inform the Court that there was an outstanding order made by Master Tokarek relating to family law litigation involving Harbans and his former spouse that precluded the trust monies held by Singleton from being dealt with until further orders of the Court in the matrimonial proceedings. While Harbans maintained that Master Tokarek's order was not material because the matter had been settled, the judge stated that he should have nonetheless been informed of the order, as he would have considered the matter in making it.
- [10] In addition, Singleton and MacAdams had each claimed solicitor's liens, together totalling \$689,000. This had not been brought to the judge's attention. Harbans and Harminder maintained that they were not aware of the claims for solicitor's liens. The judge stated that it was unnecessary to determine whether the brothers were aware of the claims; the fact remained that there were other claims to which the judge's attention had not been drawn.
- [11] The judge observed that Singleton, "[e]ven just as holder of the money", should "probably" have been made a respondent to the application, or at least should have been notified. [At para. 13.] Had this been done, he said, the firm would have been advised of the conflicting order of the master and the competing claims to the trust monies. The chambers judge acknowledged that it was a "mistake" on his own part not to have required that Singleton be served or made a respondent to the application.
- [12] The final consideration was that of costs. Singleton sought an award of special costs on a solicitor and client basis on the ground that the conduct of the two brothers was reprehensible and brought the system of justice into disrepute. Mr. Justice Verhoeven declined to make such an award. The difficulty, he said, was that he had not "gone into the details" in the evidence concerning what Harbans knew or did not know. In his words, he "was simply not given the full picture". [At para. 21.] It was clear the parties' disclosure was "very inadequate and incomplete", he stated, but there had been no finding that their disclosure was "knowingly false". [At para. 22.] Accordingly, the judge made no order for costs.
- [13] In the result, he concluded that the January 5 Order should not have been made, and would not have been made had he been given full information. Accordingly, he set aside that order.

[14] On March 28, 2017, Harminder filed a notice of appeal seeking to have the February 28 Order set aside. Subsequently, on May 15, 2017, Singleton applied to have the appeal quashed. It is to that application that I will now turn.

Application to Quash

[15] This court's jurisdiction to quash an appeal for lack of merit was summarized in *Wiens v. Campbell* (1992) 21 B.C.A.C. 206, where Gibbs J.A., writing for the Court, stated:

There is ample authority for the principle that this Court has inherent jurisdiction to quash an appeal which is so devoid of merit or substance as to constitute an abuse of the Court's own procedure. See, for example, *Re Bank of Montreal and Singh* (1979) 109 D.L.R. (3d) 117 (B.C.C.A.) and this passage from *National Life Insurance Company v. McCowbrey* (1926) 2 D.L.R. 550 (S.C.C.) quoted therein:

Every Court of Justice has an inherent jurisdiction to prevent such an abuse of its own procedure (*Reichel v. Magrath* (1889), 14 App. Cas. 665 at p. 669). If an appeal, though within its jurisdiction, be manifestly devoid of merit or substance, this Court will entertain favourably a motion to quash it, as it does in cases where costs only are involved ... as a convenient way of disposing of the appeal before further costs have been incurred.

The question is whether the Court should, on these applications, exercise the inherent jurisdiction. The answer turns on whether there is any merit or substance in the appeal. [At paras. 2-3.]

[16] Turning to the test to be applied, Gibbs J.A. asked whether the appeal was "so devoid of merit or substance that it would be abuse of the process in this Court to allow it to continue through the normal appeal processes to the point of hearing and decision." (At para. 14.) Applying this test to the facts before him, he concluded:

The statement of claim was defective and scandalous, frivolous and vexatious as against these applicants in the court below. It would still be defective and scandalous, frivolous and vexatious as against these applicants after having gone through the appeal processes. There is no point to putting the parties to all of the time and expense or of wasting valuable court time on an appeal which is bound to fail. To allow the appeal to continue would be to countenance an abuse of this court's procedures. [At para. 14.]

(See also *Dawson v Dawson*, 2014 BCCA 44.)

[17] Returning to the case at bar, Singleton raises two issues on its application to quash:

- a) Is the February 28 Order an "order" against which an appeal lies under s. 6(1)(a) of the Court of Appeal Act?
- b) Are the findings of fact made in the February 28 Order reviewable by this court?

Is the February 28 Order Appealable?

[18] Paragraph 6(1)(a) of the Act provides that an appeal lies to the Court "from an order of the Supreme Court or an order of a judge of that court". "Order" is defined in s. 1 as including, *inter alia*, a "judgment" and a "decree".

[19] Singleton submits that the word "order" in the Act does not extend to acts of the Supreme Court (or a judge of that court) that do not adjudicate procedural or substantive rights. It asserts, furthermore, that the February 28 Order was not an appealable "order" for the purposes of the Act because, in its words, it "simply set aside the January 5 Order without regard to the merits of the claims."

[20] The scope of what constitutes an appealable "order" was considered by this court in *R. v. United Fishermen and Allied Workers' Union* (1967) 63 D.L.R. (2d) 356, there in the context of the former Court of Appeal Act, R.S.B.C. 1960, c. 82. At the time, the Act contained no definition of the word "order". Davey C.J.B.C. (Branca J.A. concurring) wrote:

the orders which are appealable to this court are only those orders which make an adjudication upon some point arising during the course of a cause of action, or an adjudication upon the merits of the action or proceedings. I do not think that it was ever intended by the word "order" or the word "Rule" to give a right of appeal against a mere process that makes no adjudication upon any point. [At 358; emphasis added.]

[21] The meaning of the word "order" was more recently considered in *First Majestic Silver Corp. v. Davila Santos* 2015 BCCA 452, where Groberman J.A., for the Court, wrote:

[33] This Court derives its jurisdiction from statute. It can only entertain the appeal in this matter if it is, under s. 6 of the Court of Appeal Act, an appeal from an "an order of the Supreme Court or an order of a judge of that court". The Act defines "order" as including "a judgment" and "a decree".

[34] It is clear that not every pronouncement of a judge of the Supreme Court constitutes an "order". Procedural rulings of the trial court, for example, are generally not "orders" for the purpose of appeals: see, for example, *Chaplin v. Sun Life Assurance Company of Canada*, 2002 BCCA 292 at paras 22-23. The fact that reasons are given for a court pronouncement, then, does not make it an "order".

[39] While the word "order" in s. 6(1)(a) should not be narrowly construed. I am of the view that it cannot extend beyond decisions by the Supreme Court that determine rights (procedural or substantive) or that make declarations of law. A letter of request that does no more than transmit an existing order to a foreign court is not an "order" within the meaning of s. 6 of the Act. [At paras. 33-4, 39; emphasis added.]

[22] In light of these authorities, it seems to me that the fact the February 28 Order was made without regard to the merits of the underlying action does not preclude it from being treated as an "order" from which an appeal may be brought. The fact remains that the February 28 order reversed the earlier order: it set aside an order granting Harminder and Harbans the right to have certain trust monies paid out to them. In that sense it clearly affected the

substantive rights of the parties. Also in a sense, it was a decision on the merits - the "merits" here being that adequate disclosure had not been made in connection with the pronouncement of the earlier order. Consequently, the February 28 Order was in my opinion an appealable "order" within the meaning of the Act.

Are the Factual Findings Reviewable?

- [23] Singleton further submits that the chambers judge's factual findings are not reviewable in this court. It maintains that in order to succeed on appeal, Harbinder must demonstrate that the judge committed a palpable and overriding error in finding that he was not told about the various claims against the trust monies. Singleton asserts that "no appellate court could possibly reverse a judge's own finding with regard to what he himself was told or what he knew or did not know and much less that he committed [a] palpable and overriding error in making such a finding."
- [24] In my view, the question to be answered is not whether the judge's findings of fact are reviewable. That question must be answered in the affirmative, as Singleton has cited no authority for the proposition that Verhoeven J.'s findings made on February 28 are for some reason not susceptible to appellate review. Rather, the question to be addressed is whether, as stated in Wiens, the appeal is "so devoid of merit or substance that it would be abuse of the procedure in this Court to allow it to continue."
- [25] In my view, it cannot be said at this point that Harbinder's appeal is so devoid of merit as to constitute an abuse of process. We have not seen his written arguments and we are told, indeed, that he has been unable to file them because they are out of time. It is therefore going to be necessary for him to seek an extension of time. I make no prediction as to whether such an application will succeed.
- [26] With respect to the present application, however, it follows in my view that we must dismiss Singleton's application, with some reluctance and without prejudice to their right to advance it at a later stage once Harbinder has filed a factum or demonstrated an intention not to proceed with his appeal in the usual way. The same is true of MacAdams' entitlement.
- [27] I would therefore dismiss the application.
- [28] GARSON J.A.: I agree.
- [29] WILLCOCK J.A.: I agree.

"The Honourable Madam Justice Newbury"

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Prepared on 28 October 2026 · Esheria