CANADA / JUDGMENT

Huang v. Li

2021 BCCA 218

COURT
British Columbia Court of Appeal

DECIDED
20 May 2021

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2021 BCCA 218 Huang v. Li

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Huang v. Li,

2021 BCCA 218

Date: 20210520

Docket: CA47161

Between:

Dongdong Huang

Appellant/

Respondent on Cross Appeal

(Plaintiff)

And

Peipei Li a.k.a. Zoe Peipei Li and Peipei Zoe Li, Daqi Li,

and LPP Properties Inc.

Respondents/

Appellants on Cross Appeal

(Defendants)

Before:

The Honourable Madam Justice Bennett

(In Chambers)

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

November 16, 2020 (Huang v. Li, 2020 BCSC 1727, Vancouver Docket S173324).

Oral Reasons for Judgment

The Appellant/Respondent on Cross Appeal, appearing in person

(via teleconference):

D. Huang

Counsel for the Respondents/Appellants on Cross Appeal

(via teleconference):

B.B. Olthuis

Place and Date of Hearing:

Vancouver, British Columbia

May 17, 2021

Place and Date of Judgment:

Vancouver, British Columbia

May 20, 2021

Summary:

The three respondents sought security for costs of the appeal; as well, one respondent sought security for costs of the trial. The appellant consented to posting security for costs of the appeal but opposed the application for security for costs of the trial on the grounds that the appeal has merit and that such an order would preclude his ability to continue the appeal. The respondent argued that without an order for security for costs of the trial, it would suffer prejudice. Held: The order for security for costs of the appeal is granted, and the order for security for costs of the trial is dismissed. The appeal is arguable and there is no suggestion that the appellant has intentionally put himself out of reach of an enforceable judgment. It would not be in the interests of justice to order security for costs of the trial.

BENNETT J.A.:

Nature of the Application

[1] The applicants (the respondents, who are Peipei Li, Daqi Li and LPP Properties Inc. ("LPP")) seek an order for security for costs of the appeal in the amount of $4,000, and Daqi Li seeks an order for security for costs of the trial below in the amount of $101,000, pursuant to ss. 10(2), 18 and 24(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77.

[2] Additionally, the applicants seek an order that this appeal be stayed pending the posting of the security for appeal costs and the security for trial costs by the appellant and that, should the appellant fail to pay, the applicants be at liberty to apply for dismissal of the appeal.

Background to This Application

[3] This underlying appeal and cross appeal concerns the order of Justice Adair of the Supreme Court of British Columbia, pronounced on November 16, 2020.

[4] The reasons for judgment of Justice Adair are indexed at 2020 BCSC 1727 ("Reasons"). The trial lasted some five weeks. Justice Adair canvassed the evidence at length. For brevity, I will refer only to the relevant background to this application.

[5] On April 10, 2017, Mr. Huang brought an action against the respondents (the defendants in the underlying action) for, amongst other things, fraudulent misrepresentation and unjust enrichment. He claimed that he was the victim of Peipei Li's deceit as to her romantic and business intentions. He claimed that he relied upon her misrepresentations as to her relationship status and business plans and has sustained damage as a result. He sought to recover more than $1.1 million in damages from Ms. Li (at paras. 6-7).

[6] On May 12, 2017, the respondents brought a counterclaim against the appellant seeking damages for breach of fiduciary duty (the appellant was acting in his capacity as a lawyer), along with aggravated and punitive damages (at para. 9).

[7] In the course of the proceedings, the appellant abandoned claims of conspiracy, breach of contract by LPP, and knowing participation of Daqi Li. He pursued, however, claims against Daqi Li for unjust enrichment, trespass and conversion (at paras. 11-12). He also abandoned claims against Ms. Li's mother, father, sister and office assistant.

[8] Justice Adair noted from the outset that credibility and reliability of the Mr. Huang and Ms. Li were "critical issues in this action" (at para. 13).

[9] In the result, Justice Adair found that Mr. Huang had failed to prove his fraud claims as against Ms. Li and LPP. Justice Adair also found that Mr. Huang failed to prove his claim against Ms. Li for relief based on mistake of fact. She dismissed those claims (at para. 542).

[10] With respect to the unjust enrichment claims against Ms. Li and LPP, the judge found that Mr. Huang was entitled to judgment in the amount of $2,280 and $2,090, respectively (at para. 543).

[11] Justice Adair dismissed Mr. Huang's claims against Daqi Li (at para. 544).

[12] With respect to the counterclaim, Justice Adair ordered the appellant to account to Ms. Li certain funds he received in trust (at para. 545). She dismissed LPP's counterclaim (para. 546).

[13] On December 7, 2020, Mr. Huang filed the notice of appeal. On December 9, 2020, he filed the amended notice of appeal.

[14] On December 29, 2020, the respondents filed the notice of cross appeal.

[15] On February 24, 2021, following written submissions from the parties, Justice Adair released her supplementary reasons in the matter of costs. Those reasons are indexed at 2021 BCSC 280 ("Costs Reasons"). In the Costs Reasons, Justice Adair separately assessed costs as between Mr. Huang, Ms. Li and LPP, and costs as between Mr. Huang and Daqi Li.

[16] With respect to Ms. Li and LPP, applying the flexible standard of "substantial success" where there are multiple causes of action, and where the claim and counterclaim are clearly intertwined (as outlined by Justice Goepel in The Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc., 2017 BCCA 346 at paras. 91-92), Justice Adair found that "no one was substantially successful, so as to be entitled to costs" (Costs Reasons at para. 21). She ordered that each of Mr. Huang, Ms. Li and LPP bear their own costs (at para. 22).

[17] With respect to Daqi Li, Justice Adair noted that there was no dispute concerning entitlement as to costs. The issue was whether the costs be assessed as special costs, and how Daqi Li's offer to settle ought to factor (at para. 27). Mr. Li offered to settle the matter for $25,000 on the first day of trial. In the result, Justice Adair was not persuaded that Mr. Huang's conduct was "reprehensible" so as to justify an award of special costs (at para. 32). Turning to Daqi Li's offer to settle, Justice Adair found that the offer was one that reasonably ought to have been accepted (at para. 42). The terms offered were better than the final judgment of the court (at para. 42). Accordingly, she took Daqi Li's offer to settle into consideration with respect to costs, awarding Daqi Li double costs (at para. 43).

Legal Framework

[18] The principles that are applied on an application for security for costs of the appeal are not the same as those that apply on an application for security for trial costs: Thompson v. Soundy, 2003 BCCA 82 at para. 11 (Rowles J.A. in Chambers); Chinn v. Hanrieder, 2010 BCCA 274 at paras. 28-30 (Rowles J.A. in Chambers).

Security for Appeal Costs

[19] Mr. Huang consents to the security for costs with respect to his appeal so I will only address the question of security for trial costs.

Security for Trial Costs

[20] Authority for ordering security for trial costs is found in s. 10(2)(b) of the Court of Appeal Act, which permits a justice to make any order to prevent prejudice to any person.

[21] Justice Ryan provided a concise statement of the applicable principles on an application for security for costs for a trial judgment or for trial costs in Aikenhead v. Jenkins, 2002 BCCA 234 at para. 30:

1. The onus is on the applicant to show that it is in the interest of justice to order posting for security of a trial judgment and/or of trial costs.
2. The applicant must show prejudice if the order is not made.
3. In determining the interests of justice the chambers judge should consider the merits of the appeal and the effect of such an order on the ability of the appellant to continue the appeal.

See also: Creative Salmon Company Ltd. v. Staniford, 2007 BCCA 285 (Lowry J.A. in Chambers) at para. 11, citing Kedia v. Shandro Dixon Edgson, 2007 BCCA 57 at para. 14 (K. Smith J.A. in Chambers).

Stay of Proceedings and Execution

[22] The usual form of security for costs includes "a provision that the appeal is stayed pending the deposit of the security": Pitt Polder Preservation Society v. Pitt Meadows (District), 1999 BCCA 593 at para. 5 (Southin J.A. in Chambers).

Application

Security for Trial Costs

[23] The trial costs in favour of Mr. Li have not been assessed. The respondents say the minimum amount is $97,000.

[24] The onus is on Mr. Li to demonstrate that the order for security for trial costs is in the interests of justice (considering both merits and the effect on the appellant to continue pursuing the appeal) and that prejudice would result if no order is made.

[25] Mr. Li submits that there is very little merit with respect to the appeal in relation to his part of the case, (and the only aspect where costs were ordered against Mr. Huang). I have read the reasons for judgment, and although I acknowledge that the case depended largely on findings of fact and credibility, I cannot say that the appeal has little or no merit. It may not be the strongest appeal, but there appear to be arguable legal points with respect to the appeal in relation to Mr. Li.

[26] Mr. Huang has filed an affidavit suggesting that he has exigible assets in Canada. The respondents also filed an affidavit showing that Mr. Huang's property is subject to certificates of pending litigation (which are in relation to family litigation with his former wife). However, that litigation has been outstanding for some time, and Mr. Huang clearly has an interest in at least one property. Furthermore, Mr. Huang appears to be a successful lawyer, and has not filed any tax returns that shows the opposite.

[27] Mr. Huang also has assets in China, which Mr. Li says would be difficult to access for enforcement. However, he has not filed any material to sustain that position. In other words, there is nothing from a lawyer in China, or with knowledge of Chinese law to support that submission. It is not a fact within the realm of judicial notice.

[28] The appellant opposes the application for security for trial costs. He argues, in essence, that security for trial costs would prevent him from being able to pursue the appeal and so states that ordering it would put the respondents in no better position. He says he has exigible assets in British Columbia that are subject to family litigation, and other assets that are not liquid. He said he has no cash or financing to pay the $100,000 sought for security for trial costs. He says his financial means are "limited and uncertain". He says he "has modest income that varies from month to month and receives Covid-19 government assistance". He also noted that he had paid just shy of $20,000 for transcripts. He also emphasizes that his appeal has merit, which must be considered while analyzing whether granting the application would be in the interests of justice.

Disposition

[29] I will order that Mr. Huang post security for appeal costs in the amount of $4,000 payable within 60 days of the order. I also stay the appeal until such security is posted, with leave to apply to dismiss the appeal if the costs are not posted.

[30] I am not satisfied that it is in the interests of justice to order that Mr. Huang pay security for the trial costs of Mr. Li. He has assets in Canada that can be executed against. His appeal is not without merit. There is no suggestion that he has intentionally put himself out of easy reach of an enforceable judgment. Therefore, I dismiss the application for security for trial costs.

"The Honourable Madam Justice Bennett"

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