

CANADA / JUDGMENT

Kaban Resources Inc. v. Goldcorp Inc.

2021 BCCA 6

COURT

British Columbia Court of Appeal

DECIDED

8 January 2021

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2021 BCCA 6 Kaban Resources Inc. v. Goldcorp Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kaban Resources Inc. v. Goldcorp Inc.,

2021 BCCA 6

Date: 20210108

Docket: CA47032

Between:

Kaban Resources Inc.

Appellant

(Plaintiff)

And

Goldcorp Inc., Goldcorp Holdings (Barbados) Ltd., and Guatemala Holdings (Barbados) Limited

Respondent

(Defendants)

Before:

The Honourable Mr. Justice Grauer

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated September 4, 2020 (Kaban Resources Inc. v. Goldcorp Inc., 2020 BCSC 1307, Vancouver Docket S165822).

Counsel for the Appellant

(via videoconference):

R.D. Gibbens, Q.C.

Counsel for the Respondents

(via videoconference):

A. Cocks

Place and Date of Hearing:

Vancouver, British Columbia

December 21, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 8, 2021

Summary:

The respondents apply for security for costs of the appeal and the proceedings below in the respective amounts of \$16,017.95 and \$163,851.14. The respondents seek an order that the appeal be stayed pending the posting of security for costs and that the respondents be at liberty to apply to have the appeal dismissed as abandoned should the appellants fail to post security. Trial costs in this matter have not yet been assessed. Held: the applications for security for costs of the appeal and trial are allowed, but not in the amount sought by the respondents. Security for costs of the appeal are ordered in the amount of \$11,200. The appellant led no evidence that would demonstrate that an order for security for costs would prevent it from pursuing this appeal, and failed to meet its onus of demonstrating that it would not be in the interests of justice to order security for costs of the appeal. Security for costs of the trial are also ordered, but in the amount of \$60,000. The manner in which the appellant pursued its claim in the proceedings below caused the respondent to obtain and deliver a costly expert report on the question of damages. Now, the parties cannot proceed to assess trial costs without waiving privilege over the expert report, practically preventing the respondents from pursuing its remedies from trial. As such, the respondents have established real prejudice and met the onus of demonstrating that it is in the interests of justice to order partial security for costs of the trial. The appeal is stayed for 30 days to permit the appellants time to post the security. In the event the appellants fail to post the security ordered, the respondents are at liberty to apply to have the appeal dismissed as abandoned.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

Introduction

- [1] The appellant, Kaban Resources Inc, has brought this appeal from the judgment of Mr. Justice Voith, then of the Supreme Court, dismissing its claim after a summary trial. Justice Voith's reasons for judgment are indexed at 2020 BCSC 1307.
- [2] The respondents, whom I shall describe collectively as "Goldcorp", now apply under sections 24(1) and 10(2)(a) and (b) of the Court of Appeal Act, RSBC 1996, c 77, for an order requiring the appellant to post security both for the costs of the appeal, and for their costs of the proceedings below. Goldcorp seeks security in the amount of \$16,017.95 for a one-day appeal, and in the amount of \$163,851.14 for its trial costs (in excess of existing security), and asks that the appeal be stayed pending deposit of the amounts sought. Goldcorp also seeks the costs of this application payable forthwith.

Background

- [3] The appellant's claim against Goldcorp was for damages for the wrongful repudiation of a contract between the parties. To summarize matters very briefly, the parties had signed a letter agreement on February 3, 2016, providing for the transfer of mining assets of Goldcorp in Guatemala on various terms and conditions. On March 14, 2016, the appellant delivered an agreement to Goldcorp that purported to comply with the terms and conditions of the letter agreement, but involved a new party, Fortuna Silver Mines Inc., not mentioned in the letter agreement. Goldcorp had something to say about this, responding by letter on March 17, 2016. On March 21, 2016, Kaban sent an email to Goldcorp asserting that the March 17 letter constituted a repudiation of the February 3 letter agreement, and advising that Kaban accepted the repudiation, and considered the letter agreement to be at an end.
- [4] As I will discuss in more detail below, at a relatively early stage in the Supreme Court proceedings, the appellant was ordered to post security for costs in the amount of \$60,000. It did so. The matter was later set for trial by jury, and ultimately came before Justice Voith on Goldcorp's summary trial application.
- [5] As Justice Voith noted at para 5, the application raised four issues:
- i. Is this application suitable for disposition under Rule 9-7?
 - ii. Did the Letter Agreement contain various implied terms?
 - iii. Was there any obligation on Goldcorp to consent to the Fortuna Agreement? and
 - iv. Did the March 17 Letter constitute a repudiation of the Letter Agreement?

- [6] The parties were agreed as to the first issue: the application was suitable for disposition by way of summary trial. As to the rest, Justice Voith noted at para 6 that each issue was independent. Goldcorp would succeed if the answer to question (ii) were 'yes', or if the answer to either of questions (iii) or (iv) were 'no'. The judge concluded that the answer to (ii) was 'yes', the answer to (iii) was 'no', and it was unnecessary to answer question (iv).
- [7] Accordingly, the judge dismissed the appellant's claim with costs. Goldcorp subsequently applied for double costs under Rule 9-1(5)(b) of the Supreme Court Civil Rules. That application was dismissed in reasons delivered December 15, 2020, and indexed as 2020 BCSC 1982.
- [8] I turn next to consider Goldcorp's application for security for the costs of this appeal. I will then consider its application for security for its trial costs.

Security for the costs of the appeal

- [9] The relevant considerations have been discussed in many cases. I will quote from one, the reasons of Madam Justice D. Smith (in Chambers) in *Arbutus Bay Estates Ltd v Canada (Attorney General)*, 2017 BCCA 133:
- [17] The appellant against whom security is sought bears the onus of showing why security should not be required: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9. The ultimate question is whether the order would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6. The following relevant considerations were set out in *Lu* at para. 6:
- (a) the appellant's financial means;
 - (b) the merits of the appeal;
 - (c) the timeliness of the application; and
 - (d) whether the costs will be readily recoverable.
- [18] The appellant's financial position is the principal basis on which an order for some, all, or none of the security for appeal costs is made. See *Zen v. M.R.S. Trust Company* (1997), 88 B.C.A.C. 198 at para. 18. It is a discretionary order. Courts have also distinguished between corporate and individual plaintiffs, generally treating corporate plaintiffs with less flexibility.
- [10] As Justice Smith observed, the onus is on the appellant to establish that the interests of justice require that security not be ordered.
- [11] There is no doubt that Goldcorp has brought this application in a timely manner. Accordingly, the question really comes down to the appellant's financial position and the merits of its appeal. These need to be balanced in order to ensure that the interests of justice are not frustrated by an order for security of costs inhibiting a meritorious appeal.

- [12] In this case, it is relevant to note that the appellant is a shell company with no active business. If it has any exigible assets, or other means of securing costs, it has declined to adduce any evidence of such, though repeatedly invited to do so by Goldcorp in order to avoid this application. It has been able to raise funds, including \$60,000 to post in the court below to secure Goldcorp's costs there, but that is quite a different thing from having the ability to satisfy a judgment of costs against it. No one connected with the appellant has come forward to undertake to cover costs.
- [13] In essence, the appellant rests its opposition to the application on what it maintains is a meritorious appeal. It has not, however, led evidence to indicate that if it is obliged to post security for the costs of the appeal, it will be unable to proceed.
- [14] I am satisfied that the appellant should be ordered to post security for Goldcorp's costs of this appeal. The appellant has failed to meet the onus upon it of demonstrating that it would not be in the interests of justice to make the order.
- [15] With respect to the merits of the appeal, I would not suggest that the appeal is bound to fail. Nevertheless, the grounds it raises attract, *prima facie*, a deferential standard. Though they are framed as errors of law, they raise questions of contractual interpretation. But even if properly described as errors of law, the appellant is obliged to charge uphill given the trial judge's findings. An additional ground of appeal, alleging that the judge created "a reasonable apprehension of bias through engaging in *ad hoc* judicial moralism" also faces the significant hurdle of a heavy burden, given the presumptions of impartiality and judicial integrity.
- [16] The question then becomes, how much should the appellant be obliged to post as security for Goldcorp's costs of the one-day appeal? Goldcorp's draft bill of costs seeks the maximum for the items relating to the preparation of the factum and preparation for the hearing of the appeal. Given the nature of the appeal, I consider that unlikely to be achieved on an assessment. Its expected disbursements include the sum of \$2,850 for transcripts, which will be disputed in the context of a summary trial, where the evidence was all in affidavits. In the circumstances, I would consider \$8,000 for costs and applicable taxes, and \$3,200 for disbursements and taxes, to be a fair estimate for present purposes. Accordingly, I order the appellant to post \$11,200 to secure Goldcorp's costs of this appeal.

Security for trial costs

- [17] As Justice Smith observed in the *Arbutus Bay Estates* case at para 16, the principles relating to an application for security for the costs of trial differ from those relating to security for the costs of the appeal. Most importantly, the onus flips from the appellant to the respondent. In para 19, Justice Smith said this:

- [19] The principles governing the exercise of discretion in awarding security for trial costs are set out in *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Company* (1993), 76 B.C.L.R. (2d) 231 (C.A.); and *Kropp v. Swanaset Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252 (C.A). They include:
- (a) The onus is on the applicant to show that it is in the interest of justice to order posting for security of trial costs;
 - (b) The applicant must show prejudice if the order is not made; and
 - (c) 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 *Bronson v. Hewitt*, 2012 BCCA 268 at para. 13.
- [18] A relevant consideration is the fact that, generally, in relation to collecting its trial costs, the respondent will be in no worse a position by reason of the appeal than it was before the appeal. It follows that an important question is whether the appellant's pursuit of the appeal negatively alters Goldcorp's ability to recover sums found by the trial court to be owing to it (for instance, by the appellant obtaining a stay pending appeal): see, for instance, *D Bacon Holdings Ltd v Naramata Vines Inc*, 2010 BCCA 427 at paras 25-26; *Agent E v Canada (Attorney General)*, 2018 BCCA 492 at para 17; and *EB v British Columbia (Child, Family and Community Services)*, 2020 BCCA 263 at para 29.
- [19] The appellant contends that Goldcorp has demonstrated no such negative effect here, and indeed already has the benefit of security for its trial costs in the amount of \$60,000. Moreover, the appellant points out, Goldcorp has yet to have its trial costs assessed, a step that is usually expected unless the interests of justice dictate otherwise: *Arbutus Bay Estates* at para 20.
- [20] Goldcorp maintains that it has demonstrated a negative effect, and real prejudice. I agree. The question is whether it is sufficient to support the amount of security it requests.
- [21] Goldcorp points to the manner in which the appellant pursued its claim below. Initially, it indicated that it would pursue matters in an economical manner. When Goldcorp raised the prospect of an application for security for costs, the appellant sought to sever the questions of liability and quantum. It was in this context that it was ordered to pay security in the amount of \$60,000.
- [22] But, as Goldcorp notes, that is not what happened. Instead, the appellant set the matter down for a six-week jury trial on both liability and quantum, set for the fall of 2020. Although Goldcorp set its summary trial application down for hearing in August 2020, it was obliged, it asserts, to obtain and deliver a lengthy expert report on the question of damages, given the pending jury trial.

- [23] The expense related to this expert report comes to a total of just over \$168,000. This cost was not in contemplation at the time Goldcorp applied for security for its trial costs, because the trial was then expected to be on liability alone.
- [24] Now, because of this appeal, Goldcorp is not in a position to disclose its expert file for the purposes of supporting this expense, because to do so would waive privilege when the appellant seeks to have the case returned to the Supreme Court for a trial on damages--the subject of the expert report.
- [25] In these circumstances, I agree that prejudice arises. Because of the appellant's change in tactics (which I do not criticize, but which has consequences), Goldcorp has incurred a hefty expense that was not anticipated when it first sought to secure its costs. Now, because of the appeal, it cannot proceed to assess those costs without waiving privilege. The practical effect is much like a stay, since the respondent is practically prevented from pursuing its remedies in the trial court, all in the context of an appellant who appears to be costs-proof (compare *Chung v Shin*, 2017 BCCA 355 at paras 33-35).
- [26] But the fact remains that the appropriateness of the expert witness fee, and the reasonableness of incurring it at the time it was incurred, are in issue. It is by far the largest component of Goldcorp's unassessed bill of costs for the proceeding below.
- [27] It is, of course, open to me to order full security as requested, partial security or no security at all. Given all of the factors I have discussed, I consider that it is in the interests of justice to require the appellant to post an additional amount to secure Goldcorp's trial costs--but not the full amount requested by Goldcorp, particularly without an assessment. I conclude that requiring the appellant to post the further sum of \$60,000 would be appropriate.

Disposition

- [28] Within 30 days, the appellant shall post the sum of \$11,200 as security for Goldcorp's costs of this appeal.
- [29] Within 30 days, the appellant shall post the sum of \$60,000 as further security for Goldcorp's costs of the proceedings in the Supreme Court.
- [30] The appeal is stayed pending the posting of security as ordered.
- [31] Goldcorp will be at liberty to apply to have the appeal dismissed as abandoned in the event the appellant fails to comply with this order.
- [32] Goldcorp seeks the costs of this application payable forthwith, in any event of the cause. In the circumstances, given that the appeal may continue, I award Goldcorp the costs of this application in the cause. I note, moreover, that Goldcorp's draft bill of costs already includes the costs of preparation for and attendance at this application. In the circumstances, an order requiring the appellant to pay Goldcorp the costs of this application forthwith in any event of the cause, as Goldcorp requests, would be equivalent to requiring the appellant to

pay the application costs twice: once forthwith, and a second time when posting the security that has now been ordered.

"The Honourable Mr. Justice Grauer"

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