
CANADA / JUDGMENT

Kitov Resources Corp. v. Alpha Aviation Inc.

2020 BCCA 248

COURT

British Columbia Court of Appeal

DECIDED

3 September 2020

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2020 BCCA 248 Kitov Resources Corp. v. Alpha Aviation Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kitov Resources Corp. v. Alpha Aviation Inc.,

2020 BCCA 248

Date: 20200903

Docket: CA46910

Between:

Kitov Resources Corp. and Rod Salinger

Appellants

(Plaintiffs)

And

Alpha Aviation Inc. and The Corporation of Delta

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Butler

(In Chambers)

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

June 3, 2020 (Kitov Resources Corp. v. Alpha Aviation Inc., 2020 BCSC 820, Vancouver Docket S192835).

Counsel for the Appellants

(via teleconference):

N. Steinman

Counsel for the Respondents

(via teleconference):

L.K.L. Li

Place and Date of Hearing:

Vancouver, British Columbia

August 14, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 3, 2020

Summary:

The respondents apply for security for costs of the appeal and trial. Held: Application granted. It is in the interests of justice to make the orders sought. There is a serious question as to whether recovery may be difficult for the respondents, and the appeal has limited merit. The respondents have also shown prejudice on the basis of the appellants' conduct and lack of exigible assets.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] Since 2018, the parties have been embroiled in a protracted dispute over a 1972 twin engine Cessna model 421B aircraft (the "Aircraft") parked at the Boundary Bay Airport. In this application, the respondents, Alpha Aviation Inc. ("Alpha") and the Corporation of Delta ("Delta"), apply for:
- a) security for costs of the appeal;
 - b) security for costs of the proceeding below;
 - c) a stay of the appeal until such security has been paid into the Court, with liberty to apply for dismissal of the appeal, with costs, should the appellants fail to pay; and
 - d) costs of the application.

- [2] The appellants, consisting of Mr. Salinger and his company, KiTov Resources Corp. ("KiTov"), the owner of the Aircraft, are opposed to posting any security, although that opposition is focused more squarely on the trial costs application.
- [3] In my view, it is in the interests of justice to grant the application and order security for costs of both the appeal and the proceedings below.

History of the Proceedings

- [4] The appeal is from an order of Justice Verhoeven varying a previous order dated October 4, 2019; declining to set aside a permanent mandatory injunction against the appellants; and awarding special costs. His reasons are indexed at 2020 BCSC 820.
- [5] For the purposes of this application, it is necessary to set out the background and procedural history of the litigation.
- [6] The appellant, Mr. Salinger, is the sole director of KiTov. KiTov has stored the Aircraft at the airport since acquiring it in 2013. The Aircraft has not been flightworthy for some years now, as the engines and propellers were removed in 2014. Alpha operates the airport and is a lessee of the airport lands from Delta.
- [7] As of early 2018, KiTov was storing the Aircraft on the subleased property of International Pacific Aviation Co. Ltd. ("IPAC"), a sublessee to Alpha. In July 2018, IPAC notified KiTov that it required the Aircraft to be removed from its property. Thereafter, IPAC and Alpha entered into a non-renewable three-month parking agreement for the use of Alpha's tie-down space on Apron 3, which IPAC could then use to park the Aircraft. Following its expiration, the Aircraft remained in the tie-down space. On November 28, 2018, IPAC asked KiTov to remove the Aircraft. By letter dated March 4, 2019 to IPAC, and copied to KiTov, Alpha demanded that IPAC remove the Aircraft from the airport within 10 days.
- [8] On March 15, 2019, the appellants initiated the underlying action. They appeared on a without notice application before Justice McEwan, contending that Alpha was in breach of a parking agreement it had entered into with KiTov in 2018. Justice McEwan enjoined Alpha from moving or destroying the Aircraft, and ordered specific performance of the purported agreement. Leave was granted to the respondents to apply to set aside the order.
- [9] On March 18, 2019, the respondents advised of their intention to apply to set aside the order. On April 8, 2019, Alpha filed a counterclaim, alleging that KiTov was guilty of trespass by leaving the Aircraft on Alpha's leased property. In its pleadings, Alpha sought damages and a permanent mandatory injunction restraining trespass by KiTov and requiring KiTov to remove the Aircraft immediately. Alpha amended its counterclaim on May 3, 2019 to add claims against Mr. Salinger personally.
- [10] On June 27, 2019, the respondents filed an application for summary trial to dismiss the appellants' claims, and sought orders setting aside the McEwan order, for immediate removal of the Aircraft, and for a mandatory injunction prohibiting the appellants from

trespassing on the Airport property. The hearing date was set down for July 19, 2019. Mr. Salinger sought and obtained an adjournment of the application, alleging he had been bitten by a poisonous snake on June 17, 2019 while overseas. On August 1, 2019, even though Mr. Salinger had not filed his response to the application, Justice Matthews again adjourned the matter to October 1, 2019. She ordered that the date was peremptory on the appellants unless they brought an application to adjourn by September 16, 2019 accompanied by admissible evidence. By consent, the October 1 date was changed to October 4, 2019.

- [11] On October 4, 2019, the parties appeared before Justice Verhoeven for the hearing of the respondents' application. The appellants had recently retained counsel, but they had not filed any response materials by September 16, 2019 as ordered by Justice Matthews.
- [12] The appellants consented to a dismissal of the action, and to setting aside the McEwan order. They were given 60 days to remove the Aircraft. Justice Verhoeven granted the injunction order sought by the respondents, but provided leave to the appellants to apply on not less than 30 days' notice to set that order aside.
- [13] The appellants failed to remove the Aircraft within 60 days. On December 4, 2019, Mr. Salinger applied for a stay of the October 4 order, pending an application for rehearing before Justice Verhoeven. The respondents agreed to the stay on the condition that security for costs in the amount of \$6,442.06 be paid into court. Justice Branch granted the stay on that condition, and set the date for security to be posted as December 6, 2019. After the appellants missed that deadline, they applied without notice for a stay of Justice Branch's order. Payment was eventually made on December 30, 2019.
- [14] Meanwhile, on December 11, 2019, the appellants filed an application to set aside the injunction, to be heard on January 9, 2020. They did not file an application to set aside or vary the other orders made by Justice Verhoeven on October 4, 2019.
- [15] The hearing date of January 9, 2020 lapsed. On February 13, 2020, the respondents applied to settle the terms of the October 4, 2019 order. Justice Verhoeven allowed the appellants another opportunity to bring their application for reconsideration, and provided directions to the parties. The application was heard on April 23, 2020, by telephone, and Justice Verhoeven made the orders now appealed from.

Decision under appeal

- [16] Justice Verhoeven concluded that it was not in the interests of justice to reopen the summary trial. In his view, finality and fairness favoured refusal.
- [17] He considered that the appellants had failed to meet filing deadlines in anticipation of the October 4, 2019 hearing, yet sought a complete do-over on the merits. Further, while their counsel had only recently been retained prior to that date, the fact remained that they were represented by counsel, and had formally consented in open court "to what amounted to the primary orders". The authority of counsel to do so on their behalf was not denied. In

addition, the judge noted that the appellants had still not filed a response to the counterclaim or to the application of June 27, 2019 that led to the order.

- [18] Justice Verhoeven also considered that the concessions made by counsel were well-justified. On the evidence, there was no parking contract at all between KiTov and Alpha, despite the contrary assertion in KiTov's notice of civil claim and in its application to Justice McEwan. Even if there was, the offer was for parking for two months, and the contract would have been terminated long before the matter came before Justice McEwan.
- [19] The judge observed that in the fresh evidence sought to be introduced, the appellants produced a different form of the purported parking agreement with Alpha than the one before Justice McEwan. The "new" agreement contemplated a parking term of two years rather than two months. The respondents contended that the document was a "fraud" or "forgery" intended to mislead the court, and indeed, Justice Verhoeven doubted its authenticity. He declined to make a finding in this regard. Nevertheless, he found that Mr. Salinger had made material misrepresentations of fact about the alleged parking agreement on the ex parte application before Justice McEwan.
- [20] Justice Verhoeven further considered that Mr. Salinger had made baseless personal attacks on Alpha's staff and legal counsel, including accusations of anti-Semitism, and had sought to "broaden the dispute by involving third parties needlessly". His tone and tenor in communicating was "hostile and vitriolic".
- [21] Justice Verhoeven varied the order of October 4, 2019 only insofar as the net sales proceeds of the Aircraft were concerned. He ordered that the net proceeds remaining after deducting the respondents' expenses in disposing of and/or selling the Aircraft, together with any unpaid costs, be paid to KiTov.
- [22] Justice Verhoeven also declined to set aside the injunction. In his view, the appellants presented no persuasive evidence of any need to attend the Airport, or of any prejudice in being prohibited from attending there. Nor had there been any material change in circumstances. He referred again to the hostile and inappropriate nature of the interactions between Mr. Salinger, Alpha, and Alpha's counsel.
- [23] Finally, Justice Verhoeven ordered special costs of the proceedings, commencing with the application before Justice Branch on December 4, 2019. To this end, he was satisfied that the escalating allegations of anti-Semitism by the appellants, along with their "campaign of harassment", amounted to reprehensible conduct deserving of rebuke.

Post-judgment communications

- [24] The respondents have appended numerous email exchanges between their counsel and one "Philip Konnikov" of "Stanislav Legal" to their application materials. The appellants have filed affidavits in response. I need not refer to these in any detail except to say that the import of the emails is that A Investments LLC, a Wyoming company, purportedly acquired the Aircraft through a security agreement entered into with Mr. Salinger.
- [25] Eran Hoffer is purportedly the "sole member" and "sole manager" of the Wyoming company. He deposes that Mr. Salinger set up A Investments LLC to secure a credit facility and granted a mortgage and blank Bill of Sale for the Aircraft. After learning about the problems KiTov and Mr. Salinger were having with Alpha, he asked Mr. Konnikov to assist him with recovering the Aircraft. Mr. Hoffer says an amount equal to \$3,968 remains owing to him, which once paid, "the Bill of Sale transfer now at the FAA will be cancelled or the Aircraft will be transferred back to KiTov". The respondents also attach emails from a Washington state attorney who, for a brief period, purported to act on behalf of A Investments LLC.
- [26] The respondents made efforts to confirm the identity of Mr. Konnikov. They have provided some evidence of a forensic nature suggesting that the emails allegedly from Mr. Konnikov were sent by Aero Attack Systems Inc. -- a company with which Mr. Salinger is affiliated.
- [27] The respondents attach these emails in support of their assertion that the appellants are, once again, attempting to delay final resolution of the underlying issues through questionable means.

Legal Framework

Security for costs of appeal

- [28] Section 24(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [Act] empowers a justice of this Court to order security for costs of an appeal.
- [29] In *Lu v. Mao*, 2006 BCCA 560 (Chambers), Justice Ryan explained:
- [6] In determining whether security for costs should be ordered, the ultimate question to be answered is whether the order would be in the interests of justice. In this regard, Madam Justice Rowles in *Ferguson v. Ferstay* (2000), 81 B.C.L.R. (3d) 90 at para. 7, 2000 BCCA 592 (Chambers), identified the following as relevant considerations:
- (1) appellant's financial means;
 - (2) the merits of the appeal;
 - (3) the timeliness of the application; and
 - (4) whether the costs will be readily recoverable.

- [30] The appellant bears the onus of establishing that the interests of justice require that security not be ordered: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9 (Chambers).
- [31] The most likely basis on which to order security for costs, or to decline to do so, is the appellant's financial position. If there is a serious question as to whether recovery may be difficult, there is a presumption in favour of granting security: *Edwards v. Moran*, 2003 BCCA 443 at para. 14 (Chambers).
- [32] Security for costs will not be awarded where the order would, in effect, preclude a party from pursuing a meritorious appeal: *Creative Salmon Company* at para. 12.
- [33] In the ordinary course, an appeal will be stayed until the security is posted: *Pitt Polder Preservation Society v. Pitt Meadows (District)*, 1999 BCCA 593 at para. 5 (Chambers).

Security for costs of trial

- [34] The jurisdiction to order security for costs of a trial is found in s. 10(2)(b) of the Act. Generally, trial costs are awarded less readily than costs of an appeal: *Siekham v. Hiebert*, 2008 BCCA 299 at para. 13 (Chambers).
- [35] In *Aikenhead v. Jenkins*, 2002 BCCA 234 (Chambers), Justice Ryan, at para. 30, summarized the applicable principles on an application for security for costs for a trial judgment or for trial costs:
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.
- [36] Of course, the overriding concern is always whether it is in the interests of justice to make the order.
- [37] Prejudice may be established in many ways: *Chung v. Shin*, 2017 BCCA 355 at para. 35. A lack of exigible assets on the part of the appellant can suffice: *Chudy v. Merchant Law Group*, 2007 BCCA 424 at para. 15 (Chambers). In addition, prejudice can be shown where the appellant has displayed "a significant pattern of conduct causing delay and cost" and "expense-causing tactics throughout [the] litigation": *Chung* at para. 36; *Seikhon v. Dhillon*, 2020 BCCA 185 at paras. 27-28. In the end, I must assess whether in all the circumstances the interests of justice require that some or all of the costs of the underlying proceeding be posted: *Chung* at para. 35.

Positions of the Parties

Respondents

- [38] The respondents submit that the financial position of the appellants favours an order for security both for costs of the appeal and of trial. Aside from the Aircraft, which may not be owned by KiTov, there is no real property registered in the names of the appellants, and no indication of any income or assets in the province or elsewhere. KiTov is a Delaware company, and Delaware is not a reciprocating U.S. state under the regulations to the Court Order Enforcement Act, R.S.B.C. 1996, c. 78. Mr. Salinger has put forward no evidence that he has exigible assets of any value.
- [39] The respondents also say the appeal has little, if any, merit. The orders appealed from are discretionary. Further, they are based on the order of October 4, 2019 that was consented to by the appellants at a time when they were represented by counsel. Moreover, there is no evidence to suggest the appellants will be unable to continue prosecuting their appeal if costs are ordered.
- [40] The respondents submit that they will be prejudiced if an order for security for trial costs is not made. In addition to the absence of exigible assets, they point to the pattern of conduct in the litigation described by Justice Verhoeven that caused considerable delay as well as additional costs. They say that the claim by A Investments LLC is "another attempt by the appellants to prevent the Aircraft from being under the control of the respondents and being sold to pay for the cost of removal and their special costs".
- [41] The draft bill of costs for the appeal totals \$6,104.15. The respondents seek \$6,000 to secure those costs. They concede the costs of the proceedings below have not been assessed. Nonetheless, they seek an order of security for trial costs in the amount of \$40,000.

Appellants

- [42] The appellants' arguments were directed primarily at the application for security for trial costs. While they do not concede that an order should be made to secure the appeal costs, they do not contest that security in the amount of \$5,000-\$6,000 is appropriate if such an order is made.
- [43] The appellants submit that the Aircraft has significant value even though it is the subject of the security agreement with A Investments LLC. Mr. Salinger maintains that his shareholdings in Aero Attack Systems Inc. also have value and that the respondents could seize those shares. He deposes that certain engine parts of the Aircraft, which presumably are in his possession, are valued at \$61,750.
- [44] As for the merits of the appeal, the appellants contend they were denied natural justice in the proceedings before Justice Verhoeven. The hearing, which was conducted by telephone, lasted half of an hour. Mr. Salinger says he was unable to make certain arguments, respond to submissions, and refer to affidavit material.

- [45] The appellants further submit that the judge erred in awarding special costs against them "for making 'groundless' allegations of anti-Semitism as part of an alleged 'campaign of harassment'". They contend that Mr. Salinger's complaint to the Law Society regarding the respondents' counsel was conduct outside of the litigation and therefore ought not to have been considered. They additionally claim that an email sent by Mr. Salinger on January 6, 2020 to members of the Delta City Council, and to which the judge referred, was the subject of privilege. Finally, the appellants allege that to the extent the special costs order was grounded in delays caused by Mr. Salinger, who was self-represented for much of the proceedings, the judge committed an error of law.
- [46] The appellants rely on *Chan v. 0975713 B.C. Ltd.*, 2018 BCCA 418 (Chambers) for the proposition that in general, a party seeking an order for security for trial costs can only obtain that order with a "certificate of costs". They say the respondents have not filed anything of that nature.
- [47] If the Court orders security for trial costs, the appellants submit that only ordinary costs of the trial below would need to be secured, for which a sum of \$6,400 has already been deposited.

Discussion

Security for appeal costs

- [48] In considering security for costs of the appeal, the respondents have established there is a risk that costs will not be recovered. KiTov's only asset in this province is the Aircraft, the ownership of which is in dispute. It is telling that Mr. Salinger has failed to provide any evidence of his own personal financial circumstances. While he says the Aircraft parts and his shares in Aero Attack Systems Inc. are of some value, I am not satisfied that he has rebutted the presumption raised in favour of granting security: *Edwards* at para. 14. There is insufficient evidence to show that there may be a buyer or a market for the Aircraft, the parts or the shares. The respondents have also brought their motion in a timely manner and the amount of security sought is in line with the anticipated costs of the appeal.
- [49] I also consider the merits of the appeal to be low. The orders under appeal attract a deferential standard of review, and would not be interfered with lightly. This includes the order of special costs. Further, given the procedural indulgences provided to the appellants throughout this litigation by the respondents and the court, the prospects of succeeding with an argument rooted in natural justice are not great.
- [50] In these circumstances, it is in the interests of justice to order security for costs of the appeal. I am not persuaded the appellants will be precluded from prosecuting their case as a result of such an order. I note that they have retained experienced counsel for this application and have successfully posted security in the court below prior to the appeal.
- [51] I would therefore grant an order for security for costs of the appeal in the amount of \$6,000.

Security for trial costs

- [52] I reiterate that orders for security for trial costs are less readily granted. The respondents bear the onus of showing it is in the interests of justice to make the order and that they will suffer prejudice if the order is not made.
- [53] I must note that I am not in a position to make findings as to the veracity of the claims by A Investments LLC regarding the ownership of the Aircraft, or to opine on whether such claims are secretly driven by Mr. Salinger with intent to mislead. Nor would it be appropriate to do so. However, if ownership of the Aircraft has been transferred, it makes the prospect of recovery of costs more remote for the respondents. This increases the potential prejudice if an order for security is not made.
- [54] On the balance of the evidence, I am satisfied that it is in the interests of justice to order security for trial costs. It is evident from the findings of Justice Verhoeven that there is merit to the respondents' contention that the appellants have displayed a "significant pattern of conduct causing delay and cost" and "expense-causing tactics throughout [the] litigation": Chung at paras. 35-36. I need not refer to those findings but they are detailed throughout the reasons for judgment. I also accept that this pattern appears to be continuing in this Court. As noted in Chung and Seikhon, the existence of such a pattern of conduct is relevant to the question of prejudice. The circumstances here closely resemble those described in Seikhon.
- [55] The respondents have also established that it is likely they will suffer prejudice because of the appellants' lack of exigible assets that I have highlighted above. The prospects of recovery presented by Mr. Salinger do not inspire confidence.
- [56] The lack of merit of the appeal also favours an order securing trial costs, for reasons already stated. The appellants argue that because their strongest ground of appeal relates to the special costs order, I ought not to grant security in relation to those costs. I would not accede to that submission. The arguments advanced do not change my overall assessment of the merits of the appeal, and the overriding concern remains the interests of justice.
- [57] I also reject the appellants' submission that the \$6,400 posted as security for costs in the trial court is sufficient. That order for security was made earlier and is clearly inadequate to cover the whole of the proceedings or the special costs order in question. I agree that the amount already posted to secure trial costs is a factor to take into account in determining the amount to be ordered on this application and I have done that.
- [58] The respondents concede the costs of the proceedings below have not been assessed. While ordinarily it is the practice of this Court not to order security for trial costs until they have been assessed, the interests of justice may dictate otherwise: see *Leung v. Yung*, 2016 BCCA 64 (Chambers).
- [59] In light of all of the circumstances, I order the appellants to post security for the trial costs in the amount of \$12,500.

Disposition

[60] The appellants shall post security for costs of the appeal in the amount of \$6,000, and security for trial costs in the amount of \$12,500. The security must be placed within 30 days and the appeal is stayed pending the posting of the security. If the security is not posted within that time, the respondents are at liberty to apply to have the appeal dismissed.

"The Honourable Mr. Justice Butler"

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