

CANADA / JUDGMENT

Kitov Resources Corp. v. Alpha Aviation Inc.

2020 BCCA 388

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 388 Kitov Resources Corp. v. Alpha Aviation Inc. COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Kitov Resources Corp. v. Alpha Aviation Inc., 2020 BCCA 388 Date: 20201102 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 Groberman (In Chambers) On appeal from: An order of the Court of Appeal for British Columbia, dated September 3, 2020 (Kitov Resources Corp. v. Alpha Aviation Inc., 2020 BCCA 248, Vancouver Docket CA46910). Oral Reasons for Judgment 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 November 2, 2020 Place and Date of Judgment: Vancouver, British Columbia November 2, 2020 Summary: The appellant was ordered to post security for appeal and trial costs, but did not do so within the time limited by the order. The respondent applied for an order dismissing the appeal. Held: Appeal dismissed for failure to comply with the order. The judge who ordered the posting of security found that the appeal had little merit, and there was no basis to differ from that assessment. There was inadequate explanation as to why no part of the security had been posted, and no reliable indication that the full amount would be posted in the near future. It was in the interests of justice to dismiss the appeal.

[1] GROBERMAN J.A.: This is an application by the respondents for an order dismissing the appeal under s. 24(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 for failure to post security for costs.

[2] On September 3, 2020, Justice Butler ordered the posting of security in the amount of \$6,000 for appeal costs as well as security for trial costs in the amount of \$12,500. He allowed 30 days for the posting of security, which time expired on October 3, 2020. He also provided in his order that if the security was not posted within the time limit, the respondents would be at liberty to apply to have the appeal dismissed. The respondents have so applied and that is the application before me today.

- [3] There is some issue as to whether this hearing concerns the posting of the total amount of security ordered (\$18,500) or only the amount that was required to be filed as security for costs of the pending appeal (\$6,000). The parties suggest that *First Majestic Silver Corp. v. Santos*, 2014 BCCA 115 stands for the proposition that a judge in chambers can only dismiss an appeal for failure to post security for the costs of the appeal. In that case, a single justice of the Court had ordered security for a trial judgment pursuant to s. 10(2)(b) of the Court of Appeal Act. The Court concluded that a single justice does not have jurisdiction to dismiss an appeal for failure to comply with an order under s. 10(2)(b), and that that jurisdiction lies only with the Court.
- [4] The order in *First Majestic* had been made under s. 10(2)(b) of the Court of Appeal Act rather than under s. 24, as it concerned the trial judgment, and not simply costs. I note that in the case before me, the order purports to be made under s. 24 for security for both trial and appeal costs.
- [5] In light of the submissions made in respect of *First Majestic*, I am prepared to proceed on the assumption (without deciding the issue) that this application is founded on the failure to post the \$6,000 security for appeal costs and not on the failure to post the \$12,500 security for trial costs. It is clear, however, that in assessing the seriousness of the failure to post security for the appeal costs, I may consider all surrounding factors, including the fact that an additional amount of \$12,500 has been ordered posted.
- [6] In *Quinn v. Coutts*, 2018 BCCA 433 (Chambers), Hunter J.A. ruled on an application to dismiss an appeal for failure to post security for costs. He noted that a single justice in chambers only has the ability to grant or reject the order for dismissal of the appeal, and does not have the ability to vary the order for security. Citing para. 38 of *First Majestic*, he reached the conclusion that a judge in chambers does not have the ability to extend the period for posting security. While it is curious that a chambers judge does not have the power to extend the time for the posting of security, I agree that that appears to be the law.
- [7] In *Coutts*, the judge discussed the considerations on an application to dismiss an appeal for failure to post security for costs:
- [13] It has sometimes been suggested that not to dismiss the appeal in such circumstances would amount to a "backhanded way of setting aside" the security for costs order: see *Farmers Insurance v. Brown*, 2005 BCCA 577 at para. 9; *Pearlman v. Atlantic Trading Co. Ltd.*, 2009 BCCA 475 at para. 3 (Newbury J.A. in Chambers). I take this as a recognition that there is a practical onus on an appellant who has not complied with a security for costs order to satisfy a chambers judge that the interests of justice support the continuation of the appeal, failing which the appeal will be dismissed.
- [14] In my opinion, when a single judge is called upon to exercise the discretion conferred under s. 24(2), the following considerations among others would be relevant: · What was the reason the appellant failed to comply with the order? Has the appellant offered a realistic assurance that security will be posted within an acceptable period of time? [See *Toch v. Grove*, 2010

BCCA 428 at para. 2 (Chiasson J.A. in Chambers).] · Will the delay in posting security cause prejudice to the respondent? · Do the apparent merits of the appeal justify declining to exercise the jurisdiction to dismiss under s. 24(2)? · Overall, is the dismissal of the appeal in the interests of justice?

- [8] A judge in chambers is not bound to follow the analysis of another judge of this Court in chambers, although such a judgment will be persuasive. As a matter of comity, a judge in chambers will generally be slow to depart from the reasoning of another judge in chambers.
- [9] I would characterize what Hunter J.A. said at para. 13 of Quinn as amounting to the idea that on this kind of an application, though the onus remains on the applicant, it is in some ways the equivalent of a "show cause" hearing. It will be up to the respondent to show why an existing order of this Court for security for costs should not be enforced by dismissing the appeal. Again, while the formal onus lies with the applicant, the respondent has at least a tactical burden of demonstrating why the order sought should not be granted.
- [10] While I agree with what Hunter J.A. said in Coutts, I have some concern with the listing of the "apparent merits of the appeal" as a primary factor to be taken into consideration on this type of application. While I do not doubt that the apparent merits can play a role, it is important to recognize that the merits of the appeal have already been considered by the chambers judge in granting security for costs. My role is not that of revisiting or overruling the assessment made by the chambers judge in making his order.
- [11] It seems to me that a judge faced with an application to dismiss an appeal for failure to post security should make only limited reference to the merits of the appeal, and should refuse to engage in a wholesale reassessment of them. The merits that will be relevant on this kind of an application, therefore, will include merits that have become apparent since the date of the original application for security. At any rate, my consideration of the merits must not be in conflict with the assessment or reasoning of the chambers judge who made the order for security for costs.
- [12] In granting his order in this case, Butler J.A. said this about the merits:
- [49] I 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. ...
- [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.

- [13] In argument on this application, the appellants began by noting that the COVID-19 pandemic has created "the worst recession in nearly 75 years" and by submitting that the 30-day time limit to post security for costs for \$18,500 amounted to a wrongful exercise of discretion or a palpable and overriding error. They asserted that the chambers judge gave no weight or gave insufficient weight to the impact of the pandemic on litigants generally, or the appellants specifically. I would comment that it is not for me to find that the learned chambers judge made an error. If the respondents wish to argue the chambers judge erred in either his assessment of the merits or in his exercise of discretion, the appropriate avenue would be an application to a panel of this Court to vary the judge's order.
- [14] For the purposes of the application today, I am satisfied that I do not have any power to review Butler J.A.'s exercise of discretion or his assessment of the merits. I proceed on the basis that the order made by him was in all respects appropriate.
- [15] I turn, then, to the considerations discussed in Coutts. First, "What was the reason the appellants failed to comply with the order and have the appellants offered a realistic assurance that security will be posted within an acceptable period of time?" The appellants made little or no attempt to justify the failure to post security until the last couple of days. They have now filed two lengthy affidavits blaming the pandemic and an assortment of financial calamities for their inability to provide the required security. This comes very late in the day. I do note that the appellants attended at the Registry this morning in an apparent effort to tender the \$6,000 but not the balance of the security for costs that was ordered.
- [16] While I appreciate that the appellants have had some financial difficulties, they do not appear to have taken any steps in a timely manner to comply with the order. They appear to have panicked at the last minute in an attempt to generate some evidence to show that they may eventually be able to post the security that was ordered.
- [17] I am not satisfied that the assurances provided today are realistic. They depend very much on certain things happening in the next few days, and they do not provide any assurance that the security will, in fact, be furnished within a reasonable time. I also say that it is very late in the day to start making arrangements to provide security for costs that is almost a month out of time.
- [18] The next consideration is the question of whether there is prejudice to the respondents caused by late payment. This question is somewhat complicated. I am not of the view that there would be serious prejudice to the respondents if the appeal were delayed, at least if the delay were confined to a matter of days. While I accept that the ongoing litigation and the allegations made back and forth cause some prejudice to the respondents, I am not satisfied that it is the sort of prejudice that would result in this application being dismissed.

- [19] With respect to the merits, as I have indicated, I am not satisfied that I should go deeply into the merits as I was invited to by counsel for the appellants. Counsel has, on this application, produced a draft factum. I accept there are arguable points in it, but I am not going to revisit the assessment of the merits undertaken by the chambers judge for reasons I have already indicated. It seems to me that his assessment of the merits was a fully considered one.
- [20] Finally, I must consider the overall interests of justice. The order of Butler J.A. must be taken as being a correct one. Considerable time has passed since that order and only very recently has there been any effort to comply with it. I do not have confidence that the appellants will be able to furnish the \$18,500 security for costs in a timely manner. It is in the interests of justice for this Court to enforce the order for security for costs by dismissing the appeal.
- [21] I am therefore granting the application and dismissing the appeal. [Submissions by counsel re: costs]
- [22] GROBERMAN J.A.: I am ordering fixed costs of the appeal in the amount of \$3,000. "The Honourable Mr. Justice Groberman"

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