

CANADA / JUDGMENT

Kooner v. Kaur

2020 BCCA 233

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 233 Kooner v. Kaur

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kooner v. Kaur,

2020 BCCA 233

Date: 20200807

Docket: CA46869

Between:

Ranjit Singh Kooner

Respondent

(Claimant)

And

Harjit Kaur aka Harjit Kaur Kooner

Appellant

(Respondent)

And

Mohinderjit Kaur Kooner and Jaswinder Singh Kooner

Respondents

(Respondents by Counterclaim)

Before:

The Honourable Madam Justice Griffin

(In Chambers)

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

July 30, 2018 (Kooner v. Kaur, New Westminster Docket E040944).

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference):

H.M. Dale

Counsel for the Respondents

Mohinderjit Kaur Kooner and Ranjit Singh Kooner

(via teleconference):

P.I. Sahota

Place and Date of Hearing:

Vancouver, British Columbia

August 5, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 7, 2020

Summary:

Application for an extension of time to file and serve notice of appeal. Held: Application granted despite extraordinary delay. An appeal in the consolidated action was previously allowed, and the appellant's belief that it set aside the whole of the order below was understandable. Notably, counsel to the earlier appeal had prepared and entered the appeal order as setting aside the whole of the order below. There was merit to the appeal and prejudice from the delay was not great as the issues were still live in the trial court due to the earlier appeal.

GRIFFIN J.A. (via teleconference):

Overview

- [1] Harjit Kaur applies pursuant to ss. 10(2)(d) and 10(4) of the Court of Appeal Act, R.S.B.C. 1996, c. 77, for an extension of time to file and serve her notice of appeal from the order of Justice Macintosh made July 30, 2018 (the "Dismissal Order"). The Dismissal Order was made in relation to claims to an interest in one residential property (the "Property") as a family asset. The claims were made by two sisters who were married to two brothers. I will refer to the parties by their first names to avoid confusion.

Background

- [2] The applicant, Harjit, was married to the respondent, Ranjit Singh Kooner. Harjit's sister, Daljit Kaur, was married to Ranjit's brother, Jaswinder Singh Kooner. Both couples married, lived together and separated around the same times. Each couple had a child of the marriage. Although there were some short-term separations followed by reconciliations, it appears that the final separation date was in August 2011.
- [3] Family law actions were commenced in the court below in respect of both families: Action Number E040944 was commenced by the one brother, Ranjit against his wife and the applicant herein Harjit, in which Harjit advanced a counterclaim against Ranjit, his mother and the respondent herein Mohinderjit Kaur Kooner, and his brother Jaswinder; and Action Number E113441 was commenced by the other sister, Daljit, against the other brother, Jaswinder, Ranjit and Mohinderjit.
- [4] Even though the two family law actions involved completely independent causes of action, by consent order made February 4, 2014, the two family law actions were consolidated. It appears that the action number used in the consolidated action was E040944, the same as the claim initially involving Harjit. With the benefit of hindsight, in my respectful view this consolidation order ought to never have been made and led to procedural confusion.
- [5] Both family law actions advanced claims in relation to child custody, child support, and spousal support. These claims were unique to each of the two families, although perhaps there might have been some overlap in evidence should the parties disagree as to the periods of reconciliation and separation.
- [6] There was an aspect of the sisters' property claims where the evidence probably overlapped. As part of their respective family law actions, Harjit and Daljit each claimed a respective interest in the Property as a family asset. The Property had been purchased in the names of the two brothers, Ranjit and Jaswinder, as to a 1% interest each, and the brothers' mother, Mohinderjit, as to a 98% interest. The two sisters had lived in the residence at the Property for a relatively brief time during the two marriages. They each claimed that the brothers only put the larger share of the Property in the mother's name to defeat the sisters' claims.

- [7] Despite the consolidation order, there was a separate trial before Justice Bruce of Ranjit and Harjit's action in relation to child custody, child support and spousal support, with the claim to the Property hived off to be dealt with at another time. Following that trial, on October 15, 2015, in reasons indexed at 2015 BCSC 1880, Bruce J. pronounced orders in Harjit's counterclaim, and awarded Harjit costs. As the issue was not before her, Bruce J. made no order regarding the Property.
- [8] Likewise, earlier Daljit and Jaswinder settled some of their family law issues regarding child custody and child support, incorporated into a final order of Justice Bowden made February 4, 2014. Daljit had an outstanding claim for spousal support and to an interest in family assets including the Property, but did not advance it actively.
- [9] There is a suggestion that there was some attempt to have the Property issues in Harjit's counterclaim determined before Bruce J. but the court's schedule did not allow it.
- [10] Following the judgment of Bruce J., Harjit did not actively attempt to advance her counterclaim claiming an interest in the Property. She filed a notice of intention to act in person in June 2016.
- [11] I pause to note that the litigation no doubt stretched all of the parties' limited financial resources.
- [12] Approximately two years after the judgment of Bruce J. dealing with many of their family law issues, on October 19, 2017, the respondents, Ranjit and Mohinderjit, filed a notice of intention to proceed in Action Number E040944.
- [13] On April 9, 2018, Jaswinder as against Daljit on the one hand, and on May 16, 2018, Ranjit and Mohinderjit as against Harjit and Daljit on the other hand, filed separate notices of applications pursuant to R. 11-3 of the Supreme Court Family Rules, B.C. Reg. 169/2009, to respectively dismiss the sisters' claims to an interest in the Property, amongst other relief sought. These applications were each filed in Action Number E040944 although Ranjit and Mohinderjit's notice of application also listed Action Number E113441.
- [14] Daljit, with the assistance of counsel filed a response, an affidavit, and an amended response. She referred to the fact that the sisters and brothers married at the same time, lived together, and separated at the same time, and that both sisters had to take sole responsibility for raising their children, and both sisters were economically disadvantaged as a result of the breakup. She took the position that the Property was purchased during the course of her marriage with the intention that it would serve as the couple's matrimonial home, and that the credit used to purchase the Property came from Jaswinder (as opposed to Mohinderjit).

- [15] Harjit, however, did not file a response or an affidavit. Harjit deposes in her affidavit in support of the present application that she thought she would have counsel at the hearing of the dismissal application but he told her right before the hearing that he would not be available, which left her unrepresented.
- [16] The applications to dismiss the sisters' claims in relation to the Property were heard on July 30, 2018. Both Harjit and Daljit were unrepresented at that time and, due to their limited English language skills, had difficulty making submissions. Harjit submits that due to her limited English ability and anxiety, she was unable to make her arguments effectively. The transcript of the hearing indicates her apparent difficulty in understanding the judge's questions and in expressing herself. Amongst other things, she told the judge that "[w]hatever my sister say already you, that is true [w]hatever my sister told you." She also indicated that she had no money, she complained about not receiving the costs that Bruce J. had ordered paid to her, and she disputed what the brothers said about the Property.
- [17] At the conclusion of the hearing on July 30, 2018, Macintosh J. granted both applications against each sister respectively, dismissing both sisters' claims to an interest in the Property and cancelling the certificate of pending litigation filed against it. He also made some related orders concerning costs of the various aspects of the proceeding.
- [18] The Dismissal Order in Action Number E040944 reads, with respect to the claims to an interest in the Property:
1. The claims by [Daljit] and [Harjit] for an interest in the Respondent's interest in the [P]roperty [legal description of property] be and are hereby dismissed.
 2. The Certificate of Pending Litigation filed against [the Property] be cancelled.
 - ...
 6. There will be a settling of the net costs payable as between the parties ... The net figure regarding costs is to be taken into account as a priority payment if the house is re-financed or sold.
- [19] Only Daljit filed a notice of appeal from the Dismissal Order, filed on August 24, 2018. Harjit was not a party to that appeal and did not file her own appeal at that time. However, all of the other parties to the consolidated action were named, and appeared.
- [20] Daljit's appeal was heard and allowed on May 10, 2019, with oral reasons indexed at 2019 BCCA 188 (the "Appeal Reasons"). It is clear that the focus of the Appeal Reasons was on Daljit's individual claim to an interest in the Property, and not on both sisters' claims. The concluding paragraph of the Appeal Reasons held, referring to Daljit as the "Wife":

- [54] For these reasons, I would allow the appeal and set aside the order dismissing the Wife's claim to an interest in the Property. The Wife's claim to an interest in the Property is remitted to the trial court. The Wife is also permitted to maintain, if it is still in place, or re-file, a certificate of pending litigation against the Property.
- [21] Harjit's evidence is that when this Court allowed the appeal and set aside the Dismissal Order, she understood that her claim to an interest in the Property remained alive. Likewise, the costs payable in the consolidated action remained undetermined.
- [22] There are a number of reasons that Harjit's evidence that she had this understanding is credible.
- [23] The Dismissal Order was in the consolidated action bearing the same action number as her original matrimonial action, and in a single term dismissed her claim as well as Daljit's claim to the Property.
- [24] Harjit's ex-husband Ranjit and her former mother-in-law Mohinderjit, were involved in the appeal, including in having their lawyer file a factum and make oral submissions on their behalf at the hearing to support the Dismissal Order. The appeal was granted with oral reasons on the same date as the hearing of the appeal. I accept that Harjit has limited English language skills and limited ability to understand complicated legal concepts and procedures. It is conceivable that in these circumstances Harjit might well have understood that the entire Dismissal Order was set aside on appeal.
- [25] Harjit was not alone in apparently being confused as to the result of the appeal.
- [26] The form of appeal order (the "Appeal Order") prepared by and then signed by all counsel on appeal, including counsel for Jaswinder, and counsel for Ranjit and Mohinderjit, and entered in this Court, provides that the order of Macintosh J. dated July 30, 2018, be set aside--full stop, without qualification. The form of order entered in this Court following the appeal thus reads as though this Court set aside the entire order of Macintosh J. dismissing both sisters' claims to an interest in the Property, as well as all the ancillary terms regarding costs.
- [27] Harjit's evidence is that on November 14, 2019, she first received notice from counsel for her former mother-in-law, Mohinderjit, claiming costs in relation to the Dismissal Order. She was confused by this and did not know whether she needed to appeal the Dismissal Order herself.
- [28] At that point the Appeal Order had not yet been entered.
- [29] The Appeal Order was only entered on July 6, 2020.
- [30] Harjit retained counsel on February 19, 2020. In April, her counsel sought the other parties' agreement that the effect of the Appeal Order was to set aside the whole of the Dismissal Order. Counsel for the respondents Ranjit and Mohinderjit did not reply until May 28, 2020, when he wrote a letter communicating that he would not consent. Counsel for Harjit

determined that the best course of action was for Harjit to file the present application. On June 2, 2020, Harjit filed a notice of appeal from the Dismissal Order together with the present application for an extension of time to file and serve the notice of appeal.

- [31] The application is opposed by the respondents Ranjit and Mohinderjit. It is not opposed by Daljit or Jaswinder.
- [32] Ranjit's position, supported by Mohinderjit, is that the Appeal Order did not set aside the Dismissal Order as it relates to Harjit, nor did it order a new consolidated trial. Rather, the Appeal Order pertains only to Daljit's claim to an interest in the Property. Ranjit notes that Harjit never filed a response to the dismissal application in the court below, and that she did not file a new notice of trial following the appeal. He submits that Harjit's application for an extension of time should be dismissed because this Court should not permit her to rectify her delay at this late stage. He points to the long delay in resolving these issues since the parties' separation in 2011.

Law

- [33] Section 14(1)(a) of the Court of Appeal Act requires an appeal to be brought within 30 days from when the order is pronounced. However, s. 10(1) permits a justice to extend the time within which an appeal may be brought. Section 10(4) specifies that the power to extend time may be exercised even though the application for the extension is made after the expiry of the time in respect of which the application to extend is made.
- [34] The factors to consider on an application to extend time are set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.):
- a) Was there a bona fide intention to appeal?
 - b) When were the respondents informed of the intention?
 - c) Would the respondents be unduly prejudiced by an extension of time?
 - d) Is there merit to the appeal?
 - e) Is it in the interests of justice that an extension be granted?
- [35] The first four factors are factors to weigh in the overriding consideration, the interests of justice: *Davies* at 260-261.

Analysis

Was there a bona fide intention to appeal?

- [36] Generally, applicants must demonstrate an intention to bring an appeal in a timely manner: *Terrapin Mortgage Investment Corp. v. Ruby Lake Country Developments Ltd.*, 2011 BCCA 4 at para. 22 (Chambers). However, failure to form an intention to appeal within the required timeline is not necessarily fatal but must be considered along with the other factors in assessing the interests of justice: *Chaube v. Campbell*, 2004 BCCA 85 at para. 9 (Chambers).
- [37] It is clear that Harjit did not form a bona fide intention to appeal within the timeline to do so or within a reasonable time thereafter. She only began to consider the question of whether she needed to bring an appeal when she received a bill of costs on November 14, 2019, well over a year after the Dismissal Order was pronounced and more than six months after Daljit's appeal was allowed.
- [38] Harjit's reason for not forming an immediate intention to appeal, she says, is that she was unaware it was necessary for her to bring her own appeal. In essence, she assumed she was protected under the umbrella of Daljit's appeal. She deposes that if she had understood she needed to bring her own appeal, she would have immediately intended to do so.
- [39] For the reasons I have already given, in the context of the history of this unusual consolidated action, this explanation is not as difficult to accept as might ordinarily be the case and cannot be said to be simply a tactical choice or a matter of willful blindness. Harjit's assumption that Daljit's appeal meant that she did not need to appeal is believable in the context of the procedural complexity caused by the consolidation order, the single Dismissal Order, and her lack of sophistication. In the circumstances, I also give considerable weight to the fact that the parties to Daljit's appeal, represented by counsel, drafted and caused to be entered the Appeal Order in a form that is consistent with Harjit's understanding.
- [40] The respondents submit that even accepting that Harjit may genuinely not have appreciated that she needed to appeal the Dismissal Order initially, she must have known this by November 14, 2019, and, presumably, at the latest when she retained counsel on February 19, 2020, and she has provided no explanation for the delay in filing her notice of appeal until June 2, 2020.
- [41] Although I agree it would have been preferable had Harjit moved more quickly to retain counsel once she received notice of the costs claim against her in November 2019, I take into account the fact that the form of order from this Court's appeal was not yet entered during this period. Her counsel also attempted to obtain agreement first before taking additional steps. I also take into account that filing deadlines in this Court were suspended due to the COVID-19 pandemic as of March 18, 2020.

When were the respondents informed of the intention?

- [42] It appears that the respondents were first informed of Harjit's intention to appeal on April 27, 2020, close to two years after the Dismissal Order and almost a year after the Appeal Order.

Would the respondents be unduly prejudiced by an extension of time?

- [43] Once it has been established that there has been inordinate or inexcusable delay, a rebuttable presumption of prejudice arises: *Busse v. Chertkow*, 1999 BCCA 313 at para. 18.
- [44] The length of the delay in giving notice of the intention to appeal, and in taking steps to appeal, is so extreme in this case that I have little difficulty in concluding it is prejudicial to the respondents. Parties to litigation are entitled to some degree of finality and certainty. It is hard to imagine there will not be some level of prejudice when a party is forced to defend an appeal long after judgment is pronounced.
- [45] Nevertheless, while there is prejudice to the respondents, it is not as great as it might have been had Daljit's appeal not been brought and been successful. Because of Daljit's successful appeal there is going to be a new trial regarding the brothers' and mother's respective interests in the Property in any event. However, that new trial apparently is set to proceed in mid-October 2020 and so there could be additional prejudice of delaying that proceeding if Harjit's appeal does not proceed quickly.
- [46] In my view, the proposed appeal is not complicated and should be capable of being prosecuted expeditiously. In Daljit's appeal, the transcript of the proceeding below was already prepared, as well as an appeal record and appeal books, and so it should be easy to prepare these materials quickly for this appeal.
- [47] I am of the view that the factor of prejudice to the respondents, in the circumstances, does not weigh heavily against granting the application.

Is there merit to the appeal?

- [48] The merits threshold is low, and asks only whether the appeal is "doomed to fail": *Stewart v. Postnikoff*, 2014 BCCA 292 at para. 6 (Chambers).
- [49] At first blush, it appears that Harjit has a very strong argument on appeal given that Daljit's appeal was allowed based primarily on the judge providing insufficient reasons, and the two sisters had very similar circumstances. It may be that the respondents will be able to distinguish Harjit's position, given that she did not file a response to the dismissal application or evidence in the court below, but that remains to be determined.
- [50] In the balance, this factor weighs in favour of granting an extension.

Is it in the interests of justice that an extension be granted?

- [51] The interests of justice is the overriding consideration. Both the length and reasons for delay are relevant to the interests of justice.

- [52] In rare cases, this Court has granted an extension of time following extraordinary delay. For example, in *J.P. v. B.G.*, 2016 BCCA 91 (Chambers), aff'd 2016 BCCA 181, an extension was granted after a delay of more than three years where the interests of justice "overwhelmingly" favoured an extension in light of new evidence that an expert witness relied on at trial may have committed a fraud on the court: at para. 29. Also relevant in that case was the fact that the issues were still live in a parallel proceeding.
- [53] In my view, the present case is a rare case given the complicated procedural history and confusion arising from the consolidation of the two family actions in the court below. There has never been a full consideration and determination on the merits of the two sisters' claims to an interest in the Property, which challenges the brothers' and mother's interests shown on title to the Property, a challenge which remains a live issue in the trial court.
- [54] I have concluded that it is in the interests of justice to grant an extension of time for Harjit to file and serve her notice of appeal from the Dismissal Order. I therefore grant the application.
- [55] It is important that Harjit's appeal proceed expeditiously and efficiently with the goal of doing all that can be done to have the appeal completed in advance of the new trial date in October. I will have a discussion with counsel and provide directions in this regard.
- [Discussion with counsel re: appeal dates and filing dates]
- [56] I make a direction that the appeal be expedited with liberty to reappear before the Registrar or a single justice in chambers to seek directions or orders abridging the time.

"The Honourable Madam Justice Griffin"

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