

CANADA / JUDGMENT

Lal v. Appia Developments (2001) Limited

2020 BCSC 841

COURT

Supreme Court of British Columbia

DECIDED

25 February 2020

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2020 BCSC 841 Lal v. Appia Developments (2001) Limited

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lal v. Appia Developments (2001) Limited,

2020 BCSC 841

Date: 20200225

Docket: S163953

Registry: Vancouver

Between:

Hari Shiv Shankar Lal and Purnima Lal

Plaintiffs

And

Appia Developments (2001) Limited

Defendant

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

Sikander H. P. Visram

Counsel for the Defendant:

Jordanna Cytrynbaum

Place and Date of Hearing:

Vancouver, B.C.

February 24-25, 2020

Place and Date of Ruling:

Vancouver, B.C.

February 25, 2020

[1] THE COURT: These are my oral reasons for judgment with respect to the two applications before me:

- a) sentencing for the plaintiffs' contempt of court; and
- b) an application to strike the plaintiffs' claims for non-compliance with court orders and the Rules of Court.

I. sentencing for contempt of court

[2] I will start with the contempt sentencing application. On July 9, 2019, Justice Watchuk found the plaintiffs in contempt of court for willfully failing to provide an affidavit of documents as had been ordered by Master Taylor on October 29, 2018. My only task today is to consider and deliver the appropriate sentence for that contempt.

[3] By the Master Taylor order, the plaintiffs were to have produced an affidavit of documents by November 19, 2018. The affidavit was not delivered by the court-ordered deadline. On the eve of the application for contempt before Justice Watchuk, the plaintiffs delivered a third supplemental list of documents, on July 8, 2019. In the course of the application before Justice Watchuk, counsel for the plaintiffs advised the Court that he had sent a draft affidavit to his clients for the purpose of complying with the Master Taylor order and for the purpose of purging their contempt.

[4] Partly based on those reassurances, Justice Watchuk provided the plaintiffs a week as a window of opportunity to purge their contempt by providing an affidavit in compliance with the Master Taylor order. The Court set strict deadlines for the plaintiffs to purge their contempt. The plaintiffs were to swear their affidavit by 4:00 PM and deliver it by 5:00 PM on July 16, 2019. At paragraph 15 of her reasons (*Lal v. Appia Developments (2001) Limited* (9 July 2019), Vancouver S163953), Justice Watchuk stated:

The opportunity to purge is limited at seven days.

[5] She later says in that paragraph:

That is the timeframe. That is the window in which the contempt can be purged, the seven days sought by Mr. Visram, and that seven days is granted.

- [6] In actual fact, the plaintiffs were an hour late on each count. They attribute this lateness to forces that they say were beyond their control. They say that they attended before a notary near their residence in Anaheim, California. When they arrived at the notary's office, they discovered that the notary was unavailable. As such, the affidavit was not sworn until some time after 5:00 PM. It not delivered until 6:19 PM to counsel for the defendant.
- [7] Counsel for the plaintiffs argues that the plaintiffs' transgression goes no further than a mere one hour of lateness and that they should not be severely punished for this happenstance.
- [8] Of course, the Lal affidavit of documents is not one hour late; it is eight months late. It ought to have been delivered on November 19, 2018, as per the order of Master Taylor.
- [9] Further, when one is granted strict deadlines and a strict window in which to purge contempt, it is, to be most charitable, unwise of the contemnors to leave it to the last minute to go to the office of the notary. A contemnor in that situation should proceed at the earliest possible opportunity to ensure that all documents have been produced and ensure that the contempt is not compounded by providing an affidavit purporting to purge contempt late, under the second Court order.
- [10] Apart from the lateness, the contents of the Lals' affidavit are insufficient to purge their contempt. The affidavit consists of four brief paragraphs on one page. It contains the perfunctory statement that:

Our counsel has listed all documents that we have in this matter to date in lists of documents that have been provided to counsel for the defendants.

- [11] As will be clear from the reasons I am about to pronounce on the other application, this statement was untrue. Further, the Lals' joint affidavit contains none of the usual contents in an affidavit or other statement to the court seeking to purge contempt. There is no apology. There is no detailed excuse for non-compliance. There are no particulars of the steps and attempts to comply with the Master Taylor order. There are no reassurances or undertakings that the delinquent party will scrupulously follow and comply with all orders and rules of this Court going forward.
- [12] At a judicial management conference on December 10, 2019, I directed the parties to set down dates for the hearing of the sentencing for contempt. Defendant's counsel sought dates from plaintiffs' counsel soon after. These dates have been set down for several months. But just last Friday, on the eve before this hearing date, counsel for the plaintiffs delivered additional materials for the purpose of this hearing. These materials included a second affidavit from Mr Lal. There is only an affidavit from Mr Lal. There is no affidavit from Ms Lal, although the affidavit from Mr Lal purports to be authorized by Ms Lal as well. At the minimum, I would expect a sworn statement from Ms Lal insofar as she is hoping to purge

her own contempt.

- [13] In any case, the second affidavit is also brief. It does contain, however, a brief apology. But the apology only speaks to the lateness of the July affidavit. It does not apologize or speak to the failure of the plaintiffs to provide the affidavit of documents ordered by Master Taylor, which ought to have been provided by November 2018. The new Lal affidavit contains none of the other reassurances or typical contents of an affidavit purging contempt, as just recited. Once again, it is woefully late in the face of clear court deadlines.
- [14] Both Lal affidavits are too little, too late, to meaningfully purge contempt. Indeed, the arrival of Mr Lal's second affidavit immediately before this application, seven months after Justice Watchuk's deadline, and 15 months after the Master Taylor deadline, if anything, simply provides more evidence of these litigants' contempt of court.
- [15] A further and important consideration in assessing the seriousness of the Lals' contempt is the fact that Mr Lal is a lawyer. He has no excuse for not fully complying with an order of the court promptly and completely.
- [16] Counsel for the defendant has suggested a fine of \$2,500. She has responsibly not suggested incarceration or other more severe punishments for contempt of court.
- [17] Counsel for the plaintiffs makes a preliminary objection that really goes to the substance of the process to issue a punishment for contempt today. He argues that the defendant was obliged to personally deliver all of the materials that were before Justice Watchuk to each of the two plaintiffs. In fact, only one of these affidavits has been personally delivered or personally served on the plaintiffs. I understand that service occurred at the examinations for discovery that happened last year.
- [18] I am satisfied that the direction of Justice Watchuk did not speak retroactively to all affidavits before her in the July hearing, but only to spoke to additional affidavits, as that term is used twice in paragraph 33 of the transcript of Her Ladyship's July reasons.
- [19] I have also been referred to and agreed with the statements in the case of LLS America LLC (Trustee of) v. Dill, 2018 BCSC 2316, at paras. 50-56: strict compliance with the rules concerning contempt of court is not fatal to a contempt application. In any case, there is no doubt that the Lals' counsel has had these materials at all times, and there is no suggestion that the Lals were not aware of these materials or of the fact that they faced a contempt application.
- [20] The second argument speaks to the proposed quantum of fine. Counsel for the plaintiffs says that the \$2,500 suggested is excessive. He suggests that a fine of \$100 would be appropriate. He argues that Mr and Ms Lal are retired and living on a pension and face various health issues. He says that they can no longer afford their home in California and will have to move back to Canada. These facts are alluded to in Mr Lal's affidavit. Mr Lal provides no documents to support any of these assertions.

- [21] In response, the defendant says that Mr Lal has, at least until recently and possibly presently, held the profession of a lawyer. It is claimed that he recently sold a property worth over \$1 million. The Court is also mindful that the Lals are presently seeking an order of specific performance with respect to a property worth half a million dollars.
- [22] Based on a review of the case law, the facts of the case, and the history of these proceedings, \$2,500 is, if anything, a modest amount. It is proportionate -- perhaps excessively generous -- to the plaintiffs' behaviour. It achieves the objectives of a contempt order: it denounces unlawful conduct, and provides general and specific deterrence. It may be said to promote reformation and rehabilitation, and it provides some reparation to the public and to the Court for the harm done.
- [23] An order for special costs is also appropriate. Of course, the fine imposed does nothing to compensate the defendant for the lost time and money occasioned solely by the plaintiffs' own failures to comply with Court orders and the Rules. The defendant will never be made whole for these costs, but the best approximation will be an order for special costs. Accordingly, I exercise my discretion, on a review of the authorities and the facts of this case, to order that the plaintiffs pay special costs to the defendant.
- [24] I grant each of the orders set out in Part 1 of the contempt notice of application. With respect to item 4, I direct the parties to appear before the Registrar as soon as is reasonably possible for an assessment of those special costs, which will be payable forthwith and in any event of the cause.
- [25] Any questions or submissions with respect to the contempt application?

[DISCUSSION]

- [26] THE COURT: Do you have a suggestion with respect to when the \$2,500 be paid?
- [27] MR VISRAM: Perhaps I could seek instructions.
- [28] THE COURT: No: I need a submission now.
- [29] MR VISRAM: 30 days.
- [30] THE COURT: Ms Cytrynbaum, do you have a submission with respect to that?
- [31] MS CYTRYNBAUM: I am in Your Lordship's hands, but provided that a specific time is set and that it not be later than the time of the assessment, I do not take issue with what Mr Visram has proposed.
- [32] THE COURT: It must be paid to the Province of British Columbia within 20 (twenty) days of today's date.

II. application to strike

- [33] I will now turn to the second notice of application before me.

- [34] The defendant applies to strike the plaintiffs' notice of civil claim and have the action dismissed on the basis that the plaintiffs have repeatedly failed to comply with previous orders of this Court and the Rules of this Court. Alternatively, the plaintiffs seek extensive discovery orders with respect to lists of documents, affidavits of documents, and attendance at further oral examinations for discovery.
- [35] This action arises from a dispute over a contract of purchase and sale dated July 17, 2012 for a condominium in Burnaby. The defendant says that the plaintiffs did not complete the sale by the completion date set out in the contract. The plaintiffs plead and argue that the defendant granted extensions of the completion date, and that at all times, they were ready, willing, and able to complete the purchase. The plaintiffs plead and seek specific performance of the contract.
- [36] The plaintiffs started this action on May 3, 2016. It has not significantly progressed in the past four years. I will not set out in detail the various orders issued in this proceeding or its lengthy procedural history. Suffice to say, I echo the observations of Master Harper in an earlier application in this matter that this litigation has been characterized by non-compliance or partial compliance with the orders and Rules of this Court by the plaintiffs. Counsel for the plaintiffs has been repeatedly dilatory in responding to correspondence from the defendant and providing dates for hearings and discoveries. The voluminous materials before the Court confirm this sad state of affairs.
- [37] I will turn first to the primary application brought by the defendant, to strike the claim of the plaintiffs. The defendant relies upon Rules 22-7(5)(c) and (f):

Consequences of certain non-compliance

- (5) Without limiting any other power of the court under these Supreme Court Civil Rules, if a person, contrary to these Supreme Court Civil Rules and without lawful excuse...
 - (c) refuses or neglects to produce or permit to be inspected any document or other property...
 - (f) if the person is the plaintiff or petitioner, a present officer of a corporate plaintiff or petitioner or a partner in or manager of a partnership plaintiff or petitioner, the court may dismiss the proceeding.
- [38] The defendant also relies upon Rule 22-7(6):

Failure to comply with direction of Court

- (6) If a person, without lawful excuse, refuses or neglects to comply with a direction of the Court, the Court may make an order under subrule (5) (f) or (g).
- [39] The defendant cites the usual case law for the proposition that striking a claim is a draconian remedy and that generally parties are entitled in most cases to a second chance. The defendant also cites authority such as *Rise & Shine Grocery & Gas Ltd. v. Novak*, 2016 BCCA 483, for the proposition that the Court may exercise its discretion to order dismissal

on the first application to strike and that such a perfunctory order may be appropriate where the breaching party has already had multiple opportunities to comply and has provided no excuse for its failure to do so.

- [40] While I recognize that there have been many examples of delay and breaches of the wording and spirit of orders in this litigation, I am not satisfied that the Court should issue the draconian remedy of striking the claim today without providing the plaintiffs an opportunity to bring themselves up to full compliance with existing Court orders and to fully acquit their discovery obligations.
- [41] I expressly caution that this further opportunity will almost certainly be a final opportunity. If there is any sense that the plaintiffs have not completely and comprehensively complied with the order of this Court and the rules of this Court, I invite the defendant to renew its application to strike the claim of the plaintiffs. To be clear, I am issuing, on the record, a formal warning to the plaintiffs envisioned in the case law under Rule 22-7(5) and (6).
- [42] I now turn to the alternative discovery remedies sought by the defendant. The materials before the Court today contain many communications from counsel for the defendant requesting categories of documents from the plaintiffs. I am advised that those past discovery requests have largely been encapsulated within the examination for discovery requests. Counsel for the defendant has usefully provided a table summarizing those requests and the current state of those requests: those that have been fulfilled completely, those that have been fulfilled partly, and those that remain unfulfilled.
- [43] I am satisfied that all of the requests and documents marked as outstanding on the table do arise from the pleadings and are producible as documents or answerable as discovery questions. Specifically, they all relate to matters that are either in the pleadings or that have been raised by the plaintiffs themselves as a reason that documents or information relevant to the pleadings cannot otherwise be produced or answered.
- [44] As to the first category, they relate to the alleged extension of the completion date referred to in paragraphs 5 and 6 of the notice of civil claim and paragraphs 7-10 of the amended response, as well as to the plaintiffs' assertion that they were at all times ready, willing, and able to complete the contract either with their own funds or through financing. I refer to paragraph 8 of the claim.
- [45] As to the second category, those document requests arise from positions the plaintiffs themselves have taken as to why they cannot produce documents of core relevance based on the pleadings. These issues include a crashed computer, auto-deletion of emails, documents that apparently were destroyed by water and other means, or were destroyed at the direction of the plaintiffs in the course of this litigation. There are other excuses that would themselves create a document trail, and which form the subject matter of document and discovery requests. Those issues and excuses also arise from the Lals' assertions that various communications, particularly email communications to and from the defendant, were not received by them, as well as allegations concerning the purported extension and other

modifications of the contract.

- [46] It is clear on the evidence that the plaintiffs have not provided all documents. Two examples will suffice.
- [47] The first example is the absence of emails. The evidence establishes that both plaintiffs are active email users, with multiple email accounts. That said, fewer than 20 emails have been produced by the plaintiffs. Emails produced by the defendant indicate that they were sent to one or both of the Lals, but the receipt version of those emails have not been listed or produced by the Lals. Examples of sender emails where the sender version but not the recipient version has been produced include emails from the defendant, as well as emails from Mr Bhaloo, the Lals' realtor, whose file the defendant acquired pursuant to an order issued by Justice Smith in May 2019.
- [48] The second example is financing documents. The Lals have provided different versions to the Court as to the Lals' financial circumstances leading up to the different alleged completion dates, during which time the Lals claim that they were willing, ready, and able to complete the purchase. Counsel for the Lals said in Court that at first, Mr Lal was going to rely upon lenders to complete the purchase -- either one or both of two institutional lenders -- or alternatively that the purchase would be financed by loans from friends of the Lals. Later, the stated plan was to rely upon funds obtained from the sale of a Lal property.
- [49] On discovery, Mr Lal told a different story. He claimed that at all times between 2014 and 2017, he had cash on hand to complete the purchase derived from the sale of his childhood house. Whichever version or combination of versions is the truth, those cash sources would almost certainly have created a paper trail larger than that produced by the Lals. The relevant documents are either in the hands of the Lals themselves, or in the hands of institutions and persons over whom they have power to direct the production of documents and communications. Counsel for the Lals responsibly but belatedly admits that VanCity bank documents can be produced in reference to the sale of the childhood house, and has indicated that those documents will be produced.
- [50] It is also clear that the plaintiffs' efforts to locate those documents have been incomplete and insufficient. It is also clear that the required affidavits of documents have not provided the defendant or the Court with proper reassurances of the Lals' efforts to locate and preserve and produce documents. Given this incompleteness and the tortured history of this proceeding, it is important that the order today require the plaintiffs to provide a complete and comprehensive affidavit of documents setting out details of all of their searches to locate, preserve, and produce those documents, both with respect to their own premises and files as well as with respect to those of their financial institutions, their lawyers, their realtors, and other persons whom they can compel and request to produce those documents. The perfunctory assertions of the plaintiffs that they have produced all documents of relevance is wholly insufficient.

- [51] In this, I remind counsel for the plaintiffs of the words of *Myers v. Elman*, [1939] 4 All ER 484 at 511 with respect to the duty of counsel in ensuring a thorough search for and production of documents. A client cannot be expected to realize the whole scope of that obligation without the aid and direction of his solicitor, who therefore has a particular duty in these matters, as an officer of the Court, to carefully investigate the position as far as possible, in order to ensure that the order and duty is complied with. A client left to himself could not know what is relevant. Nor is he likely to realize that it is his obligation to disclose every relevant document, including documents which would establish against him his opponent's case or harm his own case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit. Nor can the solicitor escape the heavy responsibility of careful investigation and supervision of the discovery process.
- [52] I am also satisfied that the defendant is entitled to continue their examinations for discovery of the plaintiffs once they have received full documents and affidavits of documents, and once they have received complete responses to the outstanding discovery requests. I will not purport to list exhaustively the plaintiffs' evasive and dilatory actions with respect to examinations for discovery in these reasons. Oral examinations for discovery were set to proceed on February 5 and 6, 2019. At the last minute, on February 1st, counsel for the plaintiffs advised that Mr Lal would not attend. The reason? He had apparently suffered a stroke in late December 2018. There is no explanation as to the delay in informing counsel for the defendant between late December 2018 and February 1, 2019 that the discovery might not proceed as scheduled.
- [53] In any case, Ms Lal was not produced during the scheduled examinations in February 2019, although she could have been. Given this history, the defendant was forced to seek and obtain an order directing the plaintiffs to attend examinations for discovery by June 14, 2019. That order was granted by Justice N. Smith on March 12, 2019.
- [54] Counsel for the defendant took the Court to extensive passages from the Lals' examinations for discovery, which were held in early June 2019. The Lals' responses indicated clearly that they had done little preparation to inform themselves of the facts in dispute so as to be responsibly responsive to questions at the examinations for discovery. Many of their answers were evasive, and sought to avoid providing answers to the questions.
- [55] For example, Mr Lal quibbled with counsel for the defendant about the meanings of "printing a document" and "checking your email." Many of the responses were combative and provided rhetorical questions rather than answers. The Lals outright refused to answer certain questions. In many cases, those refusals came directly, out of their mouths, rather than that of their own counsel, based upon a principled objection.
- [56] Some examination for discovery responses have already been provided. Those were attached to an affidavit, again provided at the last minute, on the Friday before this examination for discovery. Those responses appear to have been drafted by the plaintiffs themselves, without direction or input from their counsel.

- [57] Again, by extension, *Myers v. Elman* expects counsel to direct the process of obtaining and providing comprehensive and properly-researched responses to examination for discovery requests. It is insufficient to simply attach a response penned by the client. Counsel has a duty to ensure that answers to examination for discovery requests respond and inform rather than obfuscate and mislead.
- [58] In the circumstances, I am going to grant the alternative relief sought by the defendant in the notice of application dated June 18, 2019. I am going to make some changes, however. With respect to Part 1, Order 2, instead of the stated dates or deadline sought, I am going to change each of sub-paragraphs (a), (b) and (c) to "within 25 days of the date of this Order."
- [59] With respect to sub-items (c)(i) through (v), I will leave the order in the terms set out in the notice of application. I wish to make it very clear on the record that the Court expects, in light of the number of outstanding discovery and document requests and demands, the affidavit of documents to be thick and comprehensive, attaching documentation and providing full particulars of all of the search attempts undertaken directly and indirectly by the plaintiffs to provide those documents and answers in complete form. The Court expects no stone to be left unturned. The Court expects the affidavit to set out, comprehensively, the process of lifting and turning every stone, to make sure that every effort has been made to produce those documents and provide those answers.
- [60] With respect to sub-paragraph (e), it will not be sufficient for the Lals to say that they lack technical skills to comply with that term of the order. If the Lals require forensic or expert IT assistance to comply with this order, they are to obtain that assistance. If there is any difficulty in providing the full native or original computer files, either because they have been deleted or modified, it would be appropriate for that IT technician to provide an affidavit setting out particulars of whatever impediments that may exist to full adherence with the requirements of subparagraph (e) in the order. These comments also apply to subparagraph (f).
- [61] Sub-paragraphs (g) and (h) concern the dates provided for the continuation of the examinations for discovery. Given that the contempt order that I have just issued prevents the plaintiffs from taking any further steps in the action, and given that the defendant will want to receive copies of documents before scheduling those discoveries, I will invite submissions with respect to that from Ms Cytrynbaum first and then from Mr Visram.

[SUBMISSIONS RE DATES]

- [62] THE COURT: So the dates in sub-paragraphs (g) and (h) will be changed from July 31, 2019, to August 14, 2020. I also grant sub-paragraph (i). The examination for discovery attendance will be at the Lals' own cost.

[SUBMISSIONS RE DOCUMENTS]

[63] THE COURT: I do wish to make this very clear. Mr Visram: it is up to your friend whether or not she renews her application to strike, but I want to make it absolutely clear. Sometimes courts issue a "final warning" and it winds up being five "final" warnings. As the case management judge, I do not anticipate that to be the case. I anticipate that you and your clients will have one opportunity to come to Court to show full compliance. If there are excuses for non-production, it must be particularized, with backup documentation, in sworn form, and that may or may not be sufficient to convince the Court that they be let off the obligation. But all I will say right now is that it would be unwise not to fully comply with the outstanding orders and requests.

[SUBMISSIONS]

[64] THE COURT: Let us make it an express term of the order. Counsel are free to agree to modify the deadlines if both counsel agree. But if there are in fact impediments that make compliance with the Court order impossible within the 25 days, that should be set out in the affidavit of documents that will be delivered within the 25 days. And the affidavit of documents would also provide whatever correspondence, for example, has been received from the third parties as to why the actual documents cannot be provided within 25 days, as well as particulars of when those documents and answers are expected to be provided.

[65] Let us make it very clear on the record that this is going to require very swift effort by the Lals and by their counsel to obtain these documents and provide these answers. They had better hit the ground running and start these processes tomorrow, because 25 days will elapse quickly, and there is an unhappy history throughout this litigation of the plaintiffs delivering matters at the very last minute, or leaving obligations to the last minute, and then shrugging their shoulders, and, indeed apparently welcoming the fact that some circumstance beyond their control prevents their compliance with a court order.

[SUBMISSIONS RE COSTS]

[66] THE COURT: I will grant item 3 of the notice of application, namely that the plaintiffs pay the defendant one-day lump-sum costs, payable forthwith, and in any event of the cause. We should make "forthwith" the same deadline as paying the contempt cheque to the Ministry, for greater certainty. So, 20 days from today's date the Lals shall be cutting two cheques: one to counsel for the defendant, for the lump-sum costs, and one to the Ministry, for the contempt fine.

"Crerar J"

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