

CANADA / JUDGMENT

Li v. Chao Yin Canada Group Inc.

2023 BCCA 39

COURT

British Columbia Court of Appeal

DECIDED

25 January 2023

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2023 BCCA 39 Li v. Chao Yin Canada Group Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Li v. Chao Yin Canada Group Inc.,

2023 BCCA 39

Date: 20230125

Docket: CA48420

Between:

Xiao Bo Li also known as Polly Li

Appellant

(Defendant)

And

Chao Yin Canada Group Inc.

Respondent

(Plaintiff)

Before:

The Honourable Mr. Justice Butler

(In Chambers)

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

July 23, 2021 (Chao Yin Canada Group Inc. v. Xenova Property Development Ltd.,

2021 BCSC 1445, Vancouver Docket S185569).

No one appearing on behalf of the Appellant

Counsel for the Respondent:

P.A. Kressock

Place and Date of Hearing:

Vancouver, British Columbia

January 16, 2023

Place and Date of Judgment with Written Reasons to Follow:

Vancouver, British Columbia

January 16, 2023

Place and Date of Written Reasons:

Vancouver, British Columbia

January 25, 2023

Summary:

The respondent applies to dismiss as abandoned the appellant's appeal of a trial judgment in which she was found liable in fraud to the respondent. The appellant notified respondent's counsel of her intent to appeal shortly after the trial decision was rendered, but a full year passed before she filed a notice of appeal and an application for an extension of time. Instead of pursuing the appeal, the appellant made an assignment in bankruptcy. She never made the application for an extension of time. Held: The application is granted and the appeal is dismissed as abandoned.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] The respondent, Chao Yin Canada Group Inc. ("Chao Yin"), applies for an order dismissing this appeal for failure to comply with the Court of Appeal Act, S.B.C. 2021, c. 6 and the Court of Appeal Rules. I heard the application on January 16, 2022. The appellant did not attend. At the conclusion of the hearing, I granted the application with reasons to follow. These are my reasons for granting the application and dismissing the appeal.

Background Context

Judgment Under Appeal

[2] The appellant seeks to appeal an order of Justice Verhoeven, pronounced July 23, 2021. Justice Verhoeven awarded judgment in fraud against Xenova Property Development Ltd. ("Xenova") and Ms. Li, jointly and severally, in the amount of \$154,597, together with interest

pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79. Chao Yin's claim was for the return of funds paid to Xenova (a company controlled by Ms. Li) and Ms. Li in connection with a project to develop and construct a private school in Richmond, British Columbia. The nine-day trial of the action was heard together with Supreme Court of British Columbia, New Westminster Registry, Action No. 209442, an action commenced by Xenova for payment of \$24,510 for project management services allegedly owing by the respondent. Justice Verhoeven dismissed that action and awarded costs of both actions to Chao Yin: reasons indexed as Chao Yin Canada Group Inc. v. Xenova Property Development Ltd., 2021 BCSC 1445.

- [3] The trial judge found that Ms. Li was not a credible witness: at paras. 54-56. He found that she was "highly unresponsive, argumentative, and combative", that her evidence was "frequently internally inconsistent" and "inconsistent externally, measured against other reliable evidence". He found that her evidence was "remarkably vague and inconsistent on key matters" and "inherently improbable": at para. 55.
- [4] The judge rejected Ms. Li's claim that Chao Yin contracted with Xenova for project management services. He found that Ms. Li volunteered to help Mr. Zhang (the principal of Chao Yin) as a "close and trustworthy friend" with tasks mostly "in the nature of a local personal assistant": at paras. 91-92, 126-129.
- [5] The judge rejected Ms. Li's contention that Chao Yin selectively produced only some of the messages between Ms. Li and Mr. Zhang: at paras. 97-99. He noted that the messages between Ms. Li and Mr. Zhang were equally available to both sides, and that the materials adduced by Ms. Li and Xenova were of little assistance in advancing their position: at para. 99.
- [6] The judge found that Chao Yin had established all of the elements of the tort of civil fraud, in proving that Ms. Li demanded payment of \$150,000 from Chao Yin based on the false representation that the money was urgently required for government fees connected with the project: at paras. 102-104. The judge rejected Ms. Li and Xenova's claim that the \$154,597 was payment for services rendered on the basis of the equitable remedy of quantum meruit. The judge concluded that his finding that Ms. Li and Xenova were guilty of fraud precluded a remedy of quantum meruit in their favour: at para. 117.
- [7] The judge conducted a voir dire on the admissibility of the report of Richard (Rick) Tough as opinion evidence going to the question of the value of Xenova's services. Based on the test in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, he ruled the report inadmissible, but also found that it was unnecessary given his conclusion on fraud: at paras. 131, 137.

Post Judgment Proceedings

[8] It has been more than a year and a half since the trial judgment was rendered. Ms. Li has not perfected the appeal. She did not file the notice of appeal until July 25, 2022. On the same date, the appellant filed an application seeking an extension of time to file her notice of appeal as well as a stay of proceedings. To date, neither of those applications have been heard. However, the parties have taken other steps that are relevant to the order sought. It is worthwhile to set out the full chronology of what has transpired since the trial judgment:

- July 23, 2021 - Trial judgment pronounced.
- July 26, 2021 - Ms. Li advised counsel for the respondent that she was going to appeal the decision and was seeking legal representation.
- July 2021 - Ms. Li retained counsel, Mr. Rene Aulinger. As per Ms. Li's unfiled affidavit, "Mr. Aulinger stated that the appeal application was beyond his capacity" and referred her to a bankruptcy trustee as "that is the best solution".
- August 6, 2021 - Ms. Li advised counsel for the respondent that she had retained counsel. The respondent's counsel asked her to "please have your new counsel contact me."
- August/September 2021 - Ms. Li's unfiled affidavit states what happened after she received Mr. Aulinger's advice: "I only have a few days before the 30 days appeal time expires. Then I was still trying to find any lawyer who can help me appeal. Around September 2021, I filed bankruptcy as per Mr. Aulinger's professional advice "
- September 10, 2021 - Ms. Li and Xenova made assignments in bankruptcy.
- September 22, 2021 - Justice Verhoeven ordered that the respondent recover costs from the appellant, assessed as special costs.
- October 14, 2021 - Trial orders entered.
- October 15, 2021 - Mr. Cody Reedman, a Vancouver lawyer, advised counsel for the respondent that he had been retained by Ms. Li and expected to receive instructions to seek an extension of time to file an appeal.
- December 1, 2021 - Mr. Reedman and counsel for the respondent attended a pre-hearing conference with respect to the special costs assessment.
- April 5, 2022 - Crowe MacKay & Company Ltd., Ms. Li's trustee in bankruptcy, opposed her discharge from bankruptcy on the basis that she had failed to account satisfactorily for any loss of or deficiency in assets, and for failure to perform the duties required under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. As a result, she remains an undischarged bankrupt.
- July 25, 2022 - The appellant filed a notice of appeal and materials in support of an application to extend time to file the notice of appeal (the "Extension Application"). These materials were not served on the respondent at that time.

- July 27, 2022 - Mr. Reedman advised counsel for the respondent that he was no longer counsel for Ms. Li. Mr. Reedman and counsel for the respondent had not been in contact between December 1, 2021 and that notification.
- September 13, 2022 - Counsel for Chao Yin filed an application in the bankruptcy proceedings for an order that the judgment survive the bankruptcy (the "Survival Application").
- October 27, 2022 - The trustee in bankruptcy commenced an action against Danny Ma and Clinton Li, respectively Ms. Li's partner and son, claiming that they hold certain property for Ms. Li based on express or resulting trusts and unjust enrichment, or alternatively that the property was fraudulent conveyed to them.
- November 15, 2022 - Counsel for Ms. Li, who had been retained for the Survival Application, advised counsel for Chao Yin that the appellant had filed a notice of appeal. This was the first time the respondent was notified that the appellant had filed a notice of appeal. Counsel for the respondent obtained copies of the notice of appeal and the material filed for the Extension Application.
- November 17, 2022 - Justice Millman granted the Survival Application order. He also ordered that the bankruptcy stay of proceedings be lifted to permit the respondent's special costs assessment to proceed.
- November 24, 2022 - Master Muir directed that the special costs assessment be heard on March 6, 2023. She ordered that counsel for the respondent disclose copies of invoices for legal fees and disbursements claimed in this matter, and proof of disbursements, no later than December 2, 2022. She directed Ms. Li to serve respondent's counsel with a list of any requested documents, no later than December 16, 2022, and ordered that if Ms. Li wishes to file an application for production of documents, she should do so no later than January 13, 2023.
- November 24, 2022 - Counsel for the respondent asked the appellant to set the Extension Application for hearing as soon as possible, because the Muir order required the respondent to produce documents for the costs assessment that would contain privileged information.
- To date, the appellant has taken no steps to set the Extension Application down for hearing. As of the date of this hearing, counsel for the respondent had disclosed copies of invoices and proof of disbursements to Ms. Li as ordered by Master Muir, and had not received requests for particulars or documents in response.

Grounds of Appeal

- [9] The appellant's notice of appeal states that she "seeks to appeal all orders and grounds". The application book filed in support of her Extension Application and application for a stay of the trial order provides some indication of her arguments on appeal. She claims that: 1) the trial judge erred in determining that she was not a credible witness; 2) the trial judge erred in refusing to admit the expert opinion evidence of Richard Tough; and 3) the trial judge erred in failing to provide assistance to Ms. Li as a self-represented litigant.

Law

- [10] Section 36(c) of the Court of Appeal Act provides that a justice can dismiss an appeal as abandoned for non-compliance with the Act, Court of Appeal Rules, or an order or direction of the Court, where the party in default is the appellant.
- [11] The test for an extension of time is the same, with appropriate modifications, as the test for a dismissal of an appeal as abandoned: *Vancouver City Savings Credit Union v. R.D. Backhoe Services Inc.*, 2011 BCCA 159 at para. 8 (Chambers); *XY, LLC v. IND Diagnostic Inc.*, 2016 BCCA 469 at para. 46 (Chambers). Where the delay in bringing or perfecting an appeal is short and due to the error of counsel, the Court will generally grant extensions of time. However, an appellant may not be able to rely on counsel's failure to take necessary steps where the delay is inordinate and inexcusable: *Clock Holdings Ltd. v. Braich*, 2009 BCCA 269 (Chambers), *aff'd* 2009 BCCA 437. If an appellant is aware that they have failed to bring or perfect an appeal within the time limited for doing so, they have an obligation to bring an application to remedy the defect in a timely way: *Clock Holdings Ltd.* at para. 35; *McKersie v. Macala*, 2022 BCCA 277 at para. 51 (Chambers).
- [12] Ms. Li's notice of appeal was due August 23, 2021, and she filed it on July 25, 2022. Her delay was therefore initially less than one year, but she has since failed to take further steps to prosecute the appeal, beyond filing the order under appeal. Counsel for the respondent contends that the delay has thus been more than a year.
- [13] Where the delay is less than one year, the test set out in *Davies v. Canadian Imperial Bank of Commerce* (1987), 15 B.C.L.R. (2d) 256 (C.A.) applies to an application to dismiss an appeal as abandoned, as well as an application for an extension of time: *Verlaan v. Von Deichmann*, 2006 BCCA 389 at para. 22 (Chambers); *Gaffney (Re)*, 2007 BCCA 182 (Chambers); *Tafti v. Davis*, 2021 BCCA 146 at para. 26. The Davies factors are as follows:
- [20] . . . First, was there a bona fide intention to appeal? Second, when were the respondents informed of the intention? Third, would the respondents be unduly prejudiced by an extension? Fourth, is there merit in the appeal? And fifth, is it in the interest of justice that an extension be granted?

. . .

- [22] The fifth question I think to be the most important as it encompasses the other four questions and states the decisive question. . .
- [14] In *Redpath v. Redpath*, 2008 BCCA 400 (Chambers), Justice Lowry held that where the delay has been longer than a year, the formulation developed in *Frew v. Roberts* (1990), 29 B.C.L.R. (3d) 34 (C.A.) is applicable, rather than the Davies factors. There is some uncertainty in the caselaw about whether this is the case: *British Columbia (Attorney General) v. Malik*, 2012 BCCA 58 (Chambers), reconsideration ref'd 2012 BCCA 175 at paras. 22-24. The Court in *Frew* considered only the length of the delay, the explanation for the delay, and the presence of prejudice: at para. 10.
- [15] In *Perren v. Lalari*, 2009 BCCA 564, Justice Prowse stated in obiter that the Davies factors are less strictly applied to applications for extensions of time than to applications to reinstate or reactivate appeals: at para. 36. This principle was followed in *van Melle v. Mohammed*, 2021 BCCA 217 at para. 36 (Chambers).

Positions of the Parties

Appellant

- [16] The appellant did not file submissions in response to this application, and failed to appear at the hearing of this application. However, the appellant's argument on her Extension Application, which was never set for hearing, is responsive to this application. Given her failure to appear, I will proceed on the assumption that her reasons for delay and arguments on prejudice have not changed.
- [17] In her Affidavit at Tab 3 of her Application Record (which appears to be unsworn), Ms. Li states that she immediately intended to appeal the judgment but was not able to afford a lawyer to do so: at para. 7. She states that she retained Mr. Aulinger in July 2021, who advised her, just before the 30-day deadline to file the appeal, that she should file an assignment in bankruptcy. She states that she filed for bankruptcy in September 2021, and her trustee advised that she should find a lawyer to continue her appeal. On September 30, 2021, she retained Cody Reedman to represent her, but says that he was out of the country and unable to work on the appeal from October 1, 2021 onwards, for three weeks. Mr. Reedman notified her on July 18, 2022 that he was withdrawing as her legal counsel. Ms. Li also points to significant delays in obtaining necessary court materials, including the trial record and transcripts: at para. 16. She also says that the proceedings regarding trial costs had occupied her attention: at para. 18. These points are reiterated in Ms. Li's Memorandum of Argument.

- [18] Ms. Li argues that granting the extension would not result in undue prejudice to the respondent, as the original proceedings have not been finalized. However, in the time since Ms. Li filed the Memorandum of Argument, the respondent has obtained an order permitting the judgment to survive the bankruptcy and lifting the stay to permit the special costs assessment. The special costs have yet to be assessed.

Respondent/Applicant

- [19] The respondent argues that Ms. Li did not have a bona fide intention to appeal. The respondent acknowledges that Ms. Li advised on July 26, 2021 that she intended to appeal, and that her then-counsel again advised of her intention to appeal on October 15, 2021. However, it notes that, with the benefit of legal advice, Ms. Li took steps in other matters after the appeal period expired, such as filing an assignment into bankruptcy on September 10, 2021, and having Mr. Reedman appear at the December 1, 2021 pre-hearing conference on her behalf. The respondent argues that Ms. Li's long periods of inactivity regarding the potential appeal lead to the inference that she no longer intended to pursue it.
- [20] The respondent argues that it would be prejudiced if the appeal were allowed to proceed. It points out that it has taken a number of steps to finalize the amount owing under the judgment and pursue recovery, in the belief that the judgment was not under appeal. Second, it argues that it has an ongoing special costs assessment and the trustee has an ongoing action to recover dissipated assets, which would be delayed if the appeal were allowed to proceed. In addition, it submits it has suffered prejudice because, to prepare for the special costs assessment, it was required to disclose privileged information. It also notes that Ms. Li is an undischarged bankrupt, and so would likely be unable to post security for appeal or trial costs, or to pay costs resulting from the appeal.

Application

Bona fide Intention to Appeal

- [21] As per Justice Bennett in *Terrapin Mortgage Investment Corp. v. Ruby Lake Country Developments Ltd.*, 2011 BCCA 4 (Chambers): "Generally, appellants who evince no intention to bring an appeal in a timely way are not entitled to an extension of time": at para. 22. In *Anderson v. Brouwer Canada Claims & Co. Ltd.*, 2005 BCCA 506, the Court rejected the appellant's argument that financial difficulties and medical problems had prevented him from pursuing an appeal, in part on the basis that the appellant had pursued other legal matters during the period of delay: at para. 9.
- [22] Ms. Li does appear to have intended to appeal at the time that the trial judgment was pronounced, based on her communication to the respondent on July 26, 2021. Her counsel's communication on October 15, 2021 provides some support for that position. However, all of the circumstances subsequent to July 2021, lead me to conclude that she did not have a continuing intention to appeal.

- [23] As set out in the chronology, the only procedural steps Ms. Li took between the pronouncement of the judgment and filing the notice of appeal a year later were in the bankruptcy proceeding. Of note, the only significant liability disclosed in her bankruptcy was the judgment in favour of the respondent. Ms. Li retained two lawyers in that time period. Mr. Aulinger apparently advised her that the "best solution" was to pursue bankruptcy. While Mr. Reedman advised counsel for the respondent on October 15, 2021 that he expected to receive instructions to appeal, he had no other contact with counsel about an appeal or an application for an extension of time after that date until his retainer was terminated. In that period of time, Mr. Reedman appeared at the pre-hearing conference regarding the special costs assessment, but never became counsel of record in the appeal and never took any steps to perfect the appeal.
- [24] In these circumstances, I would infer that even if Ms. Li had a bona fide intention to appeal in July 2021, she did not have a continuing intention to appeal after the 30-day period to file a notice of appeal expired. Her unfiled affidavit makes it clear that she was aware of the filing deadline and received advice from Mr. Aulinger before the deadline had passed. It would appear that she decided to pursue bankruptcy rather than the appeal after receiving Mr. Aulinger's advice.
- [25] The explanations Ms. Li gives for delay--that Mr. Reedman had trouble obtaining materials for the appeal and that he was out of town for a period of time--have no support in the documentary evidence. There is no suggestion that Mr. Reedman contacted counsel for the respondent to obtain information or material. Further, Ms. Li has provided no evidence from Mr. Reedman regarding steps he attempted to take to pursue an appeal or difficulties he had in doing so. In addition, the appellant has provided no explanation for her failure to serve the notice of appeal and materials for the Extension Application once they were filed. Indeed, Ms. Li has still not set the application to extend time down for hearing.
- [26] It is also relevant that Ms. Li filed the notice of appeal only after the appellant's trustee filed a notice of its intention to oppose Ms. Li's discharge from bankruptcy. In addition, the respondent only learned of the notice of appeal when advised of it in November 2022 by counsel retained by Ms. Li for the Survival Application. It would appear that Ms. Li's efforts with legal counsel were focused on the bankruptcy in preference to pursuing the appeal. As noted in *Johal v. Viridi*, 2011 BCCA 498 at para. 14 (Chambers), a "wait and see" approach to pursuing an appeal may demonstrate the absence of a settled and genuine intention to proceed.
- [27] In all of these circumstances, I would infer that Ms. Li relied on bankruptcy as a "solution" to her financial problems, rather than pursuing the appeal. Of course, her failure to obtain a discharge from bankruptcy and the November 17, 2022 order of Justice Millman in the Survival Application has negatively impacted that "solution". In spite of these developments, Ms. Li has still not taken steps to perfect her appeal. In this context, I would conclude that Ms. Li did not have a settled and genuine intention to pursue the appeal after early August 2021.

[28] In these circumstances, the fact that Ms. Li promptly informed the respondent of her intention to appeal on July 26, 2021, carries little weight. Counsel for the respondent asked Ms. Li to have her counsel contact him about the appeal, but she took no steps to pursue the appeal. Similarly, the fact that the appellant filed a notice of appeal in July 2022 carries little weight when she took no steps to set down the Extension Application.

Would the Respondent be Unduly Prejudiced by an Extension?

[29] As I have found that the appellant did not have a continuing bona fide intention to appeal, I need not consider whether the test developed in *Frew* is applicable in this case. However, it is my view that there is no need to draw a hard line between applications for an extension of time below and in excess of one year. Rather, the factors outlined in *Frew*--the length of delay, the explanation for the delay, and prejudice--should carry more weight in the analysis when the delay is longer. Of course, the appellant has the burden of explaining any delay and showing that the respondent would not be prejudiced by granting an extension.

[30] Here, it is my view that the delay is inordinate. The appellant did nothing to pursue her appeal for a full year after the judgment was pronounced. During that time, the appellant had the benefit of advice from two lawyers. When she filed the notice of appeal and application materials in support of an extension, she took no steps to set that application down for hearing. The appellant's explanation in her unfiled affidavit fails to provide an adequate explanation for the delay.

[31] The respondent has suffered prejudice as a result of the delay. It has taken numerous steps in the bankruptcy proceeding unaware that the appellant was still contemplating an appeal. Although it would have been required to take those steps in the event of an unsuccessful appeal by the respondent, it may have decided to focus its legal resources on the appeal in preference to the bankruptcy. Having the appeal proceed in tandem with the special costs assessment and the trustee's action to recover dissipated assets has the potential to waste resources and cause unnecessary delay. Further, the respondent was required to disclose privileged information to Ms. Li (its invoices for legal fees and disbursements, and proof of disbursements), and has done so. While Ms. Li had not, as of the date of this hearing, made requests to respondent counsel for documents or any application for production of documents, the special costs proceeding gives her an avenue to make such requests and applications. Both the respondent's disclosure of privileged documents to Ms. Li, and its potential future obligation to disclose further documents, could prejudice the respondent on appeal or should the appeal succeed and a new trial is ordered.

Is There Merit in the Appeal?

- [32] An extension of time to commence an appeal should not be granted if the appeal is without merit: *Franks v. British Columbia (B.C. Benefits Board)*, 1999 BCCA 165 at para. 10 (Chambers), *aff'd* 1999 BCCA 407, leave to appeal *ref'd*, [1999] S.C.C.A. No. 361. This merits threshold is low. An extension should only be denied on the basis of merit if the appeal is "doomed to fail" or "it can be said with confidence that the appeal has no merit": *Clock Holdings Ltd.* at para. 31; *Tafti* at para. 29.
- [33] Ms. Li goes into some detail as to the basis of her appeal in her Memorandum of Argument. She appears to take issue with the judge's finding at paras. 97-99 of the judgment that the materials produced by Chao Yin were an accurate representation of the communications between herself and Mr. Zhang. She argues that the respondent committed the criminal offence of forgery. She does not take issue with the judge's legal reasoning at paras. 102-104 of the judgment that the elements of the tort of civil fraud were established, but rather with his factual findings as to the contents of the messages between herself and Mr. Zhang. She also takes issue with the judge's findings on credibility, arguing that he erred in taking her demeanor into account (which she says was due to her asthma) and in preferring Mr. Zhang's evidence over her own. Her Memorandum of Argument does not address her concern about the judge's refusal to admit Mr. Tough's evidence.
- [34] Ms. Li's arguments focus on her disagreements with the conclusions drawn by the judge on questions of fact or mixed fact and law. The standard of review for these grounds of appeal is deferential. Although the merits of Ms. Li's arguments on appeal are very weak, it is difficult to say with confidence that her appeal has no merit whatsoever.

The Interests of Justice

- [35] I conclude that the interests of justice favour granting the respondent's application to dismiss the appeal as abandoned. I have found that the delay in filing the notice of appeal and the subsequent delay in failing to set the Extension Application down are inordinate. I have also concluded that the appellant has failed to offer a reasonable explanation for the delay. In arriving at that conclusion, I have inferred that the appellant did not have a continuing intention to appeal. Instead, she pursued bankruptcy as the perceived best solution to her legal and financial difficulties.
- [36] Although some leeway must be given to self-represented parties, fairness to other parties and the Court requires adherence to procedural requirements: *Madzar v. Sullivan*, 2014 BCCA 416 at para. 22; *Murphy v. Wynne*, 2012 BCCA 113 (Chambers). This is not a case where a self-represented litigant experienced difficulty in navigating court procedures while maintaining an intention to appeal. Ms. Li intentionally, and with the benefit of legal advice, chose to pursue personal bankruptcy rather than actively advancing this appeal.

Disposition

- [37] The appeal is dismissed as abandoned.

"The Honourable Mr. Justice Butler"

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