

CANADA / JUDGMENT

Manning v. Dhalla

2020 BCCA 35

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 35 Manning v. Dhalla

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Manning v. Dhalla,

2020 BCCA 35

Date: 20200117

Docket: CA46272

Between:

Andreas Eric Manning, A.E. Manning M.D. Inc., and 0712199 B.C. Ltd.

Respondents

(Plaintiffs)

And

Naguib Dhalla

Appellant

(Defendant)

Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
July 2, 2019 (Manning v. Dhalla, 2019 BCSC 1067, Vancouver Docket S133517).

Oral Reasons for Judgment**Counsel for the Appellant:**

T.A. Hakemi

Counsel for the Respondents:

S. Kamboj

Place and Date of Hearing:

Vancouver, British Columbia

January 17, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 17, 2020

Summary:

The respondents sought \$350,000 in security for costs of the appeal and costs of the trial. Held: Application allowed in part. Security for costs of the appeal is granted in the amount of \$35,000. It must be posted within 30 days. The application for security for costs of the trial is adjourned, generally. The respondents did not provide sufficient information to substantiate the amount sought.

- [1] DEWITT-VAN OOSTEN J.A.: The respondents seek the following orders: (1) \$350,000 as security for costs of the appeal and costs of the trial; (2) a stay of the appeal pending the posting of security; (3) leave to apply to dismiss the appeal if security is not posted within 30 days; and (4) costs on the application.
- [2] The appellant is opposed to all four orders.

Background

- [3] From 2008 to 2011, the appellant, Naguib Dhalla, was retained to assist the respondent, Andreas Eric Manning (a physician), and his two companies with bookkeeping and other financial tasks. Dr. Manning is the sole officer, director, and shareholder of the companies. In this role, Mr. Dhalla engaged in discussions with Dr. Manning about investment opportunities. Among other things, he is said to have encouraged Dr. Manning to invest over \$12 million in a Ponzi scheme orchestrated by Rashida Samji, a notary public. Dr. Manning alleges that, unbeknownst to him, Mr. Dhalla received a commission from Ms. Samji for securing that investment.

- [4] In 2012, the Ponzi scheme collapsed and the respondents lost over \$8 million. In a related class action, Ms. Samji was found to have committed fraud, misrepresentation, breach of trust, and conversion: *Jer v. Samji*, 2014 BCSC 1629; *aff'd* 2015 BCCA 257, leave to appeal *ref'd* [2015] S.C.C.A. No. 345 (S.C.C.). She was also found guilty of fraud and theft under the Criminal Code, R.S.C. 1985, c. C-46, and sentenced to six years' imprisonment: *R. v. Samji*, 2016 BCPC 301. Finally, the BC Securities Commission imposed penalties against Ms. Samji that include a disgorgement order of more than \$10 million and an administrative penalty of \$33 million: *Samji (Re)*, 2015 BCSECCOM 29. The Commission found that Ms. Samji perpetrated a fraud by trading securities to at least 200 investors for proceeds of at least \$100 million: *Samji (Re)*, 2014 BCSECCOM 286.
- [5] I understand that since the collapse of the Ponzi scheme, the respondents have recovered about \$3 million of their losses. They continue to seek remedies in respect of the remaining \$5 million.
- [6] This appeal arises from an action in fraudulent misrepresentation that was brought against Mr. Dhalla by the respondents in May 2013. Mr. Dhalla is alleged to have concealed the commission he received from Ms. Samji in exchange for the respondents' investment.
- [7] On December 5, 2018, Justice Branch dismissed the respondents' action: *Manning v. Dhalla*, 2018 BCSC 2148. The primary basis for the dismissal was that the respondents failed to prove that Mr. Dhalla received a commission. There is an outstanding appeal from that dismissal, although presently in abeyance.
- [8] Approximately two weeks after the dismissal, the respondents received documents from legal counsel in the class action that appear to substantiate their claim of a commission. Mr. Dhalla did not produce the documents in the court below; however, he has acknowledged that they likely originated with him.
- [9] The respondents applied for a mistrial based on Mr. Dhalla's failure to disclose the documents. The order dismissing the respondents' claim had not been entered when the application was filed; accordingly, they took the position that Justice Branch was not functus. The trial judge granted the application for a mistrial on grounds that not doing so would result in a miscarriage of justice. He found that "the entire trial was tainted by the absence of this information . The documents are so important that they are likely to change the complexion of everything heard at the trial": *Manning v. Dhalla*, 2019 BCSC 1067 at para. 52. Justice Branch subsequently awarded special costs to the respondents: *Manning v. Dhalla*, 2019 BCSC 1514. Those costs have not been assessed. Dr. Manning says that to complete the assessment would require that he waive privilege over his legal files on the misrepresentation action. He is not prepared to do so until the action has completed.
- [10] Mr. Dhalla appeals from the order for a mistrial, as well as the award of special costs. He contends that the trial judge erred in granting a mistrial, at least in part, on grounds that the "faster and less expensive option of an appeal would result in an injustice". Mr. Dhalla says the judge wrongly thought that a fresh evidence application on the appeal would not

adequately address the situation, and a mistrial was therefore a more effective remedy to address any injustices that would otherwise result if the respondents were not able to have their civil claim reconsidered. Mr. Dhalla also says it was reasonably open to the judge to re-open the trial, allow the documents in as evidence, and give the parties an opportunity to address them, recalling witnesses if necessary. From Mr. Dhalla's perspective, it was not required that the trial begin afresh.

Discussion

A. Security for Costs of the Appeal

- [11] The jurisdiction to order security for costs of an appeal is found in s. 24(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77. The appellant bears the onus of showing that an order is not warranted: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9 (Chambers). The primary question for me to answer is whether an order for security would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers). The relevant factors were summarized in *Gardezi v. Positive Living Society of British Columbia*, 2018 BCCA 84 (Chambers):
- [29] This Court generally considers five factors in determining whether to make an order for security for costs of the appeal. The first factor is the appellant's financial means. If ordering security for costs would prevent the appellant from pursuing a meritorious appeal, it may not be in the interests of justice to make the order: *Zen v. M.R.S. Trust Company* (1997), 88 B.C.A.C. 198 (Chambers). However, the Court may require the appellant to post security for costs of the appeal even if obtaining the funds would be difficult: *D. Bacon Holdings Ltd. v. Naramata Vines Inc.*, 2010 BCCA 427 at para. 21 (Chambers).
- [30] The second factor is whether the costs of the appeal will be readily recoverable if the respondent succeeds. If the applicant shows there is a serious question that recovery may be difficult, a presumption in favour of granting security for costs arises, unless the appellant can demonstrate the appeal has obvious merit: *Edwards v. Moran*, 2003 BCCA 443 at para. 14 (Chambers); *Sangha v. Azevedo*, 2005 BCCA 125 at para. 6 (Chambers).
- [31] The third factor is the timing of the application for security. Because the appeal is usually stayed until security is posted, injustice would result if the respondent applied for security for costs on the eve of the appeal: *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A. in Chambers).
- [32] The fourth factor is the merits of the appeal. If the appeal is "virtually hopeless" or "bound to fail", security for costs may be ordered even if the order prevents the appellant from pursuing the appeal: *Jenkins v. Swallow Frames & Cycles Ltd.* (1997), 97 B.C.A.C. 81 at paras. 5, 7 (Chambers); *Freshway Specialty Foods Inc. v. Map Produce LLC*, 2006 BCCA 592 at para. 14 (Chambers). On the other hand, the Court will not order security for costs if it would prevent the appellant from pursuing a meritorious appeal: *Creative Salmon Company Ltd.* at para. 12.

- [133] The fifth and ultimate factor is whether the order for security for costs would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6 (Chambers).

Appellant's Financial Means

- [12] Applying this framework to the case before me, Mr. Dhalla has not filed an affidavit setting out his current financial circumstances. He has not shown that he has sufficient assets to cover the costs of an appeal.
- [13] Nor has he shown that "he could not prosecute his appeal if ordered to secure the respondent's costs": *Zen v. M.R.S. Trust Company* (1997), 69 A.C.W.S. (3d) 608 (B.C. C.A.) at para. 18 (Chambers). His counsel takes the position that affidavit evidence to this effect was not necessary. Instead, the Court should simply infer, from the trial record and the evidence put forward by the respondents, that Mr. Dhalla is not someone with the means to post a large amount of security. He says he could afford \$5,000 in security, but anything above that is likely problematic.

Difficulty of Recovery

- [14] The respondents contend that Mr. Dhalla does not have sufficient exigible assets to satisfy the order for special costs made below; any award for damages that might emerge from completion of the trial; costs on the trial if the respondents are successful in their claim for misrepresentation; or, costs on the appeal should Mr. Dhalla fail in his challenge to the order for a mistrial. As noted, there is no evidence to the contrary.
- [15] According to the respondents, Mr. Dhalla holds a 1/7 interest as a registered owner of lands valued at \$684,600. However, there is a \$500,000 mortgage against that property.
- [16] The respondents also contend that Mr. Dhalla has taken steps to place assets beyond the reach of creditors, which does not bode well for their ability to recover against him. On May 30, 2019 (after the respondents filed their mistrial application), he is said to have transferred title of a residential property owned by him to his spouse for the sum of \$1.00. The assessed value of the transferred property is \$1.31 million. As I understand it, there are two mortgages registered against title, with a cumulative value of \$1.56 million. The second of these mortgages, which secures a loan of \$1 million, was registered after Mr. Dhalla transferred the property to his spouse. The respondents have filed an action in fraudulent conveyance in respect of that transfer.

Timing of the Application

- [17] Mr. Dhalla commenced his appeal on August 1, 2019. He filed the appeal record on September 30, 2019, and his appeal book on October 30, 2019. He has not filed a factum. In accordance with Rule 21(1) of the Court of Appeal Rules, the factum was due October 30, 2019. He requires an order to extend time for filing his factum. Filing the factum is a necessary pre-requisite to setting a date for hearing on the merits of the appeal.
- [18] The respondents' motion for security of costs was filed on December 5, 2019. However, on November 14, 2019, they advised Mr. Dhalla that they required security for costs (either by consent or pursuant to an order from this Court). As such, he has had notice of a pending application since then.
- [19] While there has been delay in bringing this application (three and one half months), I see no real prejudice in granting security at this point. The factums have not been prepared and a hearing date has not been secured. Mr. Dhalla accepts, for today's purposes, that the application for security is timely.

Merits of the Appeal

- [20] Mr. Dhalla contends that his appeal has merit. As noted, he says the trial judge wrongly thought that a mistrial was the only effective remedy. The appellant does not contend that a mistrial was not jurisdictionally open to the trial judge; rather, it is the basis on which the order was granted that is contested by Mr. Dhalla. He also points out that although the respondents' claim was dismissed on the ground that there was no proof of a commission, the judge went on to make other findings that would have defeated the claim in any event (such as no reliance placed by Dr. Manning on Mr. Dhalla's financial 'advice'). In deciding whether the judge committed reviewable error in granting a mistrial, these additional findings will need to be considered. It is likely to be argued on the appeal that even if the late-in-the-day documents established proof of a commission, it mattered not, because there was no reliance on anything said about the Ponzi scheme by Mr. Dhalla.
- [21] I have reviewed the reasons for judgment in the court below. It is ultimately for a division to assess the merits of the appeal and determine whether the appellant is able to establish reversible error. However, I note that in granting a mistrial, Justice Branch was alive to the fact that a mistrial is a "last resort" and "will occur only where the court concludes that no other curative measure will suffice" (at para. 33).
- [22] He also found that the "entire trial was tainted by the absence of [the discovered information]" (at para. 52). As I read his reasons, based on his familiarity with the evidence, he concluded that even if the respondents could meet the test for fresh evidence on an appeal, that application and possibly the outcome of the appeal would be assessed within the context of a record that lacked "integrity" because of the appellant's non-disclosure of the relevant documents. From the trial judge's perspective, the availability of the documents would have changed everything at the trial, and the respondents were entitled to "an

opportunity to reframe their case, from their pleadings and opening submissions, through to the evidence of their own witnesses" (at para. 52). If they remained unsuccessful in proving their case against Mr. Dhalla, any subsequent appeal of the dismissal would at least be informed by a more complete (and accurate) evidentiary foundation.

- [23] I cannot say that the appeal is without merit. However, on the face of it, I do not see obvious error in the reasoning brought to bear by the trial judge. The granting of a mistrial is discretionary and not something interfered with lightly by this Court: *Cleeve v. Gregerson*, 2009 BCCA 2 at para. 33.
- [24] After weighing the relevant factors, as a whole, I am satisfied it is in the interests of justice to order that Mr. Dhalla post security for costs of the appeal. The respondents contend that the appeal will cost approximately \$50,000. However, they have not provided a draft bill of costs supporting that estimate, or any other breakdown of the anticipated costs. The appellant says the estimate is excessive. The mistrial application took one day before Justice Branch and the appellant estimates a half day for the appeal. In my view, posting \$35,000 in security as costs of the appeal is reasonable in the circumstances of this case. Although the mistrial application consumed only one day of court time, it may be that large portions of the trial record need to be available for the appeal to properly assess the judge's determination that the entirety of the evidence was tainted by the non-disclosure.

B. Security for Costs of the Trial

- [25] The jurisdiction to order security for costs of the trial is found in s. 10(2)(b) of the Court of Appeal Act, which authorizes a justice to "make an interim order to prevent prejudice". This form of security is ordered less readily than costs of an appeal: *Siekham v. Hiebert*, 2008 BCCA 299 at para. 13 (Chambers). The governing principles are set out in *Aikenhead v. Jenkins*, 2002 BCCA 234 at para. 30 (Chambers):
1. The onus is on the applicant to show that it is in the interest of justice to order posting for security of a trial judgment and/or of trial costs.
 2. The applicant must show prejudice if the order is not made.
 3. In determining the interests of justice the chambers judge should consider the merits of the appeal and the effect of such an order on the ability of the appellant to continue the appeal.
- [26] Applying these principles, I note that prejudice in an application for security of trial costs generally arises where "pursuit of the appeal negatively alters the respondent's ability to recover sums found by the trial court to be owing to it": *Agent E v. Canada (Attorney General)*, 2018 BCCA 492 at para. 17 (Chambers). For example, prejudice can arise where an appellant obtains a stay of execution in respect of a trial judgment or trial costs, incidental to the appeal. If a respondent's ability to collect its trial costs is made no worse by the fact of an appeal, the threshold has likely not been met: *Chan v. Vancouver Trade Mart Inc.* (1997), 29 B.C.L.R. (3d) 264 (C.A.); *D. Bacon Holdings Ltd. v. Naramata Vines Inc.*, 2010 BCCA 427 at

para. 25 (Chambers).

- [27] Here, as noted, the respondents submit that Mr. Dhalla does not have sufficient exigible assets to satisfy the special costs award. Moreover, by transferring real property to his spouse, Mr. Dhalla has made it more difficult (and less likely) that the respondents will be able to recover on that judgment, or any other monetary amounts that may be awarded in their favour. The respondents say that Mr. Dhalla's conduct in the court below shows he is willing to mislead the court and disobey the rules; as such, they have little faith he will voluntarily pay amounts ordered against him. They now find themselves having to expend further costs to defend what they believe is a meritless appeal.
- [28] I appreciate the respondents' concerns; however, in my view, the prejudice alleged in support of their application for costs of the trial does not arise from the fact of an appeal. Rather, it is predominantly grounded in circumstances that existed prior to the appeal having been filed, and would have existed in any event.
- [29] The respondents have not submitted a certificate of costs relating to the trial (the costs have not been assessed), or even a draft bill of costs. The affidavits depose that the actual costs incurred at trial were in excess of \$380,000. However, there is no particularization.
- [30] There are cases in which this Court has declined to rule on an application for security for trial costs where costs have yet to be assessed. See, for example, *Buchy v. Villars*, 2008 BCCA 237 at para. 3 (Chambers); *Friends of Davie Bay v. British Columbia*, 2011 BCCA 491 at para. 14 (Chambers). At the same time, I appreciate there are decisions in which security has been granted, even without that evidence. See, for example, *Lombardo v. Lombardo*, 2008 BCCA 21. It is a case-by-case determination.
- [31] The respondents are seeking \$300,000 in security for costs of the trial. That is a considerable amount. The information before me is insufficient to decide whether the whole of that amount, or only a portion of it, will be included in the assessment of special costs. To come up with a figure at this time would be speculative. I note that the order granting special costs is itself under appeal.
- [32] As stated, although I cannot say the appeal lacks merit, I do not find it to be a strong challenge, as currently framed. Mr. Dhalla has not tendered financial information indicating that an order for security of costs of the trial will present an undue hardship to him, or preclude him from pursuing his appeal. However, given the primary genesis of the prejudice alleged by the respondents; the lack of particularization provided in support of the estimate of \$300,000; and the fact that an assessment of costs will not occur for some time, in part because of the position taken by the respondents on production of their legal files, I consider it in the interests of justice to adjourn this aspect of the respondents' motion generally. They have leave to re-apply should greater particularization become available, there is a material change in circumstance, or additional information comes to light that necessitates reconsideration.

C. Stay of Appeal Pending Posting of Security

[33] Where the Court orders security for costs, it will usually stay the appeal until security is posted: *Pitt Polder Preservation Society v. Pitt Meadows (District)*, 1999 BCCA 593 at para. 5 (Chambers); *Austin v. Goerz*, 2007 BCCA 151 at para. 6.

D. Leave to Appeal to Dismiss as Abandoned

[34] The respondents seek an order for leave to apply to dismiss the appeal as abandoned if security is not posted within 30 days. That order is unnecessary as s. 24(2) of the Court of Appeal Act gives a justice the power to dismiss the appeal of an appellant who fails to comply with an order to post security for costs of the appeal: *Sutherland v. Reeves*, 2013 BCCA 495 at paras. 22-23 (Chambers); *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2010 BCCA 80 at para. 9 (Chambers).

E. Costs of the Application

[35] Usually, costs on this type of application will be costs in the appeal: *Lee v. Lee*, 2014 BCCA 155 at para. 62 (Chambers); *Pearlman v. Insurance Corporation of British Columbia*, 2009 BCCA 237 at para. 35 (Chambers). However, the application in this case was necessitated, in large part, because of Mr. Dhalla's conduct in the court below. In those circumstances, I consider it appropriate to order that the respondents receive their costs on the application, in any event of the appeal.

Disposition

[36] For the reasons provided, I order that Mr. Dhalla post security for costs of the appeal in the amount of \$35,000. The appeal is stayed until the security is posted. The appellant has 30 days in which to do so. I grant the respondents costs on this application, in any event of the appeal.

[37] The application for security for costs of the trial is adjourned generally.

[38] Finally, the application for leave to apply to dismiss the appeal if security for costs of the appeal is not posted within 30 days is dismissed on the basis that it is not necessary.

"The Honourable Madam Justice DeWitt-Van Oosten"

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