

CANADA / JUDGMENT

Martyn v. Walton

2022 BCCA 351

COURT

British Columbia Court of Appeal

DECIDED

20 October 2022

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2022 BCCA 351 Martyn v. Walton

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Martyn v. Walton,

2022 BCCA 351

Date: 20221020

Docket: CA48359

Between:

Catherine Martyn

Appellant

(Plaintiff)

And

Heather Louise Walton

Respondent

(Defendant)

Corrected Judgment: The text of the judgment was corrected on the cover page on November 1, 2022.

Before:

The Honourable Mr. Justice Abrioux

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
May 18, 2022 (Martyn v. Walton, 2022 BCSC 832, Victoria Docket S213190).

Counsel for the Appellant:

M. Nied

Counsel for the Respondent:

R. Robertson

Place and Date of Hearing:

Vancouver, British Columbia

September 26, 2022

Place and Date of Judgment:

Vancouver, British Columbia

October 20, 2022

Summary:

The respondent applies for an order that the appellant post security for special costs of the appeal and of the proceedings below. The order below dismissed the appellant's claim as an abuse of process and awarded the respondent special costs. Held: Partial security for special costs of the proceeding below granted; security for ordinary costs on appeal granted. The appellant has relatively significant but out-of-province assets, the appeal meets the merits test, and delays in bringing the application were not prejudicial.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] The Appellant, Catherine Martyn, appeals from the judgment of Justice Murray which dismissed her claim under the Wills Variation Act, R.S.B.C. 1996, c. 490 as an abuse of process. The reasons for judgment are indexed at 2022 BCSC 832.
- [2] The Respondent, Heather Walton, applies for an order pursuant to s. 34(1) of the new Court of Appeal Act, S.B.C. 2021, c. 6 (the "New Act") requiring the Appellant to post security for costs of the appeal (including special costs in this Court) and for her as-of-yet unassessed special costs in the Supreme Court of British Columbia, together with certain ancillary orders.

Background

- [3] Ms. Walton is Ms. Martyn's step-mother. Mr. Clarke--husband to Ms. Walton and father to Ms. Martyn--passed away in 2013, leaving substantially all of his estate to his wife under their mutual wills. Ms. Walton's will provided that, if she was in sole possession of the couple's matrimonial home at the time of her death, proceeds from its sale would be divided between Mr. Clarke's children.
- [4] Mr. Clarke's testamentary wishes became the subject of litigation. In 2018, Ms. Martyn's husband commenced proceedings in the Supreme Court, alleging that a secret trust indenture prevented Ms. Walton from selling her home (the "2018 Action"). Justice Baird, in reasons for judgment indexed at 2018 BCSC 2028, dismissed the claim and awarded costs to Ms. Walton on Scale B. Mr. Martyn, who lives with his wife in Washington State, has refused to pay those costs.
- [5] In October 2021, Ms. Martyn sought an order under the Wills Variation Act that her father's will make adequate, just, and equitable provision for her (the "2021 Action"). In response, Ms. Walton applied for an order striking Ms. Martyn's pleadings as an abuse of process and res judicata, arguing that Ms. Martyn was relitigating the 2018 Action.
- [6] In her reasons for judgment, Justice Murray struck Ms. Martyn's claim and dismissed the action. The judge declined to make a finding of res judicata, as she did not accept Ms. Martyn's submissions that the 2018 and 2021 Actions' alleged similarities constituted issue or cause of action estoppel. She nevertheless found that the 2021 Action was an abuse of process, as it wrongly personally named the ill and vulnerable Ms. Walton, and a related certificate of pending litigation prevented her from selling her home. The judge also prohibited the Martyns from filing any further actions in the Supreme Court relating to Ms. Walton without leave, and from filing any actions in this province until they pay outstanding costs from the 2018 and 2021 Actions. Finally, she awarded Ms. Walton special costs.
- [7] The special costs were set to be assessed before the Supreme Court on September 1, 2022, but that hearing was adjourned until after this application had been heard.
- [8] Ms. Martyn filed a notice of appeal on June 17, 2022, her appeal record on August 15, 2022, and her factum and appeal book on September 2, 2022. She argues that Murray J. erred in dismissing the action, awarding special costs, and barring the Martyns from commencing future actions.

Positions of the Parties

Applicant

- [9] Ms. Walton argues that security for costs should be ordered with respect to costs in this Court and the Supreme Court. She submits that the Martyns have never paid any costs awards and are likely of the view that their Washington State residence immunizes them against British Columbia costs awards. She refers to Mr. Martyn's refusal to sign the order

arising from the 2018 Action on the basis that he was "not sure whether there remains any in-personam jurisdiction for [his] participation" in the proceedings. If security is not ordered, she says that she would suffer prejudice as a result of her precarious financial situation and expectation that the Martyns would pay the outstanding costs if they wished to bring further proceedings in British Columbia. She also argues that the appeal has a low degree of merit, as the orders under appeal are based on the judge's exercise of discretion.

- [10] Ms. Walton submits that she brought this application in a timely manner, advising Ms. Martyn's counsel of her intent to do so 41 days after the notice of appeal was filed and before Ms. Martyn proceeded with other steps in the appeal.
- [11] She seeks an order requiring Ms. Martyn to post a total of \$60,214.26 as security, comprising \$22,149.46 in special costs for the 2021 Action in the Supreme Court and \$38,064.80 in estimated special costs on appeal. She argues that, if the judge's finding of abuse of process is upheld on appeal, an award of special costs would follow in this Court.
- [12] She has submitted draft Bills of Costs for the costs of the appeal under both the new Court of Appeal Rules, B.C. Reg. 120/2022, effective as of July 18, 2022 (the "New Rules"), and the former Court of Appeal Rules, B.C. Reg. 297/2001 (the "Former Rules") to support an award of ordinary costs. She has also provided an estimate of solicitor own client costs to support an award of special costs.
- [13] Ms. Walton also seeks orders that the appeal be stayed pending the posting of security and that an extension of time be granted for the filing of the Respondent's factum.

Respondent

- [14] Ms. Martyn opposes the relief sought on the basis that she has a meritorious appeal. She also raises what she terms a six-week delay prior to Ms. Martyn advising of an intention to seek security for costs of the appeal and a three-month delay to bring the application. She submits that, if the appeal were dismissed, the costs in this Court and the Supreme Court would be recoverable since she earns a good income and has assets, albeit not ones located in this jurisdiction.
- [15] Ms. Martyn also says that the fact that her husband has failed to pay costs in the 2018 Action is irrelevant on this application, and that there has been no reprehensible conduct in this Court that would warrant payment of security on a special costs basis. Accordingly, security for costs of the appeal should be based on the ordinary scale under the Former Rules, and no security should be ordered for the costs in the Supreme Court until they have been assessed.

Discussion

Legal Framework

Security for Costs of the Appeal and Supreme Court Proceedings

[16] The New Act and Rules apply to this application for security for costs: New Rules, Rule 91. The New Act sets out a justice's jurisdiction to order security for the costs of both an appeal and the proceedings in the court below:

Payment of security

34 (1) A justice may order an appellant to pay into court security for one or more of the following:

- (a) costs of the appeal;
 - (b) costs of proceedings in the court appealed from, in relation to the order being appealed;
 - (c) an amount under the order being appealed.
- (2) A payment under subsection (1) must be in the amount and form determined by the justice.
- (3) This section does not apply to an appeal brought by or on behalf of the government.

[17] The provisions which pertain to granting security for appeal costs are very similar to those in the New Act's predecessor: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 24 (the "Former Act"). Accordingly, "there is no reason why the existing jurisprudence does not still apply": *Morden v. Pasternak*, 2022 BCCA 268 at para. 36 (Chambers).

[18] While security for trial costs was formerly granted pursuant to a justice's power to make an interim order to prevent prejudice, the parties here did not submit that its relocation to s. 34 of the New Act affected the applicability of earlier case law: see *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 10 (Chambers) [*Creative Salmon*].

[19] Authorities decided under the Former Act hold that the principles that apply to granting security differ depending on whether appeal or trial costs are at issue.

[20] When a respondent applies for an order that the appellant post security for costs of the appeal, the onus is on the appellant (here, Ms. Martyn) to show "why security should not be required": *Creative Salmon* at para. 9. The factors which pertain to such an application are well settled: *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.
- [33] 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).
- [21] This Court's usual practice is to "stay the appeal for 30 days to give the appellants time to post the security": *E.B. v. British Columbia (Child, Family and Community Services)*, 2020 BCCA 263 at para. 24 (Chambers).
- [22] By contrast, security for costs in the court below is ordered more rarely than security for costs of the appeal, as trial costs are generally "more substantial", and their payment would impede meritorious appeals: *Leung v. Yung*, 2016 BCCA 64 at para. 26 (Chambers). The onus is on the applicant (here, Ms. Walton) to show that it is in the interests of justice to make such an order, and that she will be prejudiced if the order is not made. The merits of the appeal and the ability of the appellant to continue the appeal are also relevant considerations: *Naimi v. Yunusova*, 2022 BCCA 311 at para. 22.
- [23] Prejudice may be caused by the appellant's lack of exigible assets in British Columbia, possible dissipation of assets, or use of expense-causing tactics: *Seikhon v. Dhillon*, 2020 BCCA 185 at para. 27.

Ordinary and Special Costs

- [24] The transition provisions of the New Rules provide that the New Rules govern the assessment of special costs, while ordinary costs are still assessed under the Former Rules: New Rules, Rules 91, 93.

- [25] A justice may order that costs be assessed as special costs: New Rules, Rule 71. Special costs of the appeal are awarded where there has been some form of reprehensible conduct deserving of rebuke: *Mayer v. Mayer Estate*, 2020 BCCA 282 at para. 39. An award of special costs at trial does not necessarily require that security for costs of the appeal be based on a special costs award where there is "no indication that the appeal itself is being conducted in an oppressive or abusive manner": *Seikhon v. Dhillon*, 2019 BCCA 483 at para. 5 (Chambers).

Analysis

Security for Costs of the Appeal

- [26] Ms. Martyn acknowledges that an amount should be posted for security for costs of the appeal proceedings. The real issue is whether this should be on a special costs basis.
- [27] Ms. Martyn attests to having relatively significant assets--\$120,000 USD available in her various bank accounts, real estate valued at \$1.1 million USD, and an annual income of approximately \$150,000 USD--but no exigible assets in this jurisdiction. It is apparent that an order requiring security for costs will not prevent Ms. Martyn from pursuing the appeal, but that recovery of an award of costs may be challenging.
- [28] Having reviewed the Appellant's factum, I am of the view that the low merits threshold requirement has been met; Ms. Walton agrees. Ms. Martyn's factum raises interesting questions regarding the scope of the abuse of process doctrine and the availability of associated remedies, such as special costs and a bar against commencing further actions.
- [29] Both parties raise the issue of the timeliness of this application.
- [30] Ms. Martyn says that this application ought to have been heard well before now, as the date for hearing of the appeal is set for January 3, 2023. She has prepared her factum and incurred other expenses in prosecuting the appeal. While this application was not brought on the eve of the hearing of the appeal, she says that Ms. Walton's delay is a relevant factor. She also argues that Ms. Walton did not disclose the full amount of costs that she was seeking until she filed this application.
- [31] Ms. Walton responds by referring to the fact that she sought a hearing in mid-August, 2022, but Ms. Martyn's counsel was unavailable. Counsel then agreed on a hearing date of September 26, 2022.
- [32] In my view, the timing of the hearing of this application is not prejudicial to Ms. Martyn. The hearing of the appeal is approximately three months from now, and there is sufficient time for Ms. Martyn to post security and lift any associated stay.

[33] Furthermore, Ms. Martyn has acted appropriately in advancing the appeal to date. This is therefore not one of those rare circumstances where security for costs in this Court should be ordered on a special costs basis. Accordingly, Ms. Martyn is to post security for the appeal costs on the ordinary scale pursuant to the Former Rules, which I estimate at \$8,000.

Security for Costs of the Supreme Court Proceedings

- [34] Ms. Martyn opposes any order for security for the trial costs on the basis that the Respondent originally provided notice only with regard to security being sought for costs in this Court.
- [35] Ms. Walton estimates that her special costs ordered in the Supreme Court will amount to approximately \$22,000. While Mr. Martyn has failed to pay costs in the 2018 Action, and has questioned whether he is within the jurisdiction of British Columbia courts, his actions are not necessarily indicative of Ms. Martyn's response to a costs order made against her. It is nevertheless clear to me that it may well be difficult for Ms. Walton to recover from Ms. Martyn any costs award in the Supreme Court.
- [36] It also bears remembering that as matters stand at this stage of the appeal, Ms. Walton was successful in the Supreme Court, and an award of special costs was made in her favor.
- [37] Taking all the factors to which I have referred into account--particularly the issues raised on the appeal and Ms. Martyn's ability to continue this proceeding--I have concluded that Ms. Walton will be prejudiced if some order is not made with respect to the trial costs, and that it is in the interests of justice to do so.

Disposition

- [38] Accordingly, I order that 50% of the approximate amount claimed as special costs in the Supreme Court--that is, \$11,000--be posted as security for those costs, together with \$8,000 for the costs of the proceedings in this Court, for a total amount of \$19,000.
- [39] Since there does not appear to be any financial impediment to Ms. Martyn posting the security, I also order that:
- (a) pending the posting of the security, the appeal is stayed to November 11, 2022;
 - (b) the time for Ms. Walton to file the Respondent's factum is extended to December 12, 2022; and
 - (c) the Appellant's reply, if any, is to be filed by December 19, 2022.
- [40] This timeframe should enable the appeal to proceed, as scheduled, on January 3, 2023.

"The Honourable Mr. Justice Abrioux"

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