

CANADA / JUDGMENT

Phillips v. Phillips

1999 BCCA 693

COURT

British Columbia Court of Appeal

DECIDED

29 November 1999

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c99-0693.html Citation: Phillips v. Phillips Date: 19991129 1999 BCCA 693 Docket: CA024582 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA BETWEEN: NORMAN KENNETH PHILLIPS PETITIONER (RESPONDENT ON APPEAL) AND: PATRICIA BARBARA PHILLIPS RESPONDENT (APPELLANT ON APPEAL) Before: The Honourable Mr. Justice Esson (In Chambers) W. Stilling, Q.C. Counsel for the Appellant J. Hittrich Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia November 18, 1999 Place and Date of Judgment: Vancouver, British Columbia November 29, 1999 Reasons for Judgment of the Honourable Mr. Justice Esson:

- [1] I will refer to the parties as "the husband" and "the wife" although they are now divorced. On this appeal, the wife appeals against a trial decision in respect of family assets. Throughout this proceeding, there has been serious delay in proceeding with the appeal, much of it attributable to the wife's solicitor (not Mr. Stilling). The wife now applies to restore the appeal to the active list.
- [2] The notice of appeal was filed on May 6, 1998 and was served some days past the 30-day deadline. In June 1998, the Chief Justice granted an extension of the time for service and extended the time for filing the appeal books to August 16. That deadline was not complied with. Some of that delay may have been attributable to ordinary problems in preparation but those were aggravated by the fact that the books as ordered by the appellant's solicitor were incomplete.
- [3] On December 29, 1998, the appellant's application to further extend the time for filing appeal books was heard by Newbury J.A. along with the husband's application to require security for costs in the amount of \$10,000.00 to be posted. Newbury J.A. ordered the time for filing appeal books be extended to February 5, 1999 and the time for filing the appellant's factum be extended to 30 days thereafter, i.e., March 7, 1999. Newbury J.A. adjourned the husband's application for security for costs until "the grounds of appeal have been clearly spelled out in Mrs. Phillips' factum". That direction was given in light of Newbury J.A.'s conclusion, based on what was before her, that "the merits of the appeal are not strong" but that it was "... not possible at this early date to make a determination whether security should be ordered".

- [4] The deadlines set by that order were not met but, by March 22, the appeal books had been filed, as had the appellant's factum.
- [5] I note here that Newbury J.A. had commented that the applications before her had arisen in the context of "very unfortunate dealings between counsel", and delays - "for which [the wife's counsel] must take, and has taken, responsibility - in applying to this Court for a resolution of counsels' differences".
- [6] After the appellant's factum was filed there were further unfortunate dealings between the lawyers for which, again, it would appear the wife's solicitor was primarily, if not wholly responsible. However, the respondent's factum was filed on April 26 which was within the time limited. On May 6, the one-year deadline for filing the certificate of readiness went by and the solicitors were duly advised by the registry of the appeal having been removed from the active list. On May 10, Mr. Hittrich wrote to the appellant's solicitor advising that if the appeal were to be pursued he would renew the application for security for costs. There was no response to that letter and no further communication from the appellant's solicitor to Mr. Hittrich until August 30 when he advised that he had launched an application to return the appeal to the active list. The delay from early May to late August is sought to be explained by a letter from a physician which states that the solicitor had been unable to attend to his practice but gives no reason for that.
- [7] The applications came before Lambert J.A. on October 14 and were then adjourned to November 4 because Mr. Stilling, who had been retained to act as counsel, did not appear. Lambert J.A., in granting the adjournment said:
- [3] This appeal has been far too long delayed and the consequence of the delay operates to the detriment of the respondent on the appeal. It must be prosecuted, if at all, with an entirely different vigor than has occurred up to this time otherwise it stands in danger of being dismissed.
- [8] He ordered the two applications adjourned to November 4 and awarded costs of the day be set at \$500.00 payable forthwith. That date was chosen in an attempt to have the application to reinstate brought on within the 180-day period after which the appeal is deemed by s.25 to be dismissed as abandoned. In the event, the applications were further adjourned to November 18 to meet the convenience of counsel. In those circumstances, I advised counsel at the outset of this application that I would deal with the applications on the basis that the application to reinstate was brought within the 180-day period.
- [9] It is rare for an application to reinstate to be refused where the matter has been prosecuted to the point where the appeal is ready to be set for hearing. It is also unusual to refuse reinstatement where the default is that of the lawyer rather than the appellant and this appears to be such a case. On the other hand, it is sometimes justifiable to visit the fault of the lawyer upon the client and leave the latter to her remedy against the lawyer. For a vigorous statement of that point of view reference may be made to the reasons of the Court of Appeal of England in *Allen et al v. Sir Alfred McAlpine et al*, [1968] 2 Q.B. 229, [1968] 1 All

E.R. 543.

- [10] In resisting the application to reinstate, Mr. Hittrich emphasizes the element of weakness in the appellant's case. Having had the benefit of seeing the factums, I am of the view that Newbury J.A., in expressing without benefit of the factums that the merits of the appeal "are not strong" put the matter as favourably as it could be put for the appellant. The difficulty in refusing reinstatement on that ground is that to date it does not appear that an application under s.25 (5) to reinstate has been refused on the ground of lack of merit. It is not even clear that lack of merit has been employed as a ground in refusing to reinstate where the appeal has been deemed dismissed under s.25 (6) although the matter has been the subject of some discussion. For a useful and relatively recent summary of our decisions in this area, see the reasons of Huddart J.A. in *Galiano Conservancy Assn. v. British Columbia (Ministry of Transportation & Highways)* (1997), 40 B.C.L.R. (3d) 171 especially at 177-178.
- [11] In the circumstances, I am not prepared to refuse reinstatement despite my view that this indulgence almost certainly will have the effect of involving both parties in further delay and costs which neither can afford. For that reason, however, the indulgence sought by the appellant must be on terms that security be posted. Appellant's counsel seeks to resist that on the ground that the application comes at so late a stage. That is generally a sound objection. See, for example, my decision in *McGinnis v. Funnell* (25 July 1997), Vancouver Registry No. CA021823 (B.C.C.A.). But here the application for security was launched, if not at the earliest possible opportunity, at least at an early stage, i.e., upon the appellant applying to extend time to file appeal books. Furthermore, the application was then adjourned specifically to await the factums being available so that an adequate assessment could be made of the strength of the case. So the major expenditures which have now been incurred have been incurred with full knowledge that the application for security was outstanding and would be pressed at this juncture.
- [12] I therefore will grant the application to reinstate the appeal on the active list provided that the certificate of readiness is filed within 30 days of pronouncement of this order and provided further that the certificate may not be filed until security for costs in the amount of \$6,000.00 is lodged with the Registrar.
- [13] The husband is entitled to the costs of both applications in any event of the appeal. "THE HONOURABLE MR. JUSTICE ESSON"

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