

CANADA / JUDGMENT

Seikhon v. Dhillon

2020 BCCA 185

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 185 *Seikhon v. Dhillon* COURT OF APPEAL FOR BRITISH COLUMBIA Citation: *Seikhon v. Dhillon*, 2020 BCCA 185 Date: 20200624 Docket: CA45007 Between: Ajmer Singh Seikhon a.k.a. Jerry Seikhon and Kamaljeet Kaur Basra a.k.a. Kiki Basra Respondents (Plaintiffs) And Inderjit Dhillon Appellant (Defendant) Before: The Honourable Mr. Justice Harris The Honourable Mr. Justice Fitch The Honourable Mr. Justice Butler On an application to vary: An order of a Justice of the Court of Appeal for British Columbia (in Chambers), dated December 3, 2019 (*Seikhon v. Dhillon*, Vancouver Docket CA45007). Oral Reasons for Judgment Counsel for the Appellant (via videoconference): R. Arora Counsel for the Respondents (via videoconference): B. Vickers Place and Date of Hearing: Vancouver, British Columbia June 22, 2020 Place and Date of Judgment: Vancouver, British Columbia June 24, 2020 Summary: The appellant applied under s. 9(6) of the Court of Appeal Act to vary or set aside the order of a justice requiring him to post security for trial and appeal costs. Held: Applications dismissed. The appellant was unable to show that the chambers judge erred in principle in ordering security for appeal costs at the high end of the range presented. There had already been a number of motions and interlocutory orders in the appeal. The appellant was unable to demonstrate that the chambers judge erred in ordering security of \$35,000 for trial costs, a small portion of the special costs awarded at trial. The appellant had displayed a pattern of conduct throughout the litigation that caused prejudice to the respondents through delay and cost. He continued that conduct by attempting to interfere with collection of the trial costs and judgment. The order represented a reasonable balance of the interests of justice.

- [1] BUTLER J.A.: The appellant applies under s. 9(6) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 to vary the December 3, 2019 order of Mr. Justice Groberman granting the respondents' application for security for costs of the appeal and for trial costs.
- [2] The underlying action is a defamation claim brought by the respondents against the appellant. In reasons for judgment indexed as *Seikhon v. Dhillon*, 2017 BCSC 2525, the trial judge found the appellant liable and awarded the respondents \$75,000 in general damages and \$40,000 in aggravated damages. The respondents were also awarded \$110,000 in special costs. The appellant initiated the appeal by filing his notice of appeal on January 3, 2018.

- [3] On December 3, 2019, the chambers judge heard the respondents' application for security for costs of the appeal, trial costs and the trial judgment. He ordered \$15,000 in security for appeal costs and \$35,000 in security for trial costs. The judge declined to order security for the trial judgment.
- [4] On this application to vary, the appellant asks this Court to reduce the amount owed in security for costs of the appeal from \$15,000 to \$5,000 and set aside the order for security for trial costs. He also seeks to introduce fresh evidence in the form of a new affidavit from the appellant.

Background

- [5] I need not set out in detail the claims at trial or the findings made by the trial judge after the seven-day trial. The reasons for judgment thoroughly describe the circumstances leading up to the trial as well as the conduct of the trial. The appellant had agreed to have his name on title to a property purchased by the respondents to facilitate their application for a mortgage. He was registered on title as holding a 1/100th undivided interest in a property that was otherwise registered in the names of the respondents. The appellant did not contribute to the purchase price. A dispute arose when the parties did not agree to the terms under which the appellant would transfer his interest to the respondents when they were able to arrange financing on their own. The appellant maintained that he was entitled to be paid based on the length of time his name was on title and to be compensated for work he allegedly performed on the property. The respondents disputed that there was any such agreement and refused to pay the appellant. The appellant began a campaign of harassment and intimidation against the respondents that included publication of disparaging statements. The trial judge allowed the respondents' claims in defamation and dismissed the appellant's counterclaims. The decision turned largely on findings of credibility. The trial judge found that the appellant: · forged a court document and knowingly produced it in the litigation in an attempt to deceive the court; · filed patently false documents and meritless claims with the residential tenancy board and land title office; · pleaded guilty to public mischief; · attempted to besmirch the unblemished record of his own solicitor; · harassed the respondents' daughters; · engaged in conduct that was egregious and outrageous; · acted in a reprehensible manner; and · gave evidence that was implausible, unreasonable and at times preposterous: at paras. 27, 60, 64, 70-71, 154, 157, and 176-180.
- [6] The appellant initially filed a general notice of appeal. He missed the filing deadlines in this Court and filed a motion on April 26, 2018 for an extension to file the transcripts and factum. The respondents originally filed the security motion on May 7, 2018. The appeal was placed on the inactive list. A consent order removed it from that list in June 2019 at which time the security motion was re-scheduled.

- [7] In his factum, the appellant raises three issues for appeal. He argues the judge erred, first, in assessing general damages for defamation; second, in finding actual malice, thereby awarding aggravated damages; and third, in awarding special costs.
- [8] For the security application, the respondents produced affidavit evidence that showed that the appellant had no real property in his name and limited personal property. In the trial reasons, the judge had similarly found that there was no evidence the appellant owned any assets of significance. At a hearing before a registrar on special costs, the appellant's counsel indicated that the appellant was unemployed and considering filing for bankruptcy. However, at the hearing before the chambers judge, the appellant's affidavit evidence indicated he had been working as a longshoreman for several years, had a good credit rating and no existing liabilities.
- [9] The appellant did not seek a stay of proceedings and the evidence before the chambers judge indicated that the respondents were attempting to execute on the trial judgment. They obtained a writ of seizure and sale and appointed a bailiff service to execute on that writ. The appellant attempted to interfere with the seizure of his vehicle by the bailiff by impersonating a court bailiff in a telephone call to the office of the respondents' counsel. Chambers Judgment
- [10] The chambers judge cited the usual rule for security for costs of the appeal from *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 that security for costs will be ordered unless that order would defeat an otherwise meritorious appeal: at para. 4. The judge did not find that the appeal would be defeated. He found that the appellant had good credit rating and was employed, but there was no evidence as to the appellant's ability to pay: at para. 3. The appeal was not, on its face, strong, but the judge could not conclude it was without merit: at para. 2.
- [11] The judge ordered security for costs of the appeal in \$15,000, representing the high end of the range estimated by the respondents' counsel: at para. 6. The judge declined to base his order on the premise that this Court will award special costs against the appellant as there was no indication the appeal was being conducted in an oppressive or abusive manner: at para. 5.
- [12] The judge was also satisfied that he should order security for trial costs: at para. 7. He declined to order the full amount (\$110,000) be posted as that would be impractical and potentially defeat the appeal. He ordered \$35,000 in security for trial costs, noting that such an amount would show that the appellant had a genuine belief in the appeal: at para. 9.
- [13] Finally, the judge declined to order security for the trial judgment itself. He found that appeal did not cause any prejudice to the respondents in terms of their ability to collect on the trial judgment: at para. 11. Application to Adduce Fresh Evidence

- [14] The appellant applies to adduce fresh evidence in the form of an affidavit in which he provides further information about his personal and financial circumstances. He attaches one weekly earnings statement as an example of his weekly earnings that shows how much was garnished from his wages. He swears that he has employment income but no savings or assets.
- [15] The respondents oppose the application to adduce fresh evidence. They say that it does not satisfy the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. In particular, they say that it is not fresh evidence and could not reasonably be expected to have affected the result. I agree. Most of the evidence is not fresh in any sense. Indeed, in oral submissions, counsel conceded that most of the evidence could have been adduced at the time of the application before the chambers judge. I would go further; I would say that all of the evidence about his wages, family circumstances and the time it would take to pay off the judgment and costs could have been included in his earlier affidavit. The attempt to adduce additional evidence to respond to the decision of a chambers judge is not to be encouraged. A party should place all relevant evidence before the Court at the first opportunity.
- [16] I would also conclude that the fresh evidence could not reasonably be expected to have affected the result of the application. While it provides some additional evidence about the appellant's poor financial circumstances, that issue was directly raised by the respondents at the time of the application. The evidence does not add anything.
- [17] I would dismiss the application to adduce fresh evidence. Standard of Review
- [18] The hearing of an application to vary is not a re-hearing of the original application: *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para. 7. The division of the Court will only intervene if the chambers judge erred in law, erred in principle or misconceived the facts: *J.P. v. B.G.*, 2016 BCCA 181 at para. 12; *Lungu v. British Columbia (Human Rights Tribunal)*, 2016 BCCA 136 at para. 8; *DeFehr v. DeFehr*, 2002 BCCA 139 at para. 6.

Analysis

Security for Costs of the Appeal

- [19] The appellant argues that the quantum for security for costs of an appeal is typically determined by referring to a draft bill of costs, citing *Braich (Re)*, 2008 BCCA 354. He says the respondents failed to provide a draft bill of costs, instead providing a range of costs at the chambers hearing. He says that absent a draft bill of costs, the chambers judge should have ordered costs at the lower end (\$5,000) of the respondents' estimated range.
- [20] I see no reason for this division to interfere with the chambers judge's decision. The chambers judge was provided with an estimated range of costs for the appeal. There had already been a number of motions and interlocutory orders on the appeal. It would have been evident to the chambers judge that the appeal was not straightforward and that the costs would be above those awarded in a routine case. There is nothing to suggest the

chambers judge erred in ordering the appeal costs to be secured in any way that would require this division to intervene. Security for Trial Costs

- [21] A chambers judge's jurisdiction to grant security for trial costs is grounded in s. 10(2)(b) of the Court of Appeal Act: In an appeal or other matter before the court, a justice may do one or more of the following:
- (b) make an interim order to prevent prejudice to any person;
- [22] On an application for security for trial costs, the chambers judge is guided by three principles:
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. (See *Aikenhead v. Jenkins*, 2002 BCCA 234 at para. 30; *Chung v. Shin*, 2017 BCCA 355 at para. 20.)
- [23] The reasons of the chambers judge are brief. However, it is clear from the memoranda of argument and from the oral submissions made by the parties that the issues relevant to the application were canvassed in some detail. Indeed, the appellant advanced the same arguments before the chambers judge that he made on this review.
- [24] While the chambers judge did not specifically articulate the three guiding principles, it is clear that his reasons responded to those principles and the circumstances of this case. Whether reasons fulfil their objectives must be determined in the context of the proceedings, including the issues raised, the evidence adduced and counsel's submissions: *Bjornson v. Shaw*, 2010 BCCA 510 at para. 18.
- [25] When I examine the judge's reasons in light of the context, the evidence and counsel's submissions, it is clear that the judge did not err in principle or in law. The following circumstances were evident from the material before the chambers judge: · The appeal, while not entirely without merit, appeared to have little substance; · If the appellant succeeded on appeal, he would still have to pay general damages and trial costs to the respondents; · The appeal proceedings had been delayed extensively by the appellant's conduct; and · Even after the trial, the appellant's discreditable conduct directed at the respondents had continued, as evidenced by his attempt to interfere with the seizure of his car by the bailiff.

- [26] The appellant's primary argument is that the chambers judge failed to consider the prejudice potentially suffered by the respondents. As the appellant notes, on an application for security for trial costs, the question of prejudice potentially suffered by a respondent is an important consideration: *Robinson v. Realm Energy International Corporation*, 2016 BCCA 298 (Chambers) at para. 9; *Chinn v. Hanrieder*, 2010 BCCA 274 (Chambers) at para. 28.
- [27] As noted in *Chung*, at para. 33, mere non-payment of trial costs is not normally sufficient to establish the prejudice necessary to support an order for security for trial costs. However, other factors can be taken into account to show prejudice. Prejudice can be shown where the appellant has no exigible assets in British Columbia: *Robinson* at para. 9. Prejudice may be established if there is a concern about the dissipation of assets, if the appellant transfers assets in suspicious circumstances or if the appellant fails to attend a post-judgment examination in aid of execution: *Chung* at para. 35. Further, prejudice can be shown where the appellant has displayed "a significant pattern of conduct causing delay and cost" and "expense-causing tactics throughout [the] litigation": *Chung* at para. 36.
- [28] That pattern of conduct causing delay and cost is evident here. As found by the trial judge, the appellant regularly conducted himself in a manner that resulted in cost and delay. The judge appropriately characterized this conduct as reprehensible. On appeal, the appellant has continued to delay matters and has shown continued behaviour to interfere with the respondents' ability to recover on the judgment and costs order. He has yet to make any significant payments towards the orders, although his wages are now being garnished.
- [29] In my view, the chambers judge did not err in principle in making the order for trial costs. In doing so, he clearly took into account the fact that the appellant will be required to pay at least some of the judgment and trial costs no matter what happens on appeal. The order reflects a reasonable balance of the interests of justice.

Disposition

- [30] I would make the following orders:
- a) I would dismiss the application to adduce fresh evidence;
 - b) I would dismiss the application to vary the order for security of appeal costs;
 - c) I would dismiss the application to set aside the order for security of trial costs; and
 - d) I would further vary the order to state that the appellant have 30 days from the date this order is made to post the security for the costs of the trial and the appeal.
- [31] HARRIS J.A.: I agree.
- [32] FITCH J.A.: I agree.

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- [33] HARRIS J.A.: The application to adduce fresh evidence is dismissed. The application to vary the order for security of appeal costs and trial costs is dismissed. The order is varied to the extent that the appellant has 30 days from the date of this order to post the security for the costs of the trial and the appeal. [Discussion with counsel re: seeking further clarification]
- [34] HARRIS J.A.: It is not the standard practice for us to make guillotine orders. Security for costs are accompanied by a liberty to apply to have an appeal dismissed as abandoned. "The Honourable Mr. Justice Butler"
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