
CANADA / JUDGMENT

Wang v. Nagin

2019 BCSC 724

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 724 Wang v. Nagin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wang v. Nagin,

2019 BCSC 724

Date: 20190509

Docket: S188354

Registry: Vancouver

Between:

Ping Wang

Plaintiff

And

Anand Nagin, Prudence Nagin,

Narendra Nagin, and KCN Partners Inc.

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

In Chambers

Counsel for Plaintiff:

J.D. Shields

Counsel for Defendant, Anand Nagin:

M. Magaril

Place and Date of Hearing:

Vancouver, B.C.

January 24, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 9, 2019

- [1] There are two applications before me. Both arise out of the plaintiff's civil claim against the defendants. The defendants' response to civil claim acknowledged the defendants would pay money to the plaintiff "forthwith". In October 2018, they consented to an order granting judgment to the plaintiff for an amount over \$1.5 million (the "Consent Judgment"). That judgment remains outstanding, and in earlier proceedings, I found the defendants Anand Nagin and Prudence Nagin in contempt of court.
- [2] The first application before me was filed January 3, 2019. In it, the plaintiff seeks an order that the defendant, Anand Nagin, be examined before the court in aid of execution. She also seeks a further committal of both Anand and Prudence Nagin and special costs. The plaintiff also seeks an order that Milan Uzelac and Mir Huculak (both are lawyers with some involvement at some point on this matter on behalf of the defendants) attend at her counsel's office to be examined under oath.
- [3] The second application is brought by Mr. Nagin and it was filed on January 11, 2019. He seeks to set aside in its entirety the order I granted on December 10, 2018 (the "December Order"). He also asks that I disqualify myself from further hearing this matter on the basis that there was a perception of bias during the hearing and arising out of the content of the December Order.
- [4] I indicated to counsel at the hearing that I would first issue reasons addressing Mr. Nagin's application and adjourn the plaintiff's application; this judgment is restricted to his application.
- [5] As to varying the December Order, I am functus because it has been entered: *The Owners, Strata Plan K855 v. Big White Mountain Mart Ltd.*, 2017 BCCA 438 at paras. 35 to 38. Counsel did not direct my attention to any Rule or legal principle that would provide an exception to that basic principle in this case. Therefore I dismiss Mr. Nagin's application to set aside the December Order on the basis I have no jurisdiction to grant that application.

- [6] As I explain in this judgment, I also dismiss Mr. Nagin's application for disqualification for two reasons. First, I find he had no right of audience before this court and no right to have his application considered because he remains in contempt of court. Thus, he has no right to seek my disqualification. I also find it is not appropriate in this case to exercise discretion to grant him an audience to seek relief while he remains in contempt.
- [7] Furthermore, even if he had a right of audience, he relies only on alleged errors in the December Order which do not substantiate an apprehension of bias but instead are a collateral attack. Even if the grounds raised could be relied upon to establish bias, I am satisfied that no right minded person appraised of all the circumstances would consider there was an apprehension of bias during the hearing that led to the December Order.

I. BACKGROUND

- [8] This is the fourth time this matter has come before me. On November 28, 2018, I heard and decided an application brought by the plaintiff to hold the defendants in contempt of court and be committed for that contempt, and I granted some of the orders sought: *Wang v. Nagin*, November 28, 2018, Vancouver Registry No. S1888354 (the "Contempt Judgment").
- [9] The defendant Prudence Nagin did not show up for that hearing, although properly served. I issued a warrant on November 28, 2018 for her to be brought before the court. She surrendered herself and appeared before the court on November 29, 2018. The plaintiff's application to hold her in contempt was adjourned to Monday, December 10, 2018 to give her an opportunity to purge her contempt.
- [10] She returned to court on the morning of December 10, 2018, but had not purged her contempt. The hearing was stood down that morning to allow her to seek legal advice, with instructions on where to get information about free legal advice (by attending at the Courthouse Library reference desk). She returned at 2:00 having, she claimed, sought legal advice. At that time I found her in contempt of court and committed her for 14 days. I also granted other orders challenged by Mr. Nagin.

The Plaintiff's Claim

- [11] The plaintiff filed a civil claim on July 30, 2018. In it she sought damages for, among other things, breach of fiduciary duty, misappropriation of funds for personal benefit, breach of trust, unjust enrichment, fraud, embezzlement and misappropriation.
- [12] The defendants filed a response to civil claim on September 18, 2018. In paragraph one of "Division Two - Defendants' Version of the Facts", the defendants stated they had not misused any funds but, "are ready, willing and able to pay the said funds forthwith to the plaintiff".

- [13] The plaintiff obtained an order from by Madam Justice Forth on July 30, 2018 (the "Freezing Order") which froze the defendants' assets as well as any of the defendants' money held in trust by the defendant's then counsel (Milan Uzelac). The Freezing Order prohibited the defendants from removing any assets from British Columbia, but stated it would cease to have effect if the defendants provided security in the amount of \$967,000 to the court. That security has never been provided.
- [14] Additionally, the Freezing Order required that the defendants provide an affidavit within five business days verifying a list of their assets whether in or outside of British Columbia. The assets to be listed were to include those in their own name, whether solely or jointly owned and "details of all such assets, including the nature of each asset, all identifying numbers and other identifying information, its exact location as of the date of this Order, and whether the asset is held in the [Defendants'] name or jointly held with another person, or by another on their behalf" (emphasis added).
- [15] Anand and Prudence Nagin each swore an affidavit dated August 10, 2018 (which was not within five business days as ordered) in response to the Freezing Order. Neither affidavit appears on the Court Registry's electronic file for this case, meaning it has never been filed. The affidavits are not, strictly speaking, evidence before this Court. Nevertheless, I agreed to consider them as if they had been filed.
- [16] Each affidavit contained a document that the affiant deposed accurately listed all assets as of July 30, 2018. Those attached documents do not have on them an exhibit stamp. Instead, on a page preceding the document, a type-written box contains the exhibit identification and a commissioner's signature. There was clearly room on the attached document for an exhibit stamp without obscuring any content. It is not clear why a separate page was used, and that is not explained in the affidavit. More troubling, neither document nor affidavit stated who, how or when the attached document was prepared. Nor do the attached documents or affidavits identify or attach any document verifying the information about assets. I find the attachments are not reliable documents and I can place little weight on them.
- [17] Mr. Nagin deposed that it was, "difficult to provide values for all foreign investment accounts" because he claimed he did not regularly receive notices. His claim that he does not regularly receive notices of investments totalling millions of US\$ strains credulity. In any event, he does not say he never received any notice yet he attaches no document about those accounts. He deposed that he gave the best approximation of the value of those accounts. He further deposed that he requested verification of the values and would, "provide a further affidavit with verified values upon receiving verification". No such verification has ever been provided.
- [18] The document attached to Mr. Nagin's affidavit also lists the following:
- a) Three RBC bank accounts with account numbers included but no branch information, with a total balance of about \$58,900;

- b) An unknown amount of common share of Visualant, Inc. (now Know Labs Inc.). Neither the location nor any estimated value is given to those shares and no details are given about the company;
- c) 100 class "A" common shares in 1167286 B.C Ltd. Neither the location nor any estimated value is given to those shares and no details are given about the company;
- d) The funds listed below are listed as investments in various entities, but operated by a "surrogate" of Anand Nagin in fixed deposit investment accounts in overseas banks. No identification information or location is given for any of the investment vehicles nor the surrogate and no address or contact information is given for any of the banks:
 - i. Approximately USD \$1.2 million in Rochester Ventures deposited with Kaiser Partner Privitban AG apparently in Liechtensein.
 - ii. Approximately USD \$1.4 million in Birmingham Capital on deposit with St. Kitts-Nevis-Anguilla National Bank Ltd.
 - iii. Approximately USD \$950,000 in Coventry Capital on deposit Bank of Marshall Islands, and;
 - iv. Approximately USD \$1.1 million in Portsmouth Resources on deposit with Bank of St. Lucia.
- e) Approximately \$156,000 held in trust by Milan Uzelac Law Offices PTL.

[19] The document attached to Ms. Nagin's affidavit lists:

- a) RRSP with RBC but no account number and no branch information is given. The balance is \$3,500;
- b) 100 class "A" common shares of KCN Partners Inc. Neither the location nor any estimated value is given to those shares and no details are given about the company;
- c) miscellaneous jewelry worth approximately \$80,000;
- d) 2018 Jaguar F-Pace SUV worth approximately \$80,000.

[20] No affidavit has ever been filed on behalf of the defendant KCN Partners Inc.

[21] I pause to comment that counsel for Mr. Nagin submitted before me that because there was "a list" of assets attached to the unfiled affidavits, it was doubtful the finding of contempt for failing to abide by the Freezing Order's requirements could stand. He submitted that the affidavits complied at least to some degree with the requirements of the Freezing Order.

[22] To suggest the information contained in the attachments to the affidavit complies with the Freezing Order is a hollow submission. It was clear that the purpose of the Freezing Order was to allow the plaintiff to enforce judgment against the defendants by seeking orders against the identified institutions holding the defendants' funds. The information is clearly insufficient to do so. Furthermore, as noted above, the list is unreliable evidence.

- [23] On September 18, 2018, plaintiff's counsel, John Shields, delivered an appointment for Mr. Nagin's examination for discovery, a letter and \$20 cash for conduct money. That \$20 has never been returned to Mr. Shields. The examination for discovery was set for September 27, 2018 but no one appeared. A certificate of non-appearance was completed.
- [24] On October 12, 2018, the plaintiff and the defendants, who were represented by counsel, agreed to settle the claim on the following terms:
- (a) the defendants agreed to pay \$1,540,758 inclusive of damages and costs to date;
 - (b) the defendants would direct the funds held in trust by Milan Uzelac to be paid to the plaintiff's counsel the following week;
 - (c) the defendants agreed to pay the balance of the settlement funds by November 5, 2018; and
 - (d) the defendants agreed to Consent Judgment which would not be filed if all funds were paid, otherwise it would be entered.
- [25] The defendants also agreed to attend an examination for discovery within the following three weeks on a date to be agreed to by counsel.
- [26] Mr. Uzelac paid plaintiff's counsel \$153,269.21 on November 1, 2018 from funds held in trust. As of November 14, 2018, the remaining balance owed by the defendants was \$946,857.73.
- [27] On October 24, 2018 two appointments for examinations for discovery were delivered to defendants' counsel, then Lisa Ridgedale. Ms. Ridgedale informed Mr. Shields by email sent at 7:27 a.m. on November 5, 2018 (the agreed upon date for the discoveries) that Mr. Nagin would not be attending "on the advice of his medical team". She also wrote that all funds would be provided prior to 2:00 p.m. Mr. Shields asked for a medical note to be produced confirming Mr. Nagin's claim that his medical team advised him not to attend the examination for discovery. No note has ever been produced.
- [28] On November 7, 2018, an appointment to examine Mr. Nagin in aid of execution of on November 20, 2018 was delivered to his lawyer. On November 19, 2018 Ms. Ridgedale informed Mr. Shields that Mr. Nagin would not be attending the examination. An endorsement of non-appearance was completed on November 20, 2018. It is my understanding that Ms. Ridgedale withdrew as counsel on this file shortly thereafter.
- [29] The application for contempt and ancillary orders was brought before me on November 28, 2018. On that date, I found Mr. Nagin in contempt of the Freezing Order and in contempt of the Consent Judgment Order. I granted a number of orders against Mr. Nagin, including that he comply with the Freezing Order by filing an affidavit with the list of assets in Canada and abroad and identifying information. I fined him \$10,000 for contempt and committed him for a period of 14 days. The November 28, 2018 Order was entered that day and it was not appealed.

- [30] As discussed earlier in this judgment, I found Ms. Nagin in contempt of court on December 10, 2018. That Order was entered that day, and it was not appealed.
- [31] It is in this context that Mr. Nagin raises the allegation that the December Order demonstrates bias against him.

Events Subsequent to the December Hearing

- [32] On December 13, 2018, Mr. Huculak wrote to "confirm" that a wire transfer of US\$960,000 was provided to Mr. Huculak and that Mr. Nagin's new lawyer (Mikhael Magaril, who argued the application before me) was expected to contact Mr. Shields regarding disposition of that money. He attached a document purporting to be an international money transfer from Credicorp Bank in Panama City.
- [33] Mr. Shields wrote to Mr. Magaril advising that there was a clerical error with the wire transfer and gave instructions on how to correct that error. Mr. Huculak sent a letter dated December 21, 2018 stating that the wire transfer funds should reach Mr. Shields' trust account by December 24,, 2018. Mr. Magaril wrote to Mr. Shields on January 2, 2019 stating his understanding that "efforts are being made to confirm that the amended wire have been properly sent".
- [34] However, Credicorp Bank informed Mr. Shield's paralegal that Mr. Nagin was not a customer of the bank and the wire transfer document sent by Mr. Huculak was not a wire transfer made by that bank. Neither Mr. Nagin, Mr. Huculak nor Mr. Magaril have explained to Mr. Shields why the wire transfer they sent and stated would result in payment was not valid.

Contemner Not Entitled to an Audience

- [35] There is a fundamental flaw with Mr. Nagin's application, which I address first before considering the substance of his claim of bias. Mr. Shields submits that because Mr. Nagin remained in contempt of court on January 24, 2019, he was not entitled to any relief, and did not have a right to be heard. He also pointed out that arguably, Mr. Nagin was not entitled to be heard when the original application for contempt was heard on November 28, 2018 because no response to the application was filed: *Vancouver (City) v. Maurice*, 2005 BCCA 37 at paras. 51 to 54.
- [36] Mr. Shields asserts the defendants' non-payment of the judgment is particularly galling because in the response to civil claim they admit they could and would pay forthwith all money claimed by the plaintiff. While represented by different counsel, Mr. Nagin consented to judgment being entered against him (and the other defendants) for an amount over \$1.5 million. In his unfiled August 10, 2018 affidavit, he claims he has overseas assets totalling over US \$4.6 million and assets possibly in Canada over \$58,000. Despite that, other than moneys held in trust by his former lawyer, Mr. Nagin has never paid a penny to the plaintiff in satisfaction of the judgment.

- [37] The defendants have never stated there is any reason why they do not owe the judgment amount to Ms. Ping, or that they cannot afford to pay. Even after both Mr. and Ms. Nagin were committed for contempt of court, Mr. Nagin (via correspondence from his lawyers) made misrepresentations that payment was forthcoming, going so far as to forward to Mr. Shields a false wire transfer document. I find on the evidence presented to me, there is a well established pattern of the defendants simply ignoring court orders and consistently and continually failing to fulfill stated promises to pay.
- [38] Therefore, Mr. Nagin remained in contempt of this Court at the January 24, 2019 hearing.
- [39] Based on the evidence before me, the statements made by Mr. Nagin, his counsel and Ms. Nagin in hearings before me, and inferences I draw from that evidence, I find Mr. Nagin has never taken any steps to pay the judgment. Viewing all the material before me and the procedural history, I find his conduct throughout has been a deliberate stalling tactic, based on misrepresentations that he will pay while all the time he had no intention of doing so. Mr. Nagin's behaviour is inexcusable and despicable. I have no doubt about my findings.
- [40] Case law supports the plaintiff's position that Mr. Nagin was not entitled to be heard on January 24, 2019, and on that basis his application can be dismissed. The normal rule is a court may refuse audience to a party who has not cured his or her contempt: *Hokhold v. Gerbrandt*, 2015 BCCA 268 at paragraph 10-13 and *Galpin v. Galpin*, 2018 BCSC 1572 at paragraph 20-21.
- [41] In *Hokhold*, the Court of Appeal affirmed that refusing to hear a party is not only a response to a party's continual non-compliance with court orders, but also to uphold the administration of justice.
- [10] In the circumstances, this court became concerned that it might be inappropriate to hear the appeal and thus appear to be assisting a party who has continuously disobeyed court orders, in particular support orders. Accordingly, the Registrar contacted Mr. Hokhold and Mr. Kahn, counsel for Ms. Gerbrandt, on May 22 advising them to be prepared to respond to speak to this matter at the outset of the appeal hearing. We brought to their attention *Larkin v. Glase* 2009 BCCA 321, in which the Court observed:

In my view, the authority of this Court to refuse to hear or to dismiss an appeal is not limited to disobedience of the order under appeal. The refusal to hear or to dismiss an appeal is based on the policy of this Court to protect the administration of justice by avoiding circumstances where the Court could be held in disrepute by assisting a party who has exhibited disdain for the judicial process. Whether that disdain is of the order under appeal or some other court order may be a matter this Court would take into account in considering how it will proceed, but it is not determinative.

In *Bettinson v. Bettinson*, [1965] 1 All E.R. 102 (Ch. Div.), Plowman J. stated as follows, at 105-106:

There is a well-settled rule that the court will not entertain an application by a person who is in contempt of court until he has purged himself of that contempt. In *Hadkinson v. Hadkinson*, [1952] 2 All E.R. 567, Denning L.J., traced the origin of the rule in Chancery back to an ordinance of Lord Bacon in the year 1618, which laid down that

'They that are in contempt are not to be heard [sic] neither in that suit, nor any other, except the court of special grace suspend the contempt'.

[Footnotes omitted]

- [42] In that case, Dr. Hokhold had refused to pay a number of orders for support and gave no convincing reason to the court why he had not done so. In order to protect the administration of justice from falling into dispute, the court refused to hear Dr. Hokhold's appeal lest it be taken as the court granting a hearing in response to a "request of a person who has exhibited disdain for the judicial process". Those same factors are at play in this application before me.
- [43] The court retains an inherent jurisdiction to extend audience and relief to a party that asks to appear notwithstanding ongoing contempt. Like any exercise of discretion, it must be exercised judicially.
- [44] In my view, it would bring the administration of justice into disrepute and impair the integrity of this Court to allow Mr. Nagin to bring any application in this litigation while he remains in contempt of court. Not only does he remain in contempt, he has not provided any explanation why he remains in contempt despite claiming he owns over US \$4.6 million, and despite not ever disputing that he owes over \$950,000 to the plaintiff. He has not sought to appeal any orders granted against him, or to set aside the Consent Judgment to which he agreed.
- [45] In light of all the circumstances and evidence (not all of which is mentioned in this judgment, but all of which I have reviewed and considered), I find Mr. Nagin has continually lied to this Court, and apparently convinced his lawyer to lie. I find his conduct in this litigation and his behaviour and attitude before and toward this Court to be outrageous and appalling, and deserving of rebuke.
- [46] In all those circumstances, Mr. Nagin was not entitled to be heard on January 24, 2019 and not entitled to seek relief from this Court and on that basis, I dismiss his application for disqualification.

No Apprehension of Bias

- [47] In the alternative, if it is not sufficient to dismiss the application for disqualification on the basis of Mr. Nagin's ongoing contempt and reprehensible behaviour, he has not satisfied me that there is a reasonable apprehension of bias arising from the conduct, result or order granted at the December 10, 2018 hearing.

[48] The parties did not dispute the applicable legal principles and the test for bias is well known. In *R. v. R.D.S.*, [1997] 3 S.C.R. 484, the Supreme Court of Canada discussed the test at paras. 109 to 115, and gave examples of its application at paras. 136 to 141. Those discussions confirm that the test is an objective one, and the person alleging bias must present evidence and meet a high standard because there is a presumption of judicial neutrality and the allegation is serious.

[49] The Court of Appeal recently reiterated the test for bias in *N.R.G. v. G.R.G.*, 2017 BCCA 407:

[65] What of the allegation of a reasonable apprehension of bias? The question is one of appearance, and the test for a reasonable apprehension of bias is the objective test described in *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at para. 60:

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, *supra*, at p. 394, is the reasonable apprehension of bias:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

[Emphasis in original]

[50] The court also quoted *D.M.M. v. T.B.M.*, 2011 YKCA 8 (CanLII) at para. 36:

[66] In *D.M.M. v. T.B.M.*, 2011 YKCA 8, Madam Justice Rowles observed:

[36] There is a strong presumption of judicial impartiality. For that reason, the grounds advanced to support a request for disqualification must be serious and convincing, and the party who is arguing for recusal carries the burden of establishing that circumstances exist that justify a finding that the judge must be disqualified: *Wewaykum Indian Band* at para. 59.

[51] *N.R.G.* was an appeal of judgment in a family law case in which the Court of Appeal held the trial judge erred by making decisions about parenting responsibilities rather than allocating the decision-making authority to a particular party. However, in addition to raising those errors, the appellant submitted the trial judge exhibited the appearance of bias. As described by the court at para. 70, the appellant made submissions similar to those made by Mr. Nagin:

[70] The mother contends the judge so consistently treated the parties unevenly, to her disadvantage, that a reasonable and right-minded person would apprehend there was bias on the part of the judge against her. She says this uneven treatment is demonstrated in numerous judicial interventions during hearings and in the written reasons of the judge. She gives as examples instances of the interjections by the judge during her cross-examination

of the father and during her submissions, interjections she says were not balanced in the latitude accorded the parties.

- [71] The appellant complains that the judge expressed unseemly sympathy for the father in the following passage, which she says ignores his expenditure of a substantial sum to obtain a commercial pilot's license, and overstated the evidence in using the word "anguish":

[Excerpts from trial judgment omitted]

- [72] Last, the appellant refers to the decision of May 10, 2017, on the contempt applications that she says demonstrate a reasonable apprehension of bias.
- [52] As in NRG, counsel for Mr. Nagin referred to passages in the transcript of proceedings on December 10, 2018 to argue that the court's statements and specific orders granted when viewed in its totality revealed a reasonable apprehension of bias.
- [53] The Court of Appeal in NRG did not give effect to the ground of appeal despite observing that based on comments made during the hearing, there was "an increasing loss of the judicial equanimity, of centered objectivity" (para. 81) because of "expressions of opprobrium" against the parties (para. 80), and "admonishment and judicial threats, and in respect to both parties, without evidence, doubted the good faith of one or the other" (para. 81).
- [54] What I take from that analysis is the following. Any conduct a party asserts demonstrates an apprehension of bias must be examined in the context of the particular case. Even where the Court of Appeal found the trial judge engaged in erroneous reasoning and made comments illustrating a lack of judicial equanimity, the test for bias was not met.
- [55] Mr. Nagin's approach in this application is similarly based on comments and conduct of the court, but not in a situation where the court was in error because he never bothered to appeal the December Order.
- [56] Moreover, the plaintiff submits, and I agree, that the indicia identified in Mr. Nagin's submission in support of the bias claim are, instead, allegations that the court erred in granting the December Order (those are discussed in the following section of this judgment). Pointing out errors is not a basis to support a claim of bias. Instead, Mr. Nagin's application is nothing more than a collateral attack on the December Order (and indirectly, on the Contempt Judgment).
- [57] I acknowledge that Mr. Nagin may have been making a broader point: the court's errors establish bias when viewed collectively. That position, however, conveniently ignores two fundamental characteristics about the state of this litigation.

- [58] First, Mr. Nagin's position was fundamentally different from the appellant in NRG. He was not one of two litigants who not yet resolved their dispute. The substantive legal dispute between the parties had been resolved by them in the form of the Consent Judgment. The only issue brought to the court addressed the procedures and judicial mechanisms to enforce that Consent Judgment. That circumstance is of critical importance and distinguishes all of the cases referred to me by Mr. Nagin.
- [59] The December 10, 2018 proceeding was a continuation of the plaintiff's contempt application against all defendants. Once he was found to be in contempt on November 28, 2018 (and he did not appeal or seek to stay that finding), the proceedings were no longer merely a dispute between Mr. Nagin and the plaintiff. He is under the court's scrutiny for his failure to respect court orders and abide by the court's authority.
- [60] In these circumstances, the court has an inherent interest independent of the plaintiff to ensure parties before it obey court orders and do not flaunt the court's authority. That interest is to protect the court's integrity and to uphold the administration of justice and the rule of law. Thus, Mr. Nagin's allegations of partiality based on the court's comments and conduct cannot be viewed as comments and conduct "in favour" of the plaintiff at his expense. They were made in furtherance of the court's authority to control its own process and to achieve justice not only for parties who have succeeded in obtaining judgment, but in the interests of society at large.
- [61] Secondly, Mr. Nagin has never said he cannot satisfy the judgment, and he has never provided any credible explanation as to why he had not paid it. In that way, the application for recusal based on bias was a collateral attack both on the entered Consent Judgment, and the entered order regarding contempt.
- [62] Mr. Magaril submitted that the court's conduct at the December 10, 2018 hearing justified having a different judge deal with this case in future. Because the test for bias requires only that an "apprehension" of bias be shown, it may be tempting for the court to err on the side of avoiding any suggestion of bias and simply ask that the matter be heard by a different judge. However, that would be contrary to my duty as a member of this Court.
- [63] A judge's obligation in matters such as this extends beyond achieving justice between the parties. Judges also have an institutional responsibility to conduct proceedings in an efficient manner and in accordance with maintaining the integrity of the court. I find the following comments of the Manitoba Court of Queen's Bench in *Kamer v. Ptashnik*, 2013 MBQB 183 to be particularly apt. In that case, the respondent sought recusal of the judge as described here:
- [43] What I glean from the Respondent's motion, two affidavits, motions brief and oral argument is the overall submission that as a result of the June 16/18, 2008 proceeding and interim order then pronounced by me, I have demonstrated the kind of bias or prejudgment that warrants disqualification or recusal from further involvement in this file. The argument rests primarily on the particulars of what occurred on June 16 and 18, 2008 in the courtroom

wherein I denied the adjournment sought by Respondent's counsel, granted leave to proceed on a short notice basis with the motions then before the court, and ultimately pronounced a substantive order regarding issues which included the custody, care and control of their son. The Respondent asserts that he was "tried ex parte" and without due process, was denied the right to file further materials and the opportunity to examine the Petitioner on her affidavit, and that I essentially abandoned my judicial function by accepting or preferring his wife's evidence at that stage of the proceeding and by acting upon it.

- [64] Justice Yard admitted to an initial inclination to grant the motion in order to move onto "the many other cases before the court requiring judicial attention", but he declined. In so doing, he commented on the institutional benefits of the Manitoba Court of Queen's Bench practice and expectation that "when a particular judge hears a first contested motion the judge will "seize" him or herself of future contested motions" until the matter is settled or determined by another judge at trial.
- [65] I can see no reason why similar expectations would not apply to the British Columbia Supreme Court. Certainly some of the benefits identified by Justice Yard at para. 62 apply: judicial economy, consistency and continuity and avoiding judge shopping.
- [66] The plaintiff submits granting the motion for disqualification would delay and increase the plaintiff's costs, and result in lost judicial time because another judge would need to become familiarized with all the circumstances of this case. I agree.
- [67] I conclude Mr. Nagin has failed to adduce evidence and failed to raise sufficient legal argument to substantiate his allegations of bias, and his application is dismissed on those bases.

Alleged Indicia for Bias

- [68] In the further alternative, if the preceding analyses are not sufficient to dispose of this application, I briefly review the circumstances cited by Mr. Magaril as constituting bias. In my view, whether viewed individually or collectively, the issues addressed below do not raise a reasonable apprehension of bias.
- [69] Mr. Magaril does not represent Prudence Nagin, yet he relied on a number of interactions between her and the court to support Mr. Nagin's assertion of bias. He went so far as to say the court failed to provide "protection" to Ms. Nagin. Yet, he submitted at the same time that Ms. Nagin "appears to be adverse in interest" to Mr. Nagin. He failed to explain how the unreasonable treatment of an adverse party demonstrates bias against his client.
- [70] In my view, the submissions based on the court's interaction with Ms. Nagin are irrelevant to Mr. Nagin's application. In any event, I am not persuaded any reasonable person would perceive that Ms. Nagin was treated with partiality or bias against her. The court's obligation is to ensure a fair and neutral hearing. The court stood down the December 10, 2018 to allow Ms. Nagin to seek legal advice, even though she had been advised to do so on November 29,

2018. Contrary to Mr. Magaril's submissions, the court was not insensitive to her status as a self-represented litigant.

- [71] Mr. Nagin submits the court, "entered into the arena and suggested that further orders should be granted in favour of the plaintiff without any request from the plaintiff, without requiring any notice be given, without requiring that any sworn affidavit material be adduced". The portions of the December Order that Mr. Nagin attacks are that he attend an examination in aid of execution with documents and information related to his offshore assets, and he be prepared to answer under oath questions as to what he did with the plaintiff's money. Given his agreement to the Consent Judgment, Mr. Nagin has not explained how these procedural steps taken to enforce the judgment prejudiced him.
- [72] Similarly, there was no evidence or even explanation as to how in this case it was prejudicial to order substitutional service on Mr. Nagin. Allowing substitutional service saved the plaintiff money. To suggest it was "unfair" or demonstrated partiality against Mr. Nagin to allow the plaintiff to have a cheaper way of delivering material to him, when he has acknowledged owing the plaintiff over \$950,000 amounts to a trivial complaint not amounting to a demonstration of bias.
- [73] At most, the preceding circumstances may have amounted, at most, to procedural flaws (although I do not find that they did).
- [74] At paragraph 18 of his application, Mr. Nagin states that the court elected to proceed on December 10, 2018 in Mr. Nagin's absence, "knowing that Mr. Nagin was in custody". That submission is entirely inappropriate. Neither Mr. Nagin nor Mr. Magaril could be aware of what knowledge the court had about Mr. Nagin's custodial status. Indeed, the only way the court could acquire that knowledge would be if Mr. Nagin filed an affidavit stating that was the case, which he had plenty of time to do so before January 24, 2019. He did not file an affidavit. Mr. Magaril knew there was no such evidence before the court but made the submission imputing knowledge to the court anyway.
- [75] Mr. Magaril argued the order that Mr. Nagin pay "within one day" the judgment amount was flawed and demonstrated bias because the court can take judicial notice of the "difficulty that exists in transferring significant sums of money within one business day". He also submitted judicial notice should be taken of legislation that "exists across Canada and most of the developed world which significantly slows down the ability to immediately transfer funds in the magnitude ordered".
- [76] It is misleading to submit Mr. Nagin was only given one day to pay over \$950,000 in circumstances where: he filed a response promising to pay the funds forthwith; he claimed in August 2018 that he had over US \$4 million offshore; he failed to attend a scheduled examination for discovery; and he consented to judgment against him for over \$1.5 million on October 12, 2018. Moreover, as of January 24, 2019, Mr. Nagin had had ample time to make payment and he had not done so and provided no explanation why he had not done so. He provided no evidence as to steps he had taken to procure his offshore funds to satisfy

the judgment.

- [77] In any event, the proposition that it is difficult to transfer significant sums of money in one business day is not appropriate for judicial notice; it is not without controversy, nor a well settled fact. Indeed, it is disquieting that Mr. Magaril would make that submission in light of Mr. Nagin's plea on November 28, 2018 that he would pay \$100,000 within a day in order to avoid being committed for contempt. It is also inconsistent with evidence before me, including correspondence to Mr. Shields from Mr. Huculak and Mr. Magaril, that payment of about \$960,000 was coming imminently. Thus, the evidence before me was more in favour of the opposite facts that Mr. Magaril submitted could be the subject of judicial notice.
- [78] Mr. Magaril submitted that Mr. Nagin was in jail on December 10, 2018 and judicial notice should be taken of the difficulty in attending to financial matters while still in jail. It is troubling that Mr. Magaril would raise an allegation of bias against the court without adducing evidence to support his supposition that Mr. Nagin was in jail on December 10, 2018. His client could have but did not provide that evidence. Instead, Mr. Magaril relied on his own calculation of how the 14 days' committal would have been treated by a correctional facility, which was a simple counting of days. Mr. Shields correctly referred to the applicable legislation and submitted it is likely Mr. Nagin would have been released at least two days before December 10, 2018. I need not resolve that contradiction because Mr. Nagin did not file an affidavit in support of his lawyer's submission. The submission is devoid of merit.
- [79] Mr. Magaril also complained that the December Order required Mr. Nagin to attend at an examination in aid of execution without providing conduct money. Mr. Nagin's address for service is only a few blocks away from the plaintiff's law firm, and there was no evidence of any request made directly or through his counsel as to the need for conduct money. In fact, Mr. Nagin was given conduct money (cash) in advance of one of the examinations for discovery that he did not attend and he never returned it. This submission had no merit.
- [80] Mr. Magaril suggested a term of the order using the phrase "show cause" demonstrated bias because it purported to reverse the onus of proof and violates the presumption of innocence. The wording may not have been ideal, but no onus was reversed. The gravamen of that portion of the December Order was that Mr. Nagin attend court on December 10, 2018; the Order did not purport to alter the legal burdens that would be at issue. The purpose of his attendance was the same as the purpose that underlies all the parties' appearances before me: the plaintiff invoking the court's aid to enforce a judgment over \$950,000 that the defendants consented to pay.
- [81] All of the preceding issues are allegations that the court erred, which is not a basis upon which bias can be asserted. In any event, I am not convinced that any of the preceding issues whether considered individually or collectively would raise in the minds of reasonable people who are appraised of all the facts relating to this litigation an apprehension of bias.

- [82] Thus, in the alternative to my preceding conclusions, I conclude Mr. Nagin has failed to substantiate in both legal and evidentiary terms his allegation of bias. I add other observations that buttress this conclusion.
- [83] Mr. Magaril's submissions should also be considered in light of events subsequent of the December 10, 2018 hearing. Mr. Nagin failed to attend two scheduled examinations in aid of execution. Mr. Huculuk send a document to Mr. Shields that he stated evidenced a wire transfer had already taken place. Mr. Magaril claimed the wire transfer had been corrected and funds would be forthcoming. Neither lawyer has provided any explanation to Mr. Shields as to why they made those claims which have now proven to be false.
- [84] In addition, I asked Mr. Magaril on January 24, 2019 whether his client had paid the outstanding judgment. He refused to answer. Mr. Nagin, as noted already, did not file any affidavit to support his application. Mr. Shields confirmed the plaintiff has not received payment.
- [85] In my view, a reasonable person appraised of all the circumstances leading up to and including the December Order, and subsequent events, would be outraged not by the court's comments, but by the defendant's continual defiance of their own promises, pleading and sworn statements and orders of this Court. What gets lost in Mr. Nagin's analysis is the underlying facts which I found in the Contempt Judgment, from which no appeal was taken. At para. 2, I wrote, among other things, that I had "evidence and in fact admissions from the defendants, of their absolutely appalling course of behaviour that has damaged the plaintiff in horrible ways". I further found that Mr. Nagin took advantage of the plaintiff and "preyed on her love for her disabled son, gave her false hope regarding her son's condition, pretended to be a doctor and investment analyst" and put the plaintiff through an "absolutely horrendous" ordeal.

II. CONCLUSION

- [86] I conclude Mr. Nagin's application must be dismissed because he remained in contempt of court on January 24, 2019 and was not entitled to be heard, much less receive relief.
- [87] In the alternative, when viewed in light of all the pertinent facts in this litigation, no reasonable person would apprehend there was any bias against Mr. Nagin.
- [88] The plaintiff has been successful and is entitled to her costs. On behalf of his counsel, Mr. Shields sought fixed costs in the amount of \$5,000 which I grant.
- [89] As noted, I adjourned the plaintiff's application. Given that I have dismissed Mr. Nagin's application, the plaintiff has liberty to set her application down to be heard by me as soon as possible. Mr. Shields may contact Supreme Court Scheduling to find a suitable date and time.

"Sharma J."

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