

CANADA / JUDGMENT

Yang v. Shi

2023 BCCA 146

COURT

British Columbia Court of Appeal

DECIDED

4 April 2023

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2023 BCCA 146 Yang v. Shi

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Yang v. Shi,

2023 BCCA 146

Date: 20230404

Docket: CA46449

Between:

Lihong Yang

Appellant

(Petitioner)

And

Li Shi

Respondent

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Fisher

On an application to vary: An order of the Court of Appeal for British Columbia,

dated October 28, 2022 (Yang v. Shi, 2022 BCCA 363, Vancouver Docket 46449).

The Appellant, appearing in person:

L. Yang

Counsel for the Respondent:

C. Shen

Place and Date of Hearing:

Vancouver, British Columbia

March 13, 2023

Place and Date of Judgment:

Vancouver, British Columbia

April 4, 2023

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Fisher

Summary:

Review of order of CA chambers judge denying leave to appeal. No reviewable error was shown. Two of the three prongs of the impugned order were moot and bound to fail; third prong concerning order to pay costs of \$1,000 forthwith had been largely addressed by opposing counsel's agreement that only \$660 should have been awarded and his agreement to seek adjustment in court below. In any event, an appeal concerning the difference of \$340 would be disproportionate to the amount involved. (Citing *Godwin v. Desjardins Financial Security Investments Inc.* 2018 BCCA 426.)

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] Ms. Yang seeks an order under s. 29 of the Court of Appeal Act varying an order made by Justice Horsman in chambers, whom I will refer to hereafter as the "Chambers Judge". The order granted Ms. Yang an extension of time in which to file and serve her application and application book, but dismissed her application for leave to appeal an order made by Justice Jackson in the Supreme Court on September 20, 2019.

- [2] In her reasons (indexed as 2022 BCCA 363), the Chambers Judge provided a useful summary of the lengthy "litigation context" of the matter that had been before Jackson J. in the court below. The underlying action was a short-term residential tenancy dispute between Ms. Yang as tenant and Ms. Shi as landlord. The dispute had led Ms. Yang, acting on her own behalf, to commence a small claims action in Provincial Court in November 2017, seeking damages in excess of \$35,000. Now, more than five years later, that action has still not been heard. In the meantime, Ms. Yang has filed five petitions and many appeals regarding matters related to the tenancy and its termination; criminal charges have been laid and withdrawn; and one application by Ms. Yang to appeal an order of this court to the Supreme Court of Canada has failed. In the present proceeding (which relates to SCBC File No. S-189243), the parties have filed extensive correspondence and documents that demonstrate Ms. Yang's repeated non-compliance with court orders and failures to communicate in a reasonable manner with counsel for Ms. Shi.
- [3] I set out below a chronology of the steps in this proceeding that are most relevant to Ms. Yang's present application:.

July 2018

Judge Bakan, a judge of the Provincial Court, heard an application concerning the manner in which witnesses would appear at the small claims trial. Ms. Yang had wanted to call her husband as a witness, but he was unable to appear in person. Bakan J. ruled that the witness could not appear other than in person, and dismissed Ms. Yang's application to adjourn the trial. Ms. Yang filed a petition for judicial review of that ruling in the Supreme Court of British Columbia.

October 4, 2018

Mr. Justice Macintosh in the Supreme Court ordered that Ms. Yang could re-schedule the petition for review of Judge Bakan's order only with respect to the term that her witnesses must appear in person at trial, and only if she provided a transcript of the arguments and reasons of the hearing before Judge Bakan to counsel for Ms. Shi and to the Supreme Court by 4 pm on October 10.

October 15, 2018

Madam Justice Sharma dismissed Ms. Yang's application for judicial review of Judge Bakan's ruling, with costs to Ms. Shi.

January 10, 2019

Master Baker assessed the costs payable by Ms. Yang to Ms. Shi in the amount of \$4,379.22.

January 11, 2019

Ms. Yang filed a notice of appeal of Master Baker's decision regarding costs.

September 20, 2019

On the scheduled date for the hearing of Ms. Yang's appeal of Master Baker's order, counsel for Ms. Shi applied for an adjournment. He told the chambers judge, Justice Jackson, that he had received Ms. Yang's materials only two or three days earlier. Jackson J. accepted the assertion of Mr. Shen, counsel for Ms. Shi, that he was unable to proceed on the scheduled date, and said she was not satisfied with Ms. Yang's explanation as to why she had filed her amended argument and affidavit so late. She observed that Ms. Yang's refusal to allow the respondent to contact her by email, insisting instead on regular mail or personal service, had meant that Ms. Shi could not have sought the adjournment before September 18, when counsel received Ms. Yang's materials.

Jackson J. granted the adjournment and directed that the matter be reset "quickly" on a date convenient to both parties. Costs incurred in preparing for the hearing were to be payable by Ms. Yang. In an effort to "reduce the growing costs that have been incurred by the respondent", the judge agreed with Mr. Shen that his client's costs should be fixed at \$1,000, payable forthwith. The Court dispensed with Ms. Yang's approval of the form of the order.

October 18, 2019

Ms. Yang filed a notice of appeal of Jackson J.'s order in this court. Although Mr. Shen notified Ms. Yang shortly thereafter that leave was required, Ms. Yang took no steps to seek leave.

December 12, 2019

Ms. Yang filed an appeal record.

January 10, 2020

Ms. Yang filed her appeal book and factum.

February 14, 2020

Ms. Shi applied to have the appeal dismissed on the basis that leave was required or alternatively, security for costs. This application was not heard due to scheduling difficulties. These difficulties were due in part to Ms. Yang's prolonged periods of absence from Canada and her refusal to have the motion to strike the appeal determined in any way other than by an in-person hearing. (This, of course, was during the time of Covid-19.)

August 16, 2022

Ms. Shi filed a request for directions concerning the procedure in this court for obtaining summary dismissal of the appeal pursuant to s. 21 of the Court of Appeal Act.

August 24, 2022

A case management conference was held before Mr. Justice Willcock. At para. 22 of his reasons (indexed as 2022 BCCA 317), he noted that the summary procedure in s. 21 is intended to give the Court a "means of dismissing appeals on a summary basis, on its own motion, where neither argument nor evidence is necessary to determine that the appeal (a) is frivolous or vexatious, or (b) can otherwise be dismissed on a summary basis." Since he found that submissions from Ms. Yang would be necessary for the Court to determine whether the appeal was bound to fail, he did not grant the order sought. However, he directed Ms. Yang to apply for leave to appeal and if necessary, to seek an extension of time in which to do so. The application for leave was to be filed within 30 days and set for hearing within 60 days of his order unless otherwise agreed by the parties. (At para. 32.)

September 22, 2022

Ms. Yang filed her application for leave and applied to extend the time for filing and serving same.

October 21, 2022

The Chambers Judge heard Ms. Yang's application to extend the time for filing and serving the application for leave to appeal and for leave to appeal.

[4] The Chambers Judge issued written reasons on October 28, 2022. They are indexed as 2022 BCCA 363. After setting forth the procedural background summarized above, she turned to the "legal framework" governing applications for leave to appeal. She noted, correctly, that the following criteria apply:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

All of these, she added, are to be considered under the broader principle of the interests of justice.

[5] The Chambers Judge noted that Ms. Yang's position had changed somewhat since the hearing before Willcock J.A., where Ms. Yang had acknowledged that the adjournment issue was "gone" and said her main concern in seeking to appeal was the costs component of Jackson J.'s order. Ms. Yang now wished to appeal all three 'prongs' of that order. The Chambers Judge found that the first two parts of Ms. Yang's purported appeal -- i.e., the adjournment and the 'setting down' direction -- were "bound to fail". In the Judge's analysis:

I agree with Ms. Shi that Ms. Yang's appeal as it relates to the granting of an adjournment is bound to fail. The adjournment was a discretionary order by a chambers judge that was grounded in the prejudice to Ms. Shi arising from late delivery of material. I see no prospect that a division of this Court would interfere with such an exercise of discretion in these circumstances. In any event, there is no utility to an appeal of an adjournment order that was made three years ago. As Willcock J.A. observed in his reasons following the case management conference, an appeal of the adjournment at this stage would not accomplish anything: 2022 BCCA 317 at para. 11. The appeal, as it relates to the adjournment, is moot.

There is also no merit to Ms. Yang's appeal as it relates to the term directing her to reschedule the hearing expeditiously. Ms. Yang says the direction that the appeal was to be rescheduled on a "date convenient to the parties" subsequently caused difficulty for her because counsel for the respondent has not been cooperative in providing dates. Counsel for the respondent denies this. In any event, to the extent that Ms. Yang has faced difficulty in rescheduling the appeal date, that has nothing to do with the propriety of Jackson J.'s direction. In my view, this aspect of Ms. Yang's proposed appeal is bound to fail. [At paras. 25-26; emphasis added.]

[6] With respect to the third prong of Ms. Yang's leave application -- i.e., the order that Ms. Yang pay costs of the September hearing in any event of the cause in the fixed amount of \$1,000 -- the Chambers Judge noted the "onerous burden" on an applicant seeking leave to appeal costs, citing *Yung v. Jade Flower Investments Ltd.* 2012 BCCA 168 at para. 19.

[7] The Chambers Judge saw no merit to Ms. Yang's argument that Jackson J. should not have awarded costs in any event of the cause. This order had been discretionary, and Ms. Yang had not cited any error in principle that might justify appellate review. (At para. 28.) However, the Chambers Judge noted that it appeared the amount of costs had been calculated erroneously, since counsel had applied items 26 and 27 of the tariff in Appendix B of the Supreme Court Civil Rules. In fact, the costs should have been assessed under items 24 and 25, which apply to appeals from a master.

[8] When this matter was raised during the hearing before the Chambers Judge, counsel for Ms. Shi told the Court he was willing to make a "concession" in order to avoid the expense of another appeal and would consent to the costs amount being \$660 (i.e., the amount assessable under items 24 and 25). The following exchange took place between counsel and the Chambers Judge:

THE COURT: ... in any event, I am not sure how it could be without a -- a bill of costs if it's going to be something less than the minimum units under the tariff, but your point is, even though I ... I can't do anything about the Supreme Court order as a Justice in chambers on a leave application, but you're making a concession on the record that the respondent would agree to adjust to reflect that it should have been tariff item 25?

CNSL C. SHEN: Yes, and the accompanying [sic] why I believe would be tariff 24.

THE COURT: Thank you, Mr. Shen.

- [9] The only remaining question to be decided by the Chambers Judge, then, was whether leave should be granted "based solely on a minor error in quantifying costs that the respondent has acknowledged, and offers to correct." The Chambers Judge ruled that it was not in the interests of justice to grant leave. In her view, the costs of an appeal to this court would be wholly out of proportion to the amounts in issue and the only error identified by Ms. Yang was "of minimal financial impact as compared to the costs of an appeal." In addition, Ms. Shi had conceded through counsel that an adjustment should be made in the Supreme Court to correct the error in the amount of costs. There being "no question of law or question of importance from a practice perspective, and no matters of importance to the proceeding between the parties", the Chambers Judge dismissed Ms. Yang's application for leave to appeal, with costs to Ms. Shi. (It appears that no entered order of the Chambers Judge has yet been filed.)

Analysis

- [10] As is well-known, a person applying for a cancellation or variation of an order made in chambers by a single justice of this court must satisfy a division that the justice was wrong in law or in principle, or misconceived the facts. As stated in *Haldorson v. Coquitlam (City)* 2000 BCCA 672:

It comes to this: that the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge. [At para. 7.]

- [11] Ms. Yang's submissions to this division were focused largely on the costs prong of the impugned order, but Ms. Yang also filed lengthy written submissions, supplemented by another submission filed with leave after our hearing, to the effect that the Chambers Judge's conclusion that her appeal was "bound to fail" was inappropriate, speculative, non-judicial, unreasonable, unmeritorious and vexatious. As well, she described the order that she pay costs forthwith as 'traumatizing', given her financial circumstances.
- [12] Comments of this kind are seldom helpful, and it is difficult to distill arguments from Ms. Yang's submissions that are appropriate for resolution by a court of law. However, since one of Ms. Yang's complaints is that courts have not addressed her submissions or objections one by one in their reasons, I have extracted the complaints underlined below, which are quoted or paraphrased from Ms. Yang's material, together with my conclusions.

- a) Ms. Yang did not "break any rules" in filing the documents she did before Jackson J.: Ms. Yang herself excepts from this statement the fact that she filed her "reply to the [response] and [her] Amended Appellant's Statement of Argument" and a ninth affidavit sworn September 17, 2022. When Mr. Shen received these materials on September 18, he wrote to Ms. Yang by mail (since she would not accept any other form of communication), stating:

The amended statement of argument is just over 8 pages long, in contrast to the 3-page Statement of Argument you filed on January 11, 2019. The bulk of your amended statement of argument consists of new content that you have only just added.

You have tripled the length of your Statement of Argument a mere two days before the hearing, despite having had since January 2019 to make any amendments you deemed necessary. On cursory review it appears that you have added new issues and arguments with this amendment.

This is an unacceptable delay in serving your amended pleading and I will require additional time to review and respond to these amendments.

Please confirm whether you will consent to adjourn generally the hearing currently set for September 20, 2019 to be re-set on a mutually agreeable date. Otherwise I will be seeking to adjourn the hearing and seek costs against you for the adjournment.

Jackson J. agreed with Mr. Shen that he should have had more time to prepare for the application. She did not "unfairly hinder the legal interests of self-represented litigants" when she granted the adjournment; she merely ensured that Ms. Shi and her counsel would have adequate time to respond to the late-filed materials. I agree with the Chambers Judge that any appeal of this ruling would be bound to fail.

- b) The Chambers Judge should not have found that there would be no utility in the appeal, in "heavy" reliance on the comments of Willcock J.A. in his reasons at para. 11 to the effect that an appeal of the adjournment would not accomplish anything. In my view, there can be no doubt that there was "no utility" to an appeal of an adjournment order that was made three years before the hearing before the Chambers Judge. Ms. Yang has not suggested anything that would be accomplished by the rehashing of the adjournment at this late date, and indeed she acknowledged before Willcock J.A. that the adjournment matter was moot.
- c) The Chambers Judge should not have found that the appeal relating to the adjournment and the resetting was bound to fail, because an application for leave need only show that there is a "possibility of the appellant's succeeding" (See *Weldon v. Agrium Inc.* 2011 BCCA 300). This is a correct statement of the law, but the Chambers Judge found, again in my view correctly, that there was no such possibility in this case. The adjournment order was indeed moot. The hearing had not been rescheduled "expeditiously" and three years had passed by the time the matter came before the Chambers Judge. Thus the "merit" criterion from *Davies v. C.I.B.C.* (1987) 15 B.C.L.R. (2d) 256 (C.A.) regarding leave to appeal was not met.

- d) Ms. Yang "needs to know the reasons why a judge has disrespected the appellant in saying 'it is bound to fail'". With respect, the Chambers Judge's Reasons explain this matter fully.
- e) The vexatious litigant order made in the Supreme Court against Ms. Yang is not binding on the Court of Appeal. This is correct, but nothing in the Chambers Judge's reasons indicates that she was relying on the vexatious litigant order for any purpose.
- f) Because the order of Jackson J. was an "abuse" and "unjustly enriches" the respondent, it should be reversed or set aside. In my view, while costs orders of the kind made by Jackson J. should be made sparingly, the circumstances of this litigation fully justified such an order. It lay in the discretion of the judge to make the order and again, an appeal would be bound to fail.
- g) The Chambers Judge 'distorted' Jackson J.'s order from one ordering costs 'payable forthwith' to one ordering costs 'in any event of the cause'. Respectfully, costs that are payable forthwith are payable in any event of the cause. The payor's liability does not depend on the outcome of any future hearing or proceeding.
- h) It was an "abuse" to order Ms. Yang to pay costs in any event of the cause given her financial position. One can readily infer that Ms. Yang's repeated non-compliance with orders and her interactions with counsel have been very costly to the respondent. On the other hand, the fact that Ms. Yang claims to have no income (and has obtained four orders waiving payment of court fees) is undermined by the facts, inter alia, that she has been able to travel to China during the course of this litigation and claims to have been living with expenses of some \$1,700 per month: see 2020 BCSC 1857 at para. 99. I note that Mr. Justice Frankel of this court concluded some years ago (see 2017 BCCA 349) that Ms. Yang was receiving significant support from her family for her living and litigation expenses. In any event, while judges have some discretion in connection with costs, the Supreme Court Civil Rules apply to all litigants regardless of wealth or lack thereof.
- i) It was unjust of Jackson J. to award costs of the application to Ms. Shi. As I have noted, this was a discretionary order: see *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd.* 2011 BCCA 523 at para. 2. The Chambers Judge found there might be some merit in the complaint that the \$1,000 costs order was fixed based on an incorrect tariff item; however, she also found that it was not in the interests of justice to grant leave to appeal the costs order on the basis of discretionary considerations, in particular the principle of proportionality. On this point, we were referred to *Godwin v. Desjardins Financial Security Investments Inc.* 2018 BCCA 426, where Harris J.A. for the Court described the "gatekeeping function" of the leave requirement, which permits the Court to "screen out appeals that, while meritorious, are not of sufficient importance or practical significance to justify granting leave." (My emphasis.) In addition, he noted, this gatekeeping function may be informed by the principle of proportionality, an "important consideration in promoting access to justice". (At para. 5.) In the result, the Court in *Godwin* endorsed the ruling of the justice in chambers that:

[E]ven accepting the strength of the appeal, this case should end and the appeal lacks practical utility to either the parties or practice. This represents an exercise of the gatekeeping function in considering whether to grant leave. It cannot be said that the judge erred in exercising her judgment. [At para. 23; emphasis added.]

- [13] In this case, of course, counsel for the respondent acknowledged on the record that his client would be content to adjust the \$1,000 amount to \$660 due to the confusion concerning the correct tariff. Although this was not, as Ms. Yang contends, "critical" to the Chambers Judge's decision to refuse leave, it did provide the Chambers Judge with the assurance that appropriate steps would be taken in the Supreme Court to correct the apparent error. While Ms. Yang argued strongly before us that the Chambers Judge had no authority to "fix" the costs at \$660, the fact is that the Chambers Judge did not do so. Rather, she accepted counsel's assurances that Ms. Yang would not be pursued for \$1,000 in costs and that he would see to the "adjustment" in Supreme Court. The only application before the Chambers Judge was the application for leave to appeal.
- [14] Finally in connection with costs, Ms. Yang handed up to this court two pages from two decisions that endorsed the principle that "costs thrown away" are intended to indemnify a party for steps reasonably necessary to proceed with an action only where those steps have been rendered useless by the other party's conduct: see *Harrison v. Afexa Life Sciences Inc.* 2014 BCSC 523 at para. 40 and *Haggan v. Mad Dash Transport Ltd.* 2018 ONSC 1889 at para. 18. As Mr. Shen contends, however, these cases are distinguishable in that they involved proceedings or trials that would still occur following the "costs thrown away" order. In the case at bar, the hearing that was scheduled for September 20 has never been heard. In the result, Mr. Shen's costs of preparation were indeed "thrown away" long ago.
- [15] Last, I note Ms. Yang's repeated charges in her written argument that she was 'disrespected' or discriminated against because she was self-represented. I have read the transcripts of the hearing before Jackson J. in the Supreme Court and before the Chambers Judge in this court and see no sign of disrespect or abuse. Both judges showed patience and concern in listening to Ms. Yang's submissions, carefully explained to her how the hearings would proceed, and gave reasons that addressed her arguments. Mr. Shen also assisted her in the hearings when appropriate. To the extent that disrespect could be detected from a transcript, there is no reason to infer that Ms. Yang's charges of 'discrimination' are justified.
- [16] At the end of the day, Ms. Yang seems to have succeeded in running up the costs of her opposing parties with impunity and, in the words of Justice Norell, has shown a "pattern of blindly filing judicial reviews and appeals without consideration of the costs to the courts or the other parties, or the merits of these proceedings." (2020 BCSC 1857 at para. 96.) This might be permissible in a legal system that has infinite time and judicial resources, but in the present context, such conduct is unfair to the opposing parties and is not in the interests of justice.

[17] I would dismiss the application to vary the order of the Chambers Judge, with costs to the respondent.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Madam Justice Fenlon"

I agree:

"The Honourable Madam Justice Fisher"

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