COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bea v. The Owners, Strata Plan LMS 2138,* 2010 BCCA 463

Date: 20101021
Docket: CA038137

Between:

Cheng-Fu Bea

Appellant
(Petitioner)

And

The Owners, Strata Plan LMS 2138

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, April 29, 2010
(*Bea v. The Owners, Strata Plan LMS 2138,* New Westminister Registry Docket S116228)

Appellant Appearing In Person:	C. Bea
Counsel for the Respondent:	P. Dougan
Place and Date of Hearing:	Vancouver, British Columbia October 7, 2010
Place and Date of Judgment:	Vancouver, British Columbia October 21, 2010

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[1] The appellant, Cheng-Fu Bea, applies for two orders pursuant to s. 9(6) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 (the "*Act*"): (i) to discharge or vary the order of Mr. Justice Groberman, in chambers, made on June 16, 2010, and (ii) to discharge or vary the order of Mr. Justice Chiasson, sitting in chambers, made on September 16, 2010.

[2] The order of Justice Groberman dismissed an application brought by the appellant for: (i) "a declaration that the respondents [owners of the strata development] are in contempt of court", and (ii) an order that the respondent strata owners provide security for "their counsel's good behaviour". He also awarded the respondent special costs of the applications. These applications appear to have been made because of the appellant's persistent and misguided belief that once a notice of appeal is filed, all proceedings in the court below that relate to the orders under appeal are automatically stayed and therefore any attempt by the respondent to enforce those orders (particularly the costs awards) amount to contempt.

[3] The order of Justice Chiasson was made in response to an application by the respondent for an order that the appellant post security for costs, as well as for an order in the nature of the one made in *Houweling Nurseries Ltd. v. Houweling,* 2010 BCCA 315, pursuant to ss. 24 and 29 of the *Act,* respectively. Chiasson J.A. adjourned the respondent's applications to this division based on a determination that the order under appeal by the appellant was an interlocutory order and therefore required the appellant to apply for leave to appeal. Chiasson J.A. directed the appellant that if he chose to bring that application he could do so before this division in conjunction with his s. 9(6) review application of Groberman J.A.'s order. The appellant did not file an application for leave to appeal the interlocutory order and the 30-day time period to do so has long since passed. Instead, he filed a s. 9(6) review application of Chiasson J.A.'s order directing him to apply for leave to appeal.

[4] Mr. Bea appears on his own behalf in the two review applications before this division. He was declared a vexatious litigant in the court below by Mr. Justice Grauer on August 23, 2010. The respondent now seeks a similar order from this Court pursuant to s. 29 of the *Act*.

A. Background

[5] The underlying dispute between the appellant and respondent strata corporation involves the appellant's refusal to comply with the respondent's assignment of a parking stall to the appellant's wife. The appellant and his wife live in a strata unit in a building owned and managed by the respondent. Title to their strata unit is in the name of the appellant's wife. The appellant refuses to park his vehicle in the parking stall he has been assigned by the strata council and has received fines totalling $1,000 for his breach of the respondent's parking bylaw. As an olive branch of sorts, the strata council has reduced the fines to $600.

[6] The appellant claims that the parking bylaw is *ultra vires* the authority of the strata corporation. To that end, he has filed three successive petitions in the court below over the same issue. The first petition was dismissed on its merits by Mr. Justice Masuhara (S113052) and costs awarded to the respondent. Costs were assessed at $4,986.67. An appeal by the appellant from that assessment was dismissed by Mr. Justice Williamson and costs of the appeal in the amount of $678.39 awarded to the respondent. The second petition was dismissed as *res judicata* by Madam Justice Brown (S114949**)**. Costs of $3,520.92 were awarded to the respondent. Mr. Bea did not appeal either of the orders dismissing the first two petitions. None of the awards of costs, however, have yet been paid.

[7] The appellant then filed a third petition relating to the same bylaw issue (S116228). That petition was dismissed by Master Taylor as vexatious and an abuse of the court process. In support of that order, the Master relied on the summary of indicia of vexatious actions provided in *Lang Michener Lash Johnston v. Fabian* (1987), 59 O.R. (2d) 353, 37 D.L.R. (4th) 685. Master Taylor also ordered that the appellant be prohibited from filing any further applications or petitions on the same

matter until he posts $7,500 as security for costs to the respondent. He also awarded the respondent 60% of its special costs of the application.

[8] Master Taylor found that the appellant was acting as a "straw man" for his wife in the litigation and had deliberately insulated himself from any costs award by having no assets in his name, including the strata unit in which he and his wife lived. This was supported by the fact that the appellant's wife had executed an assignment appointing the appellant to act as her agent pursuant to a provision in the *Strata Corporation Act,* R.S.B.C. 1988, c. 43. He therefore ordered the special costs of the petition be paid by the appellant's wife.

[9] The appellant appealed the order of Master Taylor. The appeal was dismissed by Madam Justice Gropper who also awarded special costs of the appeal to the respondent. The appellant then filed a notice of appeal in this Court from the order of Gropper J. (CA37243). The appellant made several more applications in this Court under appeal CA37243 until Madam Justice Saunders, on September 10, 2009, granted the respondent a stay of proceedings pending the appellant's posting of security for costs in the amount of $7,500 for the appeal, and $5,000 as a portion of the costs below.

[10] In the meantime, the orders of Master Taylor and Gropper J. awarding the respondent special costs were assessed by Registrar Blok, who issued a certificate of costs in the amount of $7,773.99. That judgment was secured against the strata unit legally registered in the name of the appellant's wife. When the respondent took steps to enforce the judgment, the appellant applied for a stay of execution. Mr. Justice Truscott granted the appellant a 30-day stay of execution of Registrar Blok's certificate of costs, to permit the appellant to proceed with his appeal in CA37243, by posting the security for costs ordered by Saunders J.A. In the absence of the appellant doing so, Truscott J. ordered that the stay would automatically be lifted. The appellant has not paid the security for costs order of Saunders J.A. and the appeal had since been placed on the inactive list. The only action taken by the appellant was to file a notice of appeal from the order of Truscott J. (CA38137).

[11] Thus, the appellant's third petition in the court below has now spawned two appeals in this Court. Before Groberman J.A. was an application by the appellant under CA37243; before Chiasson J.A. was an application under CA38137.

[12] On August 23, 2010, Mr. Justice Grauer dismissed the appellant's third petition in the Supreme Court of British Columbia, and included the following provisions in his order:

> 2. Mr. or Mrs. Bea, and anyone acting on their behalf, shall not file or attempt to file, by any means whatsoever, any document in any registry of the Supreme Court of British Columbia pertaining to or in any way connected with the subject matter of the proceedings in Supreme Court Registry File Nos. S113052, S114949, S116228 without leave of this Court.
>
> 3. The prohibition in paragraph 2 does not apply to any order that is made against Mr. or Mrs. Bea at the behest of another party, provided that any notice of appeal, notice of application, or other initiating document filed in this Court by Mr. or Mrs. Bea is signed by a member in good standing of the Law Society of British Columbia and Mr. and Mrs. Bea are represented by such a member at any hearing.
>
> 4. Nothing in this order stops any matter proceeding in the Court of Appeal.
>
> 5. It will not be necessary to obtain Mr. or Mrs. Bea's approval as to form of the order.
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> ...
>
> 7. This order is to be brought to the attention of this Court's registry staff.
>
> 8. Registry staff are authorized to refuse any document that is attempted to be filed in contravention of this order.

[13] We understand that the appellant has now appealed the order of Grauer J. (CA38444).

B Discussion

(i) *The Review Applications*

[14] The test to be applied on a review application from a discretionary order of a chambers judge is: "was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts": *Haldorson v. Coquitlam (City)*, 2000

BCCA 672 at para. 7. The review application is not a rehearing of the application before the chambers judge. The Court may not substitute its exercise of discretion for that of the chambers judge absent any error of law, error of principle or misconception of the facts by the chambers judge.

[15] The appellant's central submission on both review applications is that by filing a Notice of Appeal in this Court, all proceedings in the court below, including enforcement and execution proceedings on the order under appeal, are stayed pending the disposition of the appeal. Groberman J. A. went to great lengths to explain to the appellant that his understanding of the *Act* was not correct but could not persuade him otherwise.

[16] In this regard, ss. 17 and 18 of the *Act* provides:

> 17. Subject to any other enactment, if an appeal or application for leave to appeal has been brought, all proceedings relating to the appeal must be in the Court of Appeal.
>
> 18.(1) After an appeal or application for leave to appeal is brought, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal has been taken are stayed in whole or in part.

[17] Read together, these sections clearly provide that once an appeal is filed, any further proceedings in the appeal must be taken in the Court of Appeal (s. 17), and that if an appellant wishes to stay execution of the proceedings on the order under appeal, he or she must apply for such an order in a separate application before the Court of Appeal (s. 18).

[18] In short, an appeal of an order does not stay the enforcement of that order in the court below, absent the granting of a stay of execution of the order by this Court under s. 18 of the *Act.*

[19] The factors to be considered in granting a stay of execution were canvassed in *Roe v. McNeill* (1994), 49 B.C.A.C. 247:

> [6] The relevant factors to consider on whether to grant a stay are these:

1. A successful plaintiff is entitled to the fruits of his judgment. He should not be deprived of them unless the interests of justice require that they be withheld from him until the defendant's appeal is decided (*Voth Bros. Construction (1974) Ltd. v. National Bank* (1987), 12 B.C.L.R. (2d) 44).

2. The court's power to grant a stay is discretionary and should be exercised only where it is necessary to preserve the subject matter of the litigation or to prevent irremedial damage or where there are other special circumstances (*Contact Airways Ltd. v. DeHavilland of Aircraft of Canada Ltd.* (1982), 42 B.C.L.R. 141 at 142).

3. In the exercise of its discretion the court may weigh the interests of the parties, the balance of convenience and any prejudice that may arise and grant the stay on terms it considers appropriate (*Rogers Foods (1982) Ltd. v. Federal Business Development Bank* (1984), 57 B.C.L.R. 344 at 347).

4. A first step to consider on a motion for a stay is to determine whether an appeal is without merit or has no reasonable prospect of success (*Rogers* at 347 and *Mikado Resources Ltd. v. Dragoon Resources Ltd.* (1990), 46 B.C.L.R. (2d) 354 at 357.

[20] The appellant has not applied for a stay of proceedings of the costs awards from the court below, which the respondent is now attempting to collect. The appellant's appeal of those awards is, in my view, without merit and has no chance of success.

[21] It is also clear that s. 7 of the *Act* requires the respondent to obtain leave to appeal from an interlocutory order, on a matter of practice or procedure, or on a matter respecting costs only:

> 7 (1) In this section, "interlocutory order" includes
>
> ...
>
> (b) an order made under the Supreme Court Rules on a matter of practice or procedure.
>
> (2) Despite section 6(1), an appeal does not lie to the court from
>
> (a) an interlocutory order
>
> (b) an order or determination under Rule 21-7 of the Supreme Court Civil Rules
>
> without leave of a justice

[22] The order of Truscott J. is not a final order as it does not dispose of the rights of the parties. It is an order that relates to a matter of procedure and of costs by staying execution proceedings of the certificate of costs judgment. It therefore falls within the definition of an interlocutory order that requires an order for leave to appeal.

[23] The appellant did not apply for leave to appeal the order of Truscott J., and the time has long since passed to do so. Therefore, the appeal filed from his order (CA38137) is now moot: *British Columbia (Public Guardian and Trustee) v. Canada Life Assurance Co.,* 2001 BCCA 660. Consequently, the respondent's application before Chiasson J.A. for security for costs in that appeal is unnecessary.

(ii) *The Section 29 Order*

[24] The respondent is a small strata corporation. The appellant, through his litigation in the court below and in this Court, has drawn the respondent into court more than 30 times on the substantive issue of the *vires* of the respondent's parking bylaw. This is at a considerable cost to the respondent owners who are paying the legal fees to defend what amounts to an abuse of both courts' processes. The respondent owners are also faced with the appellant's attempt to insulate himself from enforcement proceedings by having no assets in his name.

[25] It is evident from the two appeals and multiple applications brought by the appellant in this Court on frivolous and unmeritorious issues, that the combined effects of s. 9(6) and s. 29 of the *Act,* absent something more, are insufficient to halt this ongoing abuse of the Court's process. In this regard, Mr. Justice Frankel offered the resolution for such a litigant in *Houweling*:

> [40] What, then, can a court do to bring to an end the misuse of the litigation process caused by the repetitive filing of unmeritorious applications that result in the needless expenditure of judicial resources and, in some cases, unnecessary expense to the other parties? The answer lies in the ancillary (inherent) jurisdiction that every court has to prevent its process from being abused. As Madam Justice Arbour stated in *United States of America v. Schulman,* 2001 SCC 21, [2001] 1 S.C.R. 616, an appellate court "like all courts, [has] an implied, if not inherent, jurisdiction to control its own process,

> including through the application of the common law doctrine of abuse of process": para. 33. See also: *United States of America v. Cobb,* 2001 SCC 19, [2001] S.C.R. 587 at para. 37.

[26] I am persuaded that the time has come for this Court to grant the respondent an order similar to the one made in *Houweling.* The effect of such an order will be to limit the appellant's access to the courts. While such an order is to be made sparingly and only in "the clearest of cases" (*Houweling* at para. 44), in my view this is one of those cases.

C. Conclusion

[27] In the result, I would dismiss the appellant's applications to discharge or vary the orders of Groberman J.A. and Chiasson J.A., and would make the following order pursuant to s. 29 of the *Act*:

1. The appellant, Cheng-Fu Bea, and anyone acting on his behalf, shall not file or attempt to file, by any means whatsoever, any document in any registry of the Court of Appeal for British Columbia pertaining to or in any way connected with the subject matter of the proceedings in Court of Appeal Registry File Nos. CA37243, CA38137, and CA38444, or pertaining to or connected with the subject matter of his allegations against the respondent, or arising from or related to that subject matter.
2. The prohibition in para. 1 does not apply to any order that is made against the appellant, Cheng-Fu Bea, at the behest of the respondent, provided that any notice of appeal, notice of application, or other initiating document filed in this Court by the appellant is signed by a member in good standing of the Law Society of British Columbia and the appellant is represented by such a member at any hearing.
3. Registry staff are authorized to discard any document that is attempted to be filed in contravention of this order.

[28] I would also grant the respondent special costs of the appeal against both the appellant and his wife.

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Hinkson"