COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Romfo v. 1216393 Ontario Inc.,***
2008 BCCA 106

Date: 20080304
Docket: CA035508

Between:

John Allan Romfo, Mary Dianne Romfo,
Murray Fairweather, Doreen Fairweather,
Robert A. Cunningham, Josephine M.J. Cunningham,
Bruce Adams, Roxana Adams and David Perrella

Appellants
(Plaintiffs)

And

1216393 Ontario Inc., Tylon Steepe Development Corporation
and Dennis Kretschmer

Respondents
(Defendants)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

Oral Reasons for Judgment

F.G. Potts
C. Martin — Counsel for the Appellants

J.B. Rotstein — Counsel for the Respondent, Dennis Kretschmer

Place and Date: Vancouver, British Columbia
4 March 2008

[1] **DONALD, J.A.:** This is an application by the defendant, Dennis Kretschmer, to vary an order of a justice of this Court. He argues the plaintiffs' appeal should be struck or quashed on the bases that (1) their notice of appeal was filed out of time, and (2) they do not allege any error on the trial judge's part.

[2] The power to review a chambers order under section 9(6) of the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77, is governed by the test in ***Haldorson v. Coquitlam (City)***, 2000 BCCA 672, 3 C.P.C. (5th) 225:

> [7] 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.

I have not been persuaded that this test has been met and I would accordingly dismiss the application.

[3] The appeal arises out of a dispute regarding contracts for the sale of property. The plaintiffs were the purchasers, and 1216393 Ontario Inc. and Tylon Steepe Development Corporation (the "corporate defendants") were the vendors. The corporate defendants cancelled the contracts, and the plaintiffs brought an action against the corporate defendants and Dennis Kretschmer, the principal of Tylon Steepe. The trial judge ordered specific performance against the corporate defendants but dismissed the plaintiffs' alternative claim against Mr. Kretschmer (2007 BCSC 1375). The corporate defendants appealed from the order for specific performance, and the plaintiffs appealed from the order dismissing their claim against Mr. Kretschmer. The defendants then applied for an order that the plaintiffs' appeal be struck or quashed. Madam Justice Rowles heard the application and ordered that the plaintiffs' appeal as against the corporate defendants be struck (2008 BCCA 45).

[4] Mr. Kretschmer now applies for an order setting aside Madam Justice Rowles's order and striking or quashing the plaintiffs' appeal altogether.

Background

[5] In 2002, the plaintiffs entered into agreements to purchase strata lots from the corporate defendants in a proposed subdivision on Kalamalka Lake, approximately 30 km. north of Kelowna, British Columbia. The plaintiffs dealt exclusively with Mr. Kretschmer, who was the principal of Tylon Steepe Development Corporation and an agent for 1216393 Ontario Inc. in the marketing, developing, and selling of the strata lots.

[6] In 2005, shortly before the subdivision was registered, the corporate defendants notified the plaintiffs that they were cancelling the contracts.

[7] In January 2006, the plaintiffs commenced an action against the corporate defendants and Mr. Kretschmer. They sought an order of specific performance against the corporate defendants. In the alternative, they sought damages from Mr. Kretschmer for negligent misrepresentation.

[8] At trial, the plaintiffs did not argue the alternative claim against Mr. Kretschmer. They took the position that if the corporate defendants were liable, then the claim against Mr. Kretschmer was a "moot issue".

[9] The trial judge, Mr. Justice Myers, delivered reasons for judgment on 14 September 2007 (2007 BCSC 1375). He found that the plaintiffs were entitled to specific performance of the contracts as against the corporate defendants, on the basis of fundamental breach and estoppel. He dealt with the plaintiffs' claim against Mr. Kretschmer in the following passages:

> XII. Personal Liability of Mr. Kretschmer
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> [339] This was another point which was plead but not argued. I do not propose to make any ruling on this. If counsel wish to address this they may make appropriate arrangements. If not the claim will be dismissed.
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> XIII. Conclusion
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> - The parties may make arrangements to argue the issue of damages or personal liability of Mr. Kretschmer. In the absence of that, the claim against Mr. Kretschmer personally is dismissed and there shall be no order for damages.

[10] On 11 October 2007, the parties appeared before the trial judge to settle the terms of the order and to argue costs.

[11] On 12 October 2007, the corporate defendants delivered notices of appeal to the plaintiffs. They filed four notices of appeal, one for each group of plaintiffs referred to in the judgment.

[12] On 17 October 2007, the parties again appeared before the trial judge to make submissions regarding his order. The defendants argued that the date of the order should be 14 September, not 17 October, because they came before the judge on 17 October on a notice of motion and the hearing was therefore not part of the trial. However, the trial judge concluded that the date of the order should be 17 October. He found that the 17 October hearing was part of the trial because he had said in his reasons for judgment that he wanted to hear from counsel on a number of matters, including the personal liability of Mr. Kretschmer. As a result, the formal order shows the date of judgment as 17 October 2007. The order was entered on 22 October 2007.

[13] Also on 22 October 2007, the plaintiffs filed notices of appeal. The notices, which include both Mr. Kretschmer and the corporate defendants as parties, state that the plaintiffs seek:

> ... an order that if the Defendants, 1216393 Ontario Inc. and Tylon Steepe Development Corporation, are successful in their appeals, the matter be remitted back to the Honourable Mr. Justice Myers to assess the liability of Mr. Dennis Kretschmer which was not pursued by the Plaintiffs once the corporate defendants were found liable.

[14] On 8 November 2007, the parties appeared before the trial judge to argue costs. The defendants asserted that the plaintiffs had abandoned the claim against Mr. Kretschmer. The plaintiffs responded that they had not abandoned the claim but rather had made the claim in the alternative.

[15] On 4 December 2007, the trial judge issued reasons for judgment on costs (2007 BCSC 1772).

[16] On 20 December 2007, Madam Justice Rowles heard applications from both parties. The defendants applied for an order that the plaintiffs' appeal be struck or quashed on the basis that it was brought after the 30-day time limit. In addition, the corporate defendants applied for an order that the appeal as against them be struck or quashed on the basis that no relief is or could be sought against them because the plaintiffs' appeal is from the order dismissing the claim against Mr. Kretschmer.

[17] The plaintiffs applied for an extension of time within which to appeal, should such an extension be necessary.

[18] The parties brought their applications with respect to one appeal only. The four notices of appeal filed by the plaintiffs are the same as one another. The parties agreed that the result of the applications would be determinative of the same issues in the other appeals.

[19] Madam Justice Rowles issued reasons for judgment on 18 January 2008 (2008 BCCA 45). She found that the plaintiffs' appeal was filed within the 30-day time limit, and thus they did not require an extension of time (at para. 22). She also found that the plaintiffs' appeal as against the corporate defendants was irregular because it did not seek any relief against them (at para. 21). She ordered that the plaintiffs' appeal as against the corporate defendants be struck and the notice of appeal be amended accordingly.

[20] Mr. Kretschmer now applies for an order setting aside Madam Justice Rowles's order and striking out or quashing the plaintiffs' appeal. He brings the application with respect to only one of the appeals. The parties have agreed that the result of this application will be determinative of the same issues in the other appeals.

Analysis

[21] At issue in this application are (1) whether the plaintiffs' appeal should be struck or quashed on the basis that it was not filed within the 30-day time limit, and (2) whether the plaintiffs' appeal should be struck or quashed on the basis that they do not allege any error on the trial judge's part.

(i) Time Limit

[22] The time limit for bringing an appeal is provided for in section 14(1) of the ***Court of Appeal Act***, the

relevant portion of which reads:

> 14 (1) The time limit for bringing an appeal or an application for leave to appeal is
> (a) 30 days, commencing on the day after the order appealed from is pronounced, …

[23] The meaning of this provision was discussed by Mr. Justice Cumming, in chambers, in ***Burlington Northern Railroad Co. v. Baseline Industries Ltd.*** (1992), 15 B.C.A.C. 172, 20 C.P.C. (3d) 90. He said:

> [16] I recognize that there are decisions of this court related to the calculation of the time for appeal where written reasons are given. Those cases, however, relate to circumstances in which judgment has been reserved and the question relates to the dates upon which notice of the reasons for judgment can be said to have been given to counsel. It is clear from those decisions that the date of filing of the reasons for judgment is the date from which the time commences to run. However, it is equally clear that communication of the judgment is the key factor to be considered. As stated by Mr. Justice Macfarlane in *Lloyd, DeBeck & Partners Ltd. v. Cumis Life Insurance Co.* (1984), 51 B.C.L.R. 168 (C.A.), at p. 171:
>
> > The essence of that reasoning is that the judgment is not pronounced until the judge has communicated his judgment to the parties.
>
> [17] It is equally the case that even where ancillary matters may be dealt with subsequent in time to the pronouncement of the order, the time for appealing from the order is the time when the order is pronounced. Thus in *Baart v. Kumar* (1983), 46 B.C.L.R. 166 (C.A.) Mr. Justice Hutcheon stated, at p. 169:
>
> > The word "pronounced" in s. 14(1)(a) should be given the same meaning that it had in s. 15(2). Notwithstanding that there may be incidental matters such as prejudgment interest or costs to be settled before the formal judgment is perfected, the time limit for bringing an appeal against an order made on a major issue such as liability or damages runs from the making of that order. I find nothing impractical or harsh in this result, since the Court of Appeal has the power to extend that time in a proper case.
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> [Emphasis added.]

[24] Mr. Kretschmer contends that the 30-day time limit began on 14 September 2007 and therefore the plaintiffs' notice of appeal, which was filed on 22 October 2007, was late. He argues that 14 September is the date on which the trial judge's reasons were "communicated" to the parties and the date on which the plaintiffs were made aware that their claim against him was dismissed. He says that the plaintiffs took no steps to argue that he was liable, and therefore they abandoned their claim against him. With respect to the October hearings, he says that the application to settle the terms of the order for specific performance dealt with ancillary matters and does not alter the date on which the 30-day time limit began.

[25] Mr. Kretschmer's argument rests on the premise that the trial judge, in his 14 September reasons for judgment, communicated an order that the claim against Mr. Kretschmer be dismissed. The trial judge did not communicate such an order. Rather, he communicated an order that the claim be dismissed *if* the parties made no arrangement to argue the issue of Mr. Kretschmer's personal liability. The date on which the order dismissing the claim was "pronounced" is therefore the date on which the parties ceased to be able to make such an arrangement. In my view, this date was 17 October 2007, when the order was entered. Until that point, it was open to the plaintiffs to arrange to make submissions on Mr. Kretschmer's personal liability, whether or not they took steps to do so.

[26] It follows that the 30-day time limit for the plaintiffs to file their notice of appeal began on 17 October 2007, and the filing on 22 October was timely.

(ii) Trial Judge's Error

[27] Mr. Kretschmer contends that the plaintiffs' appeal should be struck or quashed because it is not based on any error of law or fact on the trial judge's part. The plaintiffs cannot allege an error, he says, because the basis for the trial judge's dismissal of the claim was the plaintiffs' considered decision not to advance it.

[28] In my view, the plaintiffs' appeal is premised on the finding of an error on the trial judge's part. Their appeal is conditional upon the success of the defendants' appeal. They seek an order that their claim against Mr. Kretschmer be remitted to the trial judge *if* this Court sets aside the order for specific performance against the corporate defendants. If this Court were to set aside the order for specific performance, it would do so on the basis of some error on the part of the trial judge. Such an error would have led not only to the order for specific performance but also to the order dismissing the claim against Mr. Kretschmer, as the latter resulted from both the trial judge's conclusion that the corporate defendants were liable and the plaintiffs' resulting decision not to pursue the claim. Thus, the plaintiffs' appeal, if it is engaged, will be based on an error that led them to treat the claim against Mr. Kretschmer as unnecessary.

Conclusion

[29] I have concluded that the application to vary must fail. The finding that the plaintiffs filed their appeal within the 30-day time limit was the only reasonable conclusion in the circumstances. I reject the contention that the appeal must be quashed on the additional ground that no error could be alleged. The appeal is brought against the possibility that this Court finds an error which has the effect of removing the assumption upon which the dismissal was based. I would dismiss the application.

[30] **SAUNDERS, J.A.:** I agree.

[31] **FRANKEL, J.A.**: I agree.

[32] **DONALD, J.A.**: The application is dismissed.

"The Honourable Mr. Justice Donald"