COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1127551 B.C. Ltd. v. Prior Properties Inc.,*
2023 BCCA 222

Date: 20230515
Docket: CA46726

Between:

**1127551 B.C. Ltd., 1141536 B.C. Ltd., CSSL Export Ltd.,
Talya Grewal and Devinder Grewal**

Appellants
(Respondents)

And

Prior Properties Inc. and Main Acquisitions Consultants Inc.

Respondents
(Petitioners)

And

Avtar Nain

Respondent
(Respondent)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated February 12, 2020 (*Prior Properties Inc. v. 1127551 B.C. Ltd.*, Vancouver Docket S198146).

Oral Reasons for Judgment

Counsel for the Appellants: J.E. Shragge

No one appearing on behalf of the Respondents

Place and Date of Hearing: Vancouver, British Columbia
May 15, 2023

Place and Date of Judgment: Vancouver, British Columbia
May 15, 2023

Summary:

This is an appeal of the chambers judge's order retrospectively adding the respondent Main Acquisitions Consultants ("MAC") as a petitioner to the petition proceedings. The appellant contends that the chambers judge erred in adding MAC as a petitioner after the petition proceeding was wholly discontinued as of right. Alternatively, they say he erred in law in granting the order nunc pro tunc.
Held: Appeal allowed. The issue of whether the chambers judge erred in adding a petitioner after the proceeding was wholly discontinued should not be determined in the absence of reasoned argument on each side of the question, which there was not in this appeal. Whether or not the chambers judge had jurisdiction to make the impugned order, he should not have done so because the MAC did not establish a case for the making of an order nunc pro tunc.

WILLCOCK J.A.:

Introduction

[1] This is an appeal from an order made by Justice Harvey in chambers on February 12, 2020 (the "Harvey Order"), on the application of Main Acquisition Consultants Inc. ("MAC"), adding MAC as a petitioner in these proceedings. The application to add MAC was brought before the petition respondents, a numbered company, CSSL Export Ltd., Talya Grewal, Devinder Grewal, and Avtar Nain, had appeared in response to the petition. As a result, they were not served with notice of the application.

[2] The application was filed on January 29, 2020, and only served on the petitioner, Prior Properties Inc. ("Prior"). On February 10, 2020, Prior filed a notice of discontinuance against all respondents, and requested counsel for MAC to inform the presider hearing the MAC application of that fact.

[3] In giving reasons granting the order, the chambers judge said:

> [4] To my surprise, I have been provided with authority from the Federal Court suggesting that no step can be taken to prejudice the right of an applicant, such as MAC, by a subsequent step taken by another party until the application has been heard. I refer specifically to *Shipdock Amsterdam B.V. v. Cast Group Inc.*, 1999 CanLII 9085, which states, commencing at para. 7:
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> > [7] Notwithstanding the able arguments of counsel for the Plaintiff, I am satisfied that there are compelling reasons to grant the relief requested by the Defendant Royal Bank. It seems logical that a matter

> properly before the Court should not be defeated by a subsequent step taken by another party .In *Bruce v. John Northway & Son Ltd.* 1962 O.W.N. 150, the Senior Master stated the general rule as follows at page 151:
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> > After service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court. In *Preston v. Tunbridge Wells Opera House*, [1903] 2 Ch. 323, Farwell, J., said at p. 325
> >
> > It is due to the exigencies of the business of the Courts that an application cannot be heard the moment it is made.
>
> [8] The learned Master went on to say:
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> > In that case it was held that the right of the first mortgagee to rents was to be determined as of the date of the service of the notice of motion and not as of the date the application was heard. In *Holmested*, 5th ed., p. 837 citing this case it is stated
> >
> > > The rights of an appellant [applicant?] cannot be prejudiced by anything done after the notice of motion has been served, but his rights are to be determined as they existed at the date of its service.
> > >
> > > This appears to me to correctly state the practice. This principle is illustrated by the situation where a defendant serves a notice of motion to dismiss an action for want of prosecution and subsequent thereto and prior to the hearing of the application the plaintiff files and serves notice of discontinuance. In these circumstances it was held in *Campbell v.Sterling Trust Corp.*, [1948] O.W.N. 557 that the defendant's right was not abrogated by the subsequent notice of discontinuance.
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> [5] Curiously, while the petition seems to now be defunct, based on *Shipdock*, I will add the applicant as petitioner. I gather, at this stage, the issue will be whether the petition can proceed. That is not before me, but they will now stand as a petitioner in the within proceeding.

[4] The chambers judge, accordingly, ordered that MAC would be added on the proceedings as a petitioner *nunc pro tunc*, effective January 29, 2020, the date of the application. The Harvey Order was entered on February 12, 2020.

[5] The appellants, 1127551 B.C. Ltd., 1141536 B.C. Ltd., CSSL Export Ltd., Talya Grewal and Devinder Grewal, say the chambers judge exceeded his jurisdiction, and committed a reversible error, when he added MAC as a petitioner

after the petition proceeding was wholly discontinued as of right. Alternatively, they say he erred in law in granting the order *nunc pro tunc*.

[6] MAC appears to have taken no steps to prosecute the petition since the Harvey Order adding MAC as a petitioner. MAC did not file a factum on this appeal, or attend the appeal hearing. The appeal is, therefore, unopposed. Nevertheless, we must carefully consider whether the judge had jurisdiction to make the impugned order, and whether he exercised that jurisdiction appropriately.

Argument

Jurisdiction

[7] The appellants say this Court's decision in *DLC Holdings Corp. v. Payne*, 2021 BCCA 31 (following *Adam v. Insurance Corporation of British Columbia* (1985), 66 B.C.L.R. 164 (C.A.)), stands for the proposition that precludes the making of the impugned order: that a proceeding which is wholly discontinued as of right is "forever at an end except for the matter of costs". They argue a corollary of the "bright-line rule" laid out in *DLC Holdings* is that where a proceeding is wholly discontinued as of right, the Supreme Court, absent an order setting aside the discontinuance, loses jurisdiction to make further orders in the proceeding beyond those concerning the assessment of ordinary costs.

[8] The appellants say the principle stated in the authority cited to the chambers judge, *Shipdock Amsterdam B.V. v. Cast Group Inc.,* 1999 CanLII 9085 (F.C.), has not been previously endorsed; an examination of its antecedents casts considerable doubt on its correctness; and it should not be followed.

[9] *Shipdock* relied upon *Bruce v. John Northway & Son Ltd.*, [1962] O.W.N. 150 (Master) at 151, for the proposition that, "[a]fter service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court." The rule was said to be stated in *Holmested and Langton on the Judicature Act of Ontario*, 5th ed., and traced to *Preston v. Tunbridge Wells Opera House,* [1903] 2 Ch. 323.

[10] The appellants say *Preston* stands for a narrower proposition, and that the principle that the rights of the parties to an application "are crystalized at the date of service" seems to have gained little traction outside of the Ontario and Federal trial courts.

[11] In *1036122 Alberta Ltd. (AML Construction) v. Khurana*, 2012 ABCA 10 at paras. 14–15, Justice Berger, delivering the judgment of the court, stated that he had been unable "to find any case law in Alberta adopting that approach", although he added "neither is there any Alberta jurisprudence rejecting it".

[12] The appellants say the notion that a judge or master must ignore relevant changes in circumstances between service of an application and its eventual hearing could cause no end of mischief and injustice.

The *nunc pro tunc* order

[13] Further, the appellants say the judge erred in exercising his discretion to pronounce the order *nunc pro tunc*. They argue that in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 [*CIBC*], the Supreme Court of Canada set out a list of six non-exhaustive factors a court is to consider when determining whether to exercise its inherent jurisdiction to grant a backdated order, including assessing whether:

a) the opposing party would be prejudiced by the order;

b) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;

c) the irregularity was intentional;

d) the order will effectively achieve the relief sought or cure the irregularity;

e) the delay was caused by an act of the court; and

f) the order would facilitate access to justice.

[14] The appellants contend none of these factors is engaged, except for the first: prejudice to the opposing parties, i.e., the appellants and Mr. Nain. In particular, they say that so long as Prior's decision to discontinue the petition remains unimpeached, and MAC never applied to set aside the discontinuance, the effect of the Harvey Order is to defeat a proper step taken by Prior, as *dominus litis*, to the prejudice of the appellants.

Analysis

[15] In my view, the question whether the chambers judge had jurisdiction to make the order is not as straightforward as the appellants suggest. The Ontario jurisprudence recognizing the rule that the parties' rights are determined as of the date of service of the motion, referred to and summarized in *Philippine v. Portugal*, 2010 ONSC 956, including *Bruce*; *Cafissi v. Vana* (1973), 1 O.R. 654 (Master); and *Leblanc v. York Catholic District School Board* (2002), 61 O.R. (3d) 686 (S.C.), sets out a reasoned basis for the recognition and continued application of the rule. In *Graystone Properties Ltd*. *v. Smith et al*. (1982), 39 O.R. (2d) 709 (C.A.), Justice Blair applies the rule, but does not expressly refer to the rule or the jurisprudence supporting it.

[16] I should note that the rule is not consistently stated in the Ontario cases. In *Brightman Capital Ventures Inc. v. J.P. Haynes & Associates Inc.*, (2001) 8 C.P.C. (5th) 318, Justice Southey referred to the general rule "… that motions be decided on the basis of the facts as they existed on the date the motion was commenced …" (at para. 17). This is the rule rejected by Justice Berger in *AML Construction*.

[17] In other cases, the rule applied is stated in terms that are subtly distinct, as restated in *Holmested and Langton on the Judicature Act of Ontario* at 837:

> The rights of an appellant cannot be prejudiced by anything done after notice of motion has been served, but his rights are to be determined as they existed at the date of its service.
>
> [Emphasis added.]

[18] In *LeBlanc* and *Bruce*, the rule was described in these terms: after service of a notice of motion, as a general rule, any act done by any party affected by the application which affects the rights of the parties on the pending motion will be ignored by the Court.

[19] The rule, stated in those terms, does not effectively freeze the evidentiary record. It does not preclude a party from adducing evidence of events that have occurred subsequent to the filing of the motion. A party who brings an application to have a party held in contempt, for example, does not have a right to a contempt order, simply a right to apply. The rule does not preclude the respondent from purging the contempt in the interim. A party who has a right to bring an application for partial release of a mortgage (as in *Greystone*) is not precluded from bringing the application because of default in the interval before the application is heard.

[20] I make these observations, not to resolve the question before us, but simply for the purpose of demonstrating why I am of the view we should not determine whether, and if so to what extent, the rule should be applied in this jurisdiction, in the absence of a reasoned argument on each side of the question.

[21] In my view, the difficult question is not resolved by the judgment in *DLC Holdings Corp*. As Justice Grauer noted at para. 33 of that case:

> … [A] discontinued action is “forever at an end”, subject to the inherent jurisdiction of the court to set aside the notice of discontinuance to prevent the perpetration of an injustice, or an abuse of process, including the sorts of problems discussed by Justice Anglin in *Lye*: where discontinuance amounts to fraud, or would deprive a defendant of rights arising from interlocutory applications. The categories are certainly not closed, but all involve matters sufficiently serious to move the court to invoke its inherent jurisdiction in the interests of justice.
>
> [Emphasis added.]

[22] In para. 34, Mr. Justice Grauer noted the importance of addressing circumstances where a discontinuance “may give rise to an issue directly involving the court and its process”.

[23] While the Court in *DLC Holdings* was discussing the circumstances in which a discontinuance may be set aside, it is arguable, in my opinion, that a chambers judge has jurisdiction to make an order *nunc pro tunc* in proceedings after the filing of a discontinuance, in order to deal fairly with an application filed before the discontinuance, whether filed by a defendant or a third party.

[24] Given the complexity of these questions, which we are asked to address in a partial vacuum, and because we can do so, I am of the view this appeal should be determined by the second question: whether the extraordinary remedy of an order *nunc pro tunc* ought to have been granted in this case. In my view (understandably in the circumstances, because the motion was heard without notice to those affected), the chambers judge did not address the criteria, described in *CIBC*, that should be considered before making such an order. It falls to us, therefore, to make the order that the chambers judge ought to have made if he had been asked to and did review those criteria.

[25] It is now clear, given the apparent disinterest of MAC, that there was no compelling reason to add MAC as a petitioner *nunc pro tunc*. It is apparently unnecessary to facilitate access to justice. There is no evidence with respect to the merits of MAC's claim (which has not been pursued apparently with diligence). The appellants are evidently prejudiced by the order. In the circumstances, it is my view that whether or not he had jurisdiction to make the impugned order, the chambers judge should not have done so because MAC did not establish a case for the making of an order *nunc pro tunc*.

[26] I would therefore allow the appeal and set aside the order.

[27] **GRIFFIN J.A.**: I agree.

[28] **HORSMAN J.A.**: I agree.

[29] **WILLCOCK J.A.**: The appeal is allowed and the order is set aside.

"The Honourable Mr. Justice Willcock"