COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Deep Water Recovery Ltd. v. Reynolds,* 2023 BCCA 204

Date: 20230509
Docket: CA49018

Between:

Deep Water Recovery Ltd.

Appellant
(Defendant)

And

Mary Reynolds

Respondent
(Plaintiff)

Before: The Honourable Justice Marchand
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated April 17, 2023 (*Reynolds v. Deep Water Recovery Ltd.*, 2023 BCSC 600, Vancouver Docket S224947).

Oral Reasons for Judgment

Counsel for the Appellant:	M.G. Swanson S.M. Gallagher
Counsel for the Respondent:	J.B. Gratl T. Rauch-Davis
Place and Date of Hearing:	Vancouver, British Columbia May 2, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 9, 2023

Summary:

Deep Water Recovery Ltd. ("DWR") applies for a stay of proceedings pending the outcome of its appeal from the dismissal of its application for a declaration that the Protection of Public Participation Act does not apply to its counterclaim against the respondent. Held: Application dismissed. DWR's appeal lacks merit. Further, DWR has not established that it will suffer irreparable harm if a stay is not granted. Finally, the respondent will suffer greater harm if a stay is granted than DWR will suffer if a stay is refused. As a result, the interests of justice do not favour granting a stay.

MARCHAND J.A.:

Introduction

[1] In an order pronounced on April 4, 2023, with reasons for judgment given on April 17, 2023 and indexed at 2023 BCSC 600, the chambers judge dismissed an application by the appellant, Deep Water Recovery Ltd. ("DWR"), seeking a declaration that the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*] does not apply to its counterclaim against the respondent, Mary Reynolds. DWR brings this application seeking a stay of proceedings pending the determination of its appeal of this order.

Background

[2] DWR conducts its business operations at a property located in Baynes Sound near Union Bay, British Columbia. Mark Jurisich is a director and operations manager of DWR.

[3] Ms. Reynolds lives in Union Bay. She alleges that in 2021 DWR began a shipbreaking operation from the Baynes Sound property that involves the physical disassembly of boats and barges and the disposal and recycling of the residual materials. She has been publicly critical of the ecological impact of DWR's activities on Baynes Sound.

[4] Since approximately November 2021, Ms. Reynolds has taken photographs and recorded videos of DWR's alleged shipbreaking operation using a drone. She has posted many of these videos to an online blog. Further, news media outlets have published her videos and stills of them while reporting on DWR's operations.

[5] Ms. Reynolds alleges that, in June 2022, Mr. Jurisich stole her drone in the presence of another man and that, when he returned the drone to her several days later, it was damaged and inoperable. She also complains of other misconduct by Mr. Jurisich and others.

[6] On June 20, 2022, Ms. Reynolds commenced a civil action against DWR, Mr. Jurisich, and three John Doe defendants for conversion by theft, conversion by damaging property, harassment, assault and intimidation.

[7] On July 13, 2022, DWR and Mr. Jurisich filed a response to civil claim denying the alleged misconduct and saying, in the alternative, that they were provoked by Ms. Reynolds. On the same day, DWR filed a counterclaim against Ms. Reynolds alleging trespass, nuisance, invasion of privacy and the illegal operation of a drone. The counterclaim specifically complains of Ms. Reynolds' dissemination of the images and recordings she has collected to third parties.

[8] On August 8, 2022, Ms. Reynolds applied to dismiss the counterclaim under s. 4 of the *PPPA* for limiting her expression on a matter of public interest. On August 17, 2022, she filed a scheduling application seeking orders regarding the conduct of the *PPPA* dismissal application.

[9] On August 30, 2022, DWR applied for a declaration that the *PPPA* does not apply to its counterclaim.

[10] The parties' applications came before the chambers judge on the same day. Since there was insufficient time to hear both of them, the judge adjourned Ms. Reynolds' scheduling application. The judge then heard and dismissed DWR's application on what I would characterize as jurisdictional, procedural and policy grounds.

[11] DWR now applies for a stay of the order of the chambers judge pending the determination of an appeal of her order.

Reasons for Judgment

[12] After setting out the background to the parties' dispute, the judge described the general framework of the *PPPA*:

> [24] The *PPPA*, which came into force in March 2019, is aimed at "strategic lawsuits brought by the wealthy and powerful to shut down public criticism". It was described by the Attorney General at the time as "intended to protect an essential value of our democracy, which is public participation in the debates of the issues of the day": *Neufeld v. Hansman*, 2021 BCCA 222 at para. 3 [*Neufeld BCCA*], leave to appeal allowed [2022] S.C.C.A. No. 39796.
>
> [25] With that principle in mind, s. 4 of the *PPPA* empowers the court to prevent a plaintiff from proceeding with an otherwise valid cause of action if the court is satisfied that the public interest in protecting the defendant's expression outweighs the public interest in allowing the plaintiff to proceed: *Neufeld BCCA* at para. 5, citing *Galloway v. A.B.*, 2020 BCCA 106 at para. 55 [*Galloway*], leave to appeal ref'd [2020] S.C.C.A. No. 39203.

[13] The judge next set out s. 4 of the *PPPA*, which provides:

> **4** (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.
>
> (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant has no valid defence in the proceeding,
>
> (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[14] The judge identified the issues to be:

> a) Do the procedural requirements of the *PPPA*, the *Rules*, or any other legal principle allow DWR to make the DWR Application for declaratory relief at this stage of the proceedings, or at all, especially in the absence of cross-examination as provided in s. 9?; and

> b) If yes, has Ms. Reynolds met the threshold burden set out in s. 4(1) of the *PPPA*? In particular, has Ms. Reynolds shown that DWR's counterclaim "arises from an expression" she made?

[15] The judge began her analysis by considering whether s. 9 of the *PPPA,* the *Supreme Court Civil Rules* [*Rules*], or other authority allowed for the summary determination of threshold issues under s. 4(1) of the *PPPA*.

[16] At the outset, she noted the absence of any statutory authority for the bifurcated process advanced by DWR. She then turned to consider DWR's reliance on the court's inherent jurisdiction to make the declaration DWR was seeking. Although DWR submitted that the declaration would "ensure fairness, expediency, and the interests of justice", the judge concluded that DWR's application would not achieve those goals.

[17] On my reading of the judge's reasons as a whole, she concluded that DWR's approach would only serve to inject an additional, unnecessary and unhelpful step into a process that requires s. 4 dismissal applications "to be heard as soon as practicable".

[18] First, the judge expressed concern about the type of delay that is unfolding in this case, namely an originating application followed by an appeal regarding threshold issues. While not mentioned by the judge, it is foreseeable that such an appeal might result in a return to the trial court for a ruling on the threshold issue, which could spawn a further appeal before a possible full hearing on all of the issues raised by Ms. Reynolds' s. 4 dismissal application. In the judge's view, it would clearly be preferable for the parties to follow the statutory process resulting in a final determination of all of the issues on a full record at one time.

[19] Second, the judge concluded that DWR's approach would serve to undermine the laudable goals of the *PPPA*. She reasoned:

> [59] Secondly, as the Supreme Court of Canada has observed: "Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy

> democracy by generating fruitful public discourse and corresponding public participation in civil society.": *Pointes* at para. 1.
>
> [60] An important consideration in assessing "fairness" and the "interests of justice" is the fact that the *PPPA* was enacted to protect that freedom of expression, that is, to function as a "mechanism to screen out lawsuits that unduly limit expression on matters of public interest": *Pointes* at paras. 16 and 62. The importance of that objective is highlighted by the fact that a plaintiff can be prevented from proceeding even with a valid claim, "as long as the public interest in protecting the defendant's expression outweighs the public interest in allowing the plaintiff to proceed": *Neufeld BCCA* at para. 5.
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> [61] It is only the final step of the s. 4(2) assessment, however, that provides the court with the ability to assess "what is really going on" in any particular case, so as to balance those interests: *Pointes* at para. 81. Determining the threshold issue in isolation from the s. 4(2) analysis would deprive the court of the opportunity to do so.
>
> [62] In effect, by making the application in the manner it does, DWR seeks to quash Ms. Reynolds' right to engage in the mechanism that was designed to protect her expression from suppression prior to the full hearing of her application on its merits, and as I discuss below, in the absence of the full evidence available to her as contemplated by the *PPPA*. In my view, doing so defeats the very purpose for which the *PPPA* was enacted. That is neither "fair" nor in the "interests of justice".

[20] The judge therefore found that "there [was] no basis on which to bifurcate the determination of the s. 4 steps as contemplated by DWR."

[21] The judge next considered whether s. 9 of the *PPPA* or the *Rules* allowed for the summary determination of threshold issues under s. 4(1) of the *PPPA* without cross-examination.

[22] The judge concluded that determining threshold issues under s. 4(1), primarily on the pleadings, would deprive Ms. Reynolds of "procedural rights and obligations… conferred [on her] under s. 9 of the *PPPA*." These rights and obligations, include the requirement that "on an application for a dismissal order under section 4, evidence must be given by affidavit" and the right of the other party to cross-examine an affiant on their affidavit.

[23] Further, the judge noted that a successful dismissal application under s. 4 is expressly "not dependent on the validity (or invalidity) of the underlying action." In her view, it would, therefore, be "improper to base a decision regarding

Ms. Reynolds' possible remedy under s. 4 solely, or even primarily, on the pleadings" as "[d]oing so would prematurely deprive Ms. Reynolds of a remedy that may be available to her, regardless of the validity of the underlying cause of action."

[24] The judge summed up as follows:

> [73] For the above reasons, if DWR is entitled to bring the application for declaratory relief on the basis of s. 4(1) alone (and I have concluded that it is not), I conclude that it cannot do so on a summary basis or deprive Ms. Reynolds of the cross-examination and other procedural rights conferred by s. 9 of the *PPPA*.

[25] Finally, the judge concluded that DWR's Application was contrary to the express provisions of the *PPPA*, the legislative intent and the objects of the *PPPA*. She therefore dismissed DWR's application without having to address whether Ms. Reynolds had met the threshold burden set out in s. 4(1) of the *PPPA*. In other words, she did not address the merits of DWR's application.

Legal Framework for a Stay

[26] To obtain a stay of proceedings, DWR must satisfy the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 at 334, 337, 340–42:

> (1) Is there a serious question to be tried?
>
> (2) Will the applicant suffer irreparable harm if the stay is refused?
>
> (3) Does the balance of convenience favour granting the stay?

[27] The overarching consideration is whether granting the stay is in the interests of justice: *British Columbia (Attorney General) v. Trial Lawyers Association of British Columbia*, 2022 BCCA 289 at para. 6 (Chambers).

Analysis

The Merits of the Appeal

[28] The threshold for establishing that the appeal has merit is low. It will be met if the applicants establish that the appeal is not without merit or has no reasonable prospect of success: *Hanlon v. North Vancouver (District)*, 2022 BCCA 220 at para. 20. “[T]he appropriate question is whether there is a serious question to be tried”: *Skookum Creek Power Partnership v. JVD Installations Inc.*, 2022 BCCA 267 at para. 11, citing *Tanguay v. Bridgewater Bank*, 2012 BCCA 234 at para. 18 (Chambers).

[29] DWR focuses its merits submission on the judge’s determination that she did not have jurisdiction to make the declaration it sought. Relying on *Shuswap Lake Utilities Ltd. v. British Columbia (Comptroller of Water Rights)*, 2008 BCCA 176, it says she erred in law by failing to recognize her inherent jurisdiction to make the declaration. DWR says this was a “glaring error” that needs to be corrected not only for the benefit of this case but also to resolve the “significant confusion” created by the judge’s decision within the practice.

[30] It is trite to say that an appeal is taken from an order, not from reasons. In this case, the order under appeal is the judge’s order dismissing DWR’s application for a declaration that the *PPPA* does not apply to its counterclaim. The outcome of the appeal will not turn exclusively on the judge’s determination that she did not have the jurisdiction to make the declaration sought.

[31] While DWR has certainly raised an arguable case regarding the judge’s finding that she did not have jurisdiction to entertain its application, I have concluded that DWR’s appeal is bound to fail on a different basis.

[32] Simply put, DWR’s assertion that its counterclaim is not a strategic lawsuit against public participation raises the question of its intention. That is a question of fact that, except perhaps in the clearest case, cannot be determined primarily on the pleadings. One of the very purposes of the *PPPA* is to ensure that economically

stronger parties do not suppress expression through lawsuits that appear to be directed at vindicating their rights while, in fact, they are intended to silence the voices of others. In the circumstances of this case, DWR's intention is very much at issue and, as the judge noted, the court will be unable to discern "what is really going on" by determining the threshold issue raised by DWR in the absence of a full record.

Irreparable Harm

[33] DWR must establish that its interests will be harmed in a way that cannot be remedied if it is ultimately successful on appeal. "'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 24, citing *RJR-MacDonald* at 341.

[34] DWR asserts that if a stay is not granted it will suffer irreparable harm in two ways. First, it says its appeal would be rendered moot. It says, Ms. Reynolds should not be able to invoke the procedures under the *PPPA* "until a determination has been made that it is applicable." Second, it says it will have to disclose information under cross-examination that it would otherwise be under no obligation to disclose.

[35] While I agree that DWR's appeal may be rendered moot if a stay is not granted and that DWR will be forced to disclose additional information, I do not agree that DWR will suffer irreparable harm.

[36] Whether a stay is or is not granted, Ms. Reynolds' s. 4 dismissal application will be decided. It is just a question of how that will occur. Either way, if DWR is ultimately successful in defeating Ms. Reynolds' application, it can recover the costs of its appeal as well as the costs of Ms. Reynolds' application from her. Contrary to cases like *Jin v. Yang*, 2018 BCCA 90, DWR will not lose the very object at stake in the proceeding.

[37] As mentioned, if a stay is not granted, DWR will have to disclose information to Ms. Reynolds that it would otherwise be under no obligation to disclose. However, given the scope of the issues raised by the pleadings, DWR will be obliged to disclose extensive information to Ms. Reynolds as required by the *Rules* in any event. The only additional information it will be obliged to disclose relates to the one issue that is unique to Ms. Reynolds' s. 4 dismissal application, namely the reason(s) it filed its counterclaim.

[38] DWR has not identified how disclosing this narrow scope of additional information will cause it to, for example, disclose privileged and/or confidential information, or otherwise suffer irreparable harm. Somewhat ironically, if DWR is ultimately successful in defeating Ms. Reynolds' application, its disclosure obligations will be wider, not narrower. That is because its counterclaim would not be dismissed and Ms. Reynolds would be entitled to discovery in relation to the allegations raised in both her claim and DWR's counterclaim, rather than those raised in her claim alone.

Balance of Convenience

[39] At this stage, the court weighs the interests of the parties and determines who will suffer greater harm as a result of granting or refusing the stay: *RJR-MacDonald* at 342.

[40] DWR says the balance of convenience favours granting a stay because, if a stay is not granted, it will be forced to defend the very application it seeks to avoid and its appeal will be rendered moot. On the other hand, it says that Ms. Reynolds will only suffer delay. It says that it is prepared to expedite the hearing of its appeal.

[41] I do not agree that the balance of convenience favours DWR. In my view, it favours Ms. Reynolds.

[42] If a stay is not granted, DWR's meritless appeal may be rendered moot and it will be obliged to defend Ms. Reynolds' application as contemplated by the *PPPA* in a timely fashion. DWR could well save time and money.

[43] On the other hand, if a stay is granted, Ms. Reynolds will be forced to spend unnecessary time, energy and money defending a meritless appeal before proceeding with her application on the merits.

Conclusion and Disposition

[44] In its oral submissions, DWR argued that it is Ms. Reynold's claim that is intended to harass it and distract from her unlawful conduct rather than its counterclaim that is intended to harass her and distract from its unlawful conduct. Only time will tell whether DWR's assertions will be proven to be true—which underscores the folly of its application, appeal and stay application. The findings DWR seeks can only be made on a full record, not on a pre-emptive application driven primarily by the pleadings.

[45] DWR's appeal lacks merit. Further, DWR has not established that it will suffer irreparable harm if a stay is not granted. Finally, given my view of the merits, Ms. Reynolds will suffer greater harm if a stay is granted than DWR will suffer if a stay is refused. As a result, the interests of justice do not favour granting a stay.

[46] For all of these reasons, I dismiss DWR's stay application.

"The Honourable Justice Marchand"