COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tan v. TD Bank Group (The Toronto Dominion Bank),* 2024 BCCA 91

Date: 20240304
Docket: CA49629

Between:

Li Wen Tan

Appellant
(Plaintiff)

And

TD Bank Group (The Toronto Dominion Bank) and TD Waterhouse Canada Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Stromberg-Stein
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated January 19, 2024 (*Tan v. TD Bank Group (The Toronto Dominion Bank)*, 2024 BCSC 271, New Westminster Docket S250392).

Oral Reasons for Judgment

The Appellant, appearing in person (via teleconference):	L.W. Tan
Counsel for the Respondents:	L.J.M. Sun
Place and Date of Hearing:	Vancouver, British Columbia March 4, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 4, 2024

Summary:

The appellant applies for a no fees order in addition to various other orders modifying or waiving the service, filing and formatting requirements for his appeal documents. The respondents apply for an order for security for costs of the appeal. Held: Appellant's applications dismissed and respondents' application granted. The appeal is bound to fail and is an abuse of process, which precludes a no fees order. The lack of merit to the appeal also weighs in favour of granting the respondents' application for security for costs, along with the timeliness of the application and risk of non-recovery. The appellant did not present a sufficient reason why the other orders sought are necessary or in the interests of justice to grant.

STROMBERG-STEIN J.A.:

Introduction

[1] These reasons concern the applications brought by the appellant, Mr. Li Wen Tan, and the respondents, TD Bank Group and TD Waterhouse Canada Inc., in the appeal *Tan v. TD Bank Group*. The appellant applies for an order that no court fees are payable, as well as orders with respect to waiving filing and service requirements and for court-ordered transcripts. The respondents apply for an order that the appellant pay security for costs of the appeal in the amount of $7,500.

Background

[2] On January 19, 2024, a chambers judge dismissed the appellant's application to set aside a consent order, which the parties had entered on December 1, 2023. The consent order had dismissed a claim brought by the appellant against the respondents. The parties had agreed to the consent order in a settlement and release agreement (the "Settlement Agreement") entered into by the parties on October 27, 2023.

[3] The appellant alleged the respondents breached the Settlement Agreement by failing to deliver settlement funds in the amount of $17,000 within 21 days of executing the Settlement Agreement. During the chambers hearing, the appellant further alleged that he signed the Settlement Agreement under duress.

[4] The chambers judge rejected both allegations. With respect to the alleged breach of the Settlement Agreement, the judge found that the appellant received a

cheque for the settlement funds on November 16, 2023, which satisfied the respondents' obligations under the agreement. With respect to the allegation of duress, the judge found that the appellant was under no form of duress, and "chose to sign the settlement agreement and the release, and … is therefore bound by the terms contained therein".

[5] The chambers judge addressed threats made by the appellant to the respondents, stating:

> [8] The final matter on which I will comment is the threats made by Mr. Tan against the TD Bank. In his correspondence with the bank, he indicated that he was willing to file litigation in remote parts of British Columbia and in various courts in British Columbia in respect of the same action. I note that this action that he is referring to is an action on which he signed a settlement agreement. This underlying matter is therefore *res judicata*. It has been decided by the courts. It will be an abuse of process and potentially a vexatious action on the part of Mr. Tan to file further litigation in this court or in any other court in respect of this matter.

[6] The "threats" discussed by the chambers judge are contained in various emails sent by the appellant to counsel for the respondents in December 2023 and January 2024. I refer to the following excerpts of these emails in full, because they are relevant to the applications brought by both parties.

[7] In an email sent on December 6, 2023, the appellant stated:

> **From theoretical perspective,** I can start ligitation [sic] against TD in all Supreme courts, and small claims courts in BC against TD, even if they are all the same case.
>
> For example, is TD willing to spend the money on lawyer fees, including travel to Fort St John, Prince Rupert, and many other remote BC Supreme Courts to strike down my litigation?
>
> If they are struck down, I will appeal the case, is TD willing to spend the money on lawyer fees in Court of Appeal?
>
> If TD won these cases in Court of Appeal, I will appeal the case, is TD willing to spend the money on lawyer fees in Supreme Court of Canada?
>
> If TD won these cases in Supreme Court of Canada, I will start new cases against TD in Supreme Courts again, is TD willing to spend the money on lawyer fees in this new legal cycle?
>
> Is TD willing to risk not being able to recover all these legal costs?

> I know the limits and constraints of the court system in Canada, even if TD wins against me, it doesn't mean TD will recover these costs.
>
> You can discuss this with TD, and come up with solution.
>
> TD can:
>
> 1, pay settlement.
>
> 2, pay damages in Supreme Court civil claim OR
>
> 3, continue the legal action cycles right to the end, and this same legal cycle will repeat again and again OR
>
> 4, any combination of the above #1-3 OR
>
> 5, come up with any creative solutions that can solve the current legal issue.
>
> I have disability can qualify for all court fee waivers,
>
> Does TD qualify for fee waivers?
>
> you can imagine the number of Supreme Courts and Small Claims courts in BC, and how many documents need to be filed will cost TD.
>
> Is TD willing to bear this cost?
>
> [Emphasis in original.]

[8] In a further email on December 6, 2023, the appellant stated:

> I do not own any property, do not have employment income, is on social assistance.
>
> None of these can be garnished as a result of losing legal battles.
>
> Even if the TD wins the legal battle, the legal cost is likely to be unrecoverable.

[9] In an email sent on December 14, 2023, the appellant stated:

> TD wants to be cheap in paying settlement, but I will make sure TD will suffer paying insurmountable legal / lawyer fees, which is unrecoverable, because my status is garnish proof (no income, social assistance, no asset)
>
> TD has 2 choice:
>
> 1, pay reasonable settlement
>
> OR
>
> 2, fight with me right to the end, and new litigation cycles will start again.
>
> Either way TD needs to pay, with option #1 TD will pay one time, predictable price. With option #2 TD will pay infinite amount, unpredictable price.
>
> Even if you declare me as vexatious litigant, I can still start new litigations in other supreme courts against TD.
>
> If all BC Supreme Courts (about 30) and small claims courts (about 30), BC courts of Appeal (about 5) are exhausted, I will move to Alberta,

> Saskatchewan, Manitoba, etc. Then I will start the new litigation cycles again with TD. This is how persistent I am.
>
> PLEASE have serious conversation with TD about huge potential legal cost, should TD choose not to pay reasonable settlement.

[10] Following the chambers judgment, the appellant continued to send similar emails to the respondents. On the evening of January 19, 2024, the appellant sent an email in which he states, "[a]t this point TD can still settle, after I appeal Jan 19, 2024 decision, the unrecoverable expense for TD will become greater".

[11] In a further email sent on January 25, 2024, the appellant responded to an email sent by counsel for the respondents concerning the chambers costs judgment by stating:

> I will not pay this, and will appeal.
>
> I am happy TD wants to pay #option 1 lawyer fees, instead of #option 2 settlement.
>
> option 1 lawyer fees is unrecoverable.
>
> option 2, I may discontinue the case

[12] Most recently, on February 22, 2024, the appellant wrote to counsel for the respondent asking:

> did you ask TD to pay for Bill of Cost?
>
> who is paying for lawyer fees up until now?
>
> TD rather spend money on lawyer fees, than to spend money on settlement.

Appellant's Application

[13] In the appellant's Notice of Application, he seeks the following orders, in his words:

> 1, no fee
>
> 2, file factum, appeal record, appeal book in 3 ring binder option
>
> 3, apply email method to serve TD Bank group.
>
> 4, exempt filing paper copy for factum, appeal book, appeal record
>
> 5, exempt "bookmark" feature for filing electronic factum, appeal book, appeal record
>
> 6, ask court order transcripts for indigent people.

[14] The appellant's position, as I understand it, is that he is indigent and therefore would be caused undue hardship by the requirements in the *Court of Appeal Rules*, B.C. Reg. 120/2022 [the "*Rules*"] and *Court of Appeal Act*, S.B.C. 2021, c. 6 [the "*Act*"] concerning the payment of court fees and the filing and formatting of appeal documents. More specifically, the appellant says that he cannot afford to pay for transcripts to be prepared or documents printed, and that he does not have access to the software necessary to edit and compile electronic versions of his appeal documents. He seeks orders waiving or modifying these requirements.

No Fee Application

[15] Under Rule 85(4) of the *Rules*, a justice of the Court of Appeal may order that the court fees payable under Schedule 2 of the *Rules* are not payable where the justice finds that:

> (a) the appeal is not
>
> (i) bound to fail,
>
> (ii) scandalous, frivolous or vexatious, or
>
> (iii) an abuse of the process of the court, and
>
> (b) the person's payment of court fees under Rule 84 would cause undue hardship.

[16] In *Harrison v. Law Society of British Columbia*, 2022 BCCA 316 (Chambers), Justice Willcock explained that "if the financial criteria on Form 22 apply, then undue hardship is established and a hearing is required to assess only whether the appeal is 'bound to fail' or is scandalous, frivolous, vexatious, or otherwise an abuse of process": at para. 6.

[17] The appellant has filed a Form 22 in which he certifies that his household income is less than $60,000 and that the value of his household assets is less than $10,000. If the financial criteria on Form 22 apply, undue hardship is established, per the approach from *Harrison*. I do not, however, read R. 85(4) as removing the residual discretion of a justice to refuse to find that the Form 22 financial criteria apply. In this case, I have serious doubts about whether the criteria in fact apply, given that in November the appellant received settlement funds totaling $17,000,

which remain unaccounted for. In any event, I would not dismiss the appellant's no fee application on the basis that he has failed to demonstrate undue hardship.

[18] I would, however, dismiss the appellant's no fee application on the basis that in my view the appeal is bound to fail, and is an abuse of process.

[19] The appellant's challenge to the Settlement Agreement turned on his allegation that the respondents breached the agreement by failing to send the settlement funds within 21 days of the agreement being executed. The 21-day deadline was not a term of the executed Settlement Agreement, but instead came from an email from counsel for the respondents on October 24, 2023, in which counsel stated that "Upon receipt of the signed Settlement and Release Agreement and the signed Consent Dismissal Order, the TD Defendants will issue the settlement funds to you within 21 days". The appellant did not dispute that he received a cheque for the settlement funds on November 16, 2023. In my view, there is no question that the respondents complied with their obligations under the Settlement Agreement.

[20] The allegation of duress was not initially raised by the appellant in his Notice of Application. The chambers judge rejected the appellant's specific assertion that he was coerced into signing the Settlement Agreement because there was a forthcoming case planning conference, a conference which the appellant himself had set. In my view, the appellant's allegation of duress does not have any prospect of success on appeal.

[21] The Notice of Appeal filed by the appellant on January 29, 2024, seeks the same relief that the appellant sought before the chambers judge, which this Court cannot grant.

[22] Having reviewed the chambers judge's reasons and the record, I am satisfied that the appeal is bound to fail.

[23] The obvious lack of merit to the appeal is enlightened by the appellant's stated purpose for bringing the appeal, which is not to remedy an error in the

chambers judgment, but rather to extort additional funds from the respondents. The appellant's emails make clear that, because he views himself as judgment proof and eligible for assistance in the form of a fee waiver and other accommodations, he believes that he can continue to litigate at little cost to himself, but at great cost to the respondents. The appellant explicitly communicated to the respondents that he is willing to leverage his indigent status to secure additional payment, under the guise of "reasonable settlement".

[24] On that basis, I am also satisfied that the appellant is abusing the court process. To grant his no fee application would only embolden him in pursuit of his impermissible goal.

Other Orders Sought

[25] With respect to the other orders sought by the appellant, I would note that the appellant does not require a court order to serve materials on the respondents by email, as the respondents have filed a Notice of Appearance containing an email address for service: R. 4(2)(c) of the *Rules*. I would therefore dismiss the appellant's application for an order concerning service.

[26] Additionally, it is outside of a justice of this Court's powers to grant the appellant an order procuring transcripts on his behalf. Even if I were to treat the appellant's application as being for a waiver of the requirement to file a transcript, he is only required to do so under the *Rules* if oral testimony was given in the proceeding giving rise to the appeal, or if a transcript is necessary for the purposes of an appeal: R. 24(3) of the *Rules*. I would not grant any order with respect to transcripts.

[27] The remaining orders requested by the appellant are sought on the basis that he lacks the financial means to comply with the filing and formatting requirements for appeal documents under the *Act* and *Rules.* More specifically, the appellant wishes to be exempt from the requirement that he file his appeal documents in paper and bound in the manner specified in the completion instructions. He also seeks an order

waiving the requirement that he apply a “bookmark feature” to his appeal documents.

[28] For the following reasons, I would dismiss the appellant’s application for orders concerning the filing and formatting of his appeal documents.

[29] One of the purposes of the *Act* and *Rules* is to ensure that appeals are presented in an organized manner and are accessible to the division hearing the appeal, as well as the parties. In effect, the provisions in the *Act* and *Rules* governing the filing and formatting of appeal documents impose a minimum cost of participating in an appeal which should not be alleviated.

[30] For instance, to comply with the *Act* and *Rules*, a litigant will almost invariably require access to a computer with internet, a printer and binding materials, and a method to compile documents, whether that be a computer software or a document scanner. Accessing these resources may serve as a barrier to the most impecunious of litigants, but the basic requirements of presenting an appeal cannot typically be waived without risking appeals being presented haphazardly or incompletely, to the clear disadvantage of all parties. In my view, exceptions should not be granted on the basis of convenience or nominal cost savings, but rather only in exceptional circumstances, where the party seeking the exception has demonstrated undue hardship and where granting the exception sought is in the interests of justice.

[31] In my view, it is not in the interests of justice to grant the orders sought by the appellant because the appellant has failed to present a sufficient reason why he should not be required to file his appeal materials in accordance with the *Act* and *Rules.* The nominal costs saved by binding his appeal documents in a different way is not sufficient; nor do I think the appeal should be presented without paper filed materials. I would note that as a self-represented litigant, the appellant is not required to file his factum, appeal book or appeal record electronically, nor is he required to apply any form of “bookmark feature”, aside from the standard table of contents that is required under the paper filing completion instructions.

[32] Even if I have taken an overly restrictive view towards granting exceptions to filing and formatting requirements, I would also refuse to grant these orders on the basis that the appeal is bound to fail and is an abuse of process. I see no reason why the general principle that applies in the context of applications for no fees orders, security for costs orders, and extensions of time—that is, that it is not contrary to the interests of justice to make or refuse to make an order where the result may be that an unmeritorious appeal cannot proceed—does not also apply in this context.

[33] Finally, I note that the appellant believes that the cost of filing documents in court is another advantage he can use to extort a better settlement from the respondents. That is made clear in the appellant's email dated December 6, 2023, in which he reminds the respondents of the cost of filing documents and asks them whether they are willing to bear that cost, apparently presuming that he will not be required to do so in the same manner. In my view, it is only just that the appellant be required to meet the same standards of participating in this litigation that he seeks to weaponize against the respondents.

Respondents' Application

[34] The respondents seek an order that the appellant provide security for costs of the appeal. They have provided a draft bill of costs totalling $7,500.

[35] The authority to grant an order for security for costs of an appeal is found in s. 34(1) of the *Act*, which provides:

> (1) A justice may order an appellant to pay into court security for one or more of the following:
>
> (a) costs of the appeal;
>
> (b) costs of proceedings in the court appealed from, in relation to the order being appealed;
>
> (c) an amount under the order being appealed.

[36] The relevant considerations were discussed in *Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2017 BCCA 133 (Chambers):

> [17] The appellant against whom security is sought bears the onus of showing why security should not be required: *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9. The ultimate question is whether the order would be in the interests of justice: *Lu v. Mao*, 2006 BCCA 560 at para. 6. The following relevant considerations were set out in *Lu* at para. 6:
>
> (a) the appellant's financial means;
>
> (b) the merits of the appeal;
>
> (c) the timeliness of the application; and
>
> (d) whether the costs will be readily recoverable.

[37] Where an appeal is without merit, the impecuniosity of an appellant will not prevent an order for security for costs from being issued: *Chung v. Shin*, 2017 BCCA 355 at para. 24; *Ashraf v. Jazz Aviation LP*, 2023 BCCA 284 at para. 31 (Chambers).

[38] I have already discussed the merits of the appeal, which in these circumstances are no barrier to the order sought by the respondents and, in fact, reinforce their application for security. The application for security for costs is timely. The appellant has refused to pay the underlying costs to date. I am also satisfied that there is a real possibility that the respondents will face difficulty in collecting a costs award from the appellant, considering that he has stated he is judgment proof and will refuse to pay a costs order if he is unsuccessful.

[39] In these circumstances, I am satisfied that it is in the interests of justice to order that the appellant provide security for costs of the appeal in the amount sought by the respondents.

Disposition

[40] I make the following orders:

i. The appellant's applications are dismissed.

ii. Within 30 days, by April 3, 2024, the appellant shall post security for costs of the appeal in the amount of $7,500, failing which the respondents are at liberty to apply for an order that the appeal be dismissed.

iii. The appeal is stayed pending the posting of security for costs.

"The Honourable Madam Justice Stromberg-Stein"