COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Deline v. Shecter,*
2024 BCCA 116

Date: 20240328
Docket: CA48926

Between:

Toni Eugene Deline

Appellant
(Plaintiff)

And

Jennifer Shecter, Cathy Lowenstein, Vancouver Talmud Torah Association, Lana Tsang and Colin G.M. Gibson

Respondents
(Defendants)

Before: The Honourable Justice MacKenzie
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Voith

On an application for vary: An order of the Court of Appeal of British Columbia, dated December 5, 2023 (*Deline v. Shecter*, Vancouver Docket CA48926).

The Appellant, appearing in person:	T. Deline
Counsel for the Respondents Lana Tsang and Colin G.M. Gibson:	J. Milligan
Place and Date of Hearing:	Vancouver, British Columbia March 20, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 28, 2024

Written Reasons of the Court

Summary:

The appellant applied for an order in the British Columbia Supreme Court enjoining two of the respondents, "T" and "G", from acting as counsel for the other respondents, all of whom were defendants in an action brought by the appellant. The appellant's action was struck and his application was dismissed. The appellant filed a notice of appeal from the striking of his action and an application for leave to appeal the dismissal of his application. The appellant then brought an application in this Court for an order declaring that T and G are not respondents to his application for leave to appeal. A justice sitting in chambers dismissed the application. The appellant applies to vary that decision. Held: Application dismissed. The appellant has failed to demonstrate that the justice erred in law or in principle, or misconceived the facts when he held that T and G are both properly respondents to the appellant's application for leave to appeal.

Reasons for Judgment of the Court:

Introduction

[1] The appellant, Mr. Deline, applies pursuant to s. 29 of the *Court of Appeal Act,* S.B.C. 2021, c. 6, to vary the order of Justice Groberman that dismissed his application for an order declaring that Lana Tsang and Colin G.M. Gibson are not respondents on this appeal. Justice Groberman gave oral reasons for judgment: *Deline v. Shecter* (5 December 2023), Vancouver CA48926 (B.C.C.A. Chambers).

[2] For the reasons that follow, we dismiss the application to vary.

Background

[3] This matter has a complicated procedural history consisting of multiple actions and various applications in the court below. We will only refer to the details necessary to address this review application.

[4] Ms. Lana Tsang and Mr. Colin G.M. Gibson, the respondents on this review application (the "respondents"), are lawyers. The respondents represented the Vancouver Talmud Torah Association, a religious school, in a previous action brought by the appellant in the court below. That action arose from the appellant's time as a chess teacher at the school. Following a motion for summary judgment, on February 21, 2020, Justice Gomery dismissed the appellant's action.

[5] The appellant commenced this action, which is based on the same factual foundation as the previous action, with a notice of civil claim filed on September 6, 2022. The claim named the respondents, and Jennifer Shecter, Cathy Lowenstein, and the Vancouver Talmud Torah Association, as defendants (we will refer to the respondents other than Ms. Tsang and Mr. Gibson as "the defendants" to avoid confusion). The respondents continued to act as counsel for the other defendants. The respondents were themselves represented by Jennie Milligan.

[6] On October 28, 2022, the respondents filed an application to strike the appellant's claim against them pursuant to Rule 9-5(1)(a), (b) and (d) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009.

[7] On November 7, 2022, the appellant filed an application in the court below seeking the removal of the respondent Lana Tsang as counsel for the defendants, and restraining her and any other lawyer at Harris & Company from acting as counsel in any proceeding involving the appellant. The basis for the application was the appellant's allegation Ms. Tsang had acted improperly in the previous action that was dismissed by Justice Gomery in 2020.

[8] On February 10, 2023, Justice Warren heard: (1) the respondents' application to strike the appellant's claim pursuant to Rule 9-5(1)(a), (b) and (d) of the *Supreme Court Civil Rules*; and (2) the appellant's application to remove Ms. Tsang as counsel and restrain Ms. Tsang or any other lawyer from the law firm Harris & Company from acting as legal counsel in this and any other proceeding involving the appellant.

[9] In oral reasons for judgment, *Deline v. Shecter,* (10 February 2023), Vancouver S218002 (B.C.S.C.), Justice Warren granted the respondents' application and, pursuant to Rule 9-5(1)(a), struck the appellant's claim. Justice Warren held that the allegations in the notice of civil claim disclosed no viable claim against Ms. Tsang or Mr. Gibson:

> [16] The allegations in the notice of civil claim against Ms. Tsang and Mr. Gibson are brief. They are summarized in paragraph 3 of Part 3, the legal basis section of the pleading, in these terms:

> The defendants, Cathy Lowenstein, Colin G.M. Gibson, and Lana Tsang, jointly and severally, expressly or tacitly, maliciously conspired with Jennifer Shecter to harm the Plaintiff by unlawfully denying him the legal duty of care she owed to him. Each named defendant knowingly provided tangible assistance, and each was aware that wrongful damage to the Plaintiff, if not then ongoing, was the likely result. Harm did result and the defendants are jointly and severally liable for it.
>
> [17] If this is intended as a claim in negligence against Mr. Gibson and Ms. Tsang it is bound to fail. Their only role in the factual foundation for the claim is as lawyers for the school…
>
> [18] … From the language used in the civil claim, it appears the plaintiff intends to advance a claim for unlawful means conspiracy. One of the elements of unlawful conspiracy is that the impugned conduct of the defendants is unlawful.
>
> [19] … the factual allegations advanced against Mr. Gibson and Ms. Tsang pertain exclusively to their conduct as counsel for a party opposed in interest to the plaintiff in the prior action. Again, as counsel for an opposing party they owed no duty to the plaintiff. There is no conduct alleged against them in the notice of civil claim that, even read generously, could be characterized as unlawful.

[10] In separate oral reasons, (*Deline v. Shecter,* (10 February 2023), Vancouver S218002 (B.C.S.C.)), Justice Warren dismissed the appellant's application to remove Ms. Tsang as counsel and to restrain Harris & Company lawyers from acting in proceedings involving the appellant. Justice Warren addressed the appellant's allegations underlying his application as follows:

> [17] I wish to emphasize that the evidentiary record falls short of supporting the plaintiff's repeated and very serious allegations against Ms. Tsang, which include committing a fraud on the court. The type of exchanges that have been described by the plaintiff as having occurred between Ms. Tsang and Justices Winteringham and Gomery occur routinely in this court. The plaintiff suffered no prejudice as a result of those exchanges. No other cause has been shown to grant the extraordinary order of depriving VTTA, Ms. Lowenstein, and Ms. Shecter of the counsel of their choice.

[11] On March 13, 2023, the appellant filed a notice of appeal from both Justice Warren's orders of February 10, 2023. More precisely, the appellant appeals the order made pursuant to Rule 9-5(1)(a) striking his action against the respondents and applies for leave to appeal the order dismissing his application to remove Ms. Tsang as counsel and to restrain Harris & Company lawyers from acting in proceedings involving him.

[12] On November 24, 2023, the appellant filed an application seeking a declaration in this Court that Ms. Tsang and Mr. Gibson are not respondents to his application for leave to appeal the dismissal of his application to remove Ms. Tsang as counsel and restrain Harris & Company lawyers from acting in proceedings involving him.

[13] On December 5, 2023, Justice Groberman dismissed the appellant's application. This is the order the appellant now seeks to vary.

The Order under Review

[14] At the outset of his reasons, Justice Groberman noted the appellant's submission that he had been instructed by the Court of Appeal Registry to file a single combined form for his notice of appeal and notice of application for leave to appeal.

[15] While Justice Groberman appeared to be of the view that commencing a leave to appeal and separate appeal proceeding with a single combined notice was not the proper procedure, he nonetheless addressed the question of whether the respondents were proper parties to the application for leave to appeal.

[16] Justice Groberman determined that Ms. Tsang was a necessary party because the appellant sought injunctive relief against her in the court below, and indeed does so on appeal.

[17] While acknowledging the situation was more complex with respect to Mr. Gibson, Justice Groberman also determined Mr. Gibson was a proper party. Although Justice Groberman noted that the law firm itself may have been a more appropriate respondent, he observed that Mr. Gibson was a lawyer at Harris & Company and would therefore be covered by the injunctive relief sought by the appellant. The appellant did not exclude Mr. Gibson from the remedy he seeks. Mr. Gibson was therefore a proper party, even if he was not a necessary one. Moreover, Mr. Gibson was in fact already a respondent. He was named in the style of cause and had filed an appearance.

[18] Finally, Justice Groberman noted that Mr. Gibson was represented by the same counsel as Ms. Tsang, who was a necessary party to the appeal. Therefore, a single lawyer would be making submissions on behalf of both respondents. This meant Mr. Gibson's continued participation in the appeal as a respondent would not "in any conceivable way" prejudice the appellant (at para. 11).

[19] Accordingly, Justice Groberman dismissed the appellant's application.

The Application to Vary

[20] The appellant makes several arguments. The single overarching issue is whether Justice Groberman erred in determining that both respondents are proper parties to the appellant's application for leave to appeal. We address the appellant's various arguments below.

Standard of Review

[21] As this Court recently noted in *Pyper v. Schuetze*, 2023 BCCA 394, a review of a decision of a single justice in chambers under s. 29 of the *Court of Appeal Act* is not a rehearing of the original application (at para. 20). Accordingly, the justice's decision is entitled to deference and merely challenging the exercise of discretion is insufficient.

[22] This Court will only interfere with a justice's decision if the appellant demonstrates that the justice was wrong in law, wrong in principle, or misconceived the facts: *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, at para. 7.

Analysis

[23] We conclude the appellant has failed to demonstrate that Justice Groberman erred in law, in principle or misconceived the facts.

[24] Section 1(1) of the *Court of Appeal Act* defines a "respondent" as follows:

> (a) a person, other than the appellant,
>
> (i) who was a party to the proceedings in the court appealed from, and
>
> (ii) whose interests are affected by the relief requested by the appellant in an appeal;

> (b) a person who is added, under the rules, as a respondent to an appeal;

See also *N.N. v. Canada (Attorney General)*, 2017 BCCA 398, at para. 3, and *Cambridge Mortgage Investment Corp. v. Matich*, 2014 BCCA 377 (Chambers), at para. 26.

[25] The appellant argues the respondents are not proper parties to the proceedings before this Court. He observes that appellants must be affected parties. He says the inverse is also true: respondents must also be affected parties. And here, he says, the respondents are not affected because his claim against the respondents was struck before Justice Warren dismissed his application to remove Ms. Tsang as counsel and restrict Harris & Company lawyers from acting in proceedings involving the appellant.

[26] We disagree. Justice Groberman made clear that Ms. Tsang is not only a proper party—she is a necessary one. The injunctive relief sought by the appellant names and affects Ms. Tsang directly, making her a necessary party. She was also a party to the proceedings appealed from, meeting the s. 1(1) definition of a "respondent" in the *Court of Appeal Act*. See also *Crowe Mackay & Company Ltd. v. 0731431 B.C. Ltd.*, 2022 BCCA 158 at para. 61 (Chambers), and *Insurance Corp. of British Columbia v. Lo*, 2006 BCCA 7 at para. 4. It is clear that a named person who may be the subject of injunctive relief is a proper party to that proceeding (and indeed is indispensable to it).

[27] Nor do we discern an error of law or principle in Justice Groberman's conclusion that Mr. Gibson is a proper party.

[28] As Justice Fisher explained in *Held v. Sechelt (District*), 2021 BCCA 92 (Chambers):

> [11] The usual threshold for the addition of a party as a respondent is whether the order from which the appeal is taken has a direct effect on the legal rights of the applicant: *South Pacific Import, Inc. v. Ho*, 2009 BCCA 9 at para. 16 (Chambers). …

[29] While the hearing before Justice Groberman did not involve a formal application to add Mr. Gibson as a respondent (as Mr. Gibson was already a

respondent), the principle stated by Justice Fisher is relevant for determining who is a proper respondent on appeal.

[30] As Justice Groberman noted, Mr. Gibson would be subject to the remedial order sought enjoining all lawyers at Harris & Company from appearing in proceedings involving the appellant. Therefore, the order from which leave to appeal is sought directly implicates his legal rights. Mr. Gibson thus meets the ordinary threshold for being included as a respondent.

[31] Contrary to the appellant's position, it was not an error for Justice Groberman to refuse to remove Mr. Gibson as a respondent because the appellant declined to exclude Mr. Gibson from the relief sought. Justice Groberman's decision reflects the fact that if the appellant agreed to exclude Mr. Gibson from the injunctive relief he seeks, Mr. Gibson's legal rights would not be affected because he would not be potentially subject to an injunction order.

[32] Moreover, as Justice Hunter explained in *Sunshine Coast (Regional District) v. Vanderhaeghe*, 2023 BCCA 192 (Chambers), "[a] common theme in the jurisprudence is that the interests asserted…must be of sufficient significance to support an order that will give the [party] a share of the carriage of the appeal" (at para. 27). Here, Mr. Gibson is well-positioned to share the carriage of the appeal as he shares counsel with Ms. Tsang, and his interests along with Ms. Tsang's interests would be affected by the orders sought on appeal.

[33] The appellant contends that Justice Groberman erred in law "when he found that Mr. Gibson's situation was not analogous to that of a party in a class action". Justice Groberman observed that Mr. Deline tried to analogize this case to a class proceeding when he argued that only Ms. Tsang should be entitled to make arguments. Justice Groberman noted that the appellant relied on *Goldberg v. Law Society of British Columbia*, 2022 BCCA 388 at para. 21, which in turn referred to *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.,* 2019 BCCA 308, leave to appeal ref'd [2019] S.C.C.A. No. 455, 456. However, in *Coburn*, this Court held that a class member who is not a representative plaintiff, and thus not formally a party to the class proceeding below, has no right to appeal an order

approving a settlement. In *Goldberg*, this Court concluded Mr. Goldberg was not a party to the litigation. The Court said that having an interest in the subject matter and making submissions in the court is not, without more, sufficient to confer party status. Here, Mr. Gibson is a party in this Court and was in the court below. We see no error in Justice Groberman's conclusion that the principle in *Coburn* is not analogous or helpful (at para. 10).

[34] Indeed, both Ms. Tsang and Mr. Gibson were (through their counsel, Ms. Milligan) signatories to Justice Warren's order dismissing the appellant's application seeking their removal and restraining them from acting—the very order from which the appellant seeks leave to appeal. Accordingly, "their interests are engaged and they have a right to participate in the appeal": *Harun-ar-Rashid v. British Columbia (Human Rights Tribunal)*, 2023 BCCA 275 at para. 9. Both respondents were parties to the proceedings in the court appealed from, in addition to having their interests affected by the relief sought by the appellant, within the s. 1(1) definition of a "respondent" in the *Court of Appeal Act*.

[35] We note the appellant did not serve his application in the court below on the firm Harris & Company, despite that the application sought an order applying to all lawyers at the firm. The appellant now asserts that Justice Groberman erred by failing to order that Harris & Company be added as a respondent. In effect, the appellant concedes that all lawyers at Harris & Company, including the respondents, are proper parties. However, the issue of whether Harris & Company itself should have been added as a respondent was not properly before Justice Groberman and we would not accede to the appellant's argument that Justice Groberman erred by failing to make such an order.

[36] Finally, the appellant appears to suggest that Justice Groberman's failure to "sever" his application for leave to appeal from his notice of appeal meant he was unfairly prejudiced. The appellant says he was thereby saddled with respondents whom he denies are proper parties to his application for leave to appeal.

[37] We cannot accede to this submission. Justice Groberman gave several reasons for his conclusion that the respondents are both proper parties. Those

reasons included, but were not limited to, that the respondents are named as parties to the appellant's application for leave to appeal. As discussed above, Justice Groberman went on to explain that Ms. Tsang is a necessary party because the appellant seeks injunctive relief against her. He also found Mr. Gibson is a proper party, even if not a necessary one, because injunctive relief against all lawyers at Harris & Company would also affect him. Justice Groberman's reasons made clear that even if the appellant had filed his notice of application for leave to appeal and notice of appeal separately, the respondents would still be proper parties to both proceedings. We see no error in this conclusion, nor in Justice Groberman's refusal to strike either Ms. Tsang or Mr. Gibson as respondents.

[38] In effect, Justice Groberman proceeded on the basis that if the appellant had indeed received erroneous advice from the Registry, he should not be prejudiced by it. Justice Groberman addressed the merits of whether the respondents are proper parties, concluded that they are, and found that the appellant would suffer no prejudice as a result of their continued involvement as respondents, even if that was not the appellant's intention when he brought his application for leave to appeal. There was no error of law or principle in this approach.

Disposition

[39] For these reasons, the application is dismissed.

[40] The respondents will have their costs of this application payable forthwith. The appellant's signature on the order is dispensed with, and an entered copy of the order will be provided to the appellant.

"The Honourable Justice MacKenzie"

"The Honourable Mr. Justice Willcock"

"The Honourable Mr. Justice Voith"