

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Li v. Chao Yin Canada Group Inc.*,
2024 BCCA 217

Date: 20240523
Docket: CA48420

Between:

Xiao Bo Li also known as Polly Li

Appellant
(Defendant)

And

Chao Yin Canada Group Inc.

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Abrioux
(In Chambers)

On an application to vary: An order of the Court of Appeal for British Columbia,
dated January 25, 2023 (*Li v. Chao Yin Canada Group Inc.*, 2023 BCCA 39,
Vancouver Docket CA48420).

Oral Reasons for Judgment

Counsel for the Appellant:

R.B. Lim
J.J. Patel

Counsel for the Respondent:

G.B. Brandt
P.A. Kressock

Place and Date of Hearing:

Vancouver, British Columbia
May 17, 2024

Place and Date of Judgment:

Vancouver, British Columbia
May 23, 2024

Summary:

The appellant, Ms. Li, applies for an extension of time to vary or cancel the order of a single justice that dismissed her appeal as abandoned. Held: Application dismissed. Ms. Li has not met any of the requirements for obtaining an extension of time. It would not be in the interests of justice to grant the extension.

ABRIOUX J.A.:

Overview

[1] The appellant, Ms. Li, applies for an extension of time to file an application to vary or cancel the order of Justice Butler, made on January 16, 2023, which had dismissed her appeal as abandoned. His reasons are indexed at 2023 BCCA 39.

[2] For the reasons that follow, I would dismiss the application.

Background

[3] The background to this appeal is set out in some detail in Justice Butler’s reasons and I will not repeat it in any length.

[4] On July 23, 2021, the trial judge found the appellant liable in fraud and awarded the respondent judgment for \$154,597 plus costs. The judge subsequently ordered these costs to be assessed as special costs, and they were ultimately assessed at \$307,993.63. Shortly after judgment, Ms. Li advised the respondent that she was “going to appeal”. She did not do so within the appeal period. On September 10, 2021, on the advice of counsel, Ms. Li made an assignment into bankruptcy.

[5] Ms. Li remains an undischarged bankrupt. Notably, on October 27, 2022, the trustee in bankruptcy of her estate (the “Trustee”) commenced an action seeking recovery of \$857,831.72 alleged to have been dissipated prior to the bankruptcy (the “Trustee Action”). The Trustee Action was described by an associate judge in a 2023 interlocutory decision as having a “strong probability of success”. The Trustee Action is set for a 5-day trial starting November 18, 2024, however, the parties are

currently holding July 16–18, 2024 for a three-day summary trial to dispose of the Trustee Action.

[6] Ms. Li filed a notice of appeal and application for an extension of time to appeal on July 25, 2022, a year after the trial judgment. Ms. Li did not serve those materials.

[7] The respondent first learned of this appeal on November 15, 2022. On November 24, 2022, counsel for Chao Yin Canada Group Inc. (“Chao Yin”) advised Ms. Li to set the application for an extension of time to appeal immediately, failing which Chao Yin would apply for dismissal of the appeal. Ms. Li did not respond.

[8] On December 30, 2022, the respondent set the dismissal application for January 16, 2023 and served the application on Ms. Li by email. No response materials were filed. Emails were sent to Ms. Li by counsel on January 11, 2023, and by court staff on January 13, 2023, confirming the hearing date.

[9] On January 16, 2023, Ms. Li did not attend. Justice Butler dismissed the appeal with reasons to follow (the “Dismissal Order”). On January 23, 2023, court staff emailed the parties to advise that Justice Butler’s reasons would be released shortly. Ms. Li replied to this email within about two hours.

[10] On January 25, 2023, the judge’s written reasons were released. The respondent was then contacted by Robert Cooper, K.C. on Ms. Li’s behalf to ask about the dismissal application and service. After receiving an explanation and a copy of the reasons, Mr. Cooper advised he would not be acting for Ms. Li. Counsel for Chao Yin heard nothing about this appeal for 14 months until Ms. Li’s current counsel advised of the intention to bring this application.

[11] Aside from her non-attendance at the dismissal application hearing, Ms. Li: (i) failed to attend the post-trial costs application on September 22, 2021; (ii) failed to attend a special costs pre-hearing conference on November 24, 2022; and (iii) failed to attend the special costs assessment hearing on March 6, 2023.

Legal Framework

[12] Rule 62(2) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 requires a person intending to apply to vary an order of a justice to file and serve their notice of application not more than seven days after the order is made.

[13] The well-known criteria for extensions of time to bring an appeal, which also apply in the context of applications for an extension of time to file an application, were recently set out by this Court in *J.P. v. K.S.*, 2024 BCCA 78 at para. 15:

- 1) Was there a *bona fide* intention to seek a review?
- 2) When were the respondents informed of the intention?
- 3) Would the respondents be unduly prejudiced by an extension of time?
- 4) Is there merit in the review?
- 5) Is it in the interest of justice that an extension be granted?

Position of the Parties

Ms. Li

[14] Ms. Li submits that she was not aware of the application before Justice Butler since the materials were served at an email address which had an “auto reply” response which had been set due, in part, to health problems she was experiencing. She acknowledges this email address was not the one indicated on the notice of appeal but says the respondent was communicating at this alternative email address at all material times.

[15] Ms. Li contends that since learning of the Dismissal Order in late January 2023, her proactive efforts in approaching over 15 different law firms for the appeal evince a *bona fide* intention to seek a review.

[16] She says that she is prejudiced by the fact that, contrary to s. 116(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], counsel for Chao Yin, Mr. Kressock, was appointed as inspector for Ms. Li’s estate in the bankruptcy proceedings. Mr. Kressock should not have been permitted to serve as an inspector of Ms. Li’s estate while acting as counsel for a party actively engaged in litigation

against her estate, given the prejudice which arises by virtue of the resulting conflict of interest.

[17] Ms. Li argues that the judge was wrong in law when he inferred from Ms. Li's conduct that Ms. Li relied upon bankruptcy as a "solution" to her financial problem and therefore, did not have a settled and genuine intention to pursue the appeal after early August 2021.

[18] She also says that the judge misconceived the facts in that while it is true that Ms. Li failed to take any procedural steps between the date of the judgment and the filing of the notice of appeal, she retained counsel, being Mr. Reedman for her appeal, after the 30-day period to file the notice of appeal. She says that from the date of Mr. Reedman's engagement by Ms. Li for the present appeal until Ms. Li filed the notice of appeal herself as a self-represented litigant, she continuously followed up with Mr. Reedman about her appeal evincing her intention to pursue the appeal throughout this period.

[19] Ms. Li submits that her delay was due to a number of factors including:

- a) that difficult financial circumstances forced her to file assignment in bankruptcy;
- b) that on September 28, 2021, Mr. Reedman was out of office for a three-week period;
- c) that Mr. Reedman waited and never filed the appeal and utilized almost a year in spite of her continued inquiries regarding the status of her appeal; and
- d) the significant health issues which she had during that time frame.

Chao Yin

[20] Chao Yin submits that the evidence does not show a *bona fide* ongoing intention to seek a review of the judge's decision. The deadline for filing the

application was January 23, 2023, being 7 days after the oral judgment in Chambers of January 16, 2024. It argues that a purported difficulty in retaining counsel does not excuse a delay of more than a year, particularly when Ms. Li chose to be self-represented at trial and commenced this appeal without counsel.

[21] It contends Ms. Li's claim that she was unaware of the dismissal application hearing should not be accepted. Notice was sent multiple times to multiple email addresses. The contention that Ms. Li was not checking her email leading up to the hearing, but happened to start communicating by email on the day the Dismissal Order was made, is also not credible. Further, Ms. Li and counsel on her behalf communicated with counsel for Chao Yin shortly before and after the 7-day review period lapsed, but no application for a review was filed.

[22] Chao Yin says Ms. Li's current counsel first advised of the intention to seek a review on March 19, 2024, more than 14 months after the Dismissal Order was made.

[23] It argues that it would suffer substantial prejudice if Ms. Li were permitted to challenge the Dismissal Order, as it has taken many steps since then including:

- a) it obtained orders in Ms. Li's bankruptcy that the judgment survive the bankruptcy and that the stay be lifted for the costs assessment;
- b) it has prosecuted a special costs assessment, and in doing so, disclosed privileged documents to Ms. Li, i.e., five years of legal bills; and
- c) the Trustee Action has been diligently advanced for more than 18 months, and is set for determination later this year.

[24] Chao Yin also argues that:

- a) Ms. Li has not identified any error in the judge's reasoning giving rise to a reasonable prospect that the Dismissal Order will be set aside, particularly

given that the standard of review on an application to cancel an order of a justice is “highly deferential”;

- b) it is not in the interests of justice to grant the extension which has as its objective, an attempt to reinstate this appeal and challenge a judgment made nearly three years ago given not just the lapse of time but the lack of merit; and
- c) Ms. Li, who remains an undischarged bankrupt, has also not identified any plan to move the appeal forward even if she were presented with the extension of time she seeks. In particular, as deposed to by Mr. Jonathan McNair, licenced insolvency trustee, she has not sought or obtained the approval of the Trustee to prosecute this appeal. In fact, the Trustee intends to pursue its claims in the Trustee Action which I have described above.

[25] The thrust of Chao Yin’s submission is that this application for an extension of time is simply a last-ditch effort by Ms. Li to avoid the consequences of the trial judgment and undermine the Trustee Action.

Analysis

[26] As Justice Butler noted in his reasons for the Dismissal Order, Ms. Li originally filed an application for an extension of time to appeal the trial order on July 25, 2022 that was never served.

[27] His reasons included a review of the legal framework and a thorough application of the relevant factors in reaching his conclusion that it was in the interests of justice that the appeal be dismissed as abandoned: at paras. 32–37.

[28] I would not accede to the submission, not advanced before Justice Butler since Ms. Li did not appear at the application, that Mr. Kressock was precluded by s. 116 of the *BIA* from appearing for Chao Yin against Ms. Li on the application in question. Mr. Kressock was appointed as an inspector by the estate’s largest

creditor. He is the sole inspector. He represents Chao Yin and has not acted for the Trustee. Ms. Li has not established that Mr. Kressock was in a position of a conflict of interest at the hearing of the application before the judge or elsewhere.

[29] It bears noting that a review application is not a re-hearing of the original application. Rather, the chambers judge's decision is subject to a highly deferential standard of review. The Court will ask whether the judge was wrong in law, wrong in principle, or if they misconceived the facts. Absent any of these errors, a division will not change the order: *Gill v. Gill Estate*, 2023 BCCA 427 at para. 13. The applicant cannot simply argue that the justice should have reached a different result or exercised their discretion differently. There must be a legal error: *Martin v. Riley*, 2024 BCCA 194 at para. 24.

[30] In my view, in light of the judge's comprehensive analysis and his application of the legal framework to the circumstances of this case as they existed in January 2023, there is no likelihood that a division of this Court would vary or cancel the judge's order. This is because none of the issues raised by Ms. Li demonstrate that Justice Butler was wrong in law, wrong in principle, or misconceived the facts. He identified and applied the correct legal test for dismissing an appeal for non-compliance with the *Court of Appeal Act* and *Rules* and Ms. Li has not identified any error in the substance of his analysis.

[31] Ms. Li argues on this application that, due to the email address issues she has raised, she was unaware of the date of the hearing of the application before the judge. There is no merit to this submission when considered in the context of the affidavit evidence as a whole and in particular, the use of both email addresses in the timeframe surrounding the application before the judge.

[32] There is, on the other hand, considerable merit to Chao Yin's submission that if an extension is granted, it will adversely affect the Trustee Action. In any event, Ms. Li has not secured the Trustee's consent to pursue this appeal.

Conclusion

[33] Ms. Li has failed to satisfy any of the requirements for obtaining an extension of time to seek a variation of the judge's order or to have it cancelled. For these reasons, I conclude it is not in the interests of justice to grant the extension and the application is dismissed.

"The Honourable Mr. Justice Abrioux"