# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Canfield v. Continental Appraisals Ltd.,* 2023 BCCA 61

Date: 20230126
Docket: CA48538

Between:

**Frances Jean Walbey Canfield**

Appellant
(Plaintiff)

And

**Continental Appraisals Ltd., Bronze Wines Ltd., Howard H. Engman and Scot Stewart**

Respondents
(Defendants)

Before: The Honourable Madam Justice Fenlon
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 19, 2022 (*Canfield v. Bronze Wines Ltd.*, 2022 BCSC 1435, Nelson Docket S18180).

## Oral Reasons for Judgment

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| Counsel for the Appellant, appearing via videoconference: | T.W. Pearkes<br>B. Reaka, Articled Student<br>D. Crossley, Articled Student |
| Counsel for the Respondent, Continental Appraisals Ltd., appearing via videoconference: | R.R.W. Sookorukoff |
| Place and Date of Hearing: | Vancouver, British Columbia<br>January 23, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>January 26, 2023 |

***Summary:***

*The applicant seeks leave to appeal an order requiring her to pay the respondent double its costs of the proceeding below after October 16, 2020, the date on which the respondent made a formal offer to settle the action. She submits that her rejection of that offer was objectively reasonable because it required her to execute a release of all claims in favour in the respondent when she had an extant claim against the respondent in another proceeding. Held: Application dismissed. Leave to appeal a costs order alone will generally not be granted unless a question of principle is involved and the proposed grounds of appeal are arguable. Neither factor is met. The judge did not consider the effect of the release on the extant claim because none of the parties raised it as an issue before her in assessing the reasonableness of the offer. Further, the extant claim could not have been a factor in considering the reasonableness of the offer because it was not identified until nine months after the offer was made, and the judge was required to consider what was known by the parties about the case at the time the offer was made.*



[1] **FENLON J.A.**: Jean Canfield seeks leave to appeal an order requiring her to pay Continental Appraisals Ltd. (“Continental”) double its costs of the proceeding below after October 16, 2020.

## Background

[2] In January 2012, Mrs. Canfield signed an agreement of purchase and sale (the “Agreement”) agreeing to transfer ownership of her home (the “Property”) to Bronze Wines Ltd. (“Bronze Wines”), the CEO of which was Scot Stewart. Howard Engman was the notary who witnessed Mrs. Canfield’s signature on the Form A freehold transfer.

[3] The Agreement did not provide for immediate payment to Mrs. Canfield, but instead for a future stream of payments from a winery that Bronze Wines hoped to operate on the Property. She received no security for payment of the funds due to her. The Agreement provided that the Property would be returned to her if three consecutive payments were missed.

[4] Bronze Wines immediately borrowed funds from private lenders to finance the business, secured by registered mortgages against the Property. By 2013, there were two such mortgages: one assigned to Continental and one assigned to Air Touch Communications Ltd. (“Air Touch”).

[5] Both mortgages went into default.

[6] Mrs. Canfield filed a notice of civil claim in April 2014, advancing claims against Bronze Wines, Mr. Stewart, Mr. Engman, and Continental. The only claim Mrs. Canfield alleged against Continental in the notice of claim was that it had actual or constructive knowledge of her interest in the Property on the date its mortgage was registered on the title.

[7] In April 2018, Continental filed a foreclosure petition to preserve its right to enforce its mortgage security over the Property. In her response to this petition, Mrs. Canfield took the position that the petition was “an end run around” her claim and that the action should proceed first. In 2019, the Property was sold and the proceeds (some $338,000) were paid into court pending resolution of these proceedings.

[8] On October 16, 2020, Continental made a formal offer to settle the action on the following terms:

1. Continental to pay Mrs. Canfield $5,000;

2. Mrs. Canfield to discontinue her claim against Continental; and

3. Mrs. Canfield to execute a release of all claims in favour of Continental.

[9] The offer expired without acceptance. The third provision is key to Mrs. Canfield’s leave to appeal application.

[10] On October 28, 2020, following a pre-trial conference, Mrs. Canfield filed an amended notice of civil claim, adding an argument that the limitation period for Continental to enforce its security under the mortgage had expired.

[11] The trial commenced on July 19, 2021. In her final argument, Mrs. Canfield abandoned her claim against Continental that it had actual or constructive knowledge of her interest in the Property.

[12] After closing her case, on July 26, 2021, Mrs. Canfield applied to further amend her notice of civil claim to, among other things, plead that the Form A transfer used by Bronze Wines was a void instrument "as a result of alterations that were made [to it] prior to its registration".

[13] In reasons on this mid-trial application, indexed at 2021 BCSC 1714, the trial judge dismissed the application to add the claim based on the altered Form A transfer. She found that Mrs. Canfield had had a year and a half to amend her pleadings to include the argument, that it was a new and distinct issue that the defendants had been deprived of the opportunity to explore prior to trial, and that adding it at that point would have been too prejudicial to the defendants. She determined that the amendment could not be remedied by an adjournment as it would require the defendants "to investigate the factual circumstances of a Form A transfer that occurred almost a decade ago" (at paras. 15–18).

[14] On September 7, 2021, prior to the resumption of the trial, Mrs. Canfield amended her response in the foreclosure proceeding to raise as an issue whether the mortgage was not enforceable because the mortgagor's title was obtained by a void instrument (the altered Form A transfer). The judge issued her reasons for judgment in the trial, indexed at 2022 BCSC 546, on April 5, 2022. Mrs. Canfield was successful at trial against Bronze Wines and Mr. Engman but unsuccessful against Mr. Stewart and Continental. Mr. Engman has appealed that order and judgment remained reserved as of the date of the hearing of this application.

[15] The parties made further submissions to the trial judge on interests and costs. In reasons indexed at 2022 BCSC 1435, the judge, among other things, awarded to Continental ordinary costs until October 16, 2020—the date of the offer to settle—and double costs after that date, on the basis of Rule 9-1(5)(b) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. She noted that the question of whether the offer "ought reasonably to have been accepted" must be examined under the circumstances that existed at the time the offer was open for acceptance, and involves both a subjective and objective component—requiring consideration of the

reasons why the plaintiff declined the offer but also whether those reasons were objectively reasonable. The judge rejected Mrs. Canfield's arguments that the evidence of Continental's witnesses had not yet been tested and that she wished to explore Continental's case in cross-examination at trial. The trial judge found that Mrs. Canfield had access to the affidavits of Continental's witnesses due to a summary trial application that did not proceed, and her election to explore her case could not shield her from the cost consequences of an unaccepted offer.

[16] The judge accepted that the low value of the offer was explained by the weakness of Mrs. Canfield's claim against Continental, that Mrs. Canfield had all the facts and evidence she needed to assess the strength of her claim against Continental on the date of the offer, and that therefore, Continental's formal offer to settle was a genuine settlement offer that Mrs. Canfield ought reasonably to have accepted.

**Legal Framework**

[17] Where, as here, the only matter on appeal is in respect of costs, the order is a limited appeal order under Rule 11(f) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*New Rules*]. As a result, leave of a justice to bring the appeal is required: *Court of Appeal Act*, S.B.C. 2021, c. 6, s. 13(2)(a).

[18] The general test for granting leave to appeal a limited appeal order requires the applicant to demonstrate that there is some important issue involved both to the parties and to the public in general, that the appeal has some practical utility and some merit, and that granting leave would not cause prejudicial delay in the proceedings.

[19] The test for an application for leave to appeal a costs order is more onerous, due to the highly discretionary nature of such an order: *Yung v. Jade Flower Investments Ltd.*, 2012 BCCA 168 at para. 19 (Chambers). This reflects the deferential standard of review on appeal where, provided the judge considers the factors that are relevant to the question of whether the offer reasonably ought to

have been accepted, the judge's conclusion is entitled to deference: *Tisalona v. Easton*, 2017 BCCA 272 at para. 99.

[20] Leave will generally not be granted unless a question of principle is involved: *Neufeld v. Foster*, 2000 BCCA 485 at para. 14 (Chambers). The specific factors for consideration in an application for leave to appeal a costs order were summarized by Justice Hunter in *Gichuru v. Pallai*, 2019 BCCA 282 at para. 10 (Chambers):

> (1) whether the proposed appeal raises questions of principle that extend beyond the parameters of the particular case;
> (2) whether the questions of principle are of significance to the practice; and
> (3) whether the proposed grounds for appeal are arguable.

[21] While *Gichuru* was decided under the former *Court of Appeal Rules*, B.C. Reg. 297/2001, the same factors govern under the *New Rules*: see, e.g., *Gonzales Hill Preservation Society v. Victoria (City) Board of Variance*, 2022 BCCA 384 at para. 23 (Chambers).

**Position of the Applicant**

[22] Mrs. Canfield argues that the trial judge erred in concluding that she reasonably ought to have accepted the offer to settle, given that it required her to release all claims against Continental, and given that she had an "extant claim" against Continental in the form of the void Form A transfer argument that she raises in the foreclosure proceeding. She argues that if she is successful in that proceeding, she would be entitled to over $200,000 (the $338,000 currently in trust less a settlement reached with Air Touch). She says it therefore was not unreasonable for her to have refused an offer requiring her to release all claims against Continental in exchange for $5,000.

[23] Mrs. Canfield acknowledges that she did not raise the release term as an issue at the costs hearing, saying that she, Continental, and the trial judge all overlooked the extant claim when costs were argued.

**Is there a question of principle of significance to the practice?**

[24] Mrs. Canfield argues that the proposed appeal raises a question of principle that is of significance to the practice—whether a judge is required to consider the effect of an offer to settle requiring a release of all claims when an extant claim is yet to be determined.

**Are the grounds of appeal arguable?**

[25] Mrs. Canfield alleges the proposed appeal has merit because the trial judge failed to consider the impact of the release sought on Mrs. Canfield's outstanding claim in the foreclosure proceeding that the Form A transfer was void—a claim which would, if successful, negate Continental's security. She says in light of that impact, it would not have been reasonable for her to have accepted the offer from Continental which would have released it from that claim.

## Analysis

[26] In my view, the applicant has not met the test for the granting of leave to appeal a costs order. Although I accept that the $20,000 difference in double costs is a significant sum to Mrs. Canfield, and therefore important to her, the bar for leave to appeal a costs order alone requires something more, including the raising of a matter of principle important to the practice generally, and an arguable case.

[27] Here, the proposed appeal does not raise questions of principle that extend beyond the parameters of this case. It is already a settled principle that all of the terms of an offer must be taken into account in deciding whether it ought reasonably to have been accepted when made, including a release that could affect other proceedings or even future issues arising between the parties. This case does not raise a general principle about whether a release may or should be taken into account in assessing an offer. It is simply a case in which the judge did not consider the release because none of the parties raised it as an issue before her in assessing the reasonableness of the offer presented by Continental.

[28] This also goes to the merits of the proposed appeal. The suggestion that a judge should have considered on her own motion whether the release term could affect the foreclosure or other proceedings or rights between the parties, thereby affecting the reasonableness of the offer, is inconsistent with the general principle that it is the parties, not the judge, who frame the dispute and raise the issues to be addressed. An argument that the judge erred by not considering an issue that was not even mentioned in the case before her is not an argument that has merit.

[29] Further, on the merits, the question under Rule 9-1(5)(b) is whether the offer "ought reasonably to have been accepted" in the circumstances existing when it was presented and remained open for acceptance. The offer was made in October 2020. The issue of whether the transfer form was void was not identified by Mrs. Canfield until July 2021, so could not have been a factor in assessing the reasonableness of the offer presented nine months earlier. I would not accede to the proposition that, because the parties had knowledge of the facts ultimately relied on to underpin the void transfer claim when the offer was made, that could suffice to make the future claim a factor in assessing the offer under Rule 9-1(5)(b). Bringing a claim that was identified months later into the assessment of whether the offer ought reasonably to have been accepted would amount to an assessment of the reasonableness of an offer using hindsight. That is contrary to the rule which requires the judge considering an application for double costs to assess whether the rejection of the offer was objectively reasonable given what was known by the parties about the case at the time the offer was made.

[30] It bears repeating that, at the time the offer was made, neither Continental nor Mrs. Canfield had any inkling that she could or would challenge the transfer form as void due to the alterations on its face. It would be entirely artificial to assess the reasonableness of the decision to reject the offer on the basis of the case as it would be framed nine months later.

[31] Continental also argues that the appeal has no merit because all issues between Mrs. Canfield and Continental have been determined in the action in which

the costs order was made. As a result, the release sought in the offer would not, in any event, have affected her rights in the foreclosure proceeding. Continental says that Mrs. Canfield's attempts to re-argue those claims in the foreclosure proceeding offends the principle of *res judicata*. There appears to be considerable merit to that submission, but it is not necessary for me to rely on it in deciding this application. In my view, based on the factors I have already addressed, it is not in the interests of justice to grant leave to appeal the costs order.

## Disposition

[32] The application for leave to appeal is dismissed.

"The Honourable Madam Justice Fenlon"