COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cheng v. Chan,*
2023 BCCA 118

Date: 20230302
Dockets: CA47128; CA47129

Docket: CA47128

Between:

Wai Yee Cheng

Appellant
(Respondent)

And

Ling Linda Chan

Respondent
(Claimant)

And

Chung Yeung Chow

Respondent
(Respondent)

– and –

Docket: CA47129

Between:

Wai Yee Cheng

Appellant
(Plaintiff)

And

Chung Yeung Chow and Ling Linda Chan

Respondents
(Defendants)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: Orders of the Supreme Court of British Columbia, dated October 23, 2022 (*Chan v. Chow*, Vancouver Docket E173365 and New Westminster Docket S192839).

Oral Reasons for Judgment

Counsel for the Appellant:	R.S. Fleming A.V. Mackenzie
Counsel for the Respondent, Ling Linda Chan:	K.J. Learn
Counsel for the Respondent, Chung Yeung Chow:	W.Y. Leung
Place and Date of Hearing:	Vancouver, British Columbia March 2, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 2, 2023

Summary:

The appellant appeals from the additional terms of an adjournment order made at a trial management conference. The additional terms stated that the matter could not be re-set for trial until the court was satisfied sufficient documentation was produced demonstrating the source of certain bank deposits, with liberty to apply to demonstrate that the matter was ready for trial. The source of the bank deposits was a key issue in the litigation. Held: Appeal allowed. The additional terms of the order were made on the judge's own motion, without notice of application or affidavit evidence. The facts were in dispute regarding the ability to produce the documents in question, and the matter could not be determined without affidavit evidence. It was therefore outside the scope of the judge's discretion pursuant to R. 12-2(11). Further, the order raised problematic questions regarding the meaning and enforceability of a term requiring a party to prove a fact in issue to the satisfaction of the court before trial.

[1] **GRIFFIN J.A.**: The appellant Wai Yee Cheng (the "appellant") appeals from an order of a judge made at a trial management conference ("TMC") on October 23, 2020. She says that the order was only one that could have been made after a proper application was brought supported by affidavit evidence, and that the judge erred by making the order on his own motion.

[2] For the reasons that follow, I agree that the judge erred and I would set aside terms 2 and 3 of the order.

Background

[3] The appellant is the elderly mother of the respondent Chung Yeung Chow ("Mr. Chow") and she is represented by a litigation guardian, Ms. Lowena Louie. It is uncontested that the appellant is not mentally competent but there is a dispute as to when her incapacity arose.

[4] The background taken from the pleadings, is that Mr. Chow and the respondent Ling Linda Chan ("Ms. Chan") were married in January 1994 and then separated in August 2016. Ms. Chan commenced a family claim against Mr. Chow on December 22, 2017, seeking a division of property among other relief. Ms. Chan names the appellant as a respondent, claiming the appellant holds property in trust for Mr. Chow and Ms. Chan.

[5] After the couple separated, Mr. Chow's mother, the appellant, commenced a civil claim against Mr. Chow and Ms. Chan on October 26, 2017. The appellant lives in Hong Kong. She claims that she put approximately $10 million into a Canadian bank account of the TD Bank on the advice of Mr. Chow and Ms. Chan, and made Mr. Chow a signatory for administrative purposes only. She alleges that her son and daughter-in-law made unauthorized withdrawals from the account beginning in 2006, totalling close to $5 million, without her knowledge or permission. She claims that they then purchased luxury cars and properties, or paid mortgages on the properties, with her money.

[6] Mr. Chow filed a response to civil claim agreeing with the allegations made by his mother, the appellant.

[7] Ms. Chan's position is that the appellant's claim is entirely false and designed to try to shield Mr. Chow's assets from Ms. Chan's claims in the family action. Her position is that Mr. Chow or entities controlled by him provided the funds in the TD Bank account that they used over the years. As well, she says that the appellant was incapacitated at the time the appellant's claim was filed and so it is a nullity.

[8] There are bank records showing five large deposits into the TD Bank account in 2011 totalling approximately $9.1 million. The records show that some of this money was used in 2014 to purchase two condominium units and a Ferrari for Mr. Chow. In total, approximately $5.3 million of funds were taken from the TD Bank account.

[9] Needless to say, the source of the funds paid into the Canadian bank account is a key issue at trial. Little progress has been made in obtaining documents to prove the source of those funds. It would seem that any such documents are either in the control or power of the appellant or her son, Mr. Chow.

[10] In 2018, an order was made that the family claim and civil claim be tried together, subject to the directions of the trial judge.

[11] An order was made by Justice Crerar on February 11, 2020, adjourning the trial set to take place on April 20, 2020. As additional terms, Crerar J. ordered the parties to make best efforts to produce up-to-date lists of documents, as well as all documents in relation to the subject bank account and documents showing the source of the five major deposits in 2011, totalling approximately $9.1 million.

[12] The trial of the two claims was set for November 23, 2020. The TMC took place on October 23, 2020. In her trial brief, Ms. Chan took the position that the trial should be adjourned because the appellant and Mr. Chow had failed to produce relevant documents, including those which were the subject of the order of Crerar J., and because discoveries were not yet complete.

[13] During the hearing of the TMC, counsel for the appellant took the position that she was ready to proceed to trial without having produced the documents regarding the source of funds deposited to the TD Bank account. Counsel submitted the appellant would be content to rely on the fact that the bank account was in her name and so that established her ownership of the funds in it. Counsel also submitted that the litigation guardian had difficulties in obtaining any additional documents, complicated by the appellant's incapacity and the fact that she resides in Hong Kong.

[14] The judge conducting the TMC had no previous dealings with the actions and was not otherwise case managing them. After a brief discussion, the judge ordered that the impending trial of the two actions be adjourned. Without hearing from the appellant, and without any party seeking this additional relief, the judge ordered that the adjournment be on terms that the trial could not be rescheduled until "the court is satisfied sufficient documentation has been produced demonstrating the source" of the approximately $9.1 million deposited into the TD Bank account. Counsel for the appellant objected that there was no application or evidence for such an order, but the judge suggested that this did not matter and he was not satisfied that best efforts had been made to produce the documents.

[15] No appeal is taken from the order adjourning the trial. The appeal is taken from terms in the judge's order as follows:

> 2. The action may not be re-set for trial until the court is satisfied that sufficient documentation has been produced demonstrating the source of the following deposits made to the [appellant's TD Bank account]:
>
> a) Deposit of $499,990 on February 24, 2011;
>
> b) Deposit of $2,465,778 on April 12, 2011;
>
> c) Deposit of $2,465,778 on May 2, 2011;
>
> d) Deposit of $1,232,884 on May 25, 2011;
>
> e) Deposit of $2,465,778 on May 25, 2011.
>
> 3. The parties are at liberty to apply to demonstrate that this matter is ready to proceed to trial.

[16] The appellant was granted leave to appeal the order on July 8, 2022.

Discussion

[17] Considerable deference is shown on appeal to discretionary decisions made by judges, including decisions made as a matter of trial management. However, this Court will intervene where the judge makes an error in principle, or a palpable and overriding error: *Thurlow & Alberni Project Ltd. v. The Owners, Strata Plan VR 2213*, 2022 BCCA 257 at para. 70.

[18] Rule 12-2 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Civil Rules*] governs a TMC. Sub-rules 12-2(9) and (11) are relevant in describing the scope of orders that may be made at a TMC as follows:

> R. 12-2(9) The judge or master presiding at a trial management conference may consider the following and, without limiting the ability of the trial judge or master to make other orders at trial, may, whether or not on the application of a party, make orders respecting one or more of the following:
>
> (a) a plan for how the trial should be conducted;
>
> (b) Whether or not the trial or any part of it is to be heard without a jury, on any of the grounds set out in Rule 12-6 (5);
>
> (c) amendment of pleadings within a fixed time;
>
> (d) admissions of fact at trial;
>
> (e) admission of documents at trial, including

> (i) agreements as to the purposes for which documents may be admitted, and
>
> (ii) the preparation of common books of documents and document agreements;
>
> (f) imposing time limits for the direct examination or cross-examination of witnesses, opening statements and final submissions;
>
> (g) directing that a party provide a summary of the evidence that the party expects one or more of the party's witnesses will give at trial;
>
> (h) directing that evidence of witnesses be presented at trial by way of affidavit;
>
> (i) respecting experts, including, without limitation, orders that the parties' experts must, before the service of their respective reports, confer to determine and report on those matters on which they agree and those matters on which they do not agree;
>
> (j) directing that the parties present opening statements and final submissions in writing;
>
> (k) respecting when and how an issue between the party filing a third party notice and the third party may be tried;
>
> (l) adjournment of the trial;
>
> (m) directing that the number of days reserved for the trial be changed;
>
> (n) directing the parties to attend a settlement conference;
>
> (o) adjourning the trial management conference;
>
> (p) directing the parties to attend a further trial management conference at a specified date and time;
>
> (q) any other matter that may assist in making the trial more efficient;
>
> (r) any other matter that may aid in the resolution of the proceeding;
>
> (s) any orders the judge or master considers will further the object of these Supreme Court Civil Rules.
>
> …
>
> R. 12-2(11) A trial management conference judge or master must not, at a trial management conference,
>
> (a) hear any application for which affidavit evidence is required, or
>
> (b) make an order for final judgment, except by consent.

[19] Similar rules apply in family proceedings: Rules 14-3(9) and (11), *Supreme Court Family Rules*, B.C. Reg. 169/2009 [*Family Rules*], although there is no equivalent to *Civil Rule* 12-2(9)(b) because there are no jury trials in family

proceedings. For ease of reference, in my analysis, I will refer to the *Civil Rules* rather than the *Family Rules*.

[20] It is likely that the judge's order was based on his view that the trial would be made more efficient if documents identifying the source of the funds in the TD Bank account were produced. But while R. 12-2(9)(q) does allow a judge at a TMC to make orders that may assist in the efficiency of the trial, this discretion is limited in scope by the full context of R. 12-2(9) and (11).

[21] Read in their entirety, the full context of R. 12-2(9) and (11) establish that the types of orders envisioned by the TMC rule all have to do with the organization and presentation of each party's case at trial, that is, the management of the trial. The purpose of the Rule is to avoid a trial commencing where the parties are not yet prepared to present their case in an organized and efficient fashion, and to avoid wasting of judicial and legal resources at trial.

[22] It was relevant to the judge's exercise of discretion that none of the sub-rules R. 12-2(9)(a)–(p) specifically contemplate orders being made at a TMC for production of documents pre-trial, or for a stay of the proceeding. In my view, the fact that the type of order being contemplated does not fall within any of the listed specific examples in the TMC rule should cause a judge to pause before issuing such an order at a TMC. In such a situation, a judge should carefully consider whether it is the kind of order that should only follow from an application with affidavit evidence and thus is outside the purview of a TMC judge based on R. 12-2(11). I do not say that where the type of order contemplated is not specified within R. 12-2(9)(a)–(p), that the judge does not have the ability to conclude that what is contemplated falls within the more general provisions of R. 12-2(9)(q), (r) or (s). I simply say that the judge should be cautious in using the general provisions of R. 12-2(9)(q), (r) or (s) out of the context of the purpose of a TMC.

[23] A TMC is not the same as a case planning conference governed by R. 5-1, 5-2 and 5-3. A case planning conference addresses pre-trial steps to be taken in litigation, with the court intervening to ensure that a proceeding does not languish,

including by imposing timelines for such things as discovery of documents and examinations for discovery: see R. 5-1(6) and 5-3(1).

[24] While TMCs are meant to structure the presentation of the parties' cases at trial, the scope of R. 12-2 suggests that they are not designed to resolve procedural issues arising in the litigation generally, for which the underlying facts are in dispute and therefore affidavit evidence is required. If the determination of a procedural dispute turns on contested facts, which can only be determined by evidence (as opposed to the parties' pleadings for example), R. 12-2(11) provides that an application should be brought and the issue should not be decided at the TMC. The reason for this is to provide the parties with all of the procedural protections of the rules governing applications, including advance notice of the nature of the application, the order sought, the authority relied upon and affidavit evidence that a party has affirmed or sworn.

[25] Here, there were a number of problems with the judge's order.

[26] The judge's order implicitly assumes that the appellant has the ability, through her litigation guardian, to produce documents regarding the source of funds in the TD Bank account. That explains why, despite her counsel's objection, the judge effectively stayed the trial of her action until the documents were produced.

[27] The question of whether the appellant had the documents at issue in her possession or control was not something that was agreed by the parties appearing on the TMC, and it could not be decided merely on the basis of the representations of the parties. The assumption that the appellant had the ability to produce the documents was contested by her counsel. It was also somewhat contrary to the theory of Ms. Chan's case, who takes the position that Mr. Chow was the person who generated the source of the deposits into the TD Bank account. Even the prior best-efforts production order of Crerar J. was not directed to the appellant alone but to all parties, given the nature of the dispute over the source of the bank deposits.

[28] As such, the judge ought to have recognized that the question of who had the ability to produce the documents required a proper factual foundation by way of affidavit evidence, and that procedural fairness required that any party seeking a remedy for failure to produce the documents should bring an application, giving proper notice. In not recognizing that the matter required an application with affidavit evidence the judge erred in principle, by failing to abide by the restriction imposed on his discretion by R. 12-2(11).

[29] In reaching this conclusion, I do not intend to indicate that any time a party at a TMC contests a fact and asserts that affidavit evidence is required to decide an issue raised at the TMC, that the judge has to accept that submission. Judges have to be alert to parties who seek to cause trial delay by raising irrelevant controversies. I agree with the observations of Justice N. Smith in *Jurczak v. Mauro*, 2011 BCSC 512, to the effect that it is not the parties but the judge at a TMC to determine whether a particular application requires affidavit evidence, and whether affidavits that have been tendered are relevant: at para. 7. The same has been said in relation to case planning conferences: *Gill v. A & P Fruit Growers Ltd.*, 2011 BCSC 1421 at para. 19.

[30] Clearly the decision of a judge as to whether or not affidavit evidence is required must be principled and must include consideration of whether the facts are in dispute. While it was not disputed before the judge that the documents regarding the source of deposits made to the TD Bank account had not been fully produced, it was disputed as to whether some documents had been produced, the parties had made “best efforts”, and who might have possession and control of the documents. The only materials before the judge were the pleadings, a trial brief of the appellant in the civil action, and a trial brief of Ms. Chan in the family action. The facts in dispute could not be decided on the basis of these materials or statements of counsel.

[31] Further, the effect of the judge’s order was to grant a stay of the trial of both proceedings. The appellant had no notice of any application that such an unusual

order would be sought, and no opportunity to make informed submissions against such an application. Nor did the other parties have notice or this opportunity.

[32] It is no answer to suggest that term 3 of the order gave the parties liberty to apply to "demonstrate" that the matter was ready for trial. If the appellant had no ability to produce the documents, and there was no change in circumstances from the date of the TMC, how could she demonstrate that she was ready for trial in light of the rest of the judge's order? Further, what if Ms. Chan wished to proceed to trial at some point—was she to be forever barred from doing so by the appellant and Mr. Chow's failure to produce the documents? While Ms. Chan does not take this position on appeal, I see these unanswered questions as problematic.

[33] In addition, the terms of the order were inappropriate because a party would be unable to determine when and if they complied with the order. How was a party to know when the court would be "satisfied that sufficient documentation ha[d] been produced demonstrating the source of" the deposits in the TD Bank account? Arguably the only way to resolve that question would be at a trial.

[34] To be sure, active trial management at a TMC is desirable and appropriate. The TMC judge's concern about the failure to produce key documents is understandable. There is a frustrating lack of transparency on the part of the appellant and Mr. Chow on a central issue in the proceedings. One does wonder how that issue will be resolved by a trial judge in the absence of documentation. However, that concern only justified the adjournment of the trial and not the additional terms imposed by the judge. If Ms. Chan wished to bring further applications, that was for her to decide.

[35] As put by Justice Goepel in *Jensen v. Ross*, 2014 BCCA 173 in the context of setting aside an order made at a case planning conference in the absence of an application and affidavit evidence:

> [24] Civil litigation is an adversarial process. The judge is the referee. Judges must leave it to the parties to determine the court processes that they wish to engage to resolve a proceeding. Absent extraordinary circumstances such as those facing Chief Justice McEachern when picketers threatened to

> shut down the courthouse (*Re British Columbia Government Employees Union et al. and Attorney General of British Columbia et al*. *(1982),* 2 D.L.R. (4th) 705; aff'd (1985) 20 D.L.R (4th) 399; aff'd [1988] 2 S.C.R. 214), judges should not act on their own motion. To do so compromises their role of impartial arbitrator.

[36] And further:

> [27] The chambers judge decided the case on her own initiative in the absence of any application by the parties. For the chambers judge to act on her own motion was a clear error. She took from the parties their right to control the proceedings and determine for themselves the battleground upon which they wanted the proceedings resolved.

[37] The above comments equally apply to the terms of the order made by the judge that are challenged on this appeal.

Disposition

[38] I would therefore allow the appeal and set aside terms 2 and 3 of the October 23, 2020 order.

[39] **WILLCOCK J.A.**: I agree.

[40] **DEWITT-VAN OOSTEN J.A.**: I agree.

[41] **WILLCOCK J.A.**: The appeal is allowed and terms 2 and 3 of the October 23, 2020 order are set aside.

"The Honourable Justice Griffin"