COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Boone v. Jones,*
2023 BCCA 215

Date: 20230517
Docket: CA48536

Between:

Simone Berg Boone also known as Simone Berg

Appellant
(Defendant)

And

Sharon Gail Jones

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated July 29, 2022 (*Jones v. Boone*, 2022 BCSC 1883, Vernon Docket S57551).

Oral Reasons for Judgment

Counsel for the Appellant:	N.J. Wells
Counsel for the Respondent (via videoconference):	D.W. Draht
Place and Date of Hearing:	Vancouver, British Columbia May 17, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 17, 2023

Summary:

Appeal from an order granting the respondent judgment on a debt claim following a summary trial at which the appellant was not present. The appellant received conflicting emails from the Supreme Court registry scheduling the hearing. The first communication advised that the hearing would commence at 2:00 p.m. on July 29, 2022; the second and third, received the day before and the morning of the hearing, advised that the hearing would commence at 10:00 a.m. At 9:50 a.m. on the morning of the hearing, the appellant attempted to join by MS Teams. She had been given leave to appear remotely. She waited for seventy minutes before logging off, but not before calling for technical assistance and speaking to a clerk in the court registry about her unsuccessful efforts to join the hearing. The hearing, in fact, commenced at 2:00 p.m. that day and was all but concluded in the appellant's absence. The appellant joined the hearing at approximately 3:25 p.m. and explained what had occurred. The judge, who had nearly finished issuing oral reasons for judgment, refused to re-open the matter. The appellant seeks relief relying on the audi alteram partem principle. Held: Appeal allowed. There was a breach of procedural fairness giving rise to a failure of justice. The summary trial application was remitted to the Supreme Court for rehearing.

FITCH J.A.:

I. Introduction

[1] This is an appeal from an order granting the respondent judgment on a debt claim following a short summary trial in the Supreme Court. The trial proceeded in the appellant's absence and this is what gives rise to the appeal.

[2] The appellant, Simone Berg, submits that the trial was procedurally unfair and in breach of the *audi alteram partem* principle because she was not heard as a result of an error made by the court registry in communicating to her the time the matter was scheduled to commence.

[3] The respondent submits that the appellant did not exercise reasonable diligence in determining when the summary trial application was scheduled to commence, and has no acceptable explanation for her non-attendance. Further, and in any event, the respondent submits that as the appellant had not filed any responsive materials to the application, her attendance at the hearing could not possibly have changed the outcome.

[4] In my view, what occurred in this case resulted in a failure of justice in fact and in appearance. For the reasons that follow, I would allow the appeal, set aside the order made below and remit the summary trial application to the Supreme Court for rehearing. While I recognize that the result I am proposing is an unfortunate one, it is necessary to protect the integrity of the administration of justice and preserve the general principle that parties to a proceeding have a right to be heard.

II. Background

[5] By Notice of Civil Claim filed March 16, 2022, the respondent, Sharon Gail Jones, commenced an action against her son, Vincin Boone and the appellant (the "defendants"), alleging they had defaulted on repayment of a $200,000 loan she had made to them. She alleged that the loan agreement "was partly oral, partly written and partly [evidenced] by conduct". The defendants filed a response to civil claim in which they pleaded that the alleged loan was a gift to them from Mr. Boone's father.

[6] On June 3, 2022, the respondent filed a summary trial application seeking repayment of the debt plus interest. The defendants filed no materials in response.

[7] On June 20, 2022, the application was adjourned by Justice Wilson at the appellant's request. The defendants were directed to file responsive materials by July 15, 2022.

[8] On June 27, 2022, the respondent filed a requisition to reschedule the summary trial application for the week of July 25, 2022.

[9] On June 29, 2022, the respondent's counsel sent the defendants a requisition and accompanying letter advising that the application would be heard in the week of July 25th. The requisition and the letter advised the appellant that the application would be heard at 9:45 a.m.

[10] Mr. Boone advised that he would not be appearing or participating in the hearing.

[11] On July 18, 2022, the appellant emailed the court registry seeking a further adjournment, including on grounds that she had been referred to Access Pro Bono and would be meeting with a lawyer on August 19, 2022. She was advised that the matter could only be adjourned by consent or by order of the court. She did not take steps to apply for an adjournment prior to the return date.

[12] On July 22, 2022, both parties received an email from the court registry advising that the summary trial application would be heard on July 29, 2022 at 2:00 p.m.

[13] On July 26, 2022, the appellant, who is prohibited from driving, filed a requisition seeking leave to attend the hearing by way of telephone or video conference. The request was approved by the trial judge on July 26, 2022.

[14] On July 28, 2022, at 5:30 p.m., the appellant received an email sent on behalf of the court registry advising that the summary trial application would be heard the following day at 10:00 a.m. The appellant was advised that she would receive a further email the next morning containing a remote video appearance link with further instructions. She was told to direct all inquiries to the court registry's phone number.

[15] On July 29, 2022, at 8:45 a.m. the appellant received an email sent on behalf of the court registry that provided her with an MS Teams link and instructions to join for her scheduled appearance at 10:00 a.m. She was also provided with a dial-in telephone number.

[16] The registry's communications with the appellant on July 28 and 29 were sent only to her. The respondent's counsel was not aware that the appellant had been provided with an application start time of 10:00 a.m.

[17] The appellant seeks to have two affidavits sworn by her admitted as fresh evidence on appeal. In her first affidavit, the appellant deposes that she logged in at approximately 9:50 a.m. and waited for about 70 minutes to be admitted to the hearing. She took a screenshot shortly after 11:00 a.m., noting her attempt to appear

by video link and the display of this message on her computer screen: “When the meeting starts, we’ll let people know you’re waiting.”

[18] As instructed, the appellant called the number she had been provided to seek assistance if she encountered trouble with the video link. She waited approximately 60 minutes on the phone. When no one answered, she called the court registry and spoke to a registry clerk. The clerk indicated that she would speak to someone about the situation and call the appellant back. The appellant deposes that she never heard back from the registry.

[19] The appellant has not been cross-examined on her version of events which is, in any event, largely confirmed by independent evidence.

[20] On July 29, 2022 at 2:00 p.m., the court convened to hear the respondent’s summary trial application. Neither the appellant, nor Mr. Boone, had filed any materials in response to the application. The court clerk advised the trial judge that neither of the defendants had logged in via MS Teams. The defendants were paged as a precaution in the event they had determined to appear in person. The application then proceeded with the trial judge asking the clerk to inform her if a request to join the proceedings by video link was received during the course of the trial.

[21] The court registry and counsel for the respondent had the appellant’s email address. By filing her requisition to appear remotely, the appellant had expressed her desire and intent to participate in the hearing. Even so, it would seem that no consideration was given to contacting her before proceeding with the trial.

[22] After hearing from the respondent’s counsel, the judge proceeded to give oral reasons for judgment granting judgment to the respondent.

[23] Before completing her reasons, the judge was advised by the court clerk that someone was trying to join the proceedings by MS Teams and that the registry had just advised that the appellant called in around 3:25 p.m. “saying her notice was for 10 o’clock”.

[24] The judge determined to conclude what little remained of her oral reasons for judgment before authorizing the court clerk to admit the appellant to the hearing. The following exchange then occurred:

> THE APPELLANT: … I've been given all the wrong information.
>
> THE COURT: So Ms. Berg, the hearing today proceeded at 2 o'clock and I -- we did specifically inquire through Madam Clerk as to whether or not anyone was appearing via MS Teams in the waiting room and so forth, and there was a physical page in case you were here in person. By the time that we became aware that you were attempting to log on, I had already substantially finished my reasons for judgment in this matter. I heard submissions from counsel for the plaintiff. I did not have the benefit of materials filed on behalf of either yourself or Mr. Boone, and so I have rendered judgment in this matter. I appreciate that you attempted to log on several minutes before I finished those reasons for judgment, but in the circumstances it was necessary --
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> THE APPELLANT: Your Honour –
>
> THE COURT: Yes.
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> THE APPELLANT: Your Honour, this is very important that you know I was sent a link and I was online at 10 a.m. this morning and I got screenshots on my phone, I also took pictures on my laptop because I was given a link. I have two emails, one from yesterday, one from today saying it was changed to 10 a.m. I signed on to the link where it said at 10 a.m., you get on to this link. I got, like I say, screenshots and pictures, that I waited over an hour. And I even backed it up because when I wasn't getting picked up by the video, which I know was approved, my application so that's why I don't understand how someone didn't know I was to appear by video as well. I -- excuse me, I -- because nobody was picking up on the video like I said I was waiting on, I picked up my phone and actually phoned the back up phone number as well. It took the conference ID number and I waited on there at the same time, thinking one of these has got to pick up. This is what I understand. And then finally after 11 a.m., I hung up the phone. I phoned Claire down at the Registry and said what went on, I have a feeling there's something going -- because this is what I was, you know, sent and Claire said I'm going to look into this, I'll get right back to you. That was at about quarter after 11 this morning. She never got back to me. So here I am phoning again to say but with the mix-up was this adjourned, you know, maybe somebody had an emergency, I don't know, but I don't know how -- nobody at the courthouse knew I'd been phoning and through my application. I don't know how it took my conference ID this morning and I waited for over an hour on both video and my telephone to make sure I covered my bases. So, I was given the wrong link time, everything, and I've got my emails to prove why I -- I was there waiting.

THE COURT: Well, I understand where you're coming from, Ms. Berg, however in the circumstances I have already rendered judgment in this matter as you were not present. You have the ability to seek legal advice with respect to your rights to seek to set aside a judgment where you did not attend, but ultimately I have concluded the matter … It is also of note that there are no materials filed on your behalf pursuant to the order of Mr. Justice Wilson from June 20th, 2022.

…

THE APPELLANT: And [indiscernible] when you say I wasn't there, I was there. I was there, I was there at 10 a.m., that's the email that I got from you guys at Vernon said get on this link, bring yourself in, and I was there waiting. I don't have any email that says 2 p.m. this afternoon. I received an email about 2 p.m. a couple weeks ago, but it wasn't about the trial and then the last few I started receiving were for 10 a.m., and then it [indiscernible] so then I was confused last night about the 10 a.m. but when I got the link first thing this morning, I showed it to my girlfriend and I said yeah, am I saying this wrong, it's 10 a.m. and like I say it took my conference ID number and everything and I waited over an hour, so I was there….

MR. DRAHT [Counsel for the Respondent]: I believe she has an email that the parties received setting the time for 2 p.m., but I would like to confirm that before stating that for the court.

…

THE COURT: Ultimately though -- Ms. Berg, do you concede that you did not file an application response and affidavit material by July 15th, 2022?

THE APPELLANT: Yes, [indiscernible] no, I do agree with that, I did not file anything and that tends to the problems I've been having. I don't have the thought processing to put all these pieces together and I even have witnesses, but I don't know where to start and I needed to get legal counsel and some kind of support service who would help me piece this all together. We're talking about the loss of my home…

MR. DRAHT: Madam Justice, I can confirm actually from my own memory and I have a copy of the email here, scheduling did email us last Friday informing us that this would be on at 2 p.m. today. And that's -- that's how we found out and in that email it's to all the parties, it has Simone's address for service, as well as Vincin's address for service. I appreciate the unfortunate nature of it as it's an electronic document contained on an electronic device ... if, Madam Justice, you would like to see it, I can pass it up.

THE APPELLANT: I do have that email actually, I'm not disagreeing with that particular email, I received that Thursday morning at 9:21…

THE COURT: Ultimately, Ms. Berg, the difficulty the court finds itself in is…that I have already made my decision and rendered judgment in this matter, which included on the basis of the fact that there was no application response and no affidavit material filed pursuant to the order of Mr. Justice Wilson, and there was no filed application to

> adjourn or seek a further extension of time to file those materials. It is --
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> THE APPELLANT: It [indiscernible] ask for a readjournment -- ask for readjournment [indiscernible] --
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> THE COURT: Yes but Ms. Berg, could you please listen to me --
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> THE APPELLANT: So, I can get that together [indiscernible].
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> THE COURT: So, you will need to seek legal advice because you may have remedies available to you under Rule 22-13 [*sic: Rule 22-1(2) and (3)*] which involves where a party has not attended at a hearing, but that will have to be considered with legal counsel and by a further judge. But in the circumstances I am not comfortable with resiling from the decision that I had already made. So, my order stands and it will be open to you to…pursue any options that you have with respect to reconsideration of that on the basis of the evidence that you have that you attempted to attend but were unable to. And that concludes matters today.
>
> THE APPELLANT: Yes, okay, thank you, Your Honour.

[25] I reiterate that when the summary trial application was argued, Mr. Draht did not know the appellant had been informed by the court registry that the hearing would commence at 10:00 a.m. Again, that correspondence was sent only to the appellant.

[26] On August 3, 2022, the appellant attended at the registry to obtain a copy of the reasons for judgment. She was provided with a Court Summary Sheet which listed the appearance date and time of the summary trial application as July 19, 2022, at 10:00 a.m.

[27] The appellant filed a notice of appeal on September 13, 2022. Mr. Boone has not appealed the order.

[28] On October 28, 2022, Justice Marchand granted the appellant an extension of time to appeal and a stay of the execution of the order pending determination of the appeal.

[29] The respondent also seeks to adduce fresh evidence on appeal consisting of affidavits sworn by Mr. Boone, Dana Hilton and Melissa Boden.

[30] Mr. Boone's affidavit addresses his relationship with the appellant and her relationships with previous partners. It addresses the nature and extent of the appellant's criminal record. The affidavit speaks to the appellant's experience with the court system, including as a self-represented litigant. It also reports a statement allegedly made by the appellant to the deponent that it was her intention to drag the litigation out to deplete the respondent of funds.

[31] Ms. Hilton is the manager of the court registry in which the trial took place. Among other things, she deposes that an individual using the Teams link provided to the appellant connected before 10:00 a.m. on July 29, 2022. As it turns out, the morning had been reserved for the hearing of a criminal matter. As the appellant was not a party to the criminal proceeding, she was left to wait in the virtual electronic waiting room.

[32] Ms. Boden is a legal assistant in the law firm that acts for the respondent. Her affidavit sets out, in unobjectionable terms, a chronology of events in the litigation that they were known to the respondent's counsel. Appended to the affidavit are scheduling communications the firm received from the court registry, and correspondence reflecting the appellant's refusal to provide documentation in support of her previous adjournment request and request to appear remotely. Ms. Boden deposes that at no time did the appellant contact her or counsel for the respondent to confirm the start time of the application. Further, Ms. Boden deposes that the appellant "did provide the Courts with a satisfactory answer as to why she logged in at 10:00 am but not at 2:00 pm".

III. Analysis

1. The Fresh Evidence Applications

[33] Consistent with our usual practice, we received all of the fresh evidence submitted by the parties for the purpose of evaluating the appellant's claim that the proceedings below were procedurally unfair.

[34] Where, as here, the fresh evidence is tendered to enable assessment of the integrity of the trial process, the criteria set out in *R. v. Palmer*, [1980] 1 S.C.R. 759 apply, but in modified form, to reflect the fact that the material sought to be admitted is not aimed at undermining a substantive finding adjudicated at trial: *R. v. Aulakh*, 2012 BCCA 340 at paras. 59–67. Still, the evidence sought to be admitted must be admissible (applying the usual rules of evidence), relevant to the issue raised on appeal, and credible.

[35] Adopting this approach, I would admit most of the appellant's first affidavit sworn September 13, 2022, and most of the appellant's second affidavit sworn October 19, 2022. Some portions of both affidavits (the last bullet of the appellant's first affidavit, and paras. 32–48 of the appellant's second affidavit) deal with issues relating to the extension of time and stay applications that were before Justice Marchand. Those portions of the affidavits are not relevant to any issue this Court needs to decide and I would not admit them.

[36] I would admit the affidavit of Ms. Hilton and, with one exception, the affidavit of Ms. Boden. I would not admit the last sentence of para. 15 of Ms. Boden's affidavit in which she appears to express an opinion that the appellant did not provide the court with a satisfactory answer as to why she did not attempt to remotely join the meeting at 2:00 p.m. The trial judge did not make such a finding and the opinion of Ms. Boden on this issue is irrelevant and inadmissible.

[37] I would admit the affidavit of Mr. Boone only to the extent that it addresses the appellant's familiarity with the court system, including as a self-represented litigant. Even so, this evidence has only marginal relevance to the resolution of this appeal. To the extent it is being tendered to undermine the credibility of the appellant's explanation for her conduct the day of the hearing, I would note that the essential circumstances surrounding the appellant's non-appearance are not in dispute. I would not admit paras. 8 and 9 of Mr. Boone's affidavit. These paragraphs address the appellant's criminal record and attach Reasons for Sentence in a criminal

proceeding pertaining to her. In my view, this evidence is not relevant to any issue this Court must decide.

2. Was the Trial Procedurally Unfair?

[38] I would frame consideration of this issue by noting that the stakes for both the appellant and the respondent were high. If the appellant was found liable for a $200,000 debt, she would almost certainly lose her home.

[39] Despite filing no responsive materials, the appellant clearly expressed her intention to appear on the summary trial application by seeking leave to appear remotely.

[40] In my view, the evidence before us establishes that the appellant received contradictory information from the registry about when the trial would commence. Although she had previously been advised that the trial would begin at 2:00 p.m., the information she received the day before and the morning of the trial advised that the proceeding would begin at 10:00 a.m. In my view, it was not unreasonable for the appellant to conclude that the trial was set to commence at 10:00 a.m. on July 29, 2022.

[41] On the uncontradicted evidence before us, the appellant attempted to join the proceedings remotely by MS Teams before 10:00 a.m. She was told to stand by for admission. In addition to waiting for a considerable period of time, the appellant took steps to gain access to the proceedings by seeking technical assistance and by calling the registry. She did not receive any assistance or clarification in response to her inquiries.

[42] The respondent urges us to find that the appellant had no acceptable explanation for not attempting to join the meeting at 2:00 p.m., choosing instead to join the proceedings at approximately 3:25 p.m. The trial judge made no such finding and, while I accept that the appellant might have done more to clarify the situation on the morning of the trial, she should not be held to a standard of perfection. It is

apparent from the foregoing that the appellant exercised reasonable diligence in attempting to join the hearing remotely.

[43] In my view, the evidence establishes that the appellant was misled as to the time of the hearing and had a reasonable explanation for her non-attendance.

[44] The issue on this appeal is similar to the one that arose in *Richards-Rewt v. Rushchyna*, 2019 BCCA 143. In that case, the appellant did not appear for an application respecting parenting arrangements for his 14-year-old daughter because, unbeknownst to the chambers judge, he had been admitted to hospital suffering from septic shock the previous day. There, as here, the appellant had not filed a response to the application. To have any realistic prospect of success, the appellant would likely have had to apply for an adjournment even if he had appeared. On appeal, this Court endorsed the general proposition that an order made following a hearing in the absence of one of the parties who had an acceptable explanation for their non-attendance will amount to a breach of procedural fairness:

> [7] Although there are occasions on which it may be proper to proceed in the absence of one of the parties, the fact that Mr. Richards-Rewt was in hospital provides an acceptable explanation. It would in my view be a breach of procedural fairness, in particular the principle of *audi alteram partem*, if he were not afforded an opportunity to be heard in response to Ms. Rushchyna's application. The appeal must, in my opinion, therefore, be allowed and the application remitted back to the Supreme Court for re-hearing.

[45] I note that *Richards-Rewt* was cited with approval in *C.H. v. S.F.*, 2021 SKCA 24, a case with some considerable factual parallels to the one at bar.

[46] As in *Richards-Rewt*, I am of the view that proceeding in the appellant's absence gave rise to a breach of procedural fairness.

[47] As a general rule, and in this context, a proceeding found to be procedurally unfair nullifies the decision even if a different result was unlikely had the breach not occurred: see the remarks of Justice Le Dain made in an administrative law context in *Cardinal v. The Director of Kent Institution*, [1985] 2 S.C.R. 643 at 661. Generally speaking, it is unnecessary to ask whether the decision would have been the same

absent the breach of procedural fairness because the unfair process, in and of itself, gives rise to a failure of justice. In other words, the absence of procedural fairness is a self-standing, crystallized legal wrong in its own right. The prejudice, which is both individual and systemic, lies in the fact that a litigant has been deprived of the right to be heard. To put it differently, a defensible result may nevertheless be set aside on appeal if it is shown that the process through which the result was reached was fundamentally unfair. For this reason, neither this Court in *Richards-Rewt,* nor the Saskatchewan Court of Appeal in *C.H.,* inquired into whether the attendance of the appellant personally, or through counsel, would have altered the result of the hearing.

[48] I recognize that the requirements of procedural fairness are context specific and that, in some circumstances, a remedy for breach of the *audi alteram partem* rule may be available through application of an established framework for appellate review: see *R. v. Nahanee*, 2022 SCC 37.

[49] I also recognize that in exceptional circumstances, relief for a breach of procedural fairness may be withheld where issuance of the impugned order can fairly be described as inevitable: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at paras. 51–54.

[50] I would, however, decline to give effect to the respondent's submission that, to obtain relief in the face of a finding of procedural unfairness, it is incumbent on the appellant to establish that "had she attended the summary trial on July 29, 2022, she would have been able to alter the outcome". The respondent's position is inconsistent with the generally applicable rule that in the face of a breach of procedural fairness, "the apparent futility of a remedy will not bar its recognition": *Mobil Oil* at para. 52.

[51] Further, I would not put this case into the very narrow exception contemplated in *Mobil Oil*. I cannot say that the appellant would inevitably have been denied an adjournment, or that there was absolutely nothing to say in response to the

respondent's contention that the appellant entered into a loan agreement with her as alleged in the Notice of Civil Claim.

IV. Conclusion

[52] For the foregoing reasons, I would allow the appeal, set aside the order made below, and remit the matter to the Supreme Court for a rehearing of the summary trial application. In the unusual circumstances of this case, I would order that the parties bear their own costs.

[53] **HARRIS J.A.**: I agree.

[54] **VOITH J.A.**: I agree.

[55] **HARRIS J.A.**: The appeal is allowed, the order below is set aside, the matter is remitted to the Supreme Court for a rehearing of the summary trial application, and each party will bear their own costs.

"The Honourable Mr. Justice Fitch"