COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Callahan v. Ernst & Young (as Liquidator),* 2024 BCCA 269

Date: 20240705
Docket: CA49858

Between:

Edward Callahan

Appellant
(Respondent)

And

Ernst & Young (as Liquidator)

Respondent
(Petitioner)

And

Callahan AE #3 Trust, Bruce Callahan, Robert Callahan, and Douglas Callahan

Respondents

Before: The Honourable Justice Skolrood
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated April 10, 2024 (*In the Matter of 0081092 B.C. Ltd., In Liquidation*, 2024 BCSC 586, Vancouver Docket S232641).

Oral Reasons for Judgment

Counsel for the Appellant:	P.J. Sullivan
Counsel for the Respondent, Ernst & Young (as Liquidator):	W.L. Roberts S.B. Hannigan
Counsel for the Respondents, Callahan AE #3 Trust, Bruce Callahan, and Robert Callahan:	T-M. Young
Counsel for the Respondent, Douglas Callahan:	Y. Gao

Place and Date of Hearing:	Vancouver, British Columbia July 5, 2024
Place and Date of Judgment:	Vancouver, British Columbia July 5, 2024

Summary:

The respondents in the appeal bring two applications seeking security for costs of the appeal in the amount of $25,000 payable by the appellant.

Held: The appellant is ordered to post security in the amount of $15,000 in total for both applications. The appellant's appeal is not bound to fail, he has adequate financial means and costs would likely be recoverable. However, the appellant has three outstanding costs orders against him payable to the respondents from other legal proceedings. The appellant's litigious history and failure to respond to previous costs orders is problematic. In these circumstances, the appellant has not established that the interests of justice do not favour granting an order for security for costs.

SKOLROOD J.A.:

Nature of the applications

[1] There are two applications for security for costs brought by the respondents in this appeal. One is brought by Robert Callahan, Bruce Callahan and Callahan AE #3 Trust and the other by Douglas Callahan. Both seek security for costs in the amount of $25,000 payable by the appellant Edward Callahan.

[2] The appellant opposes the applications. In the alternative, the appellant submitted by way of his written argument that he would be prepared to post $8,000 as security. At the hearing of the applications this morning, counsel advised that he now has instructions to post $12,000.

Background

[3] Edward, Robert, Bruce and Douglas Callahan are brothers and shareholders of 0081092 B.C. Ltd., formerly known as Shasta Properties Ltd. (the "Company"). The Company owns about 18.5 acres of land in Kelowna, B.C. The land appears to be worth tens of millions of dollars and has significant redevelopment potential. The underlying dispute is one of many legal disputes between the four brothers. Like the judge, I will refer to the brothers by their first names for clarity.

[4] On November 6, 2020, the shareholders of the Company resolved to liquidate the Company and to appoint Ernst & Young as liquidator (the "Liquidator"). Edward

was the only brother who voted against the resolutions. Edward later sought to overturn the resolutions by filing a petition in Supreme Court. A judge set aside the resolutions but this Court reversed that decision: *Callahan v. Callahan*, 2022 BCCA 387. The Court held that the liquidation of the Company and the sale of its assets were not contrary to Edward's reasonable expectations, nor were they unfairly prejudicial to him. Edward applied for leave to appeal the Court's decision to the Supreme Court of Canada but the application was dismissed.

[5] On September 6, 2023, Justice Loo declined to grant the Liquidator's application for an order approving the proposed sales process as the material provided was insufficient for approval at the time: *In the Matter of 0081092 B.C. Ltd., In Liquidation*, 2023 BCSC 1567.

[6] On April 10, 2024, on a second application by the Liquidator, Loo J. ordered the approval of the proposed sales process with respect to the assets of the Company and set out specific terms: *In the Matter of 0081092 B.C. Ltd., In Liquidation*, 2024 BCSC 586 (the "Sales Process Order").

[7] On May 9, 2024, Edward filed a notice of appeal seeking to set aside the Sales Process Order. On June 14, 2024, the appeal record was filed. The appeal is being heard on August 15, 2024 on an expedited basis.

Legal Framework

[8] The jurisdiction to order security for costs of an appeal is found in s. 34 of the *Court of Appeal Act,* S.B.C. 2021, c. 6. The relevant considerations on an application for security for costs were set out in *Arbutus Bay Estates Ltd. v. Canada (Attorney General),* 2017 BCCA 133 (Chambers) at para. 17:

(a) the appellant's financial means;

(b) the merits of the appeal;

(c) the timeliness of the application; and

(d) whether the costs will be readily recoverable.

[9] Section 34(2) of the *Court of Appeal Act* provides a justice hearing the security for costs application the discretion to order all, part or none of the security requested.

[10] The onus is on the appellant to establish that the interests of justice do not favour ordering security: *Creative Salmon Company Ltd. v. Staniford,* 2007 BCCA 285 (Chambers) at para. 9. Generally, the appellant's financial means to pay costs and thus, the respondent's ability to collect costs, is the most important criteria, however, whether the order would be in the interests of justice remains the ultimate question: *Lu v. Mao,* 2006 BCCA 560 (Chambers) at paras. 6–7.

Analysis

[11] As noted, there are two applications for security for costs of the appeal against the appellant. Both applications seek security in the amount of $25,000 to be posted within seven days and an order that if security is not posted by this deadline, the respondents can apply to dismiss the appeal as abandoned. The respondents behind both applications essentially share the same position and advance similar arguments. Where they differ in position, I will identify them by name, otherwise, I will refer to them collectively as the respondents.

[12] The parties agree that Edward has adequate financial means. In particular, Edward refers to the unrelated but recent decision in *Bradley v. Callahan*, 2024 BCSC 163, where Justice Funt found for the purposes of spousal support that Edward's available annual income is $1.4 million. Further, the decision describes Edward's various business interests in the "Argus Group". The parties in *Bradley* agreed the current value of the Argus Group is at least $151 million. I note that in that decision, the judge made several family law orders, including that Edward pay $8.6 million in spousal support. It is thus clear that Edward has the financial means to pay security for costs and that being required to do so will not hinder his ability to pursue his appeal. It is also clear that he will be able to pay any costs award made against him.

[13] Edward submits with respect to the merits that the appeal is not bound to fail. He submits the judge erred in characterizing the court's task on the application before him as one that is supposed to advance the mandate of the Liquidator even though it is a private liquidation. Edward contends that unless a private liquidation is converted to a court-appointed one, the court does not have a general supervisory jurisdiction to oversee or move the liquidation forward and instead its task is simply to apply the legal test based on the evidence. Edward submits this error "permeated [the judge's] reasoning as a whole" and led the judge to apply incorrect evidentiary standards to the expert evidence and to overlook evidence that demonstrated certain steps should be taken to increase the sale price of the lands. As a result, Edward submits the judge approved a sales process that does not "optimize the chances of achieving the highest values" for the land.

[14] The Liquidator takes no position on the orders being sought by the respondents. It does, however, submit that the Sales Process Order is a discretionary order entitled to significant deference. The Liquidator submits that although Edward's factum is not yet available, the appeal appears unlikely to succeed given the standard of review. The respondents share the Liquidator's position on the merits. They submit the Sales Process Order was made pursuant to s. 325 of the *Business Corporations Act*, S.B.C. 2002, c. 57, which provides the court with broad discretion to make any orders it finds appropriate with respect to liquidations. Further, the respondents contend that before the judge, Edward was in favour of a sealed bid process, which the judge incorporated and ordered in the Sales Process Order.

[15] I agree that Edward's appeal is a difficult one given the highly deferential standard of review. However, at this stage of the appeal and given the low merits threshold, I am not prepared to say that the appeal is completely without merit. Given that the factums have not been filed yet, it is unclear if Edward will be able to raise errors of law or principle that might attract appellate intervention.

[16] The respondents also argue there are three outstanding costs orders against Edward arising from the petition that he filed in Supreme Court, the Court of Appeal's decision in that matter and the Supreme Court of Canada's dismissal of his application for leave to appeal. Douglas says his counsel sent Edward a draft bill of costs on September 27, 2023 with respect to the three costs orders but has received no response. Robert and Bruce say they sent the same on September 20, 2023 and also received no response. The costs orders remain unpaid. The respondents submit recovering costs from Edward will be difficult and the legal fees expended to recover those costs will "far outstrip" any potential costs award. This ultimately is the central thrust of the applicants' submissions, specifically that Edward is highly litigious and difficult to deal with. There is some force to this submission, although I note that all of the parties here are sophisticated, experienced and well funded litigants.

[17] In response, Edward submits costs will be readily recoverable given his financial means. He says it is not proper to suggest that because the bills of costs have not been finalized that there is a risk he will not pay them. I understand the respondents' frustration, but I would agree with the appellant that, by itself, the failure of the parties to agree on the proposed bills of costs in other proceedings is insufficient to demonstrate that security for costs should be ordered because recovery may be difficult: *Speckling v. Communications, Energy and Paperworkers' Union of Canada (Local 76)*, 2008 BCCA 1 at paras. 23–24. As Justice Kirkpatrick observed in *Speckling*, the circumstances would be different if Edward had refused to pay costs that had been assessed and certified. That said, Edward's litigious history and failure to respond to previous costs orders is problematic.

[18] Douglas says he asked Edward for consent to pay security for costs of the appeal on September 27, 2023. Robert and Bruce say they asked Edward on May 23, 2024 for consent to paying security for costs and then on June 4, 2024, they notified him that a hearing for these applications was initially scheduled for June 27, 2024. The respondents submit that the applications were thus brought in a timely manner.

[19] In considering all of the different factors and the circumstances of this appeal generally, Edward has not established that the interests of justice do not favour granting an order for security for costs.

[20] The issue then becomes one of quantum. The practice of this Court is generally, to award security in the range of $5,000–8,000, although that is not a hard and fast rule.

[21] Here, there are two sets or respondents, although, as evidenced by their common approach to these applications, their interests are closely aligned.

[22] In the circumstances, I find that security for costs in the single global amount of $15,000 is appropriate.

Disposition

[23] Accordingly, I order that within seven days of today's date, the appellant post security in the amount of $15,000 in a form acceptable to the registrar or in such form as the parties may agree. If security is not posted within seven days, the respondents are at liberty to apply to have the appeal dismissed as abandoned.

[24] Costs of both applications will be in the cause.

"The Honourable Justice Skolrood"