COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1063664 B.C. Ltd. v. Perehudoff,*
2023 BCCA 254

Date: 20230605
Docket: CA47932

Between:

1063664 B.C. Ltd.

Appellant/
Respondent on Cross Appeal
(Petitioner)

And

David Perehudoff

Respondent
Appellant on Cross Appeal
(Respondent)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Horsman
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 2, 2021 (*1063664 B.C. Ltd. v. Perehudoff*, 2021 BCSC 2136, Vancouver Docket S199051).

Oral Reasons for Judgment

Counsel for the Appellant/Respondent on Cross Appeal:	R. Robertson T. Falcone, Articled Student
Counsel for the Respondent/Appellant on Cross Appeal:	K. Wheelhouse
Place and Date of Hearing:	Vancouver, British Columbia June 5, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 5, 2023

Summary:

The appellant appeals the order of a chambers judge varying a contempt order to reduce the amount of fine payable by the respondent. The respondent's cross-appeal, seeking to set aside the contempt order, was abandoned at the outset of the hearing. Held: Appeal allowed, cross-appeal dismissed as abandoned. As the contempt order had been entered, the judge had limited jurisdiction to vary its terms. Even assuming the judge had jurisdiction to vary the order to reduce the fine payable by the respondent, there was no principled basis for the exercise of such discretion in this case.

[1] **HORSMAN J.A.**: The appellant numbered company 1063664 B.C. Ltd. ("106 Ltd.") appeals the decision of a chambers judge reducing the amount of the fine that the respondent, Mr. Perehudoff, was ordered to pay following a finding that he was in contempt of a court order.

[2] The respondent filed a cross-appeal of the judge's dismissal of his application to set aside the contempt order. For reasons I will explain, at the outset of the hearing the respondent advised the Court that he was abandoning the cross-appeal. He consents to an order dismissing the cross-appeal as abandoned, but opposes being ordered to pay costs of the cross-appeal.

Background

[3] The relevant background is set out in the judgment under appeal. The facts are not contentious. I take the following summary from the judge's reasons.

[4] The respondent is a shareholder and former director of 106 Ltd. Thomas Beyer is a shareholder and current director of 106 Ltd. 106 Ltd. was created as a holding company for a property development project in the Okanagan. The registered records office of 106 Ltd. was a house in Oliver, B.C. (the "House"). 106 Ltd.'s minute book and corporate records (the "Records") were kept at the House.

[5] The relationship between the respondent and Mr. Beyer broke down. In the summer of 2018, Mr. Beyer changed 106 Ltd.'s registered records office to the office of its legal counsel. The company then took steps under ss. 46 and 48 of the

Business Corporations Act, S.B.C. 2002, c. 57, to obtain the Records. Among other things, Mr. Beyer directed an employee of another company involved in the development project, Kim Clare, to attend the House in order to retrieve the Records. Her efforts to do so were not successful.

[6] In August 2019, 106 Ltd. commenced the underlying petition seeking an order requiring the respondent to deliver the Records to 106 Ltd. 106 Ltd. served the respondent with the petition, and supporting affidavit.

[7] The petition hearing was scheduled for October 16, 2019.

[8] The respondent did not file a response to the petition, and did not attend the petition hearing. Justice Myers ordered the respondent to deliver the Records to 106 Ltd.'s registered records office, and awarded costs fixed at $440 (the "Myers Order"). Although served with demand letters and the Myers Order, the respondent did not deliver the Records or pay the costs ordered against him.

[9] On February 27, 2020, 106 Ltd. personally served the respondent with a contempt application, the supporting affidavit of Tatania Mendoza, and notice of the March 13, 2020 hearing date.

[10] On or before March 10, 2020, 106 Ltd. served the respondent with a second affidavit, sworn by Ms. Clare, attesting to the events of her unsuccessful attempt to obtain the Records (the "Clare Affidavit").

[11] The respondent did not appear at the contempt hearing on March 13, 2020. At the hearing, 106 Ltd. also relied on an additional affidavit from Ms. Mendoza (the "Mendoza Affidavit #2") containing recent emails between the respondent and 106 Ltd.'s legal counsel.

[12] The timing of the service of the affidavits is significant to the respondent's argument that 106 Ltd. did not comply with the procedural requirements of R. 22-8(11) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. Rule 22-8(11) requires that the alleged contemnor must be personally served with the contempt application

and all filed affidavits in support of it at least 7 days before the hearing of the application.

[13] At the conclusion of the hearing on March 13, the judge made several orders and declarations. In the entered order, they are set out as follows:

> 1. The Respondent, David Perehudoff, is declared to be in contempt of the Order made by the Honourable Mr. Justice Myers in this matter on October 16, 2019;
>
> 2. As punishment for his contempt, the Respondent, David Perehudoff, must pay a fine in the amount of $5000.000 to the Petitioner forthwith.
>
> 3. The Respondent, David Perehudoff, must deliver up to the Petitioner's records office, being Wiebe Wittmann El-Khatib LLP, #1100-1111 West Hastings Street, Vancouver, B.C., V6E 2J3, the Petitioner's full corporate minute book and all documents contained therein by March 17, 2020;
>
> 4. Failure by the Respondent, David Perehudoff, to comply with the order in paragraph 3 above, will result in the imposition of addition[al] fines in the amount of $5000.00, for every 7-day period of non-compliance; and
>
> 5. The Respondent, David Perehudoff, is ordered to pay the Petitioner its special costs for this application in the fixed sum of $2500.00, payable forthwith.
>
> …
>
> (the "Contempt Order")

[14] The entered order was personally served on the respondent on the day the order was pronounced.

[15] 106 Ltd. subsequently took enforcement steps against the respondent to collect the fines owed under the Contempt Order. On May 4, 2020, 106 Ltd. obtained a Writ of Seizure and Sale. 106 Ltd.'s legal counsel filed an affidavit in support of the application for the Writ, calculating the total amount said to be owed to 106 Ltd. as of that date.

[16] On May 15, 2020, the Records were provided to the bailiff who executed the Writ. The parties agree that the respondent's contempt ended on that date.

[17] 106 Ltd. subsequently commenced bankruptcy proceedings against the respondent. On March 23, 2021, a master granted the bankruptcy application. The respondent has appealed that order and it is presently stayed.

The chambers judgment: 2021 BCSC 2136

[18] On June 28, 2021, the respondent filed an application seeking to set aside the Contempt Order pursuant to R. 8-5(8) of the *Supreme Court Civil Rules* and the Court's inherent jurisdiction. The respondent alleged that there were procedural irregularities in the service of the application, and also that counsel for 106 Ltd. had failed to disclose material facts to the judge at the contempt hearing. In the alternative, in the event that the Contempt Order was not set aside, the respondent sought to reduce the amount of the fine.

[19] The judge issued written reasons for decision on November 2, 2021, allowing the application in part.

[20] In her analysis, the judge first addressed the respondent's reliance on R. 8-5(8) of the *Supreme Court Civil Rules* as the jurisdictional basis for the orders sought. The judge found that R. 8-5(8) had no application, as the present case did not involve an order made on an urgent application brought without notice. In this case, the respondent did have notice of the hearing, and elected not to attend.

[21] Nevertheless, the judge proceeded to consider the substance of the respondent's arguments as to why the Contempt Order should be varied or set aside. The judge found that 106 Ltd. had not complied with the procedural requirements of R. 22-8(11) of the *Supreme Court Civil Rules* in relying on affidavits—the Clare Affidavit and Mendoza Affidavit #2—that had not been personally served on the respondent seven days in advance of the contempt hearing. However, she concluded that this non-compliance did not vitiate the proceeding because the respondent had "reasonable notice of the contempt application and the grounds for it": at para. 32. The judge also rejected the respondent's argument that counsel for 106 Ltd. had failed to disclose the material facts to the Court.

[22] The judge then turned to the question of the appropriate penalty for contempt. She found that the entered order, which had been prepared by counsel for 106 Ltd., contained a material error in stating that the fine was to be paid "to the Petitioner

[106 Ltd.]". Such a term is contrary to the general rule that fines for contempt of court are payable to the provincial Crown, and not to the opposing litigant: *Langford (City) v. dos Reis*, 2016 BCCA 460 at paras. 25–26. The judge stated:

> [39] I did not notice the error at the time. It was not brought to my attention by counsel for either party either before or during the present application. That was very unfortunate. 106 has represented to the court in its application for the Writ and in the bankruptcy proceedings that it is owed monies arising from the fines when that is not the case. The bailiff's intervention ended Mr. Perehudoff's contempt and in that sense benefitted him. However, he has had to endure the cost and stress of execution of the Writ and the bankruptcy action.

[23] "Taking all of this into account", the judge fixed the amount of the respondent's fine, payable to the provincial Crown, at $25,000. She ordered that the parties should each bear their own costs of the respondent's application: at para. 40.

[24] The entered order following the reconsideration application contains the following terms:

> 1. Paragraph 2 of Madam Justice Iyer's Order filed in these proceedings on March 13, 2020 is set aside and declared of no force and effect;
> 2. As punishment for his contempt of Court declared on March 13, 2020, David Perehudoff must pay a fine in the amount of $25,000 to the Provincial Crown of British Columbia; and,
> 3. Each party shall bear its own costs of the application.
>
> (the "Reconsideration Order")

Issues on appeal

[25] 106 Ltd. appeals the Reconsideration Order on the grounds that the judge erred in reducing the amount of the fine, and in ordering that each party bear their own costs.

[26] As noted, the respondent abandoned the cross-appeal at the outset of the hearing. This change in position resulted from a memo the Court sent to the parties in advance of the hearing directing that they be prepared to make submissions on the scope of the court's jurisdiction to vary an entered order, as reflected in the decision of this Court in *Harrison v. Harrison*, 2007 BCCA 120 at para. 29. The

respondent concedes that in light of that narrow jurisdiction, his cross-appeal cannot succeed.

[27] What is left for resolution is the appeal, and the question of costs on both the appeal and cross-appeal.

Analysis

[28] The various arguments advanced on the appeal and, at least initially, on the cross-appeal raise a common issue regarding the scope of the judge's jurisdiction to revisit the Contempt Order. The respondent does not challenge the judge's conclusion, which is clearly correct, that R. 8-5(8) of the *Supreme Court Civil Rules* is inapplicable. He does not rely on the trial court's jurisdiction to reconsider under R. 22-1(3), where a chambers order is made in the absence of a party. I presume this is because the respondent accepts he cannot establish that his failure to appear was not the result of wilful delay or default.

[29] What is left is the narrow jurisdiction to reconsider an entered order described by this Court in *Harrison*:

> [29] Once an order has been entered, however, the court which made the order is *functus officio* with respect to the issues therein: *Piyaratana Unnanse et al v. Wahareke Sonuttara Unnanse et al*, [1950] 2 W.W.R. 796 (P.C.). Once the judge is *functus*, the power to re-visit an order is much narrower. Generally speaking, that power is confined to making corrections or amendments in two situations: first, under Rule 41(24) of the *Supreme Court Rules* where there has been a 'slip' in drawing up the order or where a matter should have been but was not adjudicated upon; and second, where there has been an error in expressing the manifest intention of the court: *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142; see also *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

[30] These are the principles that ought to have governed the respondent's application, and which govern our consideration of the issues raised on appeal.

The appeal

Ground 1: Reduction of the fine

[31] There is no question that it was open to the judge to correct the Contempt Order to clarify that the fine imposed on the respondent is payable to the provincial government rather than to 106 Ltd. Such correction falls within the scope of the jurisdiction described in para. 29 of *Harrison*, and R. 13-1(17) of the *Supreme Court Civil Rules*. The more contentious question is whether it was open to the judge to redetermine the basis upon which the fine would be calculated.

[32] The respondent emphasizes that 106 Ltd. agreed that the judge should judicially determine the fine. He says that because the Contempt Order does not contain a precise quantification of the total fine, this was not a matter that had been adjudicated upon and, therefore, the judge did not reconsider the prior order. 106 Ltd. counters that the only role for the judge at this stage was to determine when the respondent's contempt ended, which in turn would dictate the amount of the fine under the terms of the existing order. 106 Ltd. says that the judge's determination of the amount of the fine can only be seen as a variation of the Contempt Order given that it represents a departure from the terms of the order.

[33] In my view, the judge's quantification of the fine cannot be interpreted as anything other than a variation of the Contempt Order. It was a term of that Order that the respondent must pay a fine in the amount of $5,000, and an additional fine in the amount of $5,000 for every seven-day period of non-compliance. The judge found, and the parties apparently agree, that the respondent's contempt ended on May 15, 2020 when the Records were provided to the bailiff. The respondent remained in contempt for a period of eight full weeks after the March 17, 2020 deadline for return of the Records. Under the terms of the Contempt Order, accordingly, the total fine ought to have been $45,000.

[34] The fact that the judge's determination of the fine constituted a reconsideration of the Contempt Order is evident in a comparison of the terms of the two orders. Paragraph 1 of the Reconsideration Order sets aside the entirety of

paragraph 2 of the Contempt Order, rather than simply correcting the order to reflect that the initial $5,000 fine is to be paid to the provincial government. While paragraph 4 of the Contempt Order is not set aside, it must be taken to be implicitly overridden by paragraph 2 of the Reconsideration Order. Otherwise, there is a direct conflict between the terms of the Reconsideration Order (setting the total amount of the fine at $25,000), and the terms of the Contempt Order (imposing additional fines in the amount of $5,000 for every seven-day period that the respondent remains in contempt).

[35] The respondent has not identified any basis upon which the judge could have properly exercised jurisdiction to vary the Contempt Order to reduce the fine to $25,000. The question of how the fine was to be calculated had been adjudicated upon, and the judge was *functus*. The only matter that was left open before her was the determination of the date on which the contempt ended, which in turn would dictate the amount of the fine under the terms of the Contempt Order.

[36] The judge did not identify the jurisdictional basis for her to reconsider the amount of the fine set in the Contempt Order. The parties did not, in their factums, identify any statutory or common law jurisdiction. In the course of the hearing, the division posed the question as to whether the reduction of the fine might have been authorized by Rule 22-8(15) of the *Supreme Court Civil Rules*. Rule 22-8(15) permits the court to “direct that the punishment for contempt be suspended for the period or on the terms or conditions the court may specify”.

[37] The judge did not rely on Rule 22-8(15), and we received limited submissions from the parties on its scope. I consider it unnecessary to finally resolve the question of whether Rule 22-8(15) could apply here, or whether there is any other possible source of jurisdiction to revisit a contempt order, for example in order to avoid a grave and manifest injustice. In any event I cannot see any principled basis upon which the judge could have exercised her discretion to reduce the fine, assuming she had jurisdiction to do so.

[38] To the extent that the respondent incurred additional costs as a result of the enforcement steps taken by 106 Ltd., it was open to him to seek a remedy in costs for those steps in those proceedings. The fact remains that after having been found to be in contempt of court on March 13, 2020, the respondent continued his contemptuous conduct for a period of over two months. To the extent that 106 Ltd. might be faulted for the mistake in the wording of the Contempt Order, it is difficult to see how that would lessen the seriousness of the respondent's contempt. Put another way, the conduct of 106 Ltd. in an entirely different proceeding was not relevant to the question of the penalty for the respondent's ongoing contempt of a court order.

[39] For these reasons, I would allow the appellant's appeal, and set aside the Reconsideration Order to the extent that it reduced the fine payable by the respondent.

Ground 2: Costs

[40] In light of this disposition, it is unnecessary to address the appellant's appeal of the judge's costs order. Given my proposed disposition of the appeal, the appellant was the entirely successful party and is entitled to its costs in this Court and the Court below.

Costs of the cross-appeal

[41] In relation to the cross-appeal, I see no basis to depart from the ordinary rule that the successful party is entitled to costs.

Disposition

[42] I would allow the appeal, and make the following orders:

a) Paragraphs 1 and 2 of the Reconsideration Order be set aside, and replaced with the following Orders:

i. Paragraph 2 of the Contempt Order be corrected to provide that the fine is payable to the provincial government, not to 106 Ltd.;

ii. The Respondent's contempt be declared to have ended on May 15, 2020;

iii. The total amount of the Respondent's fine, pursuant to the Contempt Order, be determined at $45,000.

[43] I would dismiss the cross-appeal as abandoned.

[44] As 106 Ltd. is the wholly successful party, I would set aside paragraph 3 of the Reconsideration Order, and order the respondent to pay the costs of 106 Ltd. in this Court and the court below.

[45] **GROBERMAN J.A.**: I agree.

[46] **SKOLROOD J.A.**: I agree.

[47] **GROBERMAN J.A.**: The appeal is allowed to the extent indicated in Justice Horsman's reasons. The cross-appeal is dismissed as abandoned.

"The Honourable Madam Justice Horsman"