COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tan v. Tan,*
2024 BCCA 341

Date: 20240926
Docket: CA49739

Between:

Li Wen Tan

Appellant
(Plaintiff)

And

Kai Tan and Hong Jiao

Respondents
(Defendants)

Before: The Honourable Chief Justice Marchand
The Honourable Madam Justice Newbury
The Honourable Justice Riley

On an application to vary: An Order of the Court of Appeal for British Columbia, dated August 15, 2024 (*Tan v. Tan*, 2024 BCCA 312, Vancouver Docket CA49739).

Oral Reasons for Judgment

The Appellant, appearing in person (via videoconference):	L.W. Tan
The Respondents, appearing in person:	K. Tan H. Jiao
Place and Date of Hearing:	Vancouver, British Columbia September 26, 2024
Place and Date of Judgment:	Vancouver, British Columbia September 26, 2024

Summary:

The applicant Mr. Tan applies for variation of an order of a justice refusing an extension of time, relying principally on new evidence. The justice found that the proposed new evidence was not credible. The application is dismissed. The justice made no reviewable error in finding the proposed new evidence not credible and in refusing the extension of time.

[1] **RILEY J.A.**: Li Wen Tan applies to vary an order of a justice of this Court. The application could fairly be characterized as repetitious in that the order Mr. Tan seeks to vary dismissed his prior application for an extension of time to vary an earlier order, which in turn dismissed his application for an extension of time to appeal. The proposed appeal relates to an order of a Supreme Court judge dismissing Mr. Tan's action seeking remedies in connection with alleged financial contributions to real property owned by his parents, the respondents Kai Tan and Hong Jiao.

[2] After reviewing the written record, and hearing Mr. Tan's oral submissions, we concluded that no basis had been shown to vary the order, such that it was not necessary to hear from the respondents. The outcome does not turn on anything they said in their brief remarks at the conclusion of the hearing.

History of Proceedings

[3] The history of the proceedings can be summarized as follows:

(a) On 1 August 2023, Mr. Tan commenced an action in the Supreme Court of British Columbia, advancing claims of breach of contract and unjust enrichment.

(b) On 24 January 2024, Justice Walkem dismissed Mr. Tan's action.

(c) On 11 March 2024, Mr. Tan filed an application for an extension of time to appeal the dismissal of his action. The proposed appeal was filed 17 days after the 30-day time limit set out in R. 6(2) of the *Court of Appeal Rules*, B.C. Reg. 120/2022.

(d) On 25 April 2024, Justice Fenlon dismissed Mr. Tan's application for an extension of time to appeal. She reasoned, among other things, that the appeal lacked merit because it was duplicative of a previous claim Mr. Tan had brought against the respondents. The earlier claim had been dismissed at trial by Justice Giaschi, whose decision was upheld by this Court: *Tan v. Jiao*, 2023 BCSC 2330, aff'd *Tan v. Tan*, 2024 BCCA 113.

(e) On 7 May 2024, Mr. Tan filed an application to extend the time to vary Fenlon J.A.'s order refusing an extension of time to appeal. This application was filed seven days after the 30-day time limit provided for under R. 62(2). Mr. Tan alleged that he had recently located a signed agreement between himself and his father dated 3 June 2013, evidencing his father's commitment to add Mr. Tan's name to the title of the real property which is the subject of the action.

(f) On 15 August 2024, in reasons indexed as *Tan v. Tan*, 2024 BCCA 312, Justice Abrioux dismissed Mr. Tan's request for an extension of time to file an application to vary Fenlon J.A.'s order. The principal basis on which Abrioux J.A. denied the extension of time was because both the application to vary and the underlying appeal lacked merit. More specifically, Abrioux J.A. was not convinced of the veracity of Mr. Tan's claim to have located a written agreement between himself and his father, considering that Mr. Tan's prior claim in relation to the very same subject matter rested on an alleged oral agreement, with no mention of any written document.

(g) On the same day, 15 August 2024, Mr. Tan filed an application to vary Abrioux J.A.'s order. That is the matter now before the Court.

The Decision Under Review

[4] Relying on *Morrison v. Laas*, 2024 BCCA 191 at para. 20, and *Barnes v. Letkeman*, 2016 BCCA 455 (Chambers) at para. 10, Abrioux J.A. set out the legal test governing applications for an extension of time. This test involves a consideration of five factors: (i) whether there was a *bona fide* intent to take the step

for which an extension of time is sought; (ii) when the respondents were notified of the intent to take the step in issue; (iii) whether the respondents would be unduly prejudiced by an extension of time; (iv) whether there is merit in the matter that is the subject of the request for an extension of time; and (v) whether it is in the interests of justice to grant the extension. The factors I have just listed originate in case law dealing with the extension of time to file an appeal, modified to suit the circumstances of an application to extend another time limit in the *Rules*, as contemplated in *Barnes*. The last factor—the interests of justice—operates as the overarching consideration, which encompasses all of the others: *Rapton v. British Columbia (Motor Vehicles)*, 2011 BCCA 71 (Chambers) at para. 19.

[5] Regarding the merit of the application, Abrioux J.A. noted the proposed application to vary Fenlon J.A.'s order was not a rehearing of the original application for an extension of time to appeal. Justice Fenlon's order could be set aside only if a division of the Court was satisfied that she erred in law, erred in principle, or misconstrued the facts.

[6] Justice Abrioux determined Fenlon J.A.'s decision refusing the extension of time to appeal was "unassailable" such that Mr. Tan's subsequent application to vary it was "bound to fail." In reaching this conclusion, Abrioux J.A. made the following comments about the new evidence Mr. Tan wanted to present, pertaining to his alleged recent discovery of a written agreement that would prove his claim:

> [13] Mr. Tan's position is that he has obtained new and relevant evidence which could justify reopening his previous claim or varying Justice Fenlon's order. He has filed an affidavit sworn on August 7, 2024. Exhibit 1 contains what appears to be a typed agreement signed by himself and his father, dated June 3, 2013, concerning the transfer of an interest in property to Mr. Tan. During his submissions, Mr. Tan sought to give details of how the agreement came into his possession. He says his parents allowed him to come to the house in July 2024 and he located the agreement at that time.
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> [14] I advised Mr. Tan that none of this information was contained in his affidavit of August 7, 2024 and I would accord it no weight. As an aside, when the respondent Mr. Kai Tan addressed the court, he categorically denied that he had signed the document in question.
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> [15] I consider this evidence not to be credible, not the least because it is the first time that Mr. Tan has alleged a written agreement between the parties. It is concerning that Mr. Tan now claims to be in possession of such a

> written agreement, only after unsuccessfully bringing two claims on the basis of an alleged oral agreement containing the same terms, and which he was questioned about by Justice Giaschi but failed to describe with any precision.

[7] Justice Abrioux concluded that there was no likelihood a division of the Court would vary Fenlon J.A.'s order. Mr. Tan had not shown any basis on which he could convince the Court that refusing his extension of time to appeal was wrong in law, wrong in principle, or rested on a misconception of the facts. Justice Abrioux therefore dismissed Mr. Tan's application for an extension of time.

Analysis

[8] The legal parameters of an application to cancel or vary an order made by a justice of the Court are discussed in *Gill v. Gill Estate*, 2023 BCCA 427 at para. 13:

> [13] Under s. 29 of the *Act*, a division of the Court may cancel or vary an order made by a single justice (other than an order granting leave to appeal). However, the Court will not do so unless the Court is satisfied the chambers judge was wrong in law, wrong in principle, or misconceived the facts. In *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, the Court put it this way:
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> > [7] It comes to this: that the review hearing is not a hearing of the original application as if it were a new application brought to a division of the court rather than to a chambers judge, but is instead a review of what the chambers judge did against the test encompassed by asking: was the chambers judge wrong in law, or wrong in principle, or did the chambers judge misconceive the facts. If the chambers judge did not commit any of those errors, then the division of the court in review should not change the order of the chambers judge.

[9] The added wrinkle in this case is that Mr. Tan sought to rely on new evidence, although no formal application to adduce fresh evidence was filed. Mr. Tan was seeking to vary Fenlon J.A.'s order refusing an extension of time to appeal. Mr. Tan says that some time after Fenlon J.A.'s decision, he discovered new evidence, namely an alleged written agreement dated 3 June 2013. As we can see from the passage quoted above, that new evidence figured prominently in Mr. Tan's subsequent application before Abrioux J.A.

[10] The issue of fresh evidence raised in an application to vary or cancel the decision of a justice of the Court was addressed in *Tianjin East China International Trade Co. Ltd. v. Li*, 2022 BCCA 335 at para. 16, where Justice MacKenzie

explained that, in both criminal and non-criminal matters, the admissibility of fresh evidence is determined by reference to the criteria set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759.

[11] The *Palmer* criteria ask whether the proposed fresh evidence: (i) could not, by exercise of due diligence, have been obtained for trial; (ii) is relevant in the sense of bearing on a decisive or potentially decisive issue; (iii) is credible in the sense of being reasonably capable of belief; and (iv) is material in the sense that it could have affected the result at trial. It must be noted that the first of these criteria, due diligence, is always relevant but is not always applied so strictly as to be an insurmountable hurdle, particularly in criminal cases where liberty is at stake.

[12] In *Tianjin*, MacKenzie J.A. went on to explain, at para. 17, that while the admissibility of fresh evidence is typically dealt with by a division of the Court hearing an appeal on its merits, a justice in chambers may find it helpful to consider the *Palmer* criteria in assessing the merits of a particular application, or the underlying appeal.

[13] In the current matter, although Abrioux J.A. did not cite the test for admission of fresh evidence, he nevertheless grappled with one of the key requirements, namely whether the proposed fresh evidence is credible. He ultimately concluded it was not, as explained in the passage cited above.

[14] Deference is owed to Abrioux J.A.’s weighing of the evidence, and Mr. Tan has not identified any reviewable error in that regard. Even if not bound by Abrioux J.A.’s assessment of the evidence, I would reach the same conclusion as to the credibility of Mr. Tan’s proposed fresh evidence.

[15] Furthermore, considering all the circumstances—including the apparent lack of merit in the underlying appeal, the repeated delays, missed deadlines, and the history of prior litigation between these parties—it would not be in the interests of justice to grant an extension of time for Mr. Tan to seek a variation of Fenlon J.A.’s order refusing the extension of time to appeal.

[16] Before concluding these reasons, I will address two specific arguments that Mr. Tan made in oral submissions.

[17] First, he says Abrioux J.A. failed to appreciate or acknowledge that he did not have the written reasons from Fenlon J.A.'s decision for some time, which was the cause of some or all of his delay in filing the application to vary her order. That argument is not convincing because the reasons were given orally in chambers and Mr. Tan would have been able to listen to them. Further, if he wished to apply to vary the order, he ought to have filed his application within the seven-day time limit, while pursuing steps to obtain the written reasons as promptly as he could. In any event, the focal point of Abrioux J.A.'s decision refusing an extension of time was on the lack of merit in the application, not the absence of an explanation for delay.

[18] Second, Mr. Tan argued that his application was not as convincing as it could have been because he speaks English as a second language, is self-represented, and has been unable to obtain timely legal assistance. It is important to bear in mind that the central point on which Abrioux J.A. ruled against Mr. Tan was that his proposed fresh evidence was not credible. This was a fundamentally factual conclusion that did not turn on complex points of law or procedure. I would add that at today's hearing, Mr. Tan was able to communicate clearly in English and to effectively articulate his position and the arguments in support of it. This is simply a matter where Mr. Tan has not identified any basis on which to vary the order refusing his application for an extension of time.

[19] I would dismiss the application.

[20] **MARCHAND C.J.B.C.**: I agree.

[21] **NEWBURY J.A.**: I agree.

[22] **MARCHAND C.J.B.C.**: The application is dismissed.

"The Honourable Justice Riley"