

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ma v. Wu*,
2024 BCCA 332

Date: 20240919
Docket: CA48650

Between:

Zhi Yong Ma and Superoptionforex Consulting Inc.

Appellants
(Defendants)

And

Hong Fang Wu

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten

On an application to vary: An Order of the Court of Appeal for British Columbia,
dated June 24, 2024 (*Ma v. Wu*, Vancouver Docket CA48650).

Oral Reasons for Judgment

The Appellant, appearing in person, and as
the representative of Superoptionforex
Consulting Inc.:

Z.Y. Ma

Counsel for the Respondent:

W. Zhang

Place and Date of Hearing:

Vancouver, British Columbia
September 19, 2024

Place and Date of Judgment:

Vancouver, British Columbia
September 19, 2024

Summary:

Application to vary a security for costs order dismissed. No error in principle was identified on review. The conclusions reached by the judge were open to him on the evidence. The Court pointed out that a review is based on the record before the judge and refused to consider additional evidence not before the judge in the absence of a new or fresh evidence application.

[1] **HARRIS J.A.:** This is an application to vary an order of a single justice ordering the posting of security for the costs of the appeal, together with security for the trial costs, in the amount of \$125,340. The judge dismissed an application to post security for the damages awarded at trial.

[2] As is well known, a review application is not a rehearing of the original application. It is a review, and a division may interfere with the order only if the judge has erred in principle or has misapprehended the facts so that the decision is clearly wrong. Contrary to the applicant's submission in his written material, the standard of review is not correctness.

[3] In this case, the judge addressed an objection Mr. Ma made to his jurisdiction to order security because such an order would interfere with other orders setting timelines for various filings. The judge concluded that he had the jurisdiction to make the orders, if appropriate. That has not been put in issue before us.

[4] The judge then proceeded to analyse the merits of the application. There is no question but that he applied the correct legal principles in his analysis. Those principles are uncontroversial and need not be repeated here. They are laid out at para. 8 of the judgment under review.

[5] While the judge was satisfied the appeal was not entirely devoid of merit, he viewed the appeal as quite weak, given that the appeal focused almost exclusively on the judge's findings of fact. He noted that Mr. Ma claimed to be impecunious, but noted problems with his candour and completeness in disclosing his financial situation. As he said:

[7] Mr. Ma has not made any efforts to pay the judgment and claims that he is impecunious. There are significant difficulties with his evidence,

however, and serious doubts have been raised as to his candour and completeness in disclosing his financial situation. The problems are effectively the same ones that troubled this Court in the parallel case of *Wu v. Ma*, 2024 BCCA 196. There has not been complete disclosure of certain suspicious transactions and there is no indication where Mr. Ma is obtaining funds that he is using for various purposes.

[6] It is clear that the justice considered the suspicious transactions Mr. Ma had engaged in, and the fact that costs would not be readily recoverable. From the judge's perspective, the most troubling parts of the application were whether it had been brought in a timely fashion, together with the interests of justice. As he explained:

[14] ... With respect to timeliness, there are certain difficulties. The judgment at trial was pronounced on October 5, 2022 and the notice of appeal was filed on November 2, 2022. The matter went on the inactive list one year later and remained on the inactive list until it was ordered reinstated in April 2024.

[15] The application for security for costs was not made until after the reinstatement of the matter from the inactive list. The application was heard on May 23, 2024. By that time, the appellant had paid for transcripts and the appeal book, and was in the course of preparing his factum which was filed on June 4, 2024.

[7] After noting that often a late application will be dismissed, the judge concluded that he was not convinced that the lateness of the application was severely prejudicial to the appellant. While a relevant consideration, it did not bar granting security.

[8] In considering the interests of justice, the judge found that Mr. Ma had some resources to fund litigation, and he was unable to conclude that Mr. Ma was impecunious. He stated his conclusions thus:

[20] Given the weakness of the appeal, it is, in my view, not unjust for the Court to make an order for security for some of the costs. I am prepared to begin by making an order for security for the costs of the appeal in the amount of \$11,996.40. That amount must be filed with the Registry within 60 days of today's date, failing which the respondent may apply to have the appeal dismissed for failure to comply with the court order.

[21] I am also, in the unique circumstances of this case, convinced that security for the trial costs of \$125,340 should also be ordered. I say this because there is some evidence that Mr. Ma did have access to a sizeable

amount of funds immediately after the judgment was issued and that he quickly divested himself of money that came as proceeds from the sale of his home. I am satisfied that it would not be unjust to order security in at least the amount that he divested himself of in the immediate aftermath of the judgment.

[9] Mr. Ma alleges, in this application, that the judge erred in both his appreciation of the merits of his appeal and his findings about his financial position. He says, in substance, that the judge has made an order that will deprive him of his opportunity to pursue his appeal, and will therefore deprive him of access to justice.

[10] In my view, Mr. Ma has not identified any reversible error in the orders under review. The judge was well aware of the principles he was to apply and the factors he had to weigh, including the relevance of the merits of the appeal and the financial means of the appellant. It was his task to evaluate those considerations, not ours. Mr. Ma seeks to reargue these issues before us as if this is simply a rehearing. The conclusions that the judge reached were open to him on the record that was before him, and it is not for us to substitute our view of the evidence for his.

[11] In oral submissions, Mr. Ma attempted to rely on material not before the judge, material that was also included in his application book. We cannot consider that evidence because our jurisdiction is limited to reviewing the judge's decision on the record that was before the judge. We have not received any application to adduce new evidence.

[12] The orders made by the judge are discretionary. The judge exercised his discretion on correct principles. It has not been demonstrated that the judge misunderstood or misapprehended the evidence before him. To the extent that the judge's orders rested on findings of fact, those findings were open to him on the record before him.

[13] Mr. Ma also seeks in his application a variety of orders relating to matters such as the timing of factums, fresh evidence in the appeal and so forth, none of which are properly before us on an application to vary.

[14] I would dismiss the application.

[15] **DICKSON J.A.:** I agree.

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

[17] **HARRIS J.A.:** The application is dismissed.

“The Honourable Mr. Justice Harris”