COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Success Group Holdings Ltd. v. Fraser Valley (Regional District),* 2024 BCCA 337

Date: 20240918
Docket: CA49459

Between:

Success Group Holdings Ltd.

Appellant
(Plaintiff)

And

Fraser Valley Regional District

Respondent
(Defendant)

Before: The Honourable Justice Dickson
The Honourable Mr. Justice Abrioux
The Honourable Justice Winteringham

On an application to vary: An Order of the Court of Appeal for British Columbia, dated February 14, 2024 (*Success Group Holdings Ltd. v. Fraser Valley Regional District*, Vancouver Docket CA49459).

Oral Reasons for Judgment

Appearing as representative for the Appellant:	E. Miao
Counsel for the Respondent:	J.W. Locke
Place and Date of Hearing:	Vancouver, British Columbia September 18, 2024
Place and Date of Judgment:	Vancouver, British Columbia September 18, 2024

Summary:

Application to vary the order of a single justice denying the applicant leave to appeal an order refusing leave to appeal the order of an associate judge requiring the applicant to post security for costs and staying the underlying action. Held: Application to vary dismissed. The applicant failed to demonstrate that the justice who dismissed its application for leave did so on the basis of an incorrect principle or due to any misapprehension of the evidence or the arguments before him.

DICKSON J.A.:

Introduction

[1] The applicant, Success Group Holdings Ltd., seeks an order varying the order of Willcock J.A. refusing to grant leave to appeal the orders of Milman J. by which he refused to extend time to appeal the order of Hughes A.J. requiring Success to post security for costs and a related stay of her order. Willcock J.A. concluded that the proposed appeal had no prospect of success and that granting leave to appeal was not in the interests of justice given the discretionary nature of Milman J.'s decision, the lack of merit in the proposed grounds of appeal, and Success's failure to demonstrate the proposed appeal was significant to the practice or the underlying action.

[2] According to Success, Willcock J.A. erred by: focusing on the proposed appeal of Hughes J.A.'s order rather than on Milman J.'s order; misinterpreting its argument on how Milman J. failed to address the imbalance of power between the parties; failing to appreciate the importance of the proposed appeal in relation to the action; and finding that Success had not adduced evidence of hardship and prejudice if it is required to pay the security for costs ordered.

[3] For the reasons that follow, I would dismiss the application to vary the order of Willcock J.A.

Background

[4] On September 8, 2022, Success commenced the underlying action. It claims against the respondent, Fraser Valley Regional District, in negligence, misfeasance

in public office, and trespass in connection with bylaw enforcement actions the District took against a building and property previously owned by Success.

[5] Success is not represented by counsel. Ms. Miao has appeared as its agent throughout the proceedings, both in the court below and in this Court.

[6] The District applied in the court below for an order requiring Success to post security for costs. In reasons indexed as 2023 BCSC 243, Hughes A.J. ordered Success to post $30,000 in security for costs, of which the first $10,000 was to be paid within 30 days, staying the action until the first $10,000 was posted, granting the District leave to apply for a dismissal of the action if the $10,000 was not posted within 30 days, and requiring the remaining $20,000 to be paid prior to Success filing of a notice of trial: at paras. 36–39.

[7] In reaching her decision, Hughes A.J. reviewed the state of the evidence in some detail. For example, she noted that the District provided an affidavit that showed Success: no longer owned the property that was the subject of the litigation, having transferred ownership on May 13, 2022; had no registered interest in any real property in British Columbia as of September 23, 2022; and had no registered security interest in any personal property in British Columbia as of September 28, 2022: at para. 14. She also noted Success's submission that it was not impecunious, and that its shareholders were willing and able to inject funds into the corporation if the claim was unsuccessful. However, she observed, no affidavit evidence to support this assertion or demonstrate Success's financial resources was provided to the court: at para. 15.

[8] Hughes A.J. also reviewed the parties' arguments in some detail. In doing so, among other things, she said this:

> [28] The last argument relates to access to justice. The plaintiff alleges repeatedly, both in written and oral submissions, that the defendant is using this application as an oppressive tactic or "dirty trick" to deter litigation of a meritorious claim. It alleges that there is no risk to the defendant if security is not posted, as it is a government entity with vast resources, and a lack of security will not hinder the defendant's ability to engage in litigation. No authority was provided to suggest that a different legal test is applicable if the

> defendant is a government entity. Many of the reported cases are in the context of applications by large corporate defendants, also having vast resources. Accordingly, my analysis is based on the principles in *Kropp*.

[9] After reviewing the evidence and the arguments, Hughes A.J. conducted her analysis based on the well-known *Kropp* principles. She was not satisfied that an order for security for costs would cause undue hardship to the extent of stifling a legitimate claim, repeated that Success had provided no evidence of its financial circumstances, and concluded it had not "discharged the burden of proving that it would not be able to pursue its claim if ordered to post security": at para. 32. In the result, she made the impugned order that Success post security for costs: at para. 36.

[10] The 30-day deadline for payment of the security for costs expired on March 20, 2023. Success has not posted the required security, and the proceedings have been stayed since then.

[11] Success failed to appeal the order of Hughes J.A. within the 14-day deadline provided by the *Supreme Court Civil Rules,* B.C. Reg. 168/2009. As a result, it applied for an order extending the time for filing a notice of appeal and staying the order requiring it to post the security for costs. In support of its application, Success contended that Ms. Miao advised the District of her intention to appeal the order, but received misleading advice from its counsel in response, which delayed the appeal process.

[12] On October 13, 2023, Success's application came on for hearing before Milman J. In unreported oral reasons delivered the same day, he applied the test summarised in *Capital Now Inc. v. Munro*, 2022 BCSC 1044, dismissed the application for an extension of time and a stay, and ordered Success to post $10,000 in security for costs within 14 days: at paras. 17–21.

[13] Specifically, Milman J. found that: Success's principals had misinterpreted what counsel for the District had told them; Success had a *bona fide* intention to appeal throughout; the District was informed of that intention within a reasonable

time; and the District would not be prejudiced by an extension. However, he concluded that he had "not been provided with a sufficient basis to find that there is any merit in the appeal or any basis upon which this court could overturn the decision" of Hughes A.J., and had not "seen anything in [her decision] to indicate that [the Associate Judge] applied an incorrect principle or that she erred in any way that is apparent … on the facts and the evidence that was before her": at para. 12. In addition, he was not "persuaded that there is any factor that weighs on the other side of the scales" suggesting it was in the interests of justice for the extension and stay to be granted despite his conclusion that the appeal lacked merit: at para. 15.

[14] Success applied to this Court for leave to appeal the orders of Milman J. On February 14, 2024, its application came on for hearing before Willcock J.A. Success proposed two specific grounds of appeal: first, that it was a self-represented party which had been misled regarding the time in which to file its appeal of Hughes A.J.'s order and, second, that Milman J. applied the merits requirement too strictly.

[15] In oral reasons delivered the same day, Willcock J.A. dismissed the application for leave to appeal the orders of Milman J.

Reasons of Willcock J.A.

[16] After reviewing the nature of the application, the reasons of Hughes A.J. and Milman J., and the tests for granting leave to appeal and a stay, Willcock J.A. summarised Success's argument that the proposed appeal would help to settle and clarify the law on whether a remedy should be granted to a self-represented litigant who was misled by opposing counsel in the course of litigation. He did not accept that argument:

> [32] The applicant says its proposed appeal "will help settle the law on the issue of whether the court should grant [a] remedy to a self-litigant who was intentionally or inadvertently misled by a legal professional in the course of litigation" and "can further clarify in law whether such power imbalance and unequal relationship should be considered in granting an equitable relief to the self-represented party".
>
> [33] Justice Milman rejected the submission the appellant was intentionally misled. Despite that fact, he accepted that the appellant intended to appeal, and his order did not turn upon whether there was an intent to appeal or

> notice to the respondent. The issue identified by the appellant as significant will not arise on appeal if leave is granted. The issue would be whether Milman J. erred in the exercise of his discretion by dismissing the application on the basis that the proposed appeal lacked merit and it was not in the interests of justice to grant leave.

[17] Nor did Willcock J.A. accept Success's argument that the proposed appeal was extremely important to the action or its assertion that it was unable to post security for costs. After noting the District's argument that Success had not tendered any evidence to support its claim of impecuniosity, and Hughes A.J.'s observation that before her Success had similarly failed to do so, he stated:

> [35] There is an inadequate basis for me to conclude that the applicant is impecunious, or that the order is of importance in the action. In her reply submissions today, Ms. Miao suggested that if her application is dismissed the appellant will look to alternative means of continuing the lawsuit. Even today, it is uncertain to me whether the position of the applicant is that it is unable to proceed with the litigation if it is required to post the security for costs as ordered.

[18] Turning to the proposed grounds of appeal, Willcock J.A. found that both lacked merit. Regarding the merits requirement, he noted that Milman J. applied the correct legal test and saw no error in his analysis: at para. 38. Regarding Success's arguments that Milman J. failed to consider its self-represented status and erred in finding it was not misled, he rejected both arguments. In particular, he stated, Milman J. clearly did consider Success's self-represented status, which was largely irrelevant to the issue on the proposed appeal: at para. 39. Moreover, he stated, both the reasons of Hughes A.J. and Success's proposed arguments were before Milman J., whose discretionary decision would attract significant appellate deference: at paras. 40–41.

[19] Given the discretionary nature of Milman J.'s decision and the absence of merit in the proposed grounds of appeal, Willcock J.A. concluded that "the proposed appeal has no prospect of success": at para. 42. He also concluded that it was not in the interests of justice to grant leave as the proposed appeal was "not demonstrably of significance to either the practice or even perhaps the action" and had not been shown to be meritorious: at para. 43. In the circumstances, he stated, there was no

basis upon which to grant a stay. Accordingly, he dismissed both applications: at para. 44.

Issue on Review

[20] The issue for determination is whether Willcock J.A. erred in refusing to grant leave to appeal the orders of Milman J.

Discussion

Standard of Review

[21] The standard of review is well-known and uncontroversial. As Harris J.A. recently explained in *Ashraf v. Jazz Aviation LP*, 2024 BCCA 45:

> [3] It is, however, important to reiterate what is well known. An application to vary is not a rehearing of the order under review. An applicant must demonstrate legal error in the order under review. In short, the applicant must demonstrate that the justice was wrong in law or principle or misconceived the facts. This standard of review is highly deferential, particularly where, as here, the order under review is discretionary. It is not open to an applicant to argue that a justice should have reached a different result or should have exercised discretion differently unless that exercise of discretion is founded on legal error.

Did Willcock J.A. err in principle or in law or misconceive the facts in refusing to grant leave to appeal Milman J.'s order?

[22] Success contends that Willcock J.A. erred by placing too much weight on its intended appeal of Hughes A.J.'s order rather than on Milman J.'s order. According to Success, Milman J. applied too stringent a test in assessing the merits of the appeal of Hughes A.J.'s order and failed to ask whether the appeal was bound to fail or consider its self-represented status in finding Success was not misled by counsel for the District. As to the latter point, it says that Willcock J.A. misinterpreted its argument, which it made at each level of Court. In particular, Success says, it argued that the proposed appeal has merit for the reasons it explained and Hughes A.J. summarised at para. 28 of her reasons (quoted above), namely, as a matter of access to justice, such that, given the imbalance of power between itself and the government defendant, it was in the interests of justice not to award security for

costs and thus stifle the litigation. However, it says, Willcock J.A. failed to take that argument into account.

[23] In Success's submission, these were manifest errors. However, it argues that in conducting his analysis, Willcock J.A. focused unduly on Hughes A.J.'s order and misinterpreted its argument. In consequence, Success says, he erroneously refused to grant it leave to appeal Milman J.'s order.

[24] In addition, Success contends Willcock J.A. erred in failing to appreciate the importance of the proposed appeal in relation to the underlying action. In its submission, the proposed appeal is crucial to the action because it is unable to post the security ordered by Hughes A.J. and it will be unable to continue with the litigation if it is required to do so. However, it says, Willock J.A. erroneously found that the order did not have that effect as Success simply needed to pay $10,000 to continue with the litigation first, and he failed to consider that it must pay the entire sum, not just the initial $10,000 installment. According to Success, whether paid as a lump sum or in periodic payments, the total amount required will prevent it from continuing the action. This is particularly so, it says, given the many legal expenses it must incur to continue, and its need, as an unrepresented party, to hire legal professionals to assist in prosecuting the action.

[25] Moreover, Success contends that Willcock J.A. erred further in finding that it had not adduced evidence on whether it would face hardship and be prejudiced if it is required to post the security for costs ordered by Hughes A.J. In its submission, the analysis of whether it can pay the security for costs goes to the appeal of her order and is not a relevant consideration with respect to the proposed appeal of the orders of Milman J. In any event, Success says, at the original hearing it submitted that paying the security for costs would cause it severe prejudice as it would be unable to hire legal professionals and pay for anticipated legal costs. It goes on to say that it will tender evidence of its financial ability at the intended appeal of Hughes A.J.'s order if the appeal of Milman J.'s decision is allowed, which is the more appropriate hearing at which to discuss such evidence.

[26] I am not persuaded by these submissions.

[27] In my view, Success has not identified any reversible error in Willcock J.A.'s order refusing to grant leave to appeal Milman J.'s order. The order is discretionary and Success has failed to demonstrate that Willcock J.A. exercised his discretion based on incorrect principles. Nor has it demonstrated that Willcock J.A. misunderstood or misapprehended the evidence or the arguments before him. He simply did not accept that their arguments had merit. Given the state of the record and the state of the law, in my view, he was entitled to reach those determinations.

Conclusion

[28] I would dismiss the application to vary Willcock J.A.'s order refusing to grant Success leave to appeal Milman J.'s order.

[29] **ABRIOUX J.A.**: I agree.

[30] **WINTERINGHAM J.A.**: I agree.

[31] **DICKSON J.A.**: The application is dismissed.

[Discussion]

[32] **DICKSON J.A.**: Ms. Miao's signature as to the form of the order is dispensed with.

"The Honourable Justice Dickson"