

Court of King's Bench of Alberta

Citation: Blench v Cheng, 2024 ABKB 616

Date: 20241018
Docket: 2203 12124
Registry: Edmonton

2024 ABKB 616 (CanLII)

Between:

David Travis Blench

Plaintiff

- and -

Minling Cheng also known as Yinning Cheng

Defendant

**Ruling on Costs
of the
Honourable Justice G.S. Dunlop**

[1] On February 7, 2024 the parties appeared before me in morning civil chambers on the plaintiff's application for the defendant to be held in contempt, with the defendant appearing by WebEx and her counsel appearing in person. I found the defendant in contempt of a provision of an order of Sullivan, J granted October 11, 2022 that the defendant provide:

sworn evidence of the nature and location of all her assets, wheresoever located, including assets held on her behalf or in trust, assets held jointly by her with some other party, assets in which she holds any interest and assets that she hold in trust for any other party.

[2] I further ordered that the defendant could purge her contempt by complying with that provision by February 29, 2024, and I ordered that she attend Court in person on February 29,

2024 to show cause why she should not have additional sanctions imposed for failure to comply with that provision.

[3] The defendant appealed my order and sought a stay of enforcement. On February 26, 2024, Watson, JA dismissed the stay application and ordered that:

Costs of this application shall be determined by Justice G. Dunlop of the Court of King's Bench before whom the "Show Cause" hearing proceeds on February 29th at 10:00 am in Justice Chambers or so soon thereafter as counsel may be heard.

[4] Watson, JA's oral reasons are now reported at *Blench v Cheng* 2024 ABCA 73. It appears from paragraph 2 of those reasons that Watson, JA understood that I would be presiding in Justice Chambers on February 29, 2024. The reported reasons are silent with respect to costs, but the order, which was approved by the defendant's counsel and filed on February 27, 2024 contains the costs provision set out above.

[5] In fact, Little, J was presiding in civil chambers on February 29, 2024 and he issued an order continuing my finding of contempt, ordering the production of certain financial documents and adjourning *sine die* the other relief sought by the parties scheduled for February 29, 2024. Little, J ordered \$500 in costs payable from one of the defendant's accounts, but that appears to have been costs of the February 29, 2024 chambers appearance, not costs of the February 26, 2024 stay application in the Court of Appeal.

[6] Consequently, costs of the February 26, 2024 stay application in the Court of Appeal have not been resolved and, pursuant to the order of Watson, JA, those costs are to be determined by me.

[7] On July 4, 2024 the plaintiff's counsel wrote me seeking my direction regarding a process for determining costs of the February 26, 2024 Court of Appeal hearing and suggesting that this be done by written submissions. In that letter the plaintiff's counsel advised that the defendant's counsel withdrew on or about February 27, 2024 and that new counsel subsequently retained by the defendant withdrew on June 24, 2024.

[8] On July 5, 2024 the defendant wrote me, indicating that she was unable to retain counsel. She provided some information regarding the litigation, but she did not address the process for determining costs of the February 26, 2024 stay application. She neither objected to written submissions, as proposed by the plaintiff, nor proposed an alternative process.

[9] On July 23, 2024 my judicial assistant emailed the plaintiff's lawyer and the defendant as follows:

Good afternoon,

Justice Dunlop has received Mr. Young's July 4, 2024 letter, Ms. Cheng's July 5, 2024 letter, and the attachments to each. He invites the parties to make written submissions regarding costs of the application before Justice Watson of the Court of Appeal heard on February 26, 2024, which Justice Watson remitted to Justice Dunlop. Each written submission must be no longer than 10 pages. The submissions may include attachments. The attachments must be no longer than 30 pages in total.

The deadline for Mr. Young's submission is September 16, 2024 and the deadline for Ms. Cheng's submission is September 30, 2024. Submissions should be emailed to me.

[10] On September 12, 2024 the plaintiff provided a four-page letter and nine pages of attachments, seeking enhanced costs in the amount of \$5,139.30 payable from the stock portion of the defendant's RBC Direct Investing Account. The plaintiff submits that payment from that account has been ordered by other Justices of this Court and the Court of Appeal on other applications, but he did not include the reasons or orders of those other Justices in his September 12, 2024 submissions.

[11] The amount of costs sought by the plaintiff is based on item 22 of Schedule C under column 5, increased by 45%. The plaintiff submits that a 45% increase in the Schedule C amount is supported by the Court of Appeal decision in *McAllister v Calgary (City)* 2021 ABCA 25.

[12] On September 30, 2024 the defendant provided a nine-page letter and thirty-one pages of attachments. The letter alleges misconduct by the plaintiff's lawyer in this litigation both before and after the February 26, 2024 stay application. The costs process I directed does not provide the plaintiff or his lawyer with an opportunity to respond to those allegations. Furthermore, according to the plaintiff's lawyer's emails to my judicial assistant on October 1 and 10, 2024, the defendant did not provide a copy of her September 30, 2024 letter to the plaintiff's counsel. In these circumstances, where the plaintiff and his lawyer have had neither notice of those allegations nor the opportunity to respond to them, I am not prepared to make any finding regarding alleged misconduct by the plaintiff's lawyer.

[13] The defendant submits that she should not be required to pay costs of the stay application and that, on the contrary, the plaintiff should pay her \$5,000 in future legal fees or enhanced costs in an amount determined by me.

[14] My assistant received emails from counsel for both parties and from the defendant personally on October 10, 2024 regarding whether the defendant had made a costs submission by the September 30, 2024 deadline. It appears that the defendant has retained again the counsel who appeared before me on February 7, 2024 and before the Court of Appeal on February 26, 2024, but who then withdrew on or about February 27, 2024. In her October 10, 2024 email the defendant's counsel seeks an extension of time to make a submission. I did not respond to the October 10, 2024 emails until now. I can advise that the defendant submitted her September 30, 2024 letter by email shortly before 11 pm on September 30, 2024. That was several hours late, but the defendant advised that she was having medical challenges which delayed her submission. The lateness of the defendant's submission has no bearing on my decision on costs. I am not prepared to permit the defendant's counsel to make a submission on costs after the deadline when the defendant has already made a submission acting for herself.

[15] The plaintiff was the successful party on the defendant's stay application in the Court of Appeal. Generally, the successful party is entitled to costs, payable forthwith: r 10.29. Costs may be awarded pursuant to Schedule C or otherwise, including as a percentage of actual legal costs, in which case the appropriate range is 40 – 50%: *McAllister* at para 29 and 41. I do not have any evidence of the plaintiff's actual costs of responding to the stay application, so I have no way to set costs based on a percentage of actual costs.

[16] The issue before me is costs of a stay application relating to a contempt finding in an interlocutory application. It is a single step in litigation which has involved many court applications over the past two years. The trial of the action has not been scheduled and would appear to be a distant prospect. I am in no position to determine whether either party has been guilty of misconduct, beyond the contempt which I addressed in morning chambers on February 7, 2024. Having heard a single brief application in morning chambers, I have little information or evidence on which to assess the other factors set out in r 10.33.

[17] In these circumstances, costs for the stay application based on Schedule C is appropriate. The column of Schedule C is determined by the amount claimed or recovered. The amount claimed is \$3,101,735, and a final judgment has not yet been issued, so Column 5 applies. I agree with the plaintiff that item 22 is the correct item, being “appearance on contested application before the Appeal Court, including brief”. The amount for that item is \$3,375.

[18] *McAllister* does not say that the amounts in Schedule C should be increased by 45%. However, the amounts in schedule C may be adjusted for inflation, being approximately 25% presently: *Catterall v Condominium Plan No. 7521572 (Park Towers)* 2024 ABKB 452 at para 34.

[19] I award costs payable by the defendant to the plaintiff for the stay application in the Court of Appeal in the amount of \$3,375, increased by 25% to \$4,218.75. I also award disbursements as claimed by the plaintiff in the amount of \$17.10 and GST on both fees and disbursements.

[20] Neither party explicitly seeks costs of the costs application in their written submission. I find the plaintiff was substantially successful on the costs application because the defendant’s position was that she should not pay any costs and should instead receive costs and the plaintiff has been awarded costs, although not as much as he sought. Consequently, the plaintiff is entitled to costs of the costs application. The applicable item is 7(1) which under column 5 is \$2,025. However, that item contemplates an appearance in court without written submission. Given the brevity of the costs submissions, which was in accordance with my direction, I set costs of the costs application at \$1,000, including an inflation adjustment.

[21] In summary, my award is fees of \$5,218.75, disbursements of \$17.10 and GST of \$261.79, for a total of \$5,497.64, payable forthwith.

[22] In the absence of any information or evidence supporting a direction that costs be drawn from a specific account, I decline to make that order.

Heard by written submissions received the 16th and 30th days of September 2024.

Dated at the City of Edmonton, Alberta this 18th day of October, 2024.

G.S. Dunlop
J.C.K.B.A.

Appearances:

Hu Eliot Young
Hu Young Law
for the Plaintiff

Monica Wang
Verhaeghe Law
for the Defendant