COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McGlue v. Girvan,*
2024 BCCA 422

Date: 20241223
Docket: CA49142

Between:

Eleanor Joanna McGlue and Stephen Anthony Ferreira

Appellants
(Defendants)

And

Alasdair John Girvan

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

Supplementary Reasons (Costs) to *McGlue v. Girvan*, 2024 BCCA 208,
Vancouver Docket CA49142.

Counsel for the Appellants:	M. Wright M.D. Mirosolin
Counsel for the Respondents:	E.M. Patel J.R. Kendall
Place and Date of Hearing:	Vancouver, British Columbia May 8, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 31, 2024
Written Submissions on Costs Received:	October 22, 24, 28, 2024
Place and Date of Supplementary Judgment (Costs):	Vancouver, British Columbia December 23, 2024

Supplementary Reasons of the Court

Summary:

The appellants' insurer, ICBC, applies for an order that the respondent, Mr. Girvan, and his former counsel, Rice Harbutt Elliott LLP, repay money advanced to them by ICBC against the judgment award that was subsequently overturned on appeal by this Court.

Held: The application is dismissed. This Court has jurisdiction to make an order for the repayment of a judgment advance under certain circumstances. Here, however, ICBC advances free-standing causes of action in contract, trust, and unjust enrichment. These are claims which this Court has no original jurisdiction to adjudicate, and which must be decided in the Supreme Court of British Columbia on a proper factual record.

Reasons for Judgment of the Court:

Introduction

[1] On May 30, 2023, the trial judge pronounced judgment awarding the respondent Mr. Girvan damages totalling $592,640 plus interest and costs for injuries sustained as a result of a motor vehicle accident that occurred on July 18, 2017. The trial reasons are indexed at 2023 BCSC 902.

[2] The defendants (appellants) appealed and on May 31, 2024, this Court granted the appeal, set aside the trial decision and dismissed Mr. Girvan's claim: 2024 BCCA 208.

[3] On September 18, 2024, counsel for the appellants and their insurer, the Insurance Corporation of British Columbia ("ICBC") wrote to the Court advising that ICBC had paid an advance on the trial judgment award in the amount of $500,000 (the "Advance") and requesting that an application be scheduled to permit ICBC to seek an order for repayment.

[4] In their correspondence, counsel advised that from the Advance, Mr. Girvan's trial counsel, Rice Harbutt Elliott LLP ("RHE") had received $295,117.75 on account of fees, disbursements and interest, with the balance of $204,882.25 paid to Mr. Girvan.

[5] On October 7, 2024, the Registrar, at the direction of the Court, invited the appellants to file an application, to be heard in writing, and set a schedule for the filing and exchange of materials and submissions.

ICBC's Application

[6] The application was filed on October 15, 2024. While brought in the name of the appellants, there is no issue that the actual applicant is ICBC and we will therefore refer to the applicant as ICBC except where necessary to specifically refer to the appellants.

[7] In its application, ICBC seeks the following relief:

> Each of the respondent and the respondent's former agent and lawyers, Rice Harbutt Elliott LLP ("RHE", repay to [ICBC] the portion of the $500,000 advance paid on the Order of the court below (the "Advance") that they kept or received, or whatever portion thereof this Court deems just, plus post-judgment interest thereon from December 21, 2023…

[8] In support of the application, ICBC cited ss. 24(1)(a)-(c), 2(a) and (c), 3(b), 25(a) and (b) and/or 43(1) of the *Court of Appeal Act,* S.B.C. 2021, c. 6 [*CAA*] as well as the inherent jurisdiction and equitable jurisdiction of the Court.

[9] In addition to what is described above, the facts underlying ICBC's application include the following.

[10] The Advance was paid by ICBC by way of a cheque made out to RHE "in trust". A representative of ICBC wrote to RHE by email on December 20, 2023 stating:

> …I confirm we have agreed to a stay of execution of your clients [sic] judgment against our insured in exchange for an advance against the judgment in the amount of $500,000. Payable forthwith. You have also agreed to remove the liens and any charges placed against our insureds [sic] property, forthwith.

[11] The "liens and charges" referred to in the email refers to a certificate of judgment registered against the property of the Defendant, Ms. McGlue, on December 14, 2023 in an apparent attempt to pressure ICBC to pay the trial judgment.

[12] This Court's order was pronounced on May 31, 2024. On June 4, 2024, counsel for ICBC wrote to RHE providing a draft form of order and demanding repayment of the Advance plus interest. ICBC included in its correspondence a demand for repayment of any amount retained by RHE for fees, disbursements and taxes.

[13] On June 17, 2024, RHE wrote in response advising that the terms of the firm's retainer agreement with Mr. Girvan are privileged and that RHE no longer

acted for Mr. Girvan. On June 18, 2024, RHE filed a Notice of Withdrawal of Lawyer with this Court.

[14] On August 6, 2024, counsel for ICBC wrote to Mr. Girvan demanding repayment of the Advance. On August 7, 2024, Mr. Girvan provided RHE's interim statement of account indicating that it retained a total of $295,117.75 from the $500,000 paid by ICBC, with the balance paid to Mr. Girvan.

[15] On September 18, 2024, counsel for ICBC wrote to the Court as described above. RHE retained counsel who responded to ICBC's letter and who acts for RHE on the present application.

The *Court of Appeal Act*

[16] ICBC cites ss. 24 and 25 of the *CAA*, the relevant portions of which state:

> **General powers of court**
>
> **24** (1) On an appeal, the court may
>
> (a) make any order that the court appealed from could have made,
>
> …
>
> (c) make any additional order that it considers just.
>
> (2) The court may
>
> …
>
> (c) exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal.
>
> **Court has power of court appealed from**
>
> **25** The court has the power, authority and jurisdiction vested in the court appealed from
>
> (a) for all purposes of and incidental to
>
> (i) the hearing and determination of any matter, and
>
> (ii) the amendment, execution and enforcement of any order, and
>
> (c) for the purpose of every other authority expressly or impliedly given to the court.

The Parties' Positions

[17] ICBC takes the position that this Court can make the orders it seeks against RHE as well as the respondent. ICBC relies on ss. 24(1)(c) and 25 of the *CAA* as the basis for this Court's jurisdiction. ICBC also submits that this Court can act pursuant to its inherent jurisdiction. However, this argument adds little to ICBC's position on ss. 24 and 25 of the *CAA* as it is well established that this Court has no inherent jurisdiction: *Gokey v. Usher*, 2019 BCCA 470 at para. 4.

[18] ICBC relies on *Camaso Estate v. Saanich (District),* 2013 BCCA 370 and *Vaillancourt v. Molnar Estate*, 2004 BCCA 384, both cases in which this Court made similar orders under similar circumstances. It argues that, through ss. 24 and 25, this Court has the jurisdiction to "do justice as between the parties", including by making orders against non-parties. It relies on *Equustek Solutions Inc. v. Jack*, 2014 BCSC 1063, aff'd 2015 BCCA 265, aff'd 2017 SCC 34 for the proposition that the Supreme Court's inherent jurisdiction includes jurisdiction to grant equitable relief against non-parties: see the SCC decision at paras. 20–21 [*Equustek*].

[19] ICBC further points to cases in which courts have ordered costs against non-parties: *Le Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305 at para. 125. It also relies heavily on *Tiamzon v. Vandt*, 2021 BCCA 73 [*Tiamzon*], where this Court made a supplementary order that the unsuccessful respondent return judgment monies which had been paid out of the Supreme Court to him following a default judgment.

[20] In sum, ICBC argues that this Court has the same inherent equitable jurisdiction as the Supreme Court for the purposes of this order, and that accordingly this Court has jurisdiction to make the restitutionary order sought.

[21] RHE takes the position that this Court has no jurisdiction to make the order ICBC seeks. It argues that this Court has no inherent jurisdiction, and that the cases ICBC relies upon where this Court has made similar orders in the past are distinguishable, either because jurisdiction was conceded by all parties — as in *Vaillancourt* — or because the advance had been paid pursuant to a stay order made by this Court — as in *Camaso Estate*. RHE argues that ICBC essentially

seeks a remedy for a freestanding cause of action in unjust enrichment, the determination of whose merits will require evidence not before this Court. It takes the position that, to the extent that ICBC has a claim at all against RHE, it lies in the Supreme Court and must be commenced as a new action.

[22] RHE does not take the position that ICBC cannot claim against Mr. Girvan directly in this Court, so it seems to acknowledge that this Court has jurisdiction to issue some, but not all, of the orders ICBC seeks. The thrust of RHE's position is that any claim against RHE would turn on evidence not before this Court, and require pleadings and discovery, fact-finding, and a process to address questions of solicitor-client privilege, all of which favour the Supreme Court as the appropriate venue for the claim.

[23] Mr. Girvan provided a written submission on ICBC's application, however it largely addresses his unhappiness about this Court's decision and does not address the issues arising on the application. This is no doubt because, as Mr. Girvan states, he has been "left to fend for himself" upon RHE withdrawing as his counsel. As described above, RHE did so very shortly after receiving ICBC's demand for repayment of the Advance. Notably, in its written submission on the application, RHE somewhat ironically states that ICBC failed to suggest to Mr. Girvan that he obtain legal advice before he produced privileged documents i.e., RHE's account to ICBC.

Analysis

[24] The cases relied on by ICBC are of little assistance in the specific circumstances of this case, at least in respect of the relief sought against RHE.

[25] In *Camaso Estate*, the appellants were ordered to pay approximately $120,000 as a condition of obtaining a stay of execution of the judgment granted in the court below. The appellants were ultimately successful on appeal. They then sought repayment of the amount paid to the respondents.

[26] The Court granted the application. In doing so, the Court rejected the respondents' argument that the court was *functus officio*:

> [10] We do not consider that we are being asked to revisit our order determining the appeal or to adjudicate upon any issue that should have been addressed at the hearing of the appeal. We are being asked to give a procedural remedy arising out of a process that was initiated and ran its course in this court alone. The trial court gave a money judgment without terms as to payment. Terms of payment of the judgment were addressed only in this court in the form of a stay of execution application brought by the appellants under s. 18(1) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77. We are not being asked to rehear or to reconsider any aspect of this appeal. No variation of our order allowing the appeal is sought. This is merely a housekeeping matter that arises out of the proceedings in this court. Therefore, the doctrine of *functus officio* has no application.

[27] In the Court's view, the order sought was a "a procedural remedy incidental to the appeal and the stay of execution order" (at para. 13).

[28] Similarly in *Vaillancourt*, the Court allowed an appeal and reduced the damages awarded to the respondent at trial. The appellant had paid an amount to the respondent on account of the judgment that exceeded the amount ultimately awarded by this Court. The Court ordered the respondent to repay the difference (at para. 7).

[29] In both *Camaso Estate* and *Vaillancourt*, the Court relied on former s. 9(8) of the *Court of Appeal Act* (now s. 25).

[30] In *Tiamzon*, the respondent obtained a default judgment against the appellant. The appellant's application to set aside the default judgment in the Supreme Court was dismissed and the money held in court was ordered to be paid out to the respondent. The appellant's appeal was allowed and the default judgment set aside. This Court ordered the respondent to return the funds paid to the Supreme Court:

> [6] It is long recognized that a transfer of funds that was the result of a judgment that has been reversed, should itself be reversed: *Rodger v. The Comptoir d'Escompte de Paris* (1871), L.R. 3 P.C. 465, 17 E.R. 120 (P.C.H.K.). This approach has been explained in terms of restitutionary principles: *Nykredit Mortgage Bank plc. v. Edward Erdman Group Ltd. (formerly Edward Erdman) (No. 2)*, [1997] 1 W.L.R. 1627 at 1636–37 (H.L.)

> per Lord Nicholls; Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Markham: LexisNexis Canada Inc., 2014) at 965.
>
> [7] There is no fault in Mr. Tiamzon having acted on the order he obtained in the Supreme Court of British Columbia – no stay of that order was obtained. Nonetheless, he has now received monies that derived from Ms. Vandt on account of a judgment that has been set aside. While Mr. Tiamzon disputes the merits of Ms. Vandt's answer to his claim, those issues are not before us, and require factual determinations we cannot make. In these circumstances, on the authority of the principles above and s. 9(3) [now s. 24(2)(c)] of the *Court of Appeal Act*, we order the monies in issue to be returned by Mr. Tiamzon to the Supreme Court of British Columbia, from where they came.

[31] In each of these cases, the Court ordered repayment by the respondent of money paid on account of a judgment obtained in the Supreme Court following a successful appeal. However, in none of these cases, nor in any other case cited by ICBC, did this Court make an order for repayment against a non-party.

[32] Further, ICBC does not clearly articulate the basis on which such an order could be made against RHE. For example, while citing ss. 24 and 25 of the *CAA*, ICBC does not explain how its claim falls within the wording of those sections. In its written submission, ICBC simply argues that because Mr. Girvan was ultimately denied any damages, RHE was not entitled to receive any fees nor any repayment of disbursements. In its reply submission, RHE suggests it is seeking restitution from RHE for unjust enrichment.

[33] While the first of these arguments has some intuitive appeal given that RHE has retained over $295,000 from money that Mr. Girvan, according to the decision of this Court, is not entitled to, the argument turns on the contractual arrangement between Mr. Girvan and RHE. The terms of that contract are not before the Court; thus, we are not in a position to adjudge the respective rights of ICBC, Mr. Girvan, and RHE.

[34] Further, ICBC's attempt to recover from a non-party cannot be characterized as a mere procedural remedy incidental to the appeal which arguably would fall within the scope of ss. 24 and/or 25 of the *CAA*. Rather, as submitted by RHE, ICBC's apparent claim in unjust enrichment is an independent, free-standing cause

of action which would require an assessment of the facts going to the constituent elements. Given the lack of an evidentiary foundation, this Court is not in a position to make the necessary findings of fact to resolve that claim.

[35] ICBC makes the point that the Advance was paid to RHE "in trust" as an advance payment of the judgment under appeal and impliedly argues that RHE was in breach of trust by paying themselves their fees and related amounts out of those funds and by disbursing the balance to Mr. Girvan. Again, such a claim involves a separate cause of action against RHE which cannot be adjudicated at first instance in this Court.

[36] For these reasons, the order sought by ICBC against RHE is not available in this Court but must be pursued in the Supreme Court. We would therefore dismiss this aspect of ICBC's application.

[37] In terms of any claim against Mr. Girvan, the authorities cited by ICBC support the jurisdiction of this Court to issue a repayment order against him and s. 24(3)(b) of the *CAA* supports this Court's power to do so. However, any claim against Mr. Girvan is inextricably tied to ICBC's claim against RHE and the two should be addressed together. Mr. Girvan would benefit from legal advice in respect of any such claim, both in terms of any obligations owing to ICBC and his rights vis-à-vis RHE.

[38] We therefore dismiss ICBC's application for an order requiring repayment of the Advance, or any portion thereof, by Mr. Girvan.

Conclusion

[39] ICBC's application is dismissed. Given the circumstances giving rise to the application, it is appropriate that each of ICBC, RHE and Mr. Girvan bear their own costs.

"The Honourable Madam Justice Stromberg-Stein"

"The Honourable Mr. Justice Voith"

"The Honourable Justice Skolrood"