COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chinn v. Hanrieder,*
2010 BCCA 274

Date: 20100601
Docket: CA037237

Between:

Bette Chinn and Dennis Hanrieder

Respondents
(Plaintiffs)

And:

Ingrid Hedwig Hanrieder

Appellant
(Defendant)

And:

Roderick E. Mont and Allin, Anderson, Mont & Walker and Heath and Company

Respondents
(Third Parties)

Before: The Honourable Madam Justice Rowles
(In Chambers)

On appeal from the Supreme Court of British Columbia, May 12, 2009, (*Chinn v. Hanrieder*, 2009 BCSC 635, Chilliwack Registry No. S0013195)

Counsel for the Appellant:	J. Legh
Counsel for the Respondent:	A. Macdonald C. Bolan
Place and Date of Hearing:	Victoria, British Columbia May 17, 2010
Place and Date of Judgment:	Vancouver, British Columbia June 1, 2010

Reasons for Judgment of the Honourable Madam Justice Rowles:

[1] The respondents on the appeal brought by Ingrid Hanrieder have applied for security for costs of the appeal and security for the assessed costs of trial. The respondents are Bette Chinn and Dennis Hanrieder, plaintiffs in the court below, and two law firms, which were third parties in the action. The appeal costs have been estimated at slightly over $8,000 for each of the three respondents. Cost certificates for the trial costs have been issued at $36,800 for each respondent.

[2] The appeal is brought from the judgment of Madam Justice Loo in which the plaintiffs' claim against the appellant based on a secret trust was allowed. The judge also found the plaintiffs' alternative claim, based on contract, to be supported by the evidence. The reasons for judgment are indexed at 2009 BCSC 635.

[3] In her reasons, the judge made adverse credibility findings against the appellant based in part on documentary evidence that contradicted her version of events. As a result of the judge's conclusions, it was unnecessary for her to consider the third party claims and those claims were dismissed with costs.

[4] On the appeal, the appellant will seek to have the judgment set aside and a new trial ordered.

[5] The appellant has not applied for stay of proceedings or execution. She has not complied with the judge's order for an accounting and has only recently given instructions to her solicitors to obtain access to her bank records so that preparation for an accounting can begin. Although it is not clear from the material that the appellant is judgment proof, there appears to be some risk of the appellant taking steps to make herself so.

[6] The appellant opposes any order for security for costs being made but the material she has filed on the application does not include an affidavit from her. The information concerning the appellant's financial circumstances has been presented on information and belief in an affidavit sworn by an associate in the law firm acting for the appellant. The appellant is elderly and is said to be suffering from cancer.

Her assets are said to include two Retirement Investment Fund accounts worth approximately $370,000. Whether the Retirement Investment Funds are registered pension funds and whether they are exigible is not known. The appellant also owns a condominium which is said to be presently worth about $136,000 but expected to be worth $280,000 after leaky condo remediation work has been completed. The appellant received a $95,000 interest-free loan through the Homeowners Protection Office for the remediation work. On those figures, the equity in the appellant's condominium will be $185,000 when the repairs are finished. However, the appellant has transferred the condominium into the names of herself and her daughter as joint tenants. The explanation proffered is that the transfer was made for estate planning purposes.

[7] I am satisfied that this is a case in which orders for security for costs of both the appeal and of trial ought to be made in this case. My reasons for reaching that conclusion follow.

The proceedings in the trial court

[8] The action was brought by the children of the late Hugo Hanrieder against Hugo's second wife, Ingrid Hanrieder. An agreed statement of facts, to which were attached a number of documents, was introduced into evidence at trial.

[9] Briefly stated, the background facts are that in about 1973, a specific trust was created by the widowed mother of Hugo Hanrieder to hold the mineral rights on some property in Saskatchewan for Hugo and his four sisters. The mineral rights were attached to the family farm of some 320 acres and were retained when the farm was sold because of their potential value for oil. By the terms of the trust, the interest of a beneficiary, upon his or her death, was to go to his or her surviving spouse. The relevant term in the trust agreement reads as follows:

> 9. The parties hereto agree that should one of the Beneficiaries named herein die, his or her share shall be delivered to his or her surviving spouse, or if no surviving spouse to his or her surviving children to be divided amongst all of the surviving children equally. It is agreed that if there is no surviving spouse and no surviving children, the deceased Beneficiary's share shall be divided equally amongst the other Beneficiaries.

[10] About seven years after the specific trust had been established by Hugo's mother, Hugo and his first wife were divorced. In 1980, Hugo married the appellant, Ingrid Hanrieder. Both Hugo and Ingrid Hanrieder had children from prior marriages.

[11] Hugo had expected that he would be able to leave by will his interest in the mineral rights to his two children but the lawyer he consulted about his will informed him that, by the terms of the specific trust, he could not do so. Hereafter, according to the judge's findings, Ingrid Hanrieder agreed with Hugo that upon his death, any benefits flowing from the mineral rights would go to Hugo's children rather than to her. Hugo and Ingrid Hanrieder informed his children of the arrangement. Up to the time of Hugo's death in 1997, the mineral rights produced minimal income.

[12] In May 1993 Hugo and Ingrid Hanrieder purchased a condominium in Nanaimo and instructed the law firm, Heath and Company, to register their interest as joint tenants. Hugo died on 8 December 1997 at the age of 75. At that time, Ingrid Hanrieder was 61.

[13] Ingrid Hanrieder was the executrix of Hugo's estate. After Hugo's death, she went to a notary to transfer title to the condominium and learned that title was not in their joint names. She spoke to one of the partners at Heath and Company and he recommended that she consult another law firm. He agreed that his firm would pay for correcting the title error. Ingrid Hanrieder went to Roderick Mont, a lawyer at the law firm known as Allin, Anderson, Mont & Walker.

[14] Before Hugo died, he owned a number of assets including his interest in the condominium and the mineral rights. Following Hugo's death, there were communications between the solicitors acting for Hugo's children and the firm acting for Ingrid Hanrieder.

[15] The judge characterized the claims and the issues as follows:

> [6] The plaintiffs Bette Chinn and Dennis Hanrieder claim that:
>
> (1) their father Hugo created a secret trust: Hugo and Ingrid Hanrieder agreed that on Hugo's death she would hold the

> mineral rights in trust for his children; and further or alternatively,
>
> (2) Ingrid Hanrieder breached an agreement made on May 29, 1998 that she would transfer the mineral rights to Bette Chinn and Dennis Hanrieder in return for them delivering executed releases.
>
> [7] The issues in my view for determination are:
>
> (1) Does Ingrid Hanrieder hold the mineral rights in trust for Bette Chinn and Dennis Hanrieder?
>
> (2) Did Ingrid Hanrieder breach an agreement made on May 29, 1998 that she would transfer the mineral rights to the plaintiffs Bette Chinn and Dennis Hanrieder in return for them delivering executed releases?
>
> [8] Mrs. Hanrieder denies any such agreement and considers the mineral rights to be hers. She has brought third party proceedings against Roderick Mont and the law firms Allin, Anderson, Mont & Walker, and Heath and Company.
>
> [9] If I conclude that Mrs. Hanrieder holds the mineral rights in trust for the plaintiffs, there is no need to determine the third party action.

[16] The trial judge found that the evidence "clearly establishes that Ingrid Hanrieder agreed with her late husband Hugo Hanrieder that, on his death, she held the mineral rights in trust for his children Bette Chinn and Dennis Hanrieder." As noted above, the judge made credibility findings against the appellant, based in part on documentary evidence which was contrary to the evidence she gave.

[17] The judge's conclusions are set out below:

> [113] I conclude as follows:
>
> (1) Hugo and Ingrid Hanrieder agreed that on his death she would hold the mineral rights in trust for Bette Chinn and Dennis Hanrieder; and
>
> (2) Ingrid Hanrieder breached an agreement made on May 29, 1998 that she would transfer the mineral rights to Bette Chinn and Dennis Hanrieder in return for them delivering executed releases.
>
> [114] It is agreed that Ingrid Hanrieder or I.H. Hanrieder Resources Ltd. received the sum of $51,598.28 and $174,360 to July 31, 2008 for a total of $225,958.28. There is no agreement that these are the only funds she has received. Ingrid Hanrieder has disclosed no sums received by her or on her behalf since July 2008.

> [115] In accordance with the relief sought by the plaintiffs in their further amended statement of claim there will be:
>
> (1) an accounting of any monies received by Ingrid Hanrieder on account of the Family Trust;
>
> (2) an order that the plaintiffs recover damages against Ingrid Hanrieder in the amount determined by the accounting, including loss of interest; and
>
> (3) a tracing order.
>
> [116] The third party proceedings are dismissed with costs.
>
> [117] The plaintiffs and the third parties will recover their costs from the defendant Ingrid Hanrieder.

[18] On the application, an associate in the law firm acting for Ingrid Hanrieder has sworn an affidavit in which, among other things, she has set out the arguments to be advanced on the appeal. The argument will be that the judge's finding that a secret trust existed in favour of Hugo's children is based on the following "misapplication" of the law:

> i. The fundamental issue is that Mr. Hanrieder owned only a life estate in the Mineral Rights and could do nothing with them on his death.
>
> ii. Trust law, requires that the settler have control of the asset in order to impose a trust upon it when received by the donee.
>
> iii. The trial judge finds that Mrs. Hanrieder agreed that on her husband's death she would hold the Mineral Rights in trust for his children, however, that is an unenforceable agreement, and a gift, which the law cannot enforce.

[19] As to the dismissal of the third party claim, the appellant intends to put forward the following argument:

> b. As a result of the finding of a trust the Trial Judge did not address the issues of the claims against the Third Party lawyers. These are significant claims of negligence, which if there is no trust, must be determined.
>
> i. The third party Heath and Company was admittedly negligent in failing to register the condominium in joint names, thus starting the whole chain of events.
>
> ii. The third party Mont, failed to document, implement or advise on the agreement found by the trial judge (which agreement was denied by Mrs. Hanrieder).

[20] The third argument the appellant proposes to advance is as follows:

c. The Trial Judge was biased or suffered from a perception of bias which affected her consideration of the evidence and which required her to decline to hear the trial.

i. One of the witnesses was Mr. Taylor, who acted for Ms. Chinn and against whom there will be liability if this action is lost by the Plaintiffs. There is an agreement between the Plaintiffs and Mr. Taylor to not raise any limitation of action defence, so that an action need not be filed against him pending the resolution of this action.

ii. Mr. Taylor's liability will arise from a failure to document in any way the agreement regarding the Mineral Rights and in fact to deliver settlement letters which make no mention of the Mineral Rights at all.

The principles to be applied on applications for security for costs of appeal

[21] The jurisdiction to order security for costs of an appeal is found in s. 24 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77. The principles to be applied when applications are made for security for costs of appeal have been well canvassed in chambers decisions of this Court. The appellant against whom such an order is sought bears the onus of showing why security should not be required: *Kedia v. Shandro Dixon Edgson*, 2007 BCCA 57 at para. 4 (Smith J.A. in Chambers). The factors to be considered are ease with which the respondent, if successful on the appeal, will be able to collect the costs that in the usual course would be awarded, the merits and timeliness of the application and the appellant's ability to post security: *Lindholm v. Hy-Wave Inc.* (1997), 89 B.C.A.C. 197 at 100-200 (Southin J.A. in Chambers); *Milina v. Bartsch* (1985), 5 C.P.C. (2d) 124 at 125 (B.C.C.A.) (Seaton J.A. in Chambers); *Southeast Toyota Distributors, Inc. v. Branch* (1997), 45 B.C.L.R. (3d) 163 (C.A.) (Huddart J.A. in Chambers); and *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A.) (Esson J.A. in Chambers).

[22] In my opinion, this is a case in which the appellant has not discharged the onus of showing why security for the appeal costs should not be ordered.

[23] The legal point on the appeal from the secret trust order appears to me to be arguable. The plaintiffs' alternative claim, based on breach of contract, rests on credibility findings made against the appellant and such findings are notoriously

difficult to overturn on appeal. Whether the claim for damages for breach of the agreement can stand as an alternative claim, independent of the trust claim, might also be an arguable point on the appeal.

[24] The appellant's material shows that she has the means to pursue her appeal as well as to post security for the respondents' costs of the appeal. In other words, the appellant in this case would not be prevented from pursuing a potentially meritorious appeal if required to post security for the respondents' costs of appeal.

[25] I also note that the respondents' material shows that early notice was given to the appellant that an application for security for costs would be brought if she pursued an appeal. In other words, this is not a case in which the appellant can complain of being prejudiced by an unexpected application for security for costs after the appeal process, with its attendant costs, is well underway.

[26] As security for costs of the appeal, the appellant must post $6000 in cash or an irrevocable letter of credit in a form satisfactory to the Registrar within 30 days of the date of this order for each of the three respondents. Until the security is posted, the appeal is stayed. Should the security not be posted within 30 days, the respondents may apply to have the appeal dismissed.

Security for costs of trial

[27] The jurisdiction to order security for the costs of trial or for the judgment is to be found in s. 10(2)(b) of the *Court of Appeal Act*: *Cadinha v. Chemar Corporation Inc.* (1995), 17 B.C.L.R. (3d) 347 (C.A.) (Lambert J.A. in Chambers), and *Paz v. Hardouin (c.o.b. Fiesta Travel and Fiesta Wayfarer)* (1995), 10 B.C.L.R. (3d) 232 (C.A.) (Lambert J.A. in Chambers). Section 10(2)(b) provides:

> 10 (2) In an appeal or other matter before the court, a justice may do one or more of the following:
>
> ...
>
> (b) make an interim order to prevent prejudice to any person; …

[28] The principles that are applied on an application for security for trial costs are not the same as those that apply on an application for security for costs of an appeal: *Thompson v. Soundy*, 2003 BCCA 82 at para. 11, 182 B.C.A.C. 168 (Rowles J.A. in Chambers); *Bird Semple Fyfe Ireland W.S. v. Dixon* (1999), 125 B.C.A.C. 150 (Esson J.A. Chambers) at 153.

[29] Under s. 10(2)(b) of the *Act*, an order for security for costs of the trial or the trial judgment can only be made to prevent prejudice to the respondent. The onus is on the applicant to show that it is in the interest of justice to order that security for the trial costs or the judgment be posted: *Aikenhead v. Jenkins*, 2002 BCCA 234, 166 B.C.A.C. 293 (Ryan J.A. in Chambers) at para. 30.

[30] For an applicant to seek security for costs of the trial or security for the trial judgment with a view to preventing the appellant from pursuing an appeal is improper and "undermines the balancing of the interests of justice referred to in the cases": *Kedia v. Shandro Dixon Edgson,* 2007 BCCA 316, 42 C.P.C. (6th) 366 (Rowles J.A. in Chambers), at para. 39.

[31] In this case, the appellant has not sought a stay of execution on the judgment. That may be unsurprising considering the fact that the appellant has not produced the accounting ordered by the trial judge. There may be some basis for holding that the appellant has abused the process of the court by failing to provide the accounting. At the least, the appellant has failed to provide the accounting in a timely fashion. As well, the respondents are likely to have difficulty in tracing the assets which comprise the secret trust. During oral argument it emerged that there is a serious question as to whether any funds remain in the corporate vehicle into which the benefits from the mineral claim were deposited.

[32] In opposing the application, appellant's counsel argued that if the appellant is obliged to withdraw funds from her Investment Savings to provide security for the costs of trial, such a withdrawal would trigger income tax which could not be recovered should she be successful on the appeal. As to that argument I make this observation. Without security being posted, the respondents are likely to be at

considerable risk of not being able to recover the costs of the trial. The extent of that risk cannot be readily quantified because the material presented by the appellant in response to the application provides no information as to the form in which the Investment Savings Plans are held. Whether they take the form of RRSPs or RRIFs is unknown and whether the savings plans are exigible is also not known. At what marginal tax rate the funds could be withdrawn, assuming they are RRSPs or RRIFs, was not disclosed. While the equity the appellant has in the condominium she owns appears to be substantial, the appellant has transferred a one-half interest in the condominium to her daughter.

[33] Whether the gaps in the appellant's material amount to a tactical withholding of potentially relevant information I cannot say. What I can say is that the material the appellant has chosen to put forward does not persuade me that being required to post some security for the costs of trial would deprive her of her right of appeal.

[34] In my view, unless security is ordered, the appellant may ultimately come away from the appeal process effectively judgment-proof, to the prejudice of all of the respondents. In the circumstances described, there is no injustice in requiring the appellant to post security for the costs of the trial in this case in the sum of $10,000 for each of the three applicants. The same terms will apply with respect to the posting of security for the costs of trial as earlier stated with respect to the order for security for the costs of the appeal.

[35] Order accordingly.

"The Honourable Madam Justice Rowles"