

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Nowak v. Lacasse*,
2023 BCCA 157

Date: 20230406
Docket: CA48840

Between:

Matthew Levi Nowak and Eco Sanitizer Inc.
(formerly known as 0966452 B.C. Ltd. dba Eco Sanitizer)

Appellants
(Defendants)

And

Eric Paul Lacasse

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Hunter
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
December 20, 2022 (*Lacasse v. Nowak*, 2022 BCSC 2219,
New Westminster Docket S231182).

Oral Reasons for Judgment

Counsel for the Appellants: J. Leung

Counsel for the Respondent: R.S. Deol

Place and Date of Hearing: Vancouver, British Columbia
April 5, 2023

Place and Date of Judgment: Vancouver, British Columbia
April 6, 2023

Summary:

The appellants seek leave to appeal an order for an accounting in a case in which a trial judge had found the appellants had been unjustly enriched by the work of the respondent. The trial judge deferred making a remedial order pending the accounting of sales proceeds of the business in which the parties had been engaged. The appellant seeks to challenge the finding of unjust enrichment through an appeal of the order for an accounting. Held: Application for leave to appeal dismissed. It is premature for the appellant to challenge the unjust enrichment judgment. Once the trial judge has concluded her judgment and an order has been entered, the appellant can appeal the judgment as of right. It is not in the interests of justice to grant leave in relation to the decision to order an accounting. In particular, an appeal of that order would unduly hinder the progress of the action.

[1] **HUNTER J.A.:** The defendant Mr. Nowak applies for leave to appeal an order for an accounting made following a trial in which the trial judge made a finding of unjust enrichment but deferred any remedial order pending the accounting.

[2] The action in which the order for an accounting was made arises from a dispute concerning the working relationship between Mr. Nowak and Mr. Lacasse relating to a business to sell hand sanitizer through the corporate appellant Eco Sanitizer Inc. (“Eco”). They began working together in April 2020. Mr. Lacasse parted company with Eco three months later.

[3] On September 22, 2020, Mr. Lacasse filed a Notice of Civil Claim against Mr. Nowak and Eco claiming damages equal to his share in the profits as a partner of Eco. In the alternative, Mr. Lacasse claimed that he was entitled to damages for unjust enrichment or a remedial constructive trust. In his Response to Civil Claim, Mr. Nowak asserted that Mr. Lacasse agreed to work as a salesperson and on administrative tasks for commissions and hourly wages.

[4] The five-day trial in this matter took place from September 12, 2022 to September 16, 2022. Judgment was reserved. On December 20, 2022, the trial judge delivered reasons for judgment, indexed at 2022 BCSC 2219, in which she held that there was neither a partnership agreement nor a contract of employment between the parties, but that the elements of unjust enrichment by Mr. Nowak at the expense of Mr. Lacasse had been made out.

[5] In discussing remedy, the trial judge assessed the unjust enrichment to be equal to 33% of the sales, less associated expenses attributable to those sales, from the commencement of Mr. Lacasse's work on April 23, 2020 to three months after he left.

[6] The trial judge stated that if a plaintiff establishes unjust enrichment, the remedy may be monetary or proprietary, at the election of the plaintiff. She further held that in this case, the time for Mr. Lacasse's election has not yet occurred because the assessment of his unjust enrichment claim is not yet complete without an understanding of the benefit gained during the relevant time period.

[7] The trial judge then referred to Rule 18-1 of the *Supreme Court Civil Rules*, entitled "Inquiries, Assessments and Accounts", and held as follows:

[170] I therefore consider this to be an appropriate case to make a reference to the registrar for an accounting of the sales revenue of Eco Sanitizer produced through Mr. Nowak, his Eco Sanitizer sole proprietorship, and Eco Sanitizer Inc., and the associated expenses of those sales between April 23, 2020 and October 6, 2020. As discussed above, the associated expenses shall not include:

- a) sales commissions;
- b) compensation or bonuses of any form paid to any employee or principal of Eco Sanitizer or any person related to such a person;
- c) dividends; or
- d) shareholders loans.

[171] The registrar shall convene a pre-hearing conference to determine what documentation or other evidence is necessary to conduct the reference. The registrar has the authority to order production of documentary evidence or other evidence for the purposes of the reference.

Conclusion

[172] I order an accounting through a reference to the registrar. Once the reference has been conducted, the matter shall be referred back to me in the form of a report and recommendation. I shall then hear submissions on and address Mr. Lacasse's election between a proprietary remedy or damages and the appropriate associated orders.

[8] The accounting has not taken place. No order has been entered with respect to the December 20, 2022 judgment. The trial judge is still seized with this matter.

[9] On January 20, 2023, Mr. Nowak and Eco filed a Notice of Appeal. Under the section, “Part of the order being appealed”, the appellants listed para. 172 of the trial judgment, which is the order for an accounting. Under the section, “Grounds for leave to appeal”, the appellants listed six grounds, including procedural fairness, misapprehension of the evidence, unreasonable inferences, assessment of credibility, errors of fact in the quantification of Mr. Lacasse’s contribution to the business and error of fact and law concerning the trial judge’s decision to exclude salaries and sales commissions from the accounting of profits.

[10] The appellants take the position that they require leave because an order under Rule 18-1 is a limited appeal order. Rule 18-1(1) states as follows:

(1) At any stage of a proceeding, the court may direct that an inquiry, assessment or accounting be held by a master, registrar or special referee.

[11] Under ss. (2) and (3) of Rule 18-1, the Court may direct that the certified result of an accounting is binding on the parties, or that the result of the accounting be stated in the form of a report and recommendation to the court. In this case, the trial judge directed that the result of the accounting be in the form of a report and recommendation to the court.

[12] As I understand the grounds of appeal, the only error alleged that relates directly to the order for an accounting is the allegation that the trial judge erred by directing that sales commissions, bonuses and other compensation paid to employees of Eco be excluded from the calculation of associated expenses. The other grounds relate to the judge’s conclusion that Mr. Nowak was unjustly enriched by the efforts of Mr. Lacasse, a conclusion that Mr. Nowak argues was the basis for the order for an accounting and therefore appealable if leave is granted.

[13] The difficulty with this leave application in my view is that the order sought to be appealed is effectively a mid-trial direction. The trial judge has made certain liability holdings, but a final order will not be entered until the accounting has been completed and the plaintiff has made his election as to remedy. The appellants’ theory appears to be that because it was the unjust enrichment finding that led to the

order for an accounting, the conclusions made by the trial judge that led her to find unjust enrichment can be challenged now, before the trial has concluded. I cannot agree. An appeal of the trial judge's liability findings must await the final order entered at the conclusion of the trial process. Appeals are brought from the formal order appealed from, not from the reasons that give rise to the order: *Moore v. Expansion Holdings Ltd.* (1994), 96 B.C.L.R. (2d) 178 (C.A.).

[14] The appellants state that if leave to appeal is granted, they will seek the following relief:

- a) An order overturning the entirety of the Decision (which the appellants define as the trial judgment of December 20, 2022) and rescinding the Order (which the appellants define as the order directing an accounting);
- b) In the alternative, an order that there be a re-trial of the action; or
- c) In the alternative, an order that the Order be varied to include payroll and other customary business expenses in the accounting.

[15] I am unable to see any circumstance in which a division of this Court would overturn the judgment of December 20, 2022 or order that there be a re-trial, until the entirety of the action has been adjudicated by the trial judge and a formal order entered. At that point and only at that point will the trial judge become *functus*. It is not open to the appellants to challenge the finding of unjust enrichment at this stage of the proceedings. When the matter has concluded in the Supreme Court and a formal order entered, the appellants will be able to appeal that order as of right.

[16] I therefore approach this application as solely an application for leave to appeal the order for an accounting of the sales revenue of Eco Sanitizer produced through Mr. Nowak, his Eco Sanitizer sole proprietorship, and Eco Sanitizer Inc., and the associated expenses of those sales between April 23, 2020 and October 6, 2020. The only point at issue raised by the appellants in relation to that order that can be reviewed at this stage of the proceedings is whether the trial judge erred by directing that sales commissions, bonuses and other compensation paid to

employees of Eco be excluded from the calculation of associated expenses on the accounting. The appellants want to challenge the liability finding, but that challenge is premature.

[17] The factors to be considered in assessing an application for leave to appeal are well known. They were set out recently in *Dehydration Research LLC v. EnWave Corporation*, 2022 BCCA 347 (Chambers) at paras. 52–53. They include:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

The overriding consideration is whether granting leave is in the interests of justice.

[18] In my view, this application does not meet any of the tests for granting leave.

[19] First, I am unable to conclude that the point on appeal is of significance to the practice. An accounting is “an obvious remedial measure where restitution for unjust enrichment is ordered”: *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357 at para. 50. The question whether on this accounting certain forms of compensation should be excluded from the associated expenses is highly fact-specific, and is unlikely to provide any principled result that would be of significance to the practice.

[20] Second, at this interim stage of proceedings, it is not possible to assess whether the point raised is of significance to the action itself. Once the accounting has been completed and a report and recommendation sent to the trial judge, the plaintiff will have an election to make, following which the trial judge will make a remedial order, which will be set out in the final order of the trial court. I am not prepared to speculate as to the significance of the point to which the appellants take objection before these steps have been taken.

[21] Third, I am unable to assess whether the proposed appeal has any merit, as the appellants' arguments were primarily grounded in the trial judge's factual conclusions that led her to find unjust enrichment on the part of the appellants. Those conclusions cannot be challenged at this stage of the proceeding.

[22] Finally, it is clear that an appeal of the order directing an accounting will hinder the progress of the action. In my view this hindrance can fairly be described as undue, as the adjudication of the respondent's claim cannot be completed until the accounting has been completed and the remedial order has been made.

[23] I consider the interests of justice do not support granting leave to appeal the order for an accounting. When the action has been fully adjudicated and the final order entered, the appellants will be in a position to appeal that order as of right, including the decision to order an accounting and any remedial orders made. An appeal from a final order subsumes within it all the orders and rulings made in the course of the litigation. This practice minimizes interference with the trial process and avoids litigating in slices: *Bentley v. Police Commissioners*, 2012 BCCA 514 at para. 10 (Chambers).

[24] The application for leave to appeal the order for an accounting is dismissed, with costs to the respondent.

"The Honourable Mr. Justice Hunter"