

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corporation*,
2024 BCCA 107

Date: 20240312
Dockets: CA48517; CA48518

Docket: CA48517

Between:

Delane Industry Co. Ltd.

Appellant
(Plaintiff)

And

Tsawwassen Quay Market Corporation

Respondent
(Defendant)

– and –

Docket: CA48518

Between:

Karry Au Yeung and Delane Industry Co. Ltd.

Appellants
(Defendants)

And

**Gary Mathiesen, Andrew Sam, and
Tsawwassen Quay Market Corporation**

Respondents
(Plaintiffs)

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

On appeal from: An order of the Supreme Court of British Columbia, dated August 9, 2022 (*Delane Industry Co. Ltd. v. Tsawwassen Quay Market Corporation*, 2022 BCSC 1348, Vancouver Dockets S103253 and S125760).

Oral Reasons for Judgment

The Applicant:

S.M. Gallagher

The Respondent on the application,
appearing on his own behalf and as the
representative of Delane Industry Co. Ltd.:

K. Au Yeung

Counsel for the Respondents, Tsawwassen
Quay Market Corporation, Gary Mathiesen
and Andrew Sam:

D.W. Gibbons

Place and Date of Hearing:

Vancouver, British Columbia
March 12, 2024

Place and Date of Judgment:

Vancouver, British Columbia
March 12, 2024

Summary:

Application by the appellants' former lawyer for an order directing the payment into Court of funds being held in his trust account as security for costs in relation to dismissed appeals. Held: Application granted. A justice of the Court has the power to make the order sought pursuant to ss. 30(a) and (b) of the Court of Appeal Act, S.B.C. 2021, c. 6.

[1] **FITCH J.A.:** This application arises in somewhat unusual circumstances. The applicant, Sean Gallagher, previously acted for the appellants, Delane Industry Co. Ltd. ("Delane") and Karry Au Yeung (together, the "appellants"). Karry Au Yeung is the sole director and officer, and the founding shareholder of Delane.

[2] The applicant seeks an order paying into Court funds that are being held in his trust account. The funds represent security for costs in appeals numbered CA48517 and CA48518 that were deposited into the applicant's trust account pursuant to orders made by Justice Dickson on November 7, 2022. She ordered the appellants to post security for appeal costs in the amount of \$9,000 on each of the appeals.

[3] As of February 15, 2024, the applicant is, with accrued interest, holding \$18,415.60 in his trust account on account of these funds.

[4] In reasons for judgment pronounced on July 21, 2023 (indexed as 2023 BCCA 298) the appeals were dismissed with costs to the respondents. The orders dismissing the appeals were entered on October 3, 2023. The appellants are seeking leave to appeal to the Supreme Court of Canada.

[5] On September 13, 2023, the applicant received a draft Bill of Costs from counsel for the respondents. The applicant was unable to obtain instructions from the appellants to the end of resolving and, ultimately, satisfying the costs awards.

[6] On December 8, 2023, the applicant filed Notices of Withdrawal on both appeals. On December 15 and 18, 2023, the appellants were served with filed copies of the Notices of Withdrawal on each of the appeals, including at the email address for service provided by the appellants on their Notices of Appeal. From what

I heard today, the Notices of Withdrawal may have subsequently been re-served, but nothing turns on this. As the appellants did not respond to the notices within the time allotted, the applicant has been permitted to withdraw as solicitor of record:

Rule 88(2)(b) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*Rules*].

[7] The only remaining step in the appeals before this Court is satisfaction of the costs award pronounced in favour of the respondents.

[8] The appellants do not oppose an order directing that the funds currently being held in the applicant's trust account be paid into Court. They submit, however, that the respondents' appeal costs should not be assessed until a matter unresolved in the original litigation (the amounts owed to or by Delane for common area expenses under its sublease with the respondent Tsawwassen Quay Market Corporation) have finally been determined. Proceedings in relation to that matter are ongoing in the Supreme Court. In addition, the appellants submit that security for appeal costs should not be paid out of court until the Supreme Court of Canada releases its decision on the leave application.

[9] Since the appellants filed their responsive materials in this matter, the Supreme Court of Canada has given notice that the leave application will be determined on March 14, 2024.

[10] For their part, the respondents do not oppose the order, but they are concerned about the prospect of the appellants making meritless applications for payment out of court prior to the assessment of their costs. They consent to the order sought on the condition that the security for costs not be paid out of court until its costs have been assessed.

[11] My jurisdiction to make the order sought is not contested by the applicant, the appellants or the respondents. I am satisfied I have jurisdiction under ss. 30(a) and (b) of the *Court of Appeal Act*, S.B.C. 2021, c. 6 [*Act*] to make the order sought. These provisions provide as follows:

30. In an appeal or other matter before the court, a justice may do one or more of the following:

- (a) make orders incidental to the appeal or matter not involving a decision of the appeal on the merits;
- (b) make orders or give directions for the purposes of managing the conduct of the appeal or other matter;

[12] The broad language used in these subsections is intended to empower a justice to make orders incidental to an appeal that are shown to be required in the interests of justice. I see no reason to give the language used by the legislature in ss. 30(a) and (b) an unduly restrictive meaning: see *Mott v. Pacific National Exhibition*, 2001 BCCA 731 at para. 30. The words “incidental to the appeal” encompass the making of an order “that has a minor or subordinate role in relation to the outcome of the appeal”: *Strata Plan 1229 v. Trivantor Investments International Ltd.* (1996), 24 B.C.L.R. (3d) 292 (C.A.), 76 B.C.A.C. 289 at para. 25. I consider the order sought on this application to be an order “incidental to the appeal”. Plainly, it is not an order involving a decision of the appeal on the merits. Further, I am satisfied it is in the interests of justice that the order be made.

[13] The applicant submitted that there is an additional source of jurisdiction for this application. He brings to my attention s. 18(2) of the *Act*, which provides that if a matter of practice or procedure is not addressed in the *Act* or the *Rules*, the practice and procedure of the court is to be regulated by analogy to the *Act* or *Rules* or, if there is no appropriate analogy, to the *Supreme Court Act*, R.S.B.C. 1996, c. 443, and *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [SCCR].

[14] Rule 10-3(1) of the SCCR addresses applications for interpleader relief. The purpose of the rule is to allow a person who has no interest in property, which is or may be the subject of a dispute, to divest themselves from the responsibility of holding that property. The consequence of granting interpleader relief is to transfer the property into the safekeeping of another so questions of entitlement can be resolved at a later date: *Neural Capital GP, LLC v. 1156062 B.C. Ltd.*, 2022 BCSC 1228 at para. 16 [*Neural Capital*]. While the court has broad remedial discretion on an application for interpleader relief, the usual relief is to order payment

or delivery of the property to the court, particularly where, as here, the property is money: *Neural Capital* at para. 29.

[15] In light of my reliance on s. 30 of the *Act*, I need not address the additional jurisdictional route raised by the applicant.

[16] In the result, I would allow the application and direct the applicant to pay into Court from his trust account the amount deposited as security for appellate costs plus accrued interest.

[17] I decline to order that the respondents' appeal costs not be assessed until the issue outstanding in the trial court is settled or until the respondents make further disclosure of boxes of materials said by Mr. Au Yeung to be relevant to the resolution of this issue. I see no connection between these two matters and no principled basis upon which I could make such an order.

[18] Further, I decline to impose the condition the appellants seek that security for costs not be paid out until the Supreme Court of Canada releases its decision on the leave application. As matters have developed, it is now clear that the leave application will be decided long before costs have been assessed, let alone paid out. If the leave application is dismissed, there is no impediment to the assessment and payout of appeal costs owed to the respondents. If leave is granted, I would, absent further order, leave to the Registrar the decision as to whether appeal costs should be assessed and paid out, or whether one or both of these steps should be deferred pending the conclusion of proceedings in the Supreme Court of Canada.

[19] To avoid further needless litigation, I would direct that, absent further order, no application for payment shall be made out until the respondents' costs have been assessed.

“The Honourable Mr. Justice Fitch”