

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Yang v. Shi*,
2023 BCCA 297

Date: 20230721
Docket: CA46449

Between:

Lihong Yang

Appellant
(Petitioner)

And

Li Shi

Respondent
(Respondent)

Corrected Judgment: The text of the judgment was corrected at para. 31
on July 26, 2023.

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

On an application to vary: Orders of the Court of Appeal for British Columbia,
dated June 6, 2023 (*Yang v. Shi*, 2023 BCCA 239, Vancouver Docket CA46449).

The Appellant, appearing on their own
behalf:

L. Yang

Counsel for the Respondent:

C. Shen

Written Submissions Received:

June 13, 14, 19 and 21, 2023

Place and Date of Judgment:

Vancouver, British Columbia
July 21, 2023

Summary:

Applications to vary the settlement by the Registrar of orders and his assessment of costs dismissed.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Nature of the Application

[1] The appellant, Lihong Yang, applies pursuant to s. 35(2) of the *Court of Appeal Act*, S.B.C. 2021, c. 6, and R. 63(2) of the *Court of Appeal Rules*, B.C. Reg. 120/2022, to: (1) vary the Registrar's settled orders and; (2) vary the Registrar's assessed costs.

[2] The respondent, Li Shi, opposes both applications and requests they be dismissed. Ms. Shi also seeks fixed costs.

[3] These application were heard by written submissions.

Background

[4] There is a lengthy history of litigation between these parties. To summarize the relevant proceedings, the underlying appeal concerns a residential tenancy dispute that began when Ms. Yang commenced a small claims action in November 2017. In July 2018, Judge Bakan ruled against Ms. Yang on an application concerning the manner in which witnesses would appear in her small claims action. Ms. Yang sought judicial review of that decision. On October 15, 2018, Justice Sharma dismissed the petition with costs payable to Ms. Shi. Master Baker assessed the costs payable to Ms. Shi in the amount of \$4,379.22. On January 11, 2019, Ms. Yang appealed Master Baker's decision on the assessment of costs. The appeal was heard by Justice Jackson who adjourned the hearing generally, with costs payable to Ms. Shi in the fixed amount of \$1,000 in any event of the cause; reset the matter to a mutually convenient date for both parties; and dispensed with Ms. Yang's approval as to the form of order. Ms. Yang sought to appeal those orders, and filed a notice of appeal on October 18, 2019. Leave to appeal was required, but not sought until September 2022.

[5] On October 28, 2022, Madam Justice Horsman sitting in chambers granted Ms. Yang an extension of time to bring her application for leave, but dismissed the application, and awarded costs to Ms. Shi (the “Leave Application Decision”): *Yang v. Shi*, 2022 BCCA 363. On April 4, 2023, a division of this Court dismissed Ms. Yang’s application to vary the Leave Application Decision order, and again awarded costs to Ms. Shi (the “Application to Vary Decision”): *Yang v. Shi*, 2023 BCCA 146.

[6] The parties appeared before Registrar Outerbridge on May 18, 2023 (*Yang v. Shi*, 2023 BCCA 239), to hear Ms. Shi’s application for an assessment of the costs of three hearings: the Leave Application Decision, the Application to Vary Decision and the costs assessment itself. Because Ms. Yang’s appeal was conducted both before and after the enactment of the current *Act* and *Rules*, the central issue was whether costs should be assessed under the current *Rules* or its predecessor. Registrar Outerbridge determined, with reference to the transitional provisions found in ss. 90–94 of the current *Rules*, that Ms. Yang’s appeal was not a “pre-existing appeal” commenced before July 18, 2022. The Registrar found that Ms. Yang’s notice of appeal did not formally commence the appeal, as an application for leave to appeal does not become an “appeal” until leave is granted and the appeal is brought. Here, Horsman J.A. did not convert the notice of appeal to a retroactive application for leave, and, regardless, leave was not granted. Accordingly, pursuant to the transitional provisions, the current *Rules* applied. He assessed costs under the new tariff in the amount of \$5,174.40.

Applications to Vary

Application to vary settled orders

[7] Ms. Yang contests the wording of the orders the Registrar settled on both the Application to Vary Decision and the Leave Application Decision. The impugned portions of these orders both read, in part: “THIS COURT FURTHER ORDERS that Li Shi do recover the costs of this application from Lihong Yang promptly after assessment”.

[8] The relief Ms. Yang seeks on this application is:

- For the language of the order on the Leave Application Decision to be changed to state: “IT IS ORDERED that the extension of time to file and serve the application for leave to appeal and application book is granted, and the application for leave to appeal is dismissed, with costs of this application to the Respondent.”
- For the language of the order on the Application to Vary Decision to be changed to state: “THIS COURT ORDERS that the application to vary the order of Madam Justice Horsman is dismissed with costs to the Respondent.”

[9] Ms. Yang says the original language in the orders made no comment on “authorizing the respondent to do anything to recover the cost[s]”. She says the Registrar does not have the ability to unilaterally change the order.

[10] Ms. Yang maintains that Ms. Shi initially agreed to this proposed language for the orders in April of 2023, in advance of the Registrar’s hearing. Ms. Yang refers to email correspondence with counsel for Ms. Shi, dated around this time, in which Ms. Shi’s counsel wrote, “I am willing to try a different wording but I am not sure it will be accepted by the court”. Ms. Yang contends this shows they had agreed on the language, and so there was no need to settle the orders.

[11] In response, Ms. Shi says there is no substantive difference between the orders as settled and the wording Ms. Yang suggests. Counsel for Ms. Shi says, referring to the April correspondence with Ms. Yang, that despite offering to try the wording Ms. Yang suggested, she still did not return signed orders, and so Ms. Shi accordingly proceeded to settle the orders.

Application to vary assessed costs

[12] Ms. Yang submits the Registrar erred in finding the appeal was not a “pre-existing appeal”. Ms. Yang concedes she mistakenly filed a notice of appeal when leave to appeal was sought, but submits that the Registrar erred in finding that

the notice of appeal was effectively a nullity. As I understand her argument, which is far from clearly articulated, she claims that the fact that she was able to rely in subsequent applications on documents filed in her initial notice of appeal serves as evidence that the appeal was “pre-existing” Ms. Yang requests this Court set aside the costs award on the basis that Ms. Shi’s action in this litigation amounts to abuse of process; alternatively, she submits her costs should be assessed pursuant to the former *Rules* in the amount of \$1,612.80, or under the current *Rules* in the amount of \$3,942.40.

[13] Ms. Yang also submits that no costs should be awarded for the hearing to settle the orders, as such a hearing is only necessary where the parties disagree on the form or content of an order. Ms. Yang relies on R. 68(1) of the *Rules* which reads:

- 68 (1) If the parties to an appeal do not agree on the form or content of an order, the parties must apply to the registrar to settle the order.
- (2) On application under subrule (1), the registrar may settle the form or content of an order, with or without a hearing and whether or not all parties attend the application hearing.
- (3) The registrar may refer a draft order to the division of the court or the justice who made the order.

[Emphasis added].

[14] Ms. Yang says the April correspondence with opposing counsel about the language to be included in the draft orders shows consensus. In her view, the cost assessment item 12 reading: “Preparation and entry of each order, including each application to settle an order before the registrar”, should accordingly be zero. In general, Ms. Yang is of the view that the steps Ms. Shi took, to have the orders settled and costs assessed, unnecessarily inflated the costs of the proceedings for which Ms. Yang is responsible.

[15] Finally, Ms. Yang also says she received Ms. Shi’s affidavit, dated May 18, 2023, the day *after* the hearing before the Registrar. Ms. Shi says this affidavit was prepared and brought to the hearing by Ms. Shi for the purpose of Ms. Yang’s

last-minute application to adjourn the May 18 hearing, and has no impact on the settlement of the orders.

Discussion

[16] In settling an order, the Registrar cannot add terms not pronounced by the Court, except by consent. A review of the Registrar's orders is governed by s. 35(2) of the *Act* and R. 63(2). Section 35(2) of the *Act* provides:

(2) A justice may vary or cancel an order or direction of the registrar.

[17] Rule 63 sets out the procedure for a party wishing to cancel or vary an order or direction of the Registrar.

[18] A review of the Registrar's order or direction is a deferential exercise. In *Wang v. The Owners, Strata Plan LMS 2970*, 2021 BCCA 255 (Chambers), Justice Voith described the approach to reviewing a Registrar's assessment of costs as follows:

[4] There appear to be relatively few reported decisions involving reviews of the Registrar's assessment of costs in this Court. In *Wright v. Sun Life Assurance Company of Canada*, 2015 BCCA 312, Justice Frankel, in chambers, described the standard of review as follows:

[10] The assessment of costs is discretionary and fact-specific; the relevant standard of review is whether the registrar erred in principle or was clearly wrong in assessing the costs. Generally, a reviewing judge accords deference to the registrar as the assessment of costs requires the registrar to draw on his experience in similar cases and to exercise his common sense. ...

[19] In *Lac La Ronge Indian Band v. British Columbia*, 2023 BCCA 117 (Chambers), Justice Skolrood contemplated the standard of review applicable to a review of scheduling decisions made by the Registrar:

[27] As Frankel J.A. noted in *Wright*, the assessment of costs is discretionary and fact-specific. This characterization applies with even more force to scheduling decisions made by the Registrar. The Registrar fulfills a number of administrative functions that are essential to the proper and efficient running of the Court, including making scheduling decisions: see for example, s. 37 of the *Act* and R. 35(1). As noted in *Wright* in respect of costs assessments, such decisions require the Registrar to draw on his experience

and common sense. In my view, such decisions are entitled to a high degree of deference.

[20] In my view, the same principles govern a review of the Registrar's discretion in settling orders. It is a fact-specific exercise, requiring the Registrar to draw on his expertise and experience in understanding how the Court has disposed of an issue. I am, accordingly, of the view that the Registrar is entitled to a high degree of deference in both his assessment of costs and in settling the orders.

[21] With that being said, this is arguably not a situation where the Registrar was required to exercise his discretion in any meaningful way. There is no substantive difference between the orders as settled and the wording Ms. Yang suggests. Contrary to what Ms. Yang suggests, the original orders *did* in fact authorize Ms. Shi to recover costs; the ability to do so inheres in the very nature of the costs orders made. There is absolutely no merit to her application to vary the orders the Registrar settled. The Registrar's decision is clearly correct.

[22] There is likewise no merit to her argument on the application to vary the Registrar's assessed costs. A Registrar may settle costs in accordance with ss. 44 and 46 of the *Act*. Though I appreciate Ms. Yang takes issue with the Registrar's conclusions, she can point to no error in his reasons. Ms. Yang refers to *I.J. v. J.A.M.*, 2013 BCCA 430 (Chambers), a decision in which Justice Frankel exercised his discretion to convert an improper notice of appeal to a notice of application for leave. That decision is of no assistance to Ms. Yang. A judge may have the jurisdiction to make such an order, but did not do so here. As the Registrar noted clearly in his reasons:

[11] I would further note the chambers judge did not exercise her discretion to convert the notice of appeal to stand retroactively as a notice of appeal seeking leave: see, e.g., *Bradley and Salloum v. Smith*, 2022 BCCA 342 (Chambers).

[12] However, even if it could be said the notice of appeal somehow stood as a notice of application for leave to appeal, leave was never granted. Accordingly, even under the most generous interpretation of the circumstances, the appellant does not have a "pre-existing appeal."

[23] Since leave was never granted, the appeal was never brought or “commenced”. Again, in my opinion, the decision of the Registrar was correct. He committed no error in his analysis.

[24] Further, it seems to me clear that the application to settle the orders was properly brought, and appropriate in the circumstances. Counsel for Ms. Shi communicated clearly that if signed orders were not returned, he would proceed to have the orders settled. Ms. Yang was notified that the consequence of arranging such a hearing would be that Ms. Shi would claim more units as a result of the further work required.

[25] Finally, the May 18, 2023 affidavit is a record of correspondence between the parties on setting a date for the hearing of the settlement of the orders. I do not see how it has any bearing on this issue.

Fixed Costs

[26] Ms. Shi submits fixed costs are appropriate in the circumstances, to reduce further time and expense of an additional hearing before the Registrar, and in anticipation of further litigious conduct by Ms. Yang resulting from any hearing. Ms. Shi seeks seven units for each application at bar, consisting of:

- i. 5 units: Item #6, #7, or #4 – for the preparation of response written submissions. Each item prescribes the same 5 units; and
- ii. 2 units: Item #12 – for entry of an order.

[27] This results in a total of 14 units for the applications. At a value of \$110 per unit, this totals \$1,540, plus \$184.80 in tax, for a sum of \$1,724.80. Ms. Shi seeks total costs of both applications fixed at \$1,500. Ms. Shi additionally asks for a direction to the Registrar to sign a certificate of costs for the fixed costs, if awarded.

[28] The former *Rules (Court of Appeal Rules, B.C. Reg. 297/2001)* provided for fixed costs at Appendix B, s. 4(1). The power to fix costs is retained in the current *Rules* through s. 45(1) of the *Act*, which allows a justice to make any order or

direction they consider appropriate in the circumstances, subject to the *Rules*; and s. 44(2)(b) of the *Act*, which allows a justice to direct the manner in which costs must be assessed. In *Dempsey v. Pagefreezer Software Inc.*, 2023 BCCA 202 at para. 51, Justice Voith fixed an amount of special costs directly, to avoid the cost and delay of a further hearing before the Registrar. Under the former *Rules*, this Court awarded fixed costs, so as to avoid the necessity of a hearing before the Registrar, where it was apparent the unsuccessful party would not agree to a proposed bill of costs: *Dawson v. Dawson*, 2013 BCCA 344 at para. 25.

[29] I agree with Ms. Shi that Ms. Yang’s behavior “exhibits the hallmarks of a vexatious proceeding”. These applications are devoid of merit. This is yet another iteration of what Justice Norell observed as Ms. Yang’s “pattern of blindly filing judicial reviews or appeals, without consideration of the costs to the courts or other parties, or the merits of these proceedings”: *Yang v. Shi*, 2020 BCSC 1857 at para. 96.

[30] Given the history of the proceedings thus far, and in particular the difficulties Ms. Yang has caused in settling costs, this is an appropriate case to award fixed costs. Since, this order amounts to an assessment of costs in respect of this aspect of the matter, I direct the Registrar to issue a certificate of costs.

Disposition

[31] I dismiss both applications to vary the Registrar’s settled orders and assessed costs. I order costs of this application to Ms. Shi fixed at \$1,500 for both applications. I direct the Registrar to issue a certificate of costs in the amount of \$1,500. I dispense with the requirement that Ms. Yang approve the form of this order, although it should be submitted to me for approval in the normal course.

“The Honourable Mr. Justice Harris”