In the Court of Appeal of Alberta

Citation: Jutt Management Inc v Legends Condo Development Corp, 2024 ABCA 367

Date: 20241118
Docket: 2403-0198AC
Registry: Edmonton

Between:

Jutt Management Inc., Somaya Kiana, Humza Tahir Jutt, Medicine Place Inc., Victor Fei, Nauman Jutt, Farooq Jutt

Applicants

- and -

Legends Condo Development Corporation

Respondent

Oral Reasons for Decision of
The Honourable Justice Jack Watson

Application to Extend Time to File Notice of Appeal

Oral Reasons for Decision of
The Honourable Justice Jack Watson

I. Introduction

[1] This is Court of Appeal file number 2403-0198AC, relating to seven underlying Court of King's Bench matters[1]. The applicants are the various participants in those matters.

II. Context

[2] The application is for an extension of time pursuant to Rule 14.8 of the *Alberta Rules of Court*, Alta Reg 124/2010, and supported by Rule 14.3(7) which is the incidental authority of single judges. The extension is for approximately six weeks and would run between the time of the decision made by the Court of King's Bench judge, which is under appeal, and the time that the appeal was filed.

[3] There is a factual circumstance, which is raised by counsel for the respondent, on the application concerning activities by the appellants between the date when decision was made on July the 5th and the actual launch of the effort to appeal. I will cover that momentarily when addressing the decision in ***Cairns v Cairns***, [1931] 4 DLR 819 which, along with many other authorities by this Court, has set out the criteria for assessing whether or not an extension of time should be granted in relation to an appeal.

[4] The characteristic that is important to mention in connection with this matter is that this appeal is taken from a judgment given on summary trial by Gill J which, as indicated, was on July 5th of 2024. That judgment has certain important elements to it, to which I will be referring.

[5] There was an indication in the materials, and counsel agree, that there were hundreds of pages of argument and evidence that were placed before Gill J that had come in on quite a number of occasions. That material involved 30 affidavits that were received by Gill J in advance of the trial and that there was, in fact, two different forms of argument, which I gather were presented to Gill J in the course of his dealing with the matter, including on July 3rd and 4th of 2024.

[6] The position relative to what was there for the content of the summary trial before Gill J is such that I am quite prepared to accept him at his word, that he had in fact, as indicated in his reasons, reviewed the material with attention. In speaking and giving his decision as to facts, he was therefore describing that material accurately.

[7] One of the arguments made on the motion is that the Court ultimately should find that there were errors of fact made by Gill J and one of those points – which I will address momentarily -

[1] These reasons have been edited from what was delivered orally for grammar, clarity and completeness and to include references and title lines.

concerns the question of a credibility finding. Such findings are always problematic when it is being done on affidavits as opposed to the usual *viva voce* basis.

[8] Gill J was, of course, aware that he was dealing with these matters on that basis and not on live evidence. Therefore, as I understand the situation, he was prepared to proceed on issues of credibility and so forth even if based upon documentary evidence. And, particularly, when the documentary evidence gives rise to a question of whether the interpretation of other documents or representations was reasonable. In that case, the decision does not really turn on credibility; it turns on reasonability and plausibility.

[9] At any rate, the motion that was made for an extension of time is based largely upon the suggestion that the delay in appealing was brief and, in fact, the various applicants for the extension of time were labouring under a misapprehension concerning how much time they had to launch an appeal. That misapprehension was, they argue, the consequence of inaccurate information or advice given to them by their trial counsel.

III. Discussion

[10] The ***Cairns*** test sets out the following criteria:

1. There was a *bona fide* intention to appeal while the right to appeal existed and that there was some special circumstance that would justify the failure to appeal;
2. There is an explanation for the delay and that the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the judgment regarding the position of both parties;
3. The appellant has not taken the benefits of the judgment from which the appeal is sought; and
4. The appeal would have a reasonable chance at success if allowed to proceed.

[11] That series of four points has actually, from time to time, been elaborated to five or six factors but essentially the common theme of all the cases returns to ***Cairns,*** which is now getting close to 100 years old and has some venerability in Alberta as a consequence.

a. *Bona Fide* Intention to Appeal

[12] In any event, going back to question number one, the application is for an extension of six weeks. The affidavit material that has been provided on the motion is complete in terms of the position taken by the lead defendant, you might say, who indicated that he was in fact speaking on behalf of the others in connection to this point and the affidavit of Mr. Odinga, who was counsel for the applicants at the trial.

[13] The situation there is that Mr. Odinga concedes that in fact, he provided certain advice to the applicants that, as mentioned before, was incorrect in so far as the amount of time they would have in order to appeal. Mr. Odinga went on to suggest, in the evidence that is in front of me, that he was not an appellate counsel and had not been for a long time. Consequently, there was some reason at least for the applicants to question whether or not they should get advice about what the time limits were for appealing so and so forth from a lawyer who does appeals.

[14] It is to be noted that the applicants in this instance are sophisticated businesspeople and would have at least some passing appreciations of the idea that, in court proceedings, there are limitations, and they have to comply with them. One of the arguments, therefore, going back to the first question in the ***Cairns*** case is whether or not there was a *bona fide* intention to appeal while the right to appeal existed.

[15] I am prepared to accept on the affidavits that, in fact, there was a *bona fide* intention to appeal. The applicants therefore satisfied that particular question in their favour. It is relevant to note that, in the context of the overall question which is ultimately the interest of justice which governs ***Cairns v Cairns*** and all the other cases, the applicants did very promptly start making preparatory steps after the decision on July the 5th in relation to their business.

[16] Whether that is related or not, I do not know. That was one of the arguments that was made. I am not going to make a finding in relation to that -- that the applicants did in some way act in a subversive or improper manner to react quickly[2]. It shows that the only relevance to the point is that, by starting to act on July the 8th, the applicants had some idea (and some degree of promptness was involved) in connection with the activities that had to follow as a result of the judgment of Gill J.

[17] In that respect, therefore, I do find that the applicants have made out a *bona fide* intention to appeal but that they did not quite act on *that bona fide* intention with as much alacrity as one might have thought would be sufficient to excuse or justify the failure to appeal.

[18] During the course of the debate on this issue, the question was raised of whether or not a person who is unrepresented or is subject to incorrect representation has to be given a little more wiggle room, you might say, in terms of pursuing their rights to appeal in this instance.

[19] In that discussion I observed that normally the other side of an appeal is not subject to the vagaries of the ineffectiveness of the counsel for the opponent. It is also true that, under ***Pintea v Johns,*** 2017 SCC 23 [2017] 1 SCR 470 and a line of authority from the Supreme Court of Canada and others, even an unrepresented person is required to familiarize themselves with Rules and understand those Rules in terms of proceeding in Court. However, as I have said before -- this is

---

[2] As pointed out in *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 34, [2015] 2 SCR 548, a conclusion of fact should be grounded on more than a "web of instinct".

perhaps somewhat too much in terms of detail on this topic -- I accept that there was a *bona fide* intention to appeal.

b. Explanation for the Delay / Serious Prejudice

[20] As far as the explanation for the delay and that the other side is not so seriously prejudiced by the delay, which is the second point in ***Cairns***, I referred to this issue about whether or not they really had an explanation for the delay because they could have gotten another lawyer right away. I turn however to the next point though, which is whether the other side was not so seriously prejudiced by the delay. Mr. Al-Khatib very eloquently points out for the applicants that the question of serious prejudice by the delay is in fact by the delay and not as a result of the appeal.

[21] Counsel for the respondent on the motion argues that, in fact, as per their written brief on this matter, there is kind of a log jam that is created by virtue of the existence of an appeal, which would be that it would stop any effort on the part of Legends to pursue an ancillary or collateral litigation in the Court of King's Bench related to certain bonds that were created for the deposits. Mr. Al-Khatib very ably responds that is life in the big city[3], in a sense, and that type of problem is not the kind of prejudice that is contemplated by *the delay* itself.

[22] There is some strength to the applicants' argument that that sort of prejudice is not what the delay under subparagraph two of ***Cairns*** is really intended to address. Therefore, I do not accept that basis for the respondent to oppose the grant of an extension of time in this case. It seems to me the prejudice that occurs in connection with matters of this sort, which is a kind of a financial prejudice, could have perhaps been addressed by things like security for costs or things of that sort which were not pursued by the respondent.

[23] So again, on the whole, I am satisfied that the respondent on the application is not so seriously prejudiced by the delay itself that it would be unjust to it for the extension to be granted.

c. Taking Benefits of the Judgment

[24] As to subparagraph three of the ***Cairns*** test – whether the appellant has taken the benefits of the judgment under appeal - there does not appear to be an issue on that aspect.

---

[3] Those were my words orally, not those of Mr Al-Khatib, who was in no sense casual about the matter and was speaking with professionalism throughout.

d. Reasonable Chance of Success if Allowed to Proceed

[25] So, the main question is whether the appeal would have a reasonable chance at success if allowed to proceed. In this respect, the question of reasonable chance of success or the various kinds or arguable merit standards has been variously thrown around over the years.

[26] People may overlook the fact that the Supreme Court of Canada in ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53, [2014] 2 SCR 633, at paras 74 and 75, provided a very helpful summary of what a reasonable prospect of success or reasonable chance and so forth is. As paragraph 74, Justice Rothstein said:

> … The common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. …

I pause to mention that the discussion of question of law was necessary because that had to do with the form of judicial view that was involved in the ***Sattva Capital*** case. But in order to decide whether a judgment should be set aside, Rothstein J continued:

> In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

So, Rothstein J's position in ***Sattva*** is that the way to describe "arguable merit" is that the issue raised by the applicant cannot be dismissed through the preliminary examination of the question of law.

[27] That is the position taken by counsel for the respondent on the application. He argues the appeal in this instance, in a sense, can be dismissed by a preliminary examination of the question of law or fact which are put forward on the appeal. Counsel for the applicants quite properly points out that a Notice of Appeal is not, in effect, a set of handcuffs and you can in fact move to amend a Notice of Appeal to change the grounds that are specified in it, if you are in a position of having an extant appeal.

[28] Elements of limitation that might apply to changing the grounds of a Notice of Appeal would be in relation to fairness to the other side in some way or another. It would also be subject to the limitation which this Court has adopted in many cases, including that brand new grounds of

appeal on issues that were not presented to the trial judge require permission to appeal to this Court[4].

[29] There was a considerable discussion during the course of oral argument of this matter whether or not certain grounds which are now being proposed by the applicants in support of the application for the extension of time were, in fact, clearly or specifically presented to Gill J.

[30] There is some disagreement between counsel on that point. And in fact, counsel for the respondent suggested that the particular points about agency and questions that I am just about to turn to, were not in fact pursued in precisely the same way before Gill J that they are being pursued today.

[31] Regardless, that would not be something that in and of itself would be a basis on which to deny an extension of time to appeal. Whether or not there was a proper organization of the argument at a trial would be something that an appeal panel would determine, not a single judge with an ancillary 'incidental' kind of a role to play.

[32] Turning back to the reasons for judgment given by Gill J, which had been referred to in argument as being fairly short, they very clear and actually quite well written for a judgment he presumably wrote overnight. His reasons are at the heart of the fourth point in the ***Cairns*** test.

[33] The telling point in connection with whether not the appeal fails to meet the test in ***Sattva*** – whether the issue can be dismissed on a preliminary examination - is found at page 3, line 41, to page 4, line 2, where Gill J states:

> Thirdly, the evidence shows that Mr. Hahn was not an agent or representative of the owner of Legends. There is also no evidence that Legends had any knowledge of the alleged representation.

[34] What Gill J is referring to there is the fact that, in the background of this matter, there was a series of condominium purchase agreements. The suggestion being made is why the applicants on the application, the defendants at the trial, felt that they were entitled to reject and not close on those various agreements and they suggest they had an understanding with Mr. Hahn, the realtor,

---

[4] The permission requirement is a gatekeeping step to ensure forensic fairness on appeal, which is a well-established point of principle. See for example *The "Tasmania" (Owners) v The "City of Corinth" (Owners)*, (1890) 15 AC 223/225 [UKHL] cited by Duff J along with many other cases in *Lamb v. Kincaid*, [1907] 38 SCR 516, [1907] SCJ No 19 (QL) at para 50; *Ibottson v. Kushner*, [1978] 2 SCR 858; *R v Perka*, [1984] 2 SCR 232/234 citing *Brown v Dean*, [1910] AC 373 and other cases. See also *Howell v Stagg*, [1937] 2 WWR 331; *Athey v Leonati*, [1996] 3 SCR 458 para. 51; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd*., 2002 SCC 19 at paras 33, 46 and 75, [2002] 1 SCR 678; *Cusson v Quan*, 2009 SCC 62 at paras 36 and 149 [2009] 3 SCR 712; *R v Mian*, 2014 SCC 54 at paras 28-42, [2014] 2 SCR 689. See also *Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anor*, [2023] UKPC 40 at paras 148-150, [2024] AC 727.

that they could in fact, deal with this matter as kind of a flip situation, rather than go through with the agreements in the traditional way - in dealing with Legends, the owner and you know, everybody closing and passing the money and so-forth.

[35] So, moving on from there, Gill J's decision, at pg 4/4-18, goes on:

> Fourthly, the alleged representation is unenforceable in the face of the entire agreement Clause, being Clause 10(a,) I just referred to. I also find that the alleged representation by Hahn also lacks credibility from the commonsense perspective. In the face of clear wording confirming that there is no representations or no other representations, why would the defence not take steps to amend the agreement or document the arrangement in some other way, to add this representation. Clearly under the purchase agreements the onus is on the defendants to add any new obligation.
>
> I also find the defendants suggestion that they believed they could buy and flip these condominiums without creating any documentation to substantiate to be quite incredible. In addition, it defies common sense as to why an owner would agree to pass on the profit from the flip to the purchasers. In summary I find that the defendants have not proven any representation was made by Mr. Hahn. There is therefore no merit to the allegations that representation, misrepresentation, or inducement. I also find that even if there was a representation made it is not legally enforceable against Legends.

[36] I emphasize this part of Gill J's judgment because, at this stage, it makes it unnecessary to locate the fact that one of the objections - one of the grounds of appeal against Gill J- was that there was not a proper basis on what he could accept Mr. Hahn's evidence and reject the applicants/ defendants at trial position that in fact Hahn made certain specified representations about what their rights would be, in connection with following through on any purchase agreement between Legends and themselves.

[37] It is pointed out by counsel against the applicants (defendants at trial) that there was no participation by Mr. Hahn as agent for Legends, directly. He was an agent for someone else. Secondly, he did not sign any of the agreements nor was a party to any of the agreements between Legends and any of the applicants/defendant. Whatever Mr. Hahn is supposed to have said to them, although he denied saying to them what they say he said to them, is not an issue which could be attributed against Legends.

[38] Returning to the sentence made by Gill J where he says: "I also find that even if there was a representation made it is not legally reinforceable [sic] against Legends". This raises a question of agency and Mr. Al-Khatib for the applicants ably switched to an argument that the effect of the

judgment of Gill J is to use the whole agreement Clause, which is Clause 10(a), to override the agency role that was being played by Mr. Hahn, on behalf of Legends, punitively, in this case.

[39] It seems to me that that is not a question of law; it is a question of fact[5]. Gill J rejected the idea that Mr. Hahn has made these representations anyway. But on the face of it and relying on the submissions made by counsel, there was no indication that the applicants/defendants had any reasonable basis to think that anything said by Mr. Hahn about a possible flip of the same properties before the closing day in some way invalidated or excused them from going through with the contracts that they signed with Legends.

[40] I have to say, based on that, it is not a question of law whether or not the whole agreement Clause overruled any kind of agreement between Hahn and Legends - or Legends and the applicants/defendants. There is no basis in the material before me nor evidently in front of Gill J, that in fact there was any reason for the defendants or respondents to think that somehow, anything that Mr. Hahn was saying was somehow binding on Legends.

[41] There was an issue as to whether or not there was a good faith concern here that was not argued before Gill J at any rate although counsel for applicants/ defendants did refer to it. It is true to say that in ***CM Callow Inc v Zollinger,*** 2020 SCC 45, [2020] 3 S.C.R. 908, the Supreme Court of Canada said that parties are not entitled to knowingly mislead each other about matters directly related to the performance of the contract.

[42] The situation here would be, if in fact Mr. Hahn had even made these representations, could this happen without any knowledge on the part of Legends, and would Legends be bound by it. I mention these representations in passing, as it does not appear to be clear enough to really have established a very valid contract anyway, but I set that aside for the sake of argument. In a sense that is what Gill J was saying. I cannot see any basis to think that he was incorrect.

[43] Gill J goes on to point out that it does not make any sense from the point of view of business practice that somehow Legends would just close their eyes to a side deal between Mr. Hahn and the purchasers, so that the purchasers would get any advance in value on the sale of those properties. Which is what Legends, as owner, was trying to sell for a profit.

[44] I can fully understand that -- as a matter of logic. Even if that's incorrect, it is simply the case that there is no basis to find that any representation by Mr. Hahn was legally binding on

[5] This would be evaluated by a panel of this Court under the standard of review of palpable and overriding error. In determining the prospects of an appeal for the *Cairns* test, the standard of review applicable to grounds of appeal is a relevant consideration: *Berro v Berro*, 2001 ABCA 157 at para 17, 286 AR 124; *Stoddard v Montague*, 2006 ABCA 109 at paras 20-21, 412 AR 88.

Legends. Inasmuch as in any kind of contract case, negligent interpretation of a contract by a party is not a defence to an allegation of breach of that contract by that party. That is what we have here.

[45] There is an alternative aspect, however, to the nature of the claim made by the applicants/ defendants in connection with the case and that is that they also allege, quite apart from whether or not Mr. Hahn's involvement in this had the effect they were hoping for, there were alleged deficiencies in connection with the performance of the contract and that in fact Legends had not, in a sense, delivered the goods that they were contracted to do because of variations.

[46] Gill J addressed that very specifically which, as I stated earlier, is a question of fact. He said that the defendants allegations were that the units were "not built to the specifications set out in the purchase agreements, specifically with respect to total square footage, windows, glazing, baseboards, heaters or other related built up materials and quality of finishing" He found the key deficiencies alleged relating to the square footage of the unit to be without merit and, in that respect, he refers to Clause 12 of the agreement, which again, would be one of those clauses reinforced by the whole Agreement Clause in Clause 10(a).

[47] Gill J's reasons basically conclude that a lot of these types of things which are said to be variations fall within Clause 12 as being something that the purchaser would be aware of. The specific Clause says, "The purchaser is aware, area measurements are approximate and based on architectural drawings and measurements", and then it goes on to say other details.

[48] The point that Gill J was mentioning was that none of those alleged defects, in connection with the purchase arrangement, would be sufficient to give the applicants/defendants the right to repudiate the contract in the way that they did. By that, I am not trying to use the word "repudiate" as a term of art; I simply mean that the "variations" did not support, as Gill J said, "a claim for rescission of the purchase agreement". He said, "in summary, I find that the claim for deficiencies is without merit. So, to summarize on liability I find that the plaintiffs have established that the defendants are in breach of their obligation to close under the purchase agreements", and then he turns to damages.

[49] My point, through all of this, is to say that I am quite satisfied that there is no merit on this application for an extension of time, simply because there is no reasonable chance of success on the appeal.

[50] This is not a reasonably arguable appeal. The points that were made by Mr. Al-Khatib on behalf of the applicants were as well put as they could be: the fact that he did Yeomans work, in terms of attempting to convert the trial that he inherited into something that was viable in argument on appeal. How unfortunately though -- and no other lawyer, as far as I can tell, could have done as good a job as this, in terms of attempting to do this on behalf of the client.

[51] But unfortunately, there is simply no substantiation to the appeal, and it has no reasonable chance of success. With that in mind and applying the various cases on extension of time applications, I am not satisfied that the extension of time should be granted. There is not a sufficient interest of justice in ensuring a full hearing of this appeal is conducted.

IV. Conclusion

[52] I thank counsel. I thank Mr. Al-Khatib; he did a great job but ended up with a bad book as they say. The application is dismissed.

[53] There was no discussion about the question of damages, by the way, and the question of costs. But it seems to me that the substance of the trial itself goes down and the question of damages would not have supported an independent appeal to this court, and I therefore will not dwell on that.

[54] In the end, the application, for all the applicants, is dismissed.

Appeal heard on September 18, 2024

Memorandum filed at Edmonton, Alberta
this 18th day of November 2024

Watson J.A.

Appearances:

Z. Al-Khatib
for the Applicants

S. Roberts
B. Kruk
for the Respondent