In the Court of Appeal of Alberta

Citation: Vuong Van Tai Holding v Alberta (Minister of Justice and Solicitor General), 2020 ABCA 169

Date: 20200501
Docket: 1903-0105-AC
Registry: Edmonton

Between:

Van Vuong Tai Holding and Van Vuong

Appellants

- and -

Minister of Justice and Solicitor General of Alberta

Respondent

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Barbara Lea Veldhuis

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Madam Justice Bielby
Concurred in by the Honourable Madam Justice Veldhuis

Appeal from the Decision by
The Honourable Mr. Justice D.R.G. Thomas
Dated the 1st day of March, 2019
Filed the 4th day of March, 2019
(2019 ABQB 146, Docket: 1903 03985)

Reasons for Judgment Reserved of
The Honourable Mr. Justice Slatter

[1] The appellants appeal a comprehensive vexatious litigant order made against them: ***Vuong Van Tai Holding/Q5 Manor v Krilow***, 2019 ABQB 146. The appellants were given permission to appeal the order, and since there was no effective respondent to the appeal, the Attorney General was invited to participate: ***Vuong Van Tai Holding Inc v Alberta (Minister of Justice and Solicitor General)***, 2019 ABCA 165. The appeal was argued with two other appeals raising related issues: ***Jonsson v Lymer***, 2020 ABCA 167 and ***Makis v Alberta Health Services***, 2020 ABCA 168.

[2] The principles underlying the granting of vexatious litigant orders are extensively reviewed in ***Jonsson v Lymer***. The order presently under appeal was granted without appropriate procedural protections, was not justified in the circumstances, and in any event the terms of the order were excessively broad.

[3] The corporate appellant is a residential landlord, owned by the individual appellant. On October 8, 2015 the corporate appellant commenced proceedings against one of its tenants, and was granted an order that the tenant pay the rent or give up vacant possession.

[4] The individual appellant, who is not a lawyer, appeared for the corporate appellant in court. The order recites that ". . . the Alberta Rules of Court currently prevent nonlawyers from appearing for corporations", and included this provision:

> 5. Except as permitted in this paragraph The Applicant, Van Vuong and Vuong Van Tai Holdings/Q5 manor, shall not make any further ab initio applications with regard to residential tenancy matters in the Court of Queen's Bench, without the written permission of the Honourable Associate Chief Justice. This consent is not required, for defending or disputing any applications brought by third parties, for registering any orders or judgments from the Provincial Court of Alberta, or the Landlord Dispute Resolution Service in the Court of Queen's Bench, or advancing any appeals.

Despite its literal wording, the intent of the order appears to have been that the corporate appellant had to retain counsel for any future court appearances. It appears that this provision in the order caused the Clerk of the Court to place the appellants' names on a list of litigants subject to such restrictions.

[5] In February 2019, the individual appellant filed an Originating Notice on behalf of the corporate appellant, without receiving the necessary consent. The proceeding was brought to the attention of the chambers judge, who indicated that he was "designated to respond to apparently abusive litigation" filed in Edmonton.

[6] The chambers judge proceeded without giving the appellants any notice, and without giving them any opportunity to respond, explain, purge their contempt or apologize. He concluded that the Originating Application was filed in contempt of the previous order, and that the appellants were:

> . . . not merely not cooperating with the Court and its processes to manage their litigation activity. They are ignoring them.

He concluded that stricter court access restrictions were appropriate. He struck out the Originating Application, and imposed a lengthy, boilerplate vexatious litigant order on the appellants: reasons at para. 13.

[7] Vexatious litigant orders should rarely, if ever, be granted *ex parte*: ***Lymer v Jonsson***, 2016 ABCA 32 at para. 3, 612 AR 122. There is no reason why the chambers judge could not have given the appellants an opportunity to explain their conduct. In the fresh evidence before this Court, the individual appellant deposes that English is not his first language. He thought the 2015 order merely prevented him from appearing in court, and did not prevent him from drafting pleadings. While he acknowledges drafting the pleadings, he deposes that he intended to retain counsel if the matter ever did go to court. The chambers judge may not have accepted that explanation, but the appellants were at least entitled to have an opportunity to present it.

[8] Secondly, notice of the intention to issue a vexatious litigant order was not given to the Attorney General. As pointed out in ***Jonsson v Lymer***, 2020 ABCA 167 at para. 32, this statutory requirement cannot simply be bypassed by invoking the inherent jurisdiction of the Court.

[9] Thirdly, a vexatious litigant order was a disproportionate reaction to what happened. The *Judicature Act*, RSA 2000, c. J-2, s. 23-23.1 requires "persistent" conduct before such an order is granted, and the circumstances of this appeal demonstrate why. The record discloses one instance of apparent breach of an order in earlier litigation in four years. Single instances of litigation misconduct call for single, focused remedies: ***Jonsson v Lymer***, 2020 ABCA 167 at para. 38. The vexatious litigant order could not be justified under the terms of the *Judicature Act*, and there was no sufficient basis for the Court to ignore the provisions of the statute when invoking its inherent jurisdiction.

[10] A more appropriate response would have involved:

(a) Giving the appellants notice of the apparent breach, and calling on them to show cause why they should not be held in contempt;

(b) Providing the appellants with an opportunity to present their explanation;

(c) If their explanation was not accepted, the appellants could have been reminded of their obligations under the 2015 order, and given an opportunity to undertake to the Court that they would abide in future; and

(d) If any further remedy was required for the contempt, the appellants were entitled to an opportunity to apologize and purge their contempt. Contrition is a significant mitigating factor in contempt proceedings, which are designed to ensure future compliance more than to punish: ***Demb v Valhalla Group Ltd***, 2016 ABCA 172 at para. 55.4, 38 Alta LR (6th) 15.

[11] It should be observed that there was nothing inherently improper about the underlying litigation commenced by the appellants. It was an unremarkable, conventional, orthodox, landlord and tenant lawsuit. There were no outlandish claims, "OPCA arguments", escalating pleadings, or hopeless litigation. The appellants are involved in a legitimate business, and it is foreseeable that from time to time they will have legal disputes with their tenants. As stated in the appellants' factum:

> The prospective appellants do not litigate for entertainment, out of spite, through an unnatural compulsion, or because of some other eccentricity. They go to Court to press their rights in the regular course of their business.

This is not an instance of facially unmeritorious, vexatious or abusive litigation.

[12] In any event, the terms of the order were excessively wide. It prevented the individual appellant from commencing any fresh proceedings. The root of the problem was said to be the requirement for the corporate appellant to be represented by a lawyer. The individual appellant has a right to be self-represented; there is no indication that he had ever started or prosecuted litigation on his own behalf in any inappropriate manner. Further, the order prevented the corporate appellant from commencing landlord and tenant proceedings in the Provincial Court, where proceedings through an agent are permitted.

[13] The order set out an elaborate procedure by which the appellants could obtain permission to commence new proceedings. Given that any new proceedings would likely be simple landlord and tenant litigation, the procedures were completely disproportionate to the problem. The only issue was that the corporate appellant could not commence proceedings without being represented by a lawyer. An order confirming the provisions of the 2015 order to that effect was all that was needed. If the corporate appellant was represented by a lawyer, no further controls were needed, at least not if the proceeding was a landlord and tenant dispute. There is no indication on the record that the appellants never commenced any other kind of litigation.

[14] The order included many "boilerplate" provisions which were not responsive to the circumstances. It provided that the appellants could only proceed in future using their proper names, not pseudonyms, but there is no indication on the record that they had ever done otherwise. It provided that the appellants could not commence new proceedings unless all prior costs awards had been paid, but there is no indication on the record that any costs awards had ever be made against the appellants, much less that they remained unpaid. The individual appellant was prohibited from providing legal advice, or acting as an agent or next friend of any third person; there is no indication that he had ever done so. Any fee waivers in his favour were suspended, but there is no indication that he ever had the benefit of one.

[15] Rule 2.23(4) of the *Rules of Court* has now restored the discretion of the Court to allow a right of audience to a non-lawyer: see ***Pacer Enterprises Ltd v Cummings***, 2004 ABCA 28 at para. 8, 26 Alta LR (4th) 241, 346 AR 161, citing ***Professional Sign Crafters (1988) Ltd. v Wedekind*** (1994), 19 Alta LR (3d) 53 at pp. 57-8, 153 AR 358:

> In order to place the issues in perspective it is important to distinguish between the inherent discretion of a superior Court to permit a non-lawyer to appear physically in Court or before a judge as a representative or advocate of another person (the "right of audience"), and the right of an individual to represent another person in respect of legal matters generally, that is, the right to practice law

The Court now has a discretion to permit an individual to speak in court on behalf of a corporation. Clause 5 of the order of October 8, 2015 is accordingly rescinded. To be clear, the enactment of R. 2.23(4) does not mean that non-lawyers have an unlimited right to represent corporations. The presumption is still that corporations must be represented by lawyers. Rule 2.23(4) merely restores the discretion of judges to give a right of audience in court to non-lawyers connected to the corporation: ***Pacer Enterprises*** at para. 13.

[16] In summary, the fresh evidence is admitted. The vexatious litigant order should not have been granted without notice, the record does not disclose a sound basis for granting such an order, and in any event the terms of the order were excessively broad. The appeal is allowed, and the vexatious litigant order is set aside. Clause 5 of the order of October 8, 2015 is rescinded.

Appeal heard on January 9, 2020

Reasons filed at Edmonton, Alberta
this 1st day of May, 2020

Slatter J.A.

I concur:

Bielby J.A.

I concur:

Authorized to sign for: Veldhuis J.A.

Appearances:

M.J. Marchen
for the Appellants

T. Hurlburt, Q.C.
for the Respondent