In the Court of Appeal of Alberta

Citation: Donn Larsen Development Ltd. v. The Church of Scientology of Alberta, 2007 ABCA 376

Date: 20071123
Docket: 0703-0259-AC
Registry: Edmonton

Between:

Donn Larsen Development Ltd.

Respondent (Respondent)

- and -

The Church of Scientology of Alberta

Applicant (Appellant)

Reasons for Decision of
The Honourable Mr. Justice Ronald Berger

Application for a Stay of Enforcement in Reliance upon Rule 508

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[1] The Applicant seeks a stay of enforcement in reliance upon Rule 508 of the *Alberta Rules of Court*. The relevant history of the litigation is as follows.

[2] The parties entered into a financial agreement dated July 26, 1999 which quantified the debt owed by the Applicant for unpaid rent.

[3] An application was heard by the Master on January 29, 2007, at which time the Respondent's motions for summary judgment, pursuant to Rule 159(1), and for summary dismissal of the Applicant's counterclaim, pursuant to Rule 159(2), were dismissed.

[4] That determination was appealed to the Court of Queen's Bench and heard *de novo* on June 28, 2007. The chambers judge, relying on ***Stott v. Merit Investment Corp.***, [1988] O.J. No. 134, concluded that the Applicant's allegation of defamatory libel as a foundational defence, and as the factual underpinning for its counterclaim, could not succeed primarily because there was no suggestion that this defence could be established on the evidence and, alternatively, even if it could be established, the Appellant should have acted long before it did. (Proceedings dated June 28, 2007, p. 56)

[5] The chambers judge was persuaded that the Respondent had established that it was plain and obvious that there was no genuine issue to be tried: ***Stott v. Merit***, ***supra***, and ***Radhakrishnan v. University of Calgary Faculty Association***, 2002 ABCA 182. Accordingly, he granted summary judgment to the Respondent in the amount of $325,691.26 with interest accruing at a rate of 1.5% per month from November 15, 2003.

[6] The test to be applied on an application for a stay of enforcement pending appeal is the tripartite test for interlocutory or injunctive relief as set out in ***Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.***, [1987] 1 S.C.R. 110 (S.C.C.):

> (a) The party seeking the stay must establish that there is a serious question to be determined;
> (b) It must be determined whether the party seeking the stay would suffer irreparable harm should the relief sought be refused, and
> (c) The court must assess the balance of convenience which involves determining which of the parties would suffer the greater harm from the granting or refusal of the stay pending a decision on the merits.

[7] Upon review of the substance of the decision appealed from, I am persuaded that the test for a stay of enforcement is not made out. That said, a number of the interventions of the chambers judge during the course of the hearing before him are said to have tainted the disposition.

[8] The thrust of the defamatory libel contention argued by the Applicant in the Court below, and

again before me, was that the impugned financial agreement which purported to set out the quantum of indebtedness of the Applicant to the Respondent was the product of threats and coercion. In support of its defence, the Appellant presented affidavit evidence from one of its members, Caroline Kristensen, that the principal of the Respondent, now deceased, had threatened to approach the media and generate bad publicity for the Applicant. It is alleged that he encouraged her not to consult legal counsel. When these arguments were advanced before the chambers judge, the following exchanges took place:

> MR. ODISHAW: They may not have wanted to sign the agreement because they didn't want to run the risk of bad publicity. They didn't want to run the risk of getting sued. But these are – this is a sophisticated organization. This has been –
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> THE COURT: Well, and it has had lots of bad publicity. I do not know that it is terribly concerned about that."
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> (Proceedings dated June 28, 2007, p. 17/16-22)
>
> ...
>
> MR. BROWN: And, sir, when you were commenting a moment ago, you made a very insightful comment during my friend's submissions. You said this Church has had a lot of bad publicity.
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> THE COURT: It has, but –
> MR. BROWN: And –
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> THE COURT: – whether it is justified or not is irrelevant but –
> MR. BROWN: Correct.
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> THE COURT: – we know it has had bad publicity. I was reading today about one of its members was trying to do a movie in Germany and was being prevented from acting there.
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> (Proceedings dated June 28, 2007, p. 34/7-19)
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> ...
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> MR. BROWN: Now, in my mind, in my submissions, sir, this case comes down to a sophisticated businessman, who, in my submission, takes advantage of the Church. He quits sending them invoices a year and a half in. He starts to allege over the course of 14 years a mounting debt without providing any documentation. He begins to threaten –
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> THE COURT: So what you are asserting is that you act for an

> unsophisticated client that is unacquainted with litigation and I think I can take judicial notice of the fact that the Church of Scientology has been involved in all kinds of litigation. I do not know what the results have been but I certainly have – one of the things I read about is the fact that the Church of Scientology has been involved in much litigation. So it is hard – I have difficulty accepting your sort of suggestion that they are unsophisticated. And that they were taken advantage of or bamboozled by a sophisticated business person."
>
> (Proceedings dated June 28, 2007, p. 52/16-53/7)

[9] The main issue is whether these comments give rise to a procedural error that provides a basis for an arguable appeal, and thus justifies a stay of enforcement pending that appeal. The two sub-issues are:

1. Do the judge's comments give rise to a reasonable apprehension of bias?
2. If so, what is the remedy?

[10] The Supreme Court's decision in ***R. v. R.D.S.***, [1997] 3 S.C.R. 484 provides the test for reasonable apprehension of bias. The elements of the test are as follows. First, the person considering the alleged bias must be reasonable and informed, with knowledge of the relevant circumstances, including the traditions of integrity and impartiality that judges are sworn to uphold. The reasonable person should also be aware of the social reality that serves as the background to the case (para. 111). Second, the apprehension of bias itself must be reasonable in the circumstances of the case. The threshold for finding a reasonable apprehension of bias is high (para. 111).

[11] The majority in ***R.D.S.*** held that judges are not required to discount their life experiences, but they drew a distinction between using the social context to ensure that the law evolves according to changes in social reality, and using social context to help determine an issue of credibility (paras. 119, 127). In particular, judges should not make comments that suggest a determination of credibility based on generalizations or stereotypes rather than specific demonstrations of truthfulness or untrustworthiness in a witness's evidence. Even though a particular generalization might be well-founded, a reasonable and informed person might perceive that the judge has relied on this information to assess credibility (paras. 132-34).

[12] In the case at bar, the judge's sole grounds for discounting the credibility of Ms. Kristensen's affidavit evidence seems to have been his general perception that the Church was experienced in litigation, was not unsophisticated and not easily "bamboozled". He stated that he was taking "judicial notice" of the Church's involvement in "all kinds of litigation". thus providing a strong indication that he considered his general perception to be akin to evidence. Further, in so concluding, it is unclear whether the chambers judge distinguished between the Church of Scientology in general and the particular branch of the Church, in this case the "Church of Scientology of Alberta".

[13] If a decision is tainted due to reasonable apprehension of bias, this arguably amounts to a jurisdictional error which renders the decision void rather than voidable. The usual remedy is to quash the decision and remit it for a rehearing before a properly constituted tribunal (Robert D. Kligman, *Bias* (Markham, Ontario: Butterworths Canada Ltd., 1998) at 58. The Supreme Court confirmed this in ***R. v. R.D.S.***, ***supra***:

> "99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. See *Curragh*, *supra* [[1997] 1 S.C.R. 537], at para. 5; *Gushman, supra* [[1994] O.J. No. 813], at para. 28. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. In the context of appellate review, it has recently been held that a 'proper drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held': *Curragh, supra*, at para. 5.
>
> 100 If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone, supra* [[1992] 1 S.C.R. 623], at p. 645; see also *Curragh, supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, 'it is impossible to render a final decision resting on findings as to credibility made under such circumstances': *Blanchette v. C.I.S. Ltd.*, [1973] S.C.R. 833, at p. 843. ..." [emphasis added]

[14] In my opinion, the impugned observations of the chambers judge afford to the Applicant an arguable foundation for success on appeal. Mindful also of the remaining arms of the test, I grant a stay of enforcement pending appeal subject to the time limits for the filing of the appeal books and factums which, if counsel cannot agree, will be fixed by the Court.

Application heard on November 9, 2007

Reasons filed at Edmonton, Alberta
this 23rd day of November, 2007

Berger J.A.

Appearances:

C.M. Odishaw
for the Respondent (Respondent)

C.J. Brown
for the Applicant (Appellant)