COURT OF APPEAL

Citation: *Versluce Estate* v. *Knol*,
2007 YKCA 08

Date: 20070705
S.C. No. 03-A0109
Registry: Whitehorse

BETWEEN:

**GENEVIEVE PIPER, EXECUTRIX
THE ESTATE OF HARRY VERSLUCE, DECEASED**

RESPONDENT

AND

LUCAS KNOL

APPELLANT

Before: Mr. Justice R.S. Veale

Appearances:

Gary W. Whittle — Counsel for the Respondent
Lucas Knol — On his own behalf

REASONS FOR JUDGMENT

INTRODUCTION

[1] Mr. Knol is appealing a judgment granted at trial dismissing his claim in contract for a residential property held by the Estate of Harry Versluce. Mr. Knol now applies for indigent status under Court of Appeal Rule 56 so that filing fees will not be required. Rule 56 first requires a finding that a litigant is indigent. It further states that even if a person is found to be indigent, fees will still be required if the appeal lacks merit, is scandalous, frivolous or vexatious or otherwise an abuse of process. Mr. Knol is

representing himself as he did at trial. The respondent also applies to have timelines set to bring the appeal to a hearing, or failing that be struck automatically.

[2] Mr. Knol filed an affidavit stating that he receives a gross monthly income of $600 from mining. He swore that he had no other assets except those set out in a Financial Statement which listed a 1979 Mercedes, valued at $1,000 and equipment valued at $800. The Financial Statement listed an asset described as “other” valued at $1,000. In a previous case in this court, Mr. Knol claimed ownership of two placer claims named Dodger 4 and 5. In that case, he recovered damages of $39,375 but claims he never collected more than $10,000. He then indicated that he owned 4 or 5 more claims on Hester Creek, where the Dodger claims are located in partnership with Jay Brown. He also recalled an additional claim. He further revealed that he has two vehicles in Whitehorse, a 78 Mercedes and a 79 Mercedes; neither of which were mentioned in his Financial Statement.

[3] I should advise at this point that the real financial issue for Mr. Knol is not court filing fees which will be several hundred dollars perhaps, but rather the $5,000 Mr. Knol says will be required for the fee for a transcript of the evidence at trial. Mr. Knol submitted a criminal case as authority for ordering his fees and disbursements to be paid by Legal Aid or the Attorney General. I advised Mr. Knol that this is based upon s. 684 of the *Criminal Code,* which empowers a judge to appoint counsel where “it is desirable in the interests of justice”. Fees are paid by Legal Aid or the Attorney General. There is no equivalent legislation in civil matters. There is no civil power similar to s. 684 of the *Criminal Code* to permit me to order payment of the transcript cost of $5,000. See *Jong* v. *Jong*, 2002 BCCA 322 and *S.B.* v. *Holmgren*, 2002 BCCA 553.

[4] I advised Mr. Knol that there is the principle of interim costs which was established by the Supreme Court of Canada in *British Columbia* v. *Okanagan Indian Band*, 2003 SCC 71, which attempts to increase access to justice in the rare case where the court wishes to mitigate severe inequality between litigants. There are three criteria set out at para. 40 to be met for such an award:

1. the person seeking interim costs cannot afford to pay for the litigation;

2. the claim is meritorious; and

3. the issues raised transcend the individual interest of the particular litigant, are of public importance and have not been resolved in previous cases.

[5] Even if these criteria are met, the court retains discretion on whether interim costs should be awarded. I should also say that the principle arose in a case involving a First Nation against government.

[6] I will deal firstly with the issues of indigency and merits and secondly with the issue of interim costs.

[7] The test for indigency is whether Mr. Knol's financial situation is such that requiring him to pay court filing fees would deprive him of the necessities of life or effectively deny him access to the courts. See *Ancheta* v. *Joe,* 2003 BCCA 374, at para. 7. Mr. Knol was not forthright in his affidavit about his assets. He did not mention his placer mining claims in the Klondike area, although he claims their value would not exceed $1,000 which is the value he stated for "other" in his Financial Statement. He failed to list two Mercedes vehicles that he owns in Whitehorse. Nevertheless, the

income that he does disclose would still place him in the indigent category, despite some misgiving I have about the extent of his assets. However, it is apparent that Mr. Knol thought he was proceeding to establish indigency pursuant to Appendix “C”, Schedule 1 of the Supreme Court *Rules*. This is not appropriate as Rules 38 and 56 of the *Court of Appeal Rules, 2005*, are the applicable rules. I have already summarized Rule 56. Rule 38, which recently came to my attention, states the following:

> An applicant for indigent status under Rule 56 must prepare, file and serve, in support of that application, an affidavit in Form 19.

[8] As a result, Mr. Knol’s filed financial materials are not entirely in conformance with an affidavit in Form 19 that he “must prepare, file and serve”. The filing of the appropriate information in Form 19 may shed further light on his financial situation. Accordingly, I am adjourning Mr. Knol’s application for indigent status generally until he files the appropriate information.

[9] There is also the issue of the merits of Mr. Knol’s appeal. His notice of appeal did not disclose the grounds of his application but he made oral submissions both on the credibility issue and the validity of his contract. I have read the decision of Gower J. He found Mr. Knol’s evidence to be “lacking credibility”. At para. 39, he stated “His testimony was at times inconsistent, argumentative, evasive and peppered with prevarication”. The latter word is defined as evasive or misleading. Gower J. recounted 10 examples. He also found the purported agreement void for uncertainty and without adequate consideration. He found there was no gift or adverse possession. Mr. Knol’s claim was dismissed with costs awarded to the Versluce estate.

[10] Mr. Knol's main ground of appeal is that the judge erred on the facts. Given the trial judge's finding on Mr. Knol's credibility, it would appear that his likelihood of success on appeal would be somewhat marginal. I think it is unlikely that Mr. Knol will persuade the Court of Appeal to reverse the factual findings of Gower J.

[11] Nevertheless, Mr. Knol also appeals the legal interpretation of the trial judge that his purported written contract is void for uncertainty and also fails for lack of consideration. It is in this aspect that Mr. Knol's appeal may have some merit as he has a written contract to rely upon. As with any contract, it is subject to interpretation and I cannot say that his appeal is completely without merit. However, despite my ruling that Mr. Knol provide the case law citations in support of his appeal, he has yet to do so and I await those citations as well.

[12] This leaves the matter of the transcript fee of $5,000 and whether it would be appropriate to award interim costs. Mr. Knol has yet to establish that he has met the first two criteria for interim costs, i.e. he cannot afford to pay for the litigation and his claim does not lack merit. But his case is decidedly a private matter between him and the estate rather than a matter of public importance that has not been resolved in previous cases. Thus, I conclude that he does not meet the criteria for an award of interim costs.

[13] Mr. Knol also applies for an *amicus curiae* to be appointed to assist him with the appeal. An *amicus curiae* can be appointed in three situations:

1. where there is a matter of importance before the court which could affect many other persons in which case the court might invite the Attorney General to appear. See *Shepherd* v. *HMTQ,* 2004 YKSC 31.

2. where one side to a litigation issue is not represented and it is desirable that the point should be considered where both sides are represented. See *Bank of Montreal* v. *Butler*, [1989] B.C.J. 871 (Q.L.) (C.A.).

3. where an unrepresented party should be represented. See *Kilrich Industries Ltd.* v. *Henri Halotier*, 2005 YKCA 04

[14] This application is for an *amicus curiae* to assist Mr. Knol. I indicated to Mr. Knol that this was not the usual reason for the appointment of an *amicus curiae*. Such an appointment has been made by me on one occasion where the issue was language rights for a party who needed counsel fluent in French. But this case does not raise issues of constitutional significance and it would not be appropriate to appoint an *amicus curiae* in a case which involves a purely private dispute without great public importance. This is not an appropriate case to appoint an *amicus curiae* or invite the Attorney General to do so.

[15] Mr. Knol also applied for an extension of time of 30 days to file a transcript and appeal record. I must also address the application of the Estate of Versluce to have deadlines set to bring this matter on for hearing as soon as possible so that the estate can be wound up. I note that the notice of appeal was filed on March 5, 2007, and no further steps have been taken. There is no express power in the *Rules* to dismiss an appeal for want of prosecution. There is the power under Rule 52(2) to extend or abridge timelines. Counsel for the estate also seeks an order abridging the timelines under the inactive rule to permit the appeal to be dismissed automatically if the timeline for setting the matter down for hearing is missed.

[16] I am reluctant to set a date that results in an automatic dismissal as numerous events can occur that the court would wish to consider before dismissing a case for missing court-ordered timelines. However, the appellant must pursue his appeal diligently in the interests of justice for both parties.

[17] I order the appellant to meet the following timelines:

1. that his Appeal Record, Appeal Book and transcript of the evidence be filed and delivered to the respondent no later than August 17, 2007;

2. that the factum of the appellant be filed and delivered no later than September 14, 2007;

3. that the factum of the respondent be filed and delivered no later than October 5, 2007;

4. that the certificate of readiness be filed and delivered no later than October 19, 2007.

The respondent may bring an application to place the case on an abridged inactive list or, alternatively to dismiss the appeal, if the appellant fails to comply with the order to meet the aforementioned timelines.

[18] Costs of this application shall be in the cause. I order that counsel for the respondent prepare and file the order without requiring the approval signature of the appellant. A copy of the order should be delivered to the appellant.

_____

VEALE J.