Case Name:

Alberta's Best Properties v. Barton

Between
Alberta's Best Properties and Chris Kuefler and Angela Kuefler, Appellants, and
Alison Barton, Respondent

[2010] A.J. No. 1045

2010 ABQB 589

98 C.P.C. (6th) 308

501 A.R. 339

196 A.C.W.S. (3d) 553

2010 CarswellAlta 1838

Docket: 1003 01226

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

D.C. Read J.

Heard: September 7, 2010.
Judgment: September 16, 2010.

(47 paras.)

Civil litigation -- Civil procedure -- Appeals -- Time to appeal -- Extension of time -- Appeal books and factums -- Application by landlord for extension of time to file transcripts dismissed -- Landlord filed Notice of Appeal from Officer's order but failed to file transcript as required by s. 23 of Residential Tenancy Dispute Resolution Service Regulations -- s. 23(2) provided relief where Court of Queen's Bench stated otherwise, so Court had jurisdiction to extend deadline -- Landlord showed

ongoing intent to appeal and 19-day delay not excessive or prejudicial -- However, error of law argued was Officer's refusal to grant further adjournments, which officer reasonably concluded was landlord's attempt to delay -- Appeal had no reasonable chance of success.

Landlord and tenant law -- Residential tenancies -- Legislation -- Application of legislation -- Landlord's obligations -- Fitness for habitation -- Residential tenancy boards -- Orders -- Abatement of rent -- Application by landlord for extension of time to file transcripts dismissed -- Landlord filed Notice of Appeal from Officer's order but failed to file transcript as required by s. 23 of Residential Tenancy Dispute Resolution Service Regulations -- s. 23(2) provided relief where Court of Queen's Bench stated otherwise, so Court had jurisdiction to extend deadline -- Landlord showed ongoing intent to appeal and 19-day delay not excessive or prejudicial -- However, error of law argued was Officer's refusal to grant further adjournments, which officer reasonably concluded was landlord's attempt to delay -- Appeal had no reasonable chance of success.

Application by the landlord for an order granting an extension of time to file transcripts. The tenant had obtained an order from the Residential Tenancy Dispute Resolution Officer for a return of her damage deposit and an abatement of rent. The landlord obtained adjournments prior to the hearing and was uncooperative in setting a date. During the hearing, the Officer refused the landlord's requests for a further adjournment. The landlord filed a Notice of Appeal and ordered the transcripts of the proceedings within one month. However, the landlord failed to file the transcripts with the brief as required, and the three-month deadline under s. 23 of the Residential Tenancy Dispute Resolution Service Regulations had expired. The tenant admitted she was not prejudiced by the delay but argued the deadline was mandatory and could not be extended.

HELD: Application dismissed. The Regulation provided an express time limit, so it could not be changed by the Court unless the same statute also gave the Court power to do so. Both ss. 23 and 28 of the Regulation used the word "shall", so made the deadline mandatory on plain reading. However, s. 23(2) allowed the Court to relieve the appellant of the requirement to file the transcript within three months "where the Court of Queen's Bench orders otherwise", so Legislature clearly intended to give the Court discretion. The landlord acted quickly in filing its Notice of Appeal and paid for the transcripts immediately, so demonstrated an ongoing intent to appeal. The delay was only 19 days, so was not excessive or prejudicial. However, the landlord's appeal was based on the argument that the Officer erred in law by refusing to grant further adjournments. The record supported the Officer's conclusion that the landlord was simply trying to delay matters, so the appeal had no reasonable grounds of success and an ext ension of time was not warranted.

Statutes, Regulations and Rules Cited:

Child Welfare Act, S.A. 1984, c. C-8.1,

Employment Standards Code, RSA 2000, c. E-9,

Freedom of Information Act,

Interpretation Act, RSA 2000, c. I-8, s. 28(2)(f), s. 29(2)(m)

Provincial Court Act, RSA 2000, c. P-31,

Residential Tenancies Act, R.S.A. c. R-17.1,

Residential Tenancy Dispute Resolution Service Regulations, Alta. Reg. 98/2006, s. 23(1), s. 23(2), s. 25(1)(a), s. 28

Rules of Court, s. 548

Counsel:

Brij Mohan, for the Appellants.

Arman Chak, for the Alison Barton.

Reasons for Judgment

1 **D.C. READ J.**:-- A landlord appealed to the Court of Queen's Bench from a decision of a Residential Tenancy Dispute Officer ("RTDO") but failed to file the transcript of the proceeding before the RTDO within the time period fixed by the legislation. The landlord applied to extend the time for filing the transcript.

Factual Background:

2 Alison Barton, applied to the Residential Tenancy Dispute Resolution Service on November 6, 2009 for return of a damage deposit paid to a landlord and for an abatement of rent from the landlord. She alleged that the landlord had allowed the rental property to become dilapidated and that poor ventilation caused a severe moisture problem, particularly in the winter months and mould developed. She claimed as well that the state of the property, particularly the windows, made the heating bills, paid by the Tenant, enormous.

3 Ms. Barton together with Benton Saunders and their children, (the "Tenant") rented a house from Chris Kuefler and Angela Kuefler in June of 2002. The rental agreement was documented by a written lease agreement which was renewed on November 20, 2002, for a period ending July 31, 2003. The tenancy continued, however, apparently on a month by month basis until the end of June 2009.

4 The monthly rental rate was originally $1100. A security deposit in the same amount was paid. By the time they left, the Tenant was paying rent of $1500 per month. The Tenant apparently always paid the rent to an entity called Alberta's Best Properties, however, notwithstanding that entity was not the named landlord on the lease agreement. The Kueflers apparently operate this entity. For the purposes of this judgment, I will refer to the Kueflers and Alberta's Best Properties as the Landlord.

5 Ms. T. Hodgkinson, a Residential Tenancy Dispute Officer ("RTDO") heard evidence in a hearing which took place over nine hours, on January 5, 2009. Mr. Kuefler attended by telephone. He requested and was refused an adjournment.

6 The matter had been previously adjourned at a hearing on November 18, 2009 before another RTDO. This adjournment was ordered at Mr. Kuefler's request because he complained he had not been properly served. Service had apparently been effected by leaving the material in a mailbox rather than by registered mail. Mr. Kuefler said he had not picked up the material until November 16 and had not had time to prepare his case. He acknowledged at the first adjourned hearing that he had received copies of all documents but asked to have them served upon him again at the address for service he provided at the first hearing. The RTDO who heard the application for an adjournment granted this request but ordered substitutional service as the address provided was a UPS store. He ordered there would be good service if the materials were sent to that address whether or not they were accepted.

7 At this first hearing, the RTDO attempted to get the parties to agree to a date for the rescheduled hearing. Mr. Kuefler refused to agree to a date. Consequently, the Tenant chose a date before re-serving the documents.

8 The hearing was rescheduled for January 5, 2010. The Landlord was re-served with all of the materials on December 23, 2009.

9 At the rescheduled hearing, Mr. Keufler attended by telephone. He applied for an adjournment numerous times during the course of the hearing for various reasons. These applications were refused.

10 Ms. Hodgkinson issued an order on January 13, 2010, accompanied by written reasons for the order. The order was certified and served on January 18, 2010. The Landlord filed a Notice of Appeal on February 8, 2010 and served it on February 12, 2010. The Landlord ordered the transcript of the hearing before both RTDOs and a receipt for payment of the transcript was filed on February 12, 2010. The transcript was not filed, however, until May 27, 2010, when it was filed together with the Landlord's brief in support of the appeal.

11 The Landlord and the Tenant are governed in respect to their dispute by the *Residential Tenancies Act,* RSA 2004, c. R-17.1 (the "Act") and by the *Residential Tenancy Dispute Resolution Service Regulation,* Alta Reg. 98/2006. (The "Regulation"). The Regulation sets out various

procedures to be followed by the Residential Tenancy Dispute Resolution Service and by the parties who apply to have their matters heard by RTDOs. Section 23 of the Regulation sets out the procedure for an appeal. By section 23(2) an appellant:

> ... shall, within 3 months from the date the notice of appeal is filed, file with the Court of Queen's Bench a transcript of the evidence heard before the tenancy dispute officer unless
>
> (a) the Court of Queen's Bench orders otherwise, or ...

12 Section 28 of the Regulation specifies that "if an appellant fails to comply with the requirements of section 23, the appeal shall be dismissed by the Court of Queen's Bench".

13 Both parties agree that the transcript should have been filed on May 8, 2010. The Tenant concedes that they are not prejudiced by the late filing.

Submissions of Counsel:

14 The Tenant submits that the Regulation is mandatory and does not give a judge of this Court any discretion to extend the time for filing of a transcript. The Tenant argues that appeal provisions set out in statute are substantive and that this Court has no discretion to relieve against non-compliance with the statutory requirements set out in the Regulation. Alternatively, the Tenant argues that if this Court does have such discretion, it must be exercised in accordance with the test set out in ***Cairns v. Cairns***, [1931] A.J. No. 76 and this test has not been met by the Landlord. On application of the test, the Tenant says that leave to extend time should not be granted.

15 The Landlord submits that this Court does have jurisdiction to extend the time for filing and I should exercise this discretion in favour of granting leave to extend the time in these circumstances. The Landlord references R. 548 of the Rules of Court and argues this provision permits the court to extend the time permitted for filing the transcript after the time has expired. Alternatively, the Landlord says that discretion can be found in the proper interpretation of the wording of the relevant provisions or by analogy to other legislation. The Landlord submits it does meet the requirements of the ***Cairns*** test.

Discussion and Decision:

16 Rule 548 does not apply here. The Rule refers to the ability of a court to enlarge or abridge time in "these Rules", "unless there is an express provision that this Rule does not apply". However, the time limit applicable here is not in a Rule but in the Regulation. The case law makes it clear that a court cannot change a time fixed by statute unless the statute expressly gives that power: ***J.U. v. Regional Director of Child Welfare***, 2001 ABCA 125, leave denied [2001] S.C.C.A. No. 381.

17 Rather the issue is one of statutory interpretation. If I have discretion to extend the time period requested, it must be found in the wording of the Regulation. Neither counsel was able to direct me to any decisions which have interpreted the provisions of s. 23 and s. 28.

18 The Landlord attempted to draw an analogy between the statutory appeal limits set out in the *Provincial Court Act*, RSA 2000, c. P-31, which provisions have been judicially considered, arguing that the line of cases should be followed, which cases consider the appeal provisions of the *Provincial Court Act* and which conclude on various bases that the Court of Queen's Bench does have the jurisdiction to permit late filing of an appeal from a decision of that Court.

19 The Tenant relies, as well, on decisions which interpret the appeal provisions of the *Provincial Court Act* but also made reference to decisions which interpret other statutes such as the *Employment Standards Code*, R.S.A. 2000 c. E-9 and the *Child Welfare Act*, S.A. 1984, c. C-8.1.

20 Before considering the interpretation of other legislation, the correct approach, in my view, is first to consider the provisions of this legislation. Both s. 23 and s. 28 of the Regulation use the word "shall", which connotes a mandatory requirement. Section 28(2)(f) of the *Interpretation Act*, makes it clear that the word "shall" is to be construed as imperative in any "enactment". Enactment means an Act or regulation: s. 28(1)(m). Clearly, the Regulation is an enactment as this term is used in the *Interpretation Act.*

21 Thus, by the plain wording of the Regulation, it appears that the Legislature intended to make the provisions of s. 23 mandatory. However, s. 23(2) permits this Court to relieve an appellant from the requirement to file a transcript of the evidence within three months of the filing of the notice of appeal where "the Court of Queen's Bench orders otherwise".

22 In my view, by providing this exception, the Legislature intended to permit this Court some discretion in terms of the requirement to file the transcripts. I note, that we are here dealing with the requirement for filing of the transcript and not the notice of appeal, itself. Section 28 of the Regulation draws no distinction between the filing of a notice of appeal and the other mandated steps to perfecting the appeal set out in s. 23 and requires the Court to dismiss the appeal for failure to comply with any of "the requirements of section 23". However, the Legislature did draw a distinction in s. 23. There is no provision similar to s. 23(2)(a) which gives the court any discretion to enlarge time periods for any of the other required steps in an appeal.

23 I find, based upon the wording of s. 23(2) that the Legislature did intend to give discretion to this Court to relieve against the time periods set out in section 23, insofar as the filing of transcripts is concerned. Further, unlike the case of the *Provincial Court Act*, the Regulation does not specify that an application to extend time must be brought before the expiration of that time set out for filing of the transcripts. Therefore, the two lines of cases respecting extension of time under the *Provincial Court Act* are of limited assistance in determining whether or not this court retains discretion to extend time.

24 On its plain wording, s. 23(2) of the Regulation gives this Court the discretion to relieve an appellant from the requirement of filing a transcript of the evidence heard before the tenancy dispute officer and does not require that the application for this relief be made within the three month period mandated for filing.

25 Having concluded that I have the discretion to grant the Landlord's application, even after the three month time period has lapsed, I turn now to the question of how that discretion should be exercised.

26 Although the application is to permit more time for filing of the transcript, in effect, it is similar to an application to extend time to appeal. Under the Regulation, the right of appeal is limited to "a question of law or of jurisdiction: s. 23(1). It is an appeal on the record and "no evidence other than the evidence that was submitted to the Dispute Resolution Service may be admitted": s. 25(1)(a). Therefore, if the proceedings before the RTDO have been recorded, the appeal cannot be heard until a transcript is obtained and both parties have had a chance to review it. Thus, if more time is permitted to file the transcript the appeal will necessarily be delayed.

27 Because the application, if successful, would extend the time for the hearing of the appeal, I conclude that the Tenant is correct in their submission that the test originally set out by the Court of Appeal in***Cairns*** is applicable here. The case is from 1931 and involves extending time to file a notice of appeal from a judgment giving custody of a child to a parent but, in my view, the principles set out in ***Cairns*** are applicable here. That ***Cairns*** remains good law is clear. It is frequently cited both in this Court and in the Court of Appeal: see for example ***Armstrong v. Armstrong*** 2006 ABCA 228. The test is relevant to different types of appeals and is not limited to matrimonial causes: see for example ***Royal Bank of Canada v. Lane*** [1990] A.J. No. 472 (C.A.).

28 In ***Armstrong***, C_t_, JA set out the test beginning at paragraph 15. The requirements may be summarized as follows:

a. The appellant must show a *bona fide* intention to appeal which was held before the time to appeal expired.

29 Here a *bona fide* intention to appeal appears clear. The Notice of Appeal was filed quickly and well within the required time. The Landlord paid for a transcript to be prepared, also within the required time.

b. There must be "some very special circumstance which serves to excuse or justify" the failure to appeal in time. In this instance, the failure is to file the transcript in time rather than a failure to appeal.

30 Counsel for the Landlord (not counsel who argued this application) falls on his sword in respect to this issue and admits that he did not read the Regulation and did not realize it required filing of the transcript within a certain time period. He says he relied upon the information provided

on the web site of the Residential Tenancy Dispute Resolution Service ("RTDRS") which, in its summary of the appeal procedure, did not mention the necessity of filing the transcript with the Court within a three month period. Counsel says the website was misleading and he was misled.

31 However, this web site, on its face, suggests that further information can be obtained elsewhere on the web site and, in fact, offers a link to a section called *Rules of Practice and Procedure* "for full details on how the RTDRS works". Further, the Regulation, itself, is widely available in electronic form from the Queen's Printer and other web sites and services. It also continues to be available in paper form. It is not obscure and it is difficult to fathom why a lawyer would not go further than a web site, which indicates that the information provided is not complete, to determine what the appeal requirements are.

32 Further, counsel admitted at the hearing that the transcript had been received on March 17, 2010. This was not a situation where receipt of the transcript was delayed because of some administrative or other problem. It appears that counsel had almost two months after receiving the transcript to do the necessary research and to comply with the Regulation. By failing to file until May 27, 2010, only shortly before the appeal was originally scheduled to be heard, and only filing it together with its brief, the Landlord gave the Tenant little time to review the transcript or to prepare their response to the appeal. The Landlord says there was no requirement in the legislation to serve the transcript. That may be. However, the appeal cannot proceed until both the appellant and the respondent have had a chance to review the transcript and prepare their case. The error made by counsel for the Landlord cannot now be called a special circumstance within the meaning of the ***Cairns*** case, *supra*.

c. The appellant must account for the delay.

33 The delay was some 19 days. It is not excessive.

d. The appellant must show that the respondent has not been seriously prejudiced by the delay so as to make it unjust to extend the time.

34 The respondent admits here that it has not been seriously prejudiced.

e. Has the appellant taken the fruits of the judgment?

35 The Landlord has not paid the amount ordered to be paid by the RTDO and has not asked for or been granted a stay. Counsel for the Landlord admits that it has been advantaged by this. Neither counsel provided me with any case law which says that failure to pay a judgment constitutes taking the fruits of the judgment under the ***Cairns*** test but it seems logical to me that it does.

f. The appellant must show he has a reasonable chance of success if allowed to appeal.

36 A number of grounds of appeal are set out in the Notice of Appeal. Nonetheless, the Landlord bases its argument to extend the time for filing of the transcript on one ground alone: the failure of the RTDO to grant an adjournment at the second hearing on January 5, 2010. They argue that the failure to grant the adjournment was a breach of the RTDO's duty of fairness in that it deprived the Landlord of its right to counsel and to prepare properly for the hearing.

37 While it would not be appropriate for me effectively to decide the appeal on its merits in considering the issue before me, nonetheless it is necessary to do some weighing of the evidence to determine if the Landlord has a reasonable chance of success if allowed to file the transcript and continue with his appeal.

38 The transcript reveals multiple attempts by the Landlord to obtain an adjournment. For the Landlord, Mr. Kuefler apparently sent a number of faxes to the RTDRS even before the hearing commenced, requesting a further adjournment. He set out a number of bases for his request including that he needed more time to prepare; needed more time to retain legal counsel; needed to file a *Freedom of Information Act* request to Alberta Health Services "and possibly other entities"; possibly needed to subpoena various entities from Alberta Health Services if they would not cooperate and possibly needed to subpoena "a whole whack of [other] people" including two un-named witnesses whom he said were out of the country until spring time; needed to arrange for telephone attendance of another witness that lived out of town; needed to locate digital photographs; needed to compile a videotape; needed to prepare and file a counterclaim; and needed to obtain or have time to prepare other additional items that he did not wish to disclose because "I wouldn't want to tip off the [Tenant]".

39 When the RTDO pointed out to him that he had had the materials since November 16 and could have retained counsel and prepared, Mr. Keufler said that he had much experience with landlord/tenant disputes and did not engage counsel until he was sure the appeal would not "disappear into the ether" by which he apparently meant, until he was certain that the Tenant was serious about advancing their appeal and not abandoning it.

40 The RTDO ruled that Mr. Keufler had had adequate time to retain counsel although she permitted a brief adjournment to allow Mr. Keufler to contact counsel. Mr. Keufler was successful in contacting counsel and he listened on the telephone for part of the hearing. Counsel was not permitted by the RTDO to make submissions. She also ruled that Mr. Keufler had had adequate time to prepare and do the other things he indicated he wished to do. She therefore refused the adjournment.

41 Mr. Keufler renewed his adjournment application on numerous occasions during the course of the hearing for various other reasons, including concerns about his own health.

42 The RTDO seemed to have concluded that Mr. Keufler's further requests for an adjournment were simply an attempt at delay and refused them on that basis.

43 Having reviewed the transcript, her decisions not to grant the adjournment do not seem unreasonable and is unlikely to constitute an error of law or jurisdiction. As a consequence, I conclude that the ground of appeal the Landlord relies upon is weak and does not have a reasonable chance of success.

44 In conclusion, the Landlord has not overcome a number of the mandatory hurdles (branches) of the traditional test for extending time in an appeal.

45 I read the Alberta cases as saying that absent special circumstances, the various parts of the traditional test must all be met. I do not see that any special circumstances apply here. If I am wrong, and it is a matter of weighing the criteria, there are few factors favouring the granting of more time to advance appeal and these are outweighed by those operating against giving more time.

46 I conclude that I should not extend time to file the transcripts and the application to do so is dismissed. As a consequence, the appeal will not be heard on its merits.

47 The Tenant is entitled to costs of this hearing.

D.C. READ J.