

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bentley v. Anglican Synod of the Diocese
of New Westminster,*
2011 BCCA 242

Date: 20110519
Dockets: CA037770, CA037771
Docket: CA037770

Between:

**Michael Bentley, Ethel Marion Campbell, Peter Chapman,
Zenia Cheng, Simon Chin, Krista Friebel, R. Patrick Greenwood,
Marie Kristine Klukas, Johnny Leung, David Ley,
Ruth Lin, Lanny James Reedman, Linda Seale, Anne Scheck,
David Kenneth Short, Trevor Howard Walters, and Shirley Wiebe**

Appellants
(Plaintiffs)

And

**Anglican Synod of the Diocese of New Westminster, and
Michael Ingham in his capacity as the Anglican Bishop of the
Diocese of New Westminster**

Respondents
(Defendants)

- and -

Docket: CA037771

Between:

**Eric Law, Stephen Wing Hong Leung, Annie Sheung Kan Tang,
Stephen Chi Him Yuen, and Winsor Wing Tai Yung**

Appellants
(Plaintiffs)

And

**Anglican Synod of the Diocese of New Westminster, and
Michael Ingham in his capacity as the Anglican Bishop of the
Diocese of New Westminster**

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Garson

On appeal from the Supreme Court of British Columbia, November 25, 2009
(*Bentley v. Anglican Synod of the Diocese of New Westminster*,
2009 BCSC 1608,
Vancouver Registry, Dockets S086372 & S087230)

Counsel for the Appellants: D.G. Cowper, Q.C.
W.S. Martin
K. Gammon

Counsel for the Respondents: G.K. Macintosh, Q.C.
T.A. Dickson

Place and Date of Hearing: Vancouver, British Columbia
September 13, 14, 15, & 16, 2010

Written submissions received: August 17 & 27, 2010 and
February 15, 23 & 28, 2011

Place and Date of Judgment: Vancouver, British Columbia
May 19, 2011

Written Reasons by:

The Honourable Mr. Justice Lowry (Page 6, para. 12)

Concurred in by:

The Honourable Madam Justice Garson

Dissenting Reasons by:

The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] Following the release of our reasons in these two appeals (see 2010 BCCA 506), the parties have supplemented their previous arguments with regard to the costs of this appeal and of trial.

[2] In the court below, the defendants sought costs at Scale C on the basis that they had been substantially successful and that the matter had been complex. The trial judge stated in his reasons that in response, the plaintiffs submitted that as trustees, they were entitled to be indemnified, as were the defendants, out of the trust properties; and alternatively, that the case was an appropriate one in which to make no order as to costs – i.e., that both parties should pay their own costs. The plaintiffs noted in particular that courts have on occasion declined to make cost orders in proceedings regarding church divisions, in order to promote “harmony”: see, e.g., *Chong v. Lee* (1981) 29 B.C.L.R. 13 (S.C.), *per* Hinds J., as he then was.

[3] In oral reasons delivered on June 29, 2010, the trial judge concluded that it was not appropriate for the plaintiffs to be indemnified from the trust property in this case, and rejected the argument that an “own costs” order would bring about harmony. He was satisfied that the defendants had enjoyed substantial success, and that the matter was of more than ordinary difficulty; and thus ordered that the defendants were entitled to costs at Scale C.

[4] In their written submissions filed February 15 of this year, the plaintiffs say that they did not ask the trial judge to make any order that they be indemnified out of the parish properties. They say they referred to the law relating to indemnification of trustees only “as support for the argument that in this case it was appropriate to make no order for costs.”

[5] In their original materials filed on August 17, 2010 in this court, the plaintiffs asserted that the trial judge erred in holding that the proceedings did not arise out of the administration of a trust, in holding that the proceedings were “in substance

for the collective benefit of persons who agreed with the plaintiffs” and therefore “in substance for their personal gain”; and that he had erred in concluding that the interests of harmony were not relevant to this case, given that the plaintiffs had agreed voluntarily to cease holding office as trustees “in light of the advice of the Court.”

[6] Now that this court has issued its reasons, the plaintiffs contend that the considerations in favour of making no order as to costs at trial are supported and strengthened by this court’s reasons. They note that the trial judge was found to have erred on several key issues, although not on the final question of whether a *cy-près* scheme should be ordered. They contend that they brought a “serious and legitimate issue as to the administration of the [parish] trust to court, that the church authorities “with equal propriety put forward a different view of the trust obligations”, and that given that all the parties consider themselves to be Anglicans in communion with the wider Anglican church, it would indeed be in the interests of harmony that no order as to costs should be made either in respect of the trial or the appeal.

[7] The defendants strongly oppose these arguments and in particular, submit that “there is simply no harmony to be preserved.” They contend that the ANiC is “obviously pursuing systematic litigation across the country as part of its attempt to remove church properties from the Anglican Church of Canada. If the appellants are entitled to pay for their litigation campaign from the parish corporations, the result will simply be litigation without end.” Further, they say the trial judge made no error in making the order he did and that there is no basis on which this court could or should intervene with the exercise of his discretion.

[8] With respect to the costs of the appeal, the defendants emphasize that they were substantially successful on the main appeal, although not in the *Chun* action, which was secondary to the main appeal. Again, they take issue with the plaintiffs’ position that they were simply seeking “clarification” of the trusts and how to carry out their duties as trustees and were acting generally in good faith

and as committed Anglicans. Overall, they say, neither harmony nor justice would be served by denying the defendants their costs.

Analysis

[9] It is my opinion that in determining whether an “own costs” order should be made, the trial judge erred in failing to consider the fact that although the plaintiffs were not “trustees in the ordinary sense”, they were nevertheless acting on behalf of a larger group of like-minded persons who were following their consciences in declining to accept a doctrinal position that is not the position taken by the majority of Anglican churches, either in Canada or worldwide. The fact that they are leaving their parishes does not logically negate the argument that such an order should be made in the interests of harmony. In my view, harmony in the larger sense would not be served by the trial judge’s order.

[10] I am therefore of the view that the plaintiffs’ appeal in respect of the trial judge’s order as to costs should be allowed and that the parties should bear their own costs of trial.

[11] For similar reasons, I would also order that the parties bear their own costs of the appeal.

“The Honourable Madam Justice Newbury”

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[12] I have had the opportunity to read in draft the reasons of Madam Justice Newbury with respect to costs and find that I take a somewhat different view. I would not order the parties to bear their own costs.

[13] I do not, with respect, consider the judge can be said to have erred in the result in awarding costs to the defendants despite the plaintiffs having advanced this litigation on behalf of like-minded persons in each of the four church parishes involved. I do not consider the law governing the indemnification of trustees who seek court direction with respect to trust property to have any application here. This action was brought by some, on behalf of themselves and others, for declaratory relief regarding their entitlement to the use of church property to further affiliation with the ANiC with which they have seen fit to align themselves. They have (apart from the secondary disposition of the *Chun* action) been unsuccessful. In my view, the usual order as to costs following the event should be made in this Court as it was in the trial court. While clearly driven only by matters of religious conscience, this action is, in the end, a dispute over property and, with respect to costs, should not be treated otherwise.

[14] I recognize that, as my colleague points out, on occasion the interests of promoting harmony have affected the awarding of costs in disputes arising out of divisions within a church, but this is not a case where it appears to me that consideration arises. I say that because the plaintiffs have described their differences with the Anglican Church of Canada with respect to the use of the church property as irreconcilable. Indeed, regardless of the outcome of the action, they are intent on disassociating themselves from the Anglican Church of Canada. The judge took the view there was no harmony to be preserved and there is no apparent basis on which it can be said his view in that regard was misguided.

[15] The defendants enjoyed substantial success at trial. Under Rule 57(9) (now Rule 14-1(9)), costs are awarded to the party that was substantially

successful, unless, having regard for the governing principles, the court's discretion is otherwise exercised, and s. 23 of the *Court of Appeal Act* is to like effect. In my view, the trial judge was not wrong in declining to exercise his discretion in favour of ordering the parties to bear their own costs, and it does not appear to me there is justification for exercising this Court's discretion differently in respect of the appeal.

[16] I would award the defendants their costs of the appeal proceedings in this Court on Scale 3.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Garson"