

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190709

Docket: A-415-18

Citation: 2019 FCA 200

Present: LOCKE J.A.

BETWEEN:

**AUDREY WANG aka NINI WANG aka NI YANG;
JUN YANG aka MICHAEL YANG; CANADA
ROYAL IMPORT & EXPORT CO. LTD.**

Appellants

and

**LOUIS VUITTON MALLETIER S.A.; LOUIS
VUITTON CANADA, INC.; CELINE; CHRISTIAN
DIOR COUTURE, S.A.; GIVENCHY S.A.**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 9, 2019.

REASONS FOR ORDER BY:

LOCKE J.A.

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190709

Docket: A-415-18

Citation: 2019 FCA 200

Present: LOCKE J.A.

BETWEEN:

**AUDREY WANG aka NINI WANG aka NI YANG;
JUN YANG aka MICHAEL YANG; CANADA
ROYAL IMPORT & EXPORT CO. LTD.**

Appellants

and

**LOUIS VUITTON MALLETIER S.A.; LOUIS
VUITTON CANADA, INC.; CELINE; CHRISTIAN
DIOR COUTURE, S.A.; GIVENCHY S.A.**

Respondents

REASONS FOR ORDER

LOCKE J.A.

[1] This is the second of three decisions released this day in the present appeal. This decision concerns the respondents' motion to strike the notice of appeal on the basis that it was filed outside the permitted time.

[2] As a preliminary point, I note that the appellants' submissions in the present motion were filed on behalf of all of the appellants. In view of my dismissal of the appellants' separate motion for an Order permitting the appellant Nini Wang to represent the corporate appellant, and in view of the fact that the other individual appellant (Michael Yang) does not appear to have signed the appellants' submissions in the present motion, these submissions will be treated as being those of Ms. Wang alone.

[3] The present appeal seeks to set aside an Order of the Federal Court (*per* Lafrenière J.) which dismissed the appellants' motion to set aside a Mareva Injunction against them. The Order of the Federal Court was communicated orally from the bench at the hearing on February 28, 2018. At that time, the Federal Court also ordered that the appellants provide affidavits concerning their assets. On the issue of costs, the Federal Court gave the parties time to make submissions before deciding, and indicated that "I will await those cost submissions before I issue my Order."

[4] As it turns out, the wait for a written Order and reasons was long. They were issued only on November 28, 2018. These reasons were then amended on December 5, 2018 because the original written Order failed to mention the obligation of the appellants to provide affidavits concerning their assets. The appellants filed their notice of appeal on December 17, 2018.

[5] The time for appealing the Federal Court's Order is provided for in paragraph 27(2)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which is reproduced here:

Notice of appeal

27 (2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(a) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

...

Avis d'appel

27(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

[...]

[6] Accordingly, the time allowed for filing the notice of appeal began to count upon “pronouncement” of the Order, and the deadline (other than with leave of a judge of this Court) was 10 days later.

[7] Ms. Wang argues that the appellants respected the deadline for filing the notice of appeal in that the time for doing so began to count on December 5, 2018 upon issuance of the amended Order, and the tenth day fell on a Saturday, such that the deadline was Monday, December 17, 2018. Ms. Wang notes that the appellants consulted the Registry of the Court in advance and were advised twice that December 17, 2018 was indeed the deadline.

[8] The respondents argue that the Order under appeal was pronounced on February 28, 2018 when the appellants' motion before the Federal Court was dismissed orally from the bench, and that the time for filing the notice of appeal began to count on that day. The respondents argue that the subsequent issuance of reasons and an Order in writing (including with regard to costs) does not affect the deadline for appealing the oral Order. The respondents argue that the time for filing the notice of appeal expired in March 2018, long before it was actually filed. The respondents also argue that the appellants have not sought a deadline extension, and that no extension should be granted. The respondents further argue that the Court should pay no heed to advice the appellants may have received from the Registry. The respondents note that the appellants were represented by counsel at the relevant time. Moreover, the respondents argue that any advice the appellants received from the Registry could be relevant only to the issue of costs (which was not addressed orally) and not to the issue of the dismissal of the appellants' motion to set aside the Mareva Injunction.

[9] The question of when the time for filing the notice of appeal began to count is not easily answered. The word "pronouncement" in paragraph 27(2)(a) of the *Federal Courts Act* is not defined. However, Pelletier J.A., in 2786885 *Canada Inc. v. Canada*, 2010 FCA 224 at para.10 stated that "[t]he jurisprudence of this Court is to the effect that where judgment is pronounced orally in public, the time for the filing of a notice of appeal commences to run as of that time."

[10] On the other hand, the Federal Court's statement that it would await submissions on costs before issuing an Order suggests that the Federal Court may have intended that its Order not have effect until the written Order was issued. On this point, it is relevant to note the following

passage from the decision of Sharlow J.A. in *Canada Trustco Mortgage Company v. Canada*, 2008 FCA 382 at para 4 [*Canada Trustco*]:

... Normally, in the case of a judgment rendered in writing by a judge of a superior court of record, a judgment would be considered to be “pronounced” when it has been signed and recorded by the registry. The latter step is often referred to as “entering” the judgment into the record of the court. ...

[11] It should be noted that *Canada Trustco* did not concern an oral judgment. Nevertheless, the circumstances in this case introduce some doubt as to when the Order was pronounced.

[12] Further doubt comes from the wording of Rule 392(2) of the *Federal Courts Rules*, SOR/98-106, which is reproduced here:

Effective time of order

392(2) Unless it provides otherwise, an order is effective from the time that it is endorsed in writing and signed by the presiding judge or prothonotary or, in the case of an order given orally from the bench in circumstances that render it impracticable to endorse a written copy of the order, at the time it is made.

Prise d’effet

392(2) Sauf disposition contraire de l’ordonnance, celle-ci prend effet au moment où elle est consignée et signée par le juge ou le protonotaire qui préside ou, dans le cas d’une ordonnance rendue oralement en audience publique dans des circonstances telles qu’il est en pratique impossible de la consigner, au moment où elle est rendue.

[13] I am not prepared to conclude whether this provision affects the time for filing an appeal or simply the date at which an Order takes effect. However, it is not clear whether the Order under appeal in this case was made in circumstances that rendered it impracticable to endorse a written copy thereof at the time it was made.

[14] In the end, I have concluded that the respondents' motion to strike should be dismissed because, even if the deadline for filing the notice of appeal was not respected, it should be extended to the date the notice of appeal was actually filed. My reasons for this conclusion are set out in the following paragraphs.

[15] I begin with the legal test. It has been discussed many times in this Court and in the Federal Court. I quote from *Ontario Federation of Anglers and Hunters v. Alderville Indian Band*, 2014 FCA 145 at paras 29 and 30 [*Anglers and Hunters*]:

[29] The following factors bear upon the question whether this Court should grant the extension of time:

- (1) a continuing intention to pursue the appeal;
- (2) potential merit to the appeal;
- (3) the absence of prejudice to any party to the appeal; and
- (4) a reasonable explanation for the delay.

See *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.); *Canada (Attorney General) v. Larkman*, 2012 FCA 204 at paragraph 62. The importance of each factor depends upon the particular circumstances of the case.

[30] Further, not all of these four factors have to be resolved in the appellant's favour. For example, "a compelling explanation for the delay may lead to a positive response even if the case against the judgment appears weak, and equally a strong case may counterbalance a less satisfactory justification for the delay": *Grewal, supra* at page 282. In certain cases, particularly in unusual cases, other questions may be relevant. The overriding consideration is that the interests of justice be served. See generally *Grewal*, at pages 278-279.

[16] The respondents note that the appellants have not sought an extension of time to file their notice of appeal. The respondents also argue that none of the factors for consideration favours granting an extension of time.

[17] The appellants' failure to request an extension of time is not determinative. Paragraph 27(2)(a) does not indicate that a request from a party is a prerequisite to granting an extension of time. This distinguishes an extension of time to file a notice of appeal from an extension of time pursuant to Rule 8(1) of the *Federal Courts Rules*, which contemplates a request by motion. Accordingly, the Court may consider a deadline extension in this appeal on its own motion.

[18] As regards the continuing intention to pursue the appeal, the respondents argue that there is no indication that the appellants had an intention to appeal back in March 2018. They argue that, in fact, it appears that the appellants formed the intention to appeal only upon issuance of the written Order.

[19] I agree that there is no indication that the appellants originally intended to appeal the Order of the Federal Court, and that this factor favours denying an extension of time. But this situation shows part of the appellants' difficulty due to the long passage of time between the oral judgment and the written Order with the award of costs. The appellants might well have decided around the time of the oral judgment that, for practical reasons, they did not wish to appeal. However, they might well have decided to revisit that original decision in view of the fact that the terms of the written Order were substantially different from those of the oral judgment, for example with regard to costs. Such a change of strategy would not be illegitimate. This situation highlights an inherent problem with allowing a long period of time between an oral judgment and a written Order confirming the oral judgment. This problem can be serious, especially where the written Order adds important terms that were not included in the oral judgment. While this practical difficulty does not affect my conclusion concerning the factor of continuing intention to

pursue the appeal, it is relevant to the overriding consideration that the interests of justice be served. This overriding consideration is discussed below.

[20] Moving on to the next factor identified in *Anglers and Hunters*, the respondents argue that the appellants have not shown any potential merit to their appeal. Though Ms. Wang's submissions set out various issues that she argues were not properly considered by the Federal Court, many of those issues are either irrelevant or unsupported. Ms. Wang's submissions are not clear enough, in my view, to meet the onus the appellants bear to show that there is potential merit to the present appeal. I conclude that this factor favours denying an extension of time. That said, the appeal may have some merit that has not been shown. In addition to being untrained in the law, it is clear that Ms. Wang is not comfortable with the use of the English language, at least in writing. The failure to show potential merit in the appeal may be due to these handicaps rather than a real lack of merit.

[21] The respondents assert that they will suffer prejudice if the time for filing the notice of appeal is extended. I find the respondents' assertions in this regard vague and unconvincing. For example, it may well be that the respondents, as they allege, proceeded for months on the basis that the Federal Court's Order and the Mareva Injunction would stand. But there is no detail concerning the prejudice that allegedly arose as a result of the late filing of the notice of appeal.

[22] The respondents also argue that they are prejudiced by the appellants' failure to pay costs awarded forthwith by the Federal Court in the written Order and reasons. In my view, the failure to pay these costs is a question of compliance with the Order under appeal, not one of whether

prejudice to the respondents occurred that should lead to the denial of an extension of time to appeal. In addition, I note that, though the Federal Court's reasons indicate that costs of the appellants' motion to set aside the Mareva Injunction were payable forthwith, the Order itself does not so provide. This apparent inconsistency was not corrected in the amended Order. Accordingly, it is not clear that those costs were indeed payable forthwith.

[23] It does not appear that there will be any prejudice to the respondents if the time for filing the notice of appeal is extended. Therefore, I conclude that this factor favours granting an extension of time.

[24] Finally, the respondents argue that the appellants have provided no reasonable explanation for their delay in filing the notice of appeal. I disagree. In my view, Ms. Wang has explained the circumstances that led to the delay in filing the notice of appeal, and that explanation is reasonable. The appellants likely decided initially either not to appeal (possibly because they had not yet seen the award of costs) and later changed their minds, or to wait for a written Order before filing a notice of appeal. At that time, they could not have expected that a written Order would not be issued for nine months. Though the appellants might have acted more quickly to appeal the dismissal of their motion to set aside the Mareva Injunction, I find the explanation for the delay reasonable in the circumstances. This is particularly so in view of the large award of costs that was not known to the appellants until November 28, 2018. Accordingly, I conclude that this factor favours granting an extension of time.

[25] As indicated above, the overriding consideration in determining whether an extension of time should be granted is that the interests of justice be served. Though two of the factors mentioned above favour denying an extension of time, I conclude that the factors favouring the extension should prevail. Though this is a close call, I am sensitive to the likelihood that the Federal Court's delay in issuing a written Order had an important effect on the appellants' failure to file a notice of appeal in March 2018, and that this delay may have led the appellants into error. In my view, they should not be denied the right to appeal because they waited until the Federal Court had issued a written Order, including its ruling on costs. The appellants should not be faulted in this case for treating the timing of their appeal with no more urgency than did the Federal Court in issuing its written Order. I am also sensitive to the appellants' challenges in setting out the merits of their appeal. On balance, I conclude that the present appeal should not be stopped here.

[26] The respondents argue that, even if the Order under appeal was not pronounced until the issuance of the written Order on November 28, 2018, the filing of the notice of appeal was still out of time since the deadline based on that date was Monday, December 10, 2018. My conclusion on the present motion and much of my reasoning set out above would be the same if I considered an extension of time from that date. Also, the extension of time in that event would be minor (only seven days).

[27] Accordingly, I will dismiss the respondents' motion to strike, and grant an extension of the time for filing the notice of appeal to the date that it was in fact filed.

[28] Though the respondents have been unsuccessful in their motion to strike, I will not award costs against them in this motion. In my view, the motion was reasonable, and almost successful, given (i) the arguable lateness of the filing of the notice of appeal, (ii) the failure of the appellants to request an extension of time for filing, and (iii) the failure of the appellants to show either a continuing intention to pursue the appeal or potential merit to the appeal. I am also concerned about incidents noted in the Order under appeal in which the appellants have apparently failed to respect orders of the Federal Court.

"George R. Locke"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:

A-415-18

STYLE OF CAUSE:

AUDREY WANG aka NINI WANG
aka NI YANG; JUN YANG aka
MICHAEL YANG; CANADA
ROYAL IMPORT & EXPORT CO.
LTD. v. LOUIS VUITTON
MALLETTIER S.A.; LOUIS
VUITTON CANADA, INC.;
CELINE; CHRISTIAN DIOR
COUTURE, S.A.; GIVENCHY S.A.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:

LOCKE J.A.

DATED:

JULY 9, 2019

WRITTEN REPRESENTATIONS BY:

Nini Wang

FOR THE APPELLANTS

Karen F. MacDonald
Mathew D. Brechtel

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Norton Rose Fulbright Canada LLP
Vancouver, BC

FOR THE RESPONDENTS