

**CITATION:** Davies v. The Corporation of the Municipality of Clarington et al,  
2019 ONSC 6895  
**COURT FILE NO.:** DC-18-1133  
**DATE:** 20191206

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Bonnie Davies

Plaintiff (Appellant)

– and –

The Corporation of the Municipality of  
Clarington, VIA Rail Canada Inc., Canadian  
National Railway Company, Timothy  
Garnham, The BLM Group Inc., Apache  
Specialized Equipment Inc., Apache  
Transportation Services Inc., Blue Circle  
Canada Inc., and Hydro One Networks Inc.

Defendants (Respondents)

)  
)  
)  
) Jeffrey Wm. Strype, for the Appellant  
) Christopher Zuber  
)

)  
)  
) Stephen J. MacDonald, for the Respondent  
) Hydro One Networks Inc.  
)

) Thomas J. Hanrahan, for the Respondent  
) VIA Rail Canada, Canadian National  
) Railway Company,  
)

) Alon Barda, for the BLM Group  
)

) A. Sciacca, for Timothy Garnham, Apache  
) Specialized Equipment Inc. and Apache  
) Transportation Services Inc.  
)  
)  
)  
)  
)

) **HEARD:** November 27, 2019

**WOODLEY, J**

**OVERVIEW**

- [1] The Appellant, Christopher Zuber, brings this motion for an order setting aside the Registrar's Order dated July 15, 2019, dismissing the appeal of the Judgment of Justice M.E. Edwards dated July 16, 2018, and for an order extending the time to perfect the appeal.

## **FACTS**

### **The Derailment Accident and Class Action**

- [2] On November 23, 1999, a VIA passenger train heading eastbound from Toronto to Montreal was involved in a train derailment accident in Bowmanville, Ontario.
- [3] In early 2000, a class action was commenced relating to the derailment accident which action was certified by Order of Justice MacKinnon on August 30, 2000.
- [4] The Appellant, Christopher Zuber (“Zuber”), who is a Polish Australian national, was a passenger on the train and a member of the class action.
- [5] On April 5, 2006, Justice J.E. Ferguson dismissed the action against the Defendant Blue Circle Canada Inc.
- [6] The issue of liability relating to the derailment accident was resolved between all remaining Defendants

### **The Appellant’s Trial and Reasons for Decision**

- [7] The Appellant Zuber alleged that he sustained permanent and serious personal injuries as a result of the accident. Zuber elected to have his individual claim, limited to quantification of damages, proceed to trial.
- [8] On November 17, 2014, Zuber’s trial commenced before Justice M.E. Edwards. The trial proceeded for 26 non-continuous weeks spanning from November 2014 to May 2017.
- [9] On July 16, 2018, Justice Edwards released his Reasons for Decision which awarded Zuber general damages of \$50,000 plus pre-judgment interest with no award for past or future income and no award for past or future care costs.

### **The Appeal**

- [10] On August 14, 2018, Zuber delivered a Notice of Appeal to the Ontario Court of Appeal.
- [11] On August 16, 2018, Zuber delivered an amended Notice of Appeal to the Court of Appeal.
- [12] On December 3, 2018, the appeal was transferred from the Court of Appeal to the Divisional Court, on consent, by Order of Justice Huscroft.
- [13] On December 17, 2018, the parties appeared before Justice Edwards to argue the issue of the costs of the trial.

- [14] On January 14, 2019, the parties, together with two non-parties (litigation loan participants), appeared before Justice Edwards to provide submissions as to the litigation loan parties' involvement in the costs proceeding.
- [15] On March 8, 2019, the parties (without the litigation loan participants) attended before Justice Edwards to make further submissions regarding costs.
- [16] On April 15, 2019, Justice Edwards released his Costs Decision which awarded the Defendants costs of \$2,562,000.00, payable before set-off. Justice Edwards reserved on the issue of "whether any or all of the loan providers has any responsibility for the costs awarded to the Defendants".
- [17] At the date of the hearing of the within motion, the issue relating to the "responsibility of the litigation loan providers for the costs awarded" had not been determined by Justice Edwards.

### **The Registrar's Dismissal of the Appeal**

- [18] On May 21, 2019, the Registrar of the Divisional Court delivered a Notice Dismissing Appeal that advised that pursuant to Rule 61.13(2.1) of the *Rules* the appeal would be dismissed for delay, with costs, on June 11, 2019, unless it was perfected within 10 days after service of the notice.
- [19] On July 15, 2019, a Dismissal Order was issued by the Registrar of the Divisional Court dismissing the appeal as the Appellant had not cured the default, although given notice under rule 61.13 to do so. The order provided that the appeal be dismissed for delay, with costs fixed at \$750, despite Rule 58.13.

### **The Motion to Set Aside the Dismissal**

- [20] On September 3, 2019, the Appellant commenced the within motion to set aside the dismissal and for an Order extending the time for the perfection of the appeal. The motion was originally scheduled for September 13, 2019, but due to administrative scheduling issues was adjourned to the November 2019 trial sittings.
- [21] In support of the motion the Appellant filed a Motion record containing a Notice of Motion dated September 3, 2019, and an affidavit of Judi Denesi, senior law clerk, dated August 9, 2019.
- [22] The Respondents, Via Rail Canada Inc and Canadian National Railway Company filed a Motion Record containing the affidavit of Samantha Dufresne, legal assistant sworn September 16, 2019, Factum, and Book of Authorities, dated September 16, 2019.
- [23] The Respondents submitted that the motion should not be granted for the following reasons:

- a. the relief sought by the Appellant in his Notice of Motion is to set aside the “notice dismissing the appeal”. The Respondents note that the appeal was dismissed by the order of the Registrar dated July 15, 2019, which is not referred to in the Appellant’s motion;
- b. the relief should not be granted as the Appellant has not provided any evidence regarding the merits of the appeal and provides no argument regarding the test set out by the Court of Appeal in *Paulsson v. Cooper*, 2010 ONCA 21, to set aside a dismissal order;
- c. the trial of this matter was decided on the lack of credibility of the Appellant and the witnesses he called and such findings by the trial judge are entitled to deference. The Respondents argue that there is no merit to this appeal as the appeal does not have a real chance of success and the motion should be dismissed.

[24] Following service of the Respondents’ materials, the Appellant filed a supplementary affidavit of Judi Denesi, sworn September 19, 2019, and a Factum dated November 26, 2019, which provided evidence specifically addressing the issues raised by the Respondents’ materials.

[25] The motion was heard by me on November 27, 2019.

[26] At the hearing of the motion, the Respondents Hydro One Networks Inc., VIA Rail, and Canadian National Railway opposed the motion and the Respondents Timothy Garnham, Apache Specialized Equipment Inc., Apache Transportation Services Inc. and BLM Group consented to the relief sought.

## **ISSUES**

[27] Should the court grant the Appellant’s motion to set aside the Order of the Registrar dismissing the appeal for delay, and extend the time for the perfection of the appeal, and if so, on what terms?

## **THE LAW AND ANALYSIS**

### **Requirements to Set Aside the Registrar’s Dismissal Order**

[28] The moving party bears the burden of proof on motions to set aside the Registrar’s dismissal for delay: *Yue v. Chouzouris*, 2014 ONSC 3409.

[29] The factors to be considered in determining whether to set aside the Registrar’s Order for delay include:

- a. Whether the appellant had an intention to appeal within the time for bringing an appeal;

- b. The length of the delay;
- c. Any explanation for the delay;
- d. Any prejudice to the respondent caused by the delay;
- e. And the justice of the case which requires consideration of the merits of the appeal.

[30] The last factor is the most important and requires a consideration of the merits of the appeal. *Paulsson v. Cooper*, 2010 ONCA 21; *Wang v. Unifund Assurance Company*, 2019 ONSC 4217.

### **Review and Analysis of the Factors**

#### **a. Whether the Appellant had an intention to appeal within the appeal timeline**

[31] The materials establish that the Appellant had an intention to appeal within the time for bringing an appeal.

#### **b. The length of the delay**

[32] In order to understand the length of the delay – it is necessary to review the steps required to perfect the appeal with a view to determining what steps were completed and what steps remain outstanding.

##### **Step One: Filing Notice of Appeal and Certificate Within 30 Days of Order**

[33] The Appellant was required pursuant to Rule 61.04, to serve a notice of appeal together with the certificate within 30 days after the making of the order appealed from and to file the Notice within 10 days after service.

[34] The Appellant satisfied this provision. The Notice of Appeal was filed on August 14, 2018 which is less than 30 days from the date of the Judgment and although it was filed in the wrong court – this error was corrected without undue delay.

##### **Step Two: Filing Proof of Transcript Order 30 after Filing Notice of Appeal**

[35] Thirty days after filing the notice of appeal the Appellant is required to file proof that he has ordered a transcript of all oral evidence.

[36] The supplementary affidavit filed by the Appellant established that the Appellant ordered all transcripts on an ongoing basis throughout the trial and by the date of the appeal had all transcripts in his possession. While there is no evidence the Appellant filed proof of having ordered the transcripts - he remains able to satisfy this requirement on an expedited basis.

Step Three: Perfecting Appeal Within 60 Days of Notice that Evidence is Transcribed

- [37] Rule 61.09 (2) requires the Appellant within 60 days after receiving notice that the evidence has been transcribed to move before a judge of the appellate court for an order that the original exhibits be sent to the Registrar if they are required for the proper hearing of the appeal.
- [38] I was advised that this request had not yet been made. In the circumstances of this case, however, it does not appear necessary. This was an Oshawa trial, and therefore regardless of where Justice Edwards heard any aspect of the trial, the Exhibits are held at the Oshawa Court. The appeal is to the Divisional Court which will also be heard at the Oshawa Court. The original exhibits are already present for the Registrar of the Divisional Court in Oshawa and do not appear to require any further order of the Court. To the extent that this Rule may be applicable – it has been satisfied and there is no resultant delay.
- [39] Rule 61.09 (3) (a)(b) requires the Appellant to serve on every other party to the appeal and file with the Registrar: (i) the appeal book and compendium; (ii) the exhibit book; (iii) a typed copy of the transcript of evidence; (iv) an electronic version of the transcript of evidence; and (v) a typed copy of the Appellant's factum. Following service and filing of the above documents, Rule 61.09 (3)(c) requires the Appellant to serve and file a Certificate of Perfection.
- [40] In the present case the Appellant argues that he has not been able to complete the Appeal Book and Compendium because he does not have a copy of the Judgment of Justice Edwards as issued and entered which is a required document for the completion of the Appeal Book due to the following reasons:
- i. The parties cannot agree on the form and content of the judgment;
  - ii. The form of the Judgment in dispute contains the rulings from the July 16, 2018 decision and the April 15, 2019 decision; and
  - iii. Justice Edwards reserved on the issue of the litigation loan providers and the costs order is not complete.
- [41] With respect to item i. - Rule 59.04(10) provides that where approval of a draft order is not received within a reasonable time a party may obtain an appointment to have the order settled by the registrar, or, where the registrar considers it necessary, by the court, judge or officer that made it, and notice of the appointment shall be served on all other parties who were represented at the hearing and filed, with proof of service, at least seven days prior to the appointment.
- [42] With respect to item ii – as determined by the Court of Appeal in *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 668 (CanLII), a decision on the determination of the merits is a determination separate and apart from the decision on costs. It is improper to draft a single order incorporating both the merits decision and the costs decision. Rather, what is

required is for two formal orders to be taken out. The first order should deal with the merits, and the second order should deal with the issue of costs as they relate to the parties, with each order bearing the respective date when those decisions were released.

[43] With respect to item iii - again I refer to the decision of the Court of Appeal in *Schnarr* which (similar to the present case) directs the parties to draft separate cost orders where two different costs orders are made on two different dates with one cost order being made with respect to intervenors and one cost order being made with respect to the parties. Clearly Justice Edwards has delivered his Reasons for Decision as it relates to costs with respect to the parties to the action. These Reasons can be incorporated into a formal cost order bearing the date of the decision being April 15, 2019. As for the issue relating to the liability of the non-party litigation loan providers, any future decision made with respect to the litigation loan providers will require a separate formal order bearing the date that any such order was made.

[44] If there is an issue as to the enforceability of the April 15, 2019 cost order as against Zuber, enforceability could be stayed pending determination of the liability of the litigation loan providers.

#### Conclusion Regarding Delay

[45] Having reviewed the various steps required to be completed to perfect the appeal and considering the length of the trial and the voluminous amount of evidence that was presented during the trial and the difficulties experienced between counsel in settling the terms of the orders – I find that the delay encountered in perfecting the appeal is neither unexpected nor unwarranted.

[46] Provided the Appellant takes those steps outlined above to obtain the issued and entered orders of Justice Edwards dated July 16, 2018 and April 15, 2019, the appeal may be perfected in a timely fashion.

#### **c. Any explanation for the delay**

[47] The Appellant has provided a reasonable explanation for the delay in the circumstances of this case.

#### **d. Any prejudice to the respondent caused by the delay**

[48] No prejudice was alleged by any of the Respondents and as such no prejudice is found by me.

#### **e. The justice of the case which requires consideration of the merits of the appeal.**

[49] As for the justice of the case, the Appellant submits that truncating the Appellant's right to appeal the Judgment of Justice Edwards which required a 106-day trial spanning over two



years – on a procedural irregularity – is contrary to the interest of justice and would constitute a miscarriage of justice.

[50] As for the merits of the appeal, the Appellant has pleaded 20 separate grounds of appeal relating to the July 16, 2018 Judgment, which in summary are as follows:

- i. the trial judge misapprehended the evidence and committed palpable and overriding errors in assessing the credibility of Zuber, in finding Zuber had violated a witness exclusion order, in dismissing the evidence of all Polish, Russian, French and Ukrainian witnesses without justification, and in finding uncontested evidence unreliable;
- ii. the trial judge erred in law in applying the incorrect legal test with respect to the violation of a witness exclusion order, by excluding damages for future care costs on the basis that they were not accounted for in Polish currency, by failing to apply the correct legal test with respect to past and future loss of income, by failing to apply the correct legal test for the preservation of evidence by a class member in a class action, and by restricting Zuber's right to fully present his case; and
- iii. the reasons for decision raise a reasonable apprehension of bias such that there is extreme doubt as to the correctness of the judgment.

[51] The Respondents submit that the grounds for the appeal have no merit. More particularly the Respondents argue that the credibility of the Appellant was fundamental to the outcome of the trial as Justice Edwards did not find Zuber to be a credible witness. The Respondents argue that the case was decided on the lack of credibility of the Appellant and the Appellant's witnesses and such findings are entitled to deference on appeal.

[52] Having reviewed and considered the Reasons for Decision of Justice Edwards and the Appellant's Notice of Appeal, there seems to be no dispute that the decision was based largely on negative findings regarding the credibility and reliability of the Appellant and his witnesses. There can also be no dispute that the findings of the trial judge are entitled to deference on appeal. However, this does not mean that the appeal is without merit.

[53] The Appellant is not required to prove to the Court that he will succeed on his appeal. The view is not whether the appeal will succeed, but whether the Appellant has shown that he has a decent, arguable case so that the interests of justice support his right to proceed despite his being late in perfecting: *Bronz v. Scotia Mortgage Corporation*, 2018 ONSC 724, at para 19.

[54] In the present case, Justice Edwards wrote detailed and considered Reasons for Decision that contained very particular and incisive assessments of the credibility and reliability of the Appellant and his witnesses. For the most part throughout the Reasons Justice Edwards found the Appellant and his witnesses to be lacking credibility.



[55] While assessments of credibility and reliability are afforded deference on appeal, that does not mean that an appeal court does not review such assessments. This is especially true where findings of credibility and reliability are inherently tied to evidentiary findings premised on incorrect applications of the law and/or evidentiary burdens, as is alleged by the Appellant in the current case.

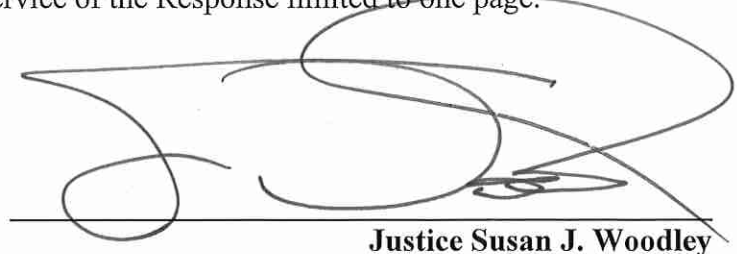
[56] It is not my place to determine the appeal. I must only assess whether the Appellant has an arguable case so that the interests of justice support his right to proceed despite being late perfecting. Given the length and complexity of this case and the voluminous evidence that was proffered and ruled upon throughout the trial, while I do not suggest the Appellant will be successful, I find that the Appellant has an arguable case.

[57] In all the circumstances of this case, considering the length of the trial, the number of exhibits and documents, the numerous evidentiary rulings made and the nature of the allegations and issues raised on appeal, I am of the view that truncating the Appellant's right to appeal based on a procedural irregularity would be contrary to the interest of justice.

[58] The motion to set aside the Registrar's Dismissal Order is granted on the following terms:

- a. The Appellant shall take all necessary steps to have the Judgments of Justice Edwards dated July 16, 2018 and April 15, 2019, issued and entered. If the parties cannot agree as to the form and content of the Judgments within 8 business days of the date herein, the Appellant shall, on or before December 31, 2019, begin the procedure under Rule 59.04 (10) to settle the terms of the Order; and
- b. The Appellant shall be granted an extension to April 9, 2020 to perfect his Appeal, including the filing of any Amended Notice of Appeal.

[59] Although the Appellant was successful, he seeks the indulgence of the Court. For this reason, I am of the view that there should be no costs awarded for this motion. However, if any party wishes to argue costs, the party seeking costs shall have 10 days to serve and file written submissions limited to three pages with a Bill of Costs and Cost Outline attached. Any Responding Party shall have 5 days from service upon them to serve and file a Response limited to three pages with a Bill of Costs and Cost Outline attached. Any Reply is to be served and filed within 3 days from service of the Response limited to one page.



Justice Susan J. Woodley

**Released:** December 6, 2019

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2019 ONSC 6895  
**COURT FILE NO.:** DC-18-1133  
**DATE:** 20191206

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**ONTARIO SUPERIOR COURT OF**  
**JUSTICE**

**BETWEEN:**

Bonnie Davies

Plaintiff

– and –

The Corporation of the Municipality of Clarington, VIA  
Rail Canada Inc., Canadian National Railway Company,  
Timothy Garnham, The BLM Group Inc., Apache  
Specialized Equipment Inc., Apache Transportation  
Services Inc., Blue Circle Canada Inc., and Hydro One  
Networks Inc.

Defendants

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**REASONS FOR DECISION**

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The Honourable Justice S.J. Woodley

**DATE RELEASED:** December 6, 2019