



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Goodwin v. Bitmain Technologies Ltd.*,
2022 NLCA 7

Date: February 8, 2022

Docket Number: 2020 01H 0046

BETWEEN:

JAMES GOODWIN

APPELLANT

AND:

BITMAIN TECHNOLOGIES LTD.

RESPONDENT

Coram: Fry C.J.N.L., Welsh and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Grand Bank, 202001G0847

Appeal Heard: On written submissions

Judgment Rendered: February 8, 2022

Reasons for Judgment by: Welsh J.A.

Concurred in by: Fry C.J.N.L. and O'Brien J.A.

Counsel for the Appellant: John Drover

Counsel for the Respondent: No appearance

Authorities Cited:

CASES CITED: *Powers v. Mitchell*, 2019 NLCA 16, 4 C.A.N.L.R. 231

STATUTES CONSIDERED: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rule 39

Welsh J.A.:

[1] The issue before this Court is whether the appeal is moot, and, if so, whether the Court should proceed in any event to decide one or more of the grounds of appeal.

BACKGROUND

[2] Bitmain Technologies Ltd. commenced actions in contract against both Great North Data Ltd. (the “Company”), and James Goodwin in his capacity as president and CEO of the Company. The Company filed an assignment in bankruptcy on November 22, 2019, and a trustee was appointed. Mr. Goodwin filed for personal bankruptcy on December 9, 2019. The bankruptcy resulted in a stay of Bitmain’s claims against both the Company and Mr. Goodwin (section 69.3(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3). Bitmain applied for an order lifting the stay of proceedings in both matters.

[3] Before that application could be heard, Mr. Goodwin filed a notice of motion on March 10, 2020 requesting that Bitmain’s solicitor and his law firm be removed as solicitors of record because of an alleged conflict of interest based on solicitor-client privilege. The judge concluded that Mr. Goodwin did not have standing to apply for removal of Bitmain’s solicitors. Mr. Goodwin filed a notice of appeal.

[4] A hearing in this Court on June 10, 2021 was adjourned when the Court was advised that Bitmain would likely be discontinuing its action. When the Court was later advised that the action had been discontinued and that Mr. Goodwin had been discharged from bankruptcy, it became necessary to determine whether the appeal was moot. The parties were invited to make written submissions on the mootness issue.

[5] Bitmain advised that it would not be participating further in the appeal. In the result, only Mr. Goodwin filed submissions, leaving the Court with no submissions in response. The Court was satisfied that the appointment of a friend of the court was not warranted in the circumstances (*Court of Appeal Rules*, rule 39).

[6] In the result, with Mr. Goodwin's agreement, the Court proceeded to decide the question of mootness on the written materials filed by Mr. Goodwin, with no oral hearing.

ANALYSIS

A Moot Appeal

[7] The analytical approach to determining whether an appeal is moot is addressed in *Powers v. Mitchell*, 2019 NLCA 16, 4 C.A.N.L.R. 231:

[5] The issue of when a court should decline to hear an appeal on the basis that it is moot is discussed in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. Sopinka J., for the Court, set out an analytical framework, at page 353:

The approach in recent cases involves a two-step analysis. First, it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. ... I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[8] Mr. Goodwin concedes that there is no live controversy, and that, therefore, the appeal is moot. The main action has been discontinued, Mr. Goodwin has been discharged as a bankrupt, and Bitmain and Mr. Goodwin's former trustee in bankruptcy have expressed no interest in the appeal. Nonetheless, Mr. Goodwin asks the Court to exercise its discretion to proceed with the appeal.

Discretion to Hear a Moot Appeal

[9] The issue Mr. Goodwin seeks to have the Court determine, despite the appeal being moot, is whether the applications judge erred in concluding that the solicitor-client privilege claimed by an individual who files for bankruptcy is a property right that falls within the scope of the *Bankruptcy Act* and is, therefore, transferred to the trustee and lost to the bankrupt.

[10] Criteria relevant to exercising discretion under the second step of the analysis to hear a moot appeal is discussed in *Powers*:

[8] The discretion to hear a moot appeal is “to be judicially exercised with due regard for established principles” (*Borowski*, at page 358). As discussed in *Borowski*, the analysis involves a consideration of three rationales underlying the exercise of the discretion; that is, an adversarial context, consideration of judicial economy, and the adjudicative role of the courts. ...

[9] The first rationale arises from the court’s roots in an adversarial system. This is discussed in *Borowski*, at pages 358 to 359:

... The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

[11] In this case, the adversarial context is absent. There is no respondent to challenge Mr. Goodwin’s submissions or provide an alternate position. This factor weighs strongly against proceeding with the moot appeal.

[12] The second rationale is also addressed in *Powers*:

[15] The second rationale to be considered is the concern for judicial economy based on the “need to ration scarce judicial resources among competing claimants” (*Borowski*, at page 360). Examples where it may be appropriate to exercise the discretion to hear a moot case, discussed in *Borowski*, at pages 361 to 362, are: (1) special circumstances warrant resolution of the dispute; (2) a decision, while not resolving the parties’ dispute, will nevertheless have some practical effect on their rights; (3) an important issue of a recurring nature, but brief duration, may evade judicial review because the issue will virtually always disappear before it is ultimately resolved; and (4) the issue is of public importance and its resolution is in the public interest.

[13] None of the above is engaged in this case. There are no special circumstances that would warrant hearing the moot appeal. The dispute has been resolved with the discontinuance of the matter. Determining the appeal, now that it is moot, would not have a practical effect on the rights of any of the parties. There is no reason to conclude that the issue may evade judicial review or that it is such as to require resolution in the public interest, in the absence of an adversarial context. Should the issue arise in the future, it could be well and fully argued by the parties in the ordinary course. That would, in fact, have occurred in this case had Bitmain not discontinued the action.

[14] The third rationale, the courts' adjudicative role, is also referenced in *Powers*:

[18] The third rationale underlying the discretion of the Court to hear a moot appeal is discussed in *Borowski*, at page 362:

The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch. ...

[15] This criterion is not relevant on the facts of this case. A consideration of the distinct functions of the judicial and legislative branches of government is not engaged because the issue raised by Mr. Goodwin would have only judicial implications based on application of the common law with respect to solicitor-client privilege.

SUMMARY AND DISPOSITION

[16] In the result, I am satisfied that there is no basis on which to exercise the Court's discretion to proceed given that the appeal is moot.

[17] I would add that this conclusion should not be taken as endorsing the decision of the applications judge. Whether solicitor-client privilege claimed by an individual who files for bankruptcy is a property right that falls within the scope of the *Bankruptcy Act* and is, therefore, transferred to the trustee and lost to the bankrupt is an issue to be left for another day when the adversarial context would permit the Court to undertake a comprehensive and informed analysis.

[18] Accordingly, I would dismiss the appeal, with no order as to costs.

B. G. Welsh J.A.

I concur: _____

D. E. Fry C.J.N.L.

I concur: _____

F. P. O'Brien J.A.