

CANADA / JUDGMENT

0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.

2022 BCCA 261

COURT

British Columbia Court of Appeal

DECIDED

15 July 2022

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2022 BCCA 261 0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.,

2022 BCCA 261

Date: 20220715

Dockets: CA48119; CA48381

Docket: CA48119

Between:

0790482 B.C. Ltd.

Respondent

(Plaintiff)

And

KBK No. 11 Ventures Ltd., 1100 Georgia Partnership,

Peterson Investment (Georgia) Limited Partnership,

Abbey Adelaide Holdings Inc., LJV Georgia Investments Inc. and

No. 274 Cathedral Ventures Ltd.

Appellants

(Defendants)

- and -

Docket: CA48381

Between:

0790482 B.C. Ltd.

Respondent

(Plaintiff)

And

KBK No. 11 Ventures Ltd., 1100 Georgia Partnership,

Peterson Investment (Georgia) Limited Partnership,

Abbey Adelaide Holdings Inc., LJV Georgia Investments Inc. and

No. 274 Cathedral Ventures Ltd.

Appellants

(Defendants)

Before:

The Honourable Madam Justice DeWitt-Van Oosten

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated

September 3, 2021, February 1, 2022 and June 29, 2022

(0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd., 2021 BCSC 1761, 2022 BCSC 226

and 2022 BCSC 1095, Vancouver Docket S1510418).

Oral Reasons for Judgment

Counsel for the Appellants

(appeared via videoconference July 15, 2022):

M. Good

M. Hashmi

Counsel for the Respondent:

J.K. McEwan, Q.C.

(appeared July 13, 2022 only)

M. Hunt

Place and Date of Hearing:

Vancouver, British Columbia

July 13, 2022

Place and Date of Judgment:

Vancouver, British Columbia

July 15, 2022

Summary:

The appellants in two related appeals, both arising from a class action, apply for an order staying the proceeding of the underlying class action pending the disposition of the appeals. They also seek an order that the appeals be heard together.

Held: Applications for stays of proceedings dismissed; application that appeals be heard together granted. The appellants did not establish that they would suffer irreparable harm if the stay were not granted. Moreover, a stay of the class action may have the effect of delaying a 130-day trial set down to begin in early October, causing prejudice to the respondent. The balance of convenience does not weigh in favour of the appellants.

- [1] DEWITT-VAN OOSTEN J.A.: The appellants seek stays of proceedings in two appeals: CA48119 and CA48381. They also request an order that the appeals be heard together.
- [2] File CA48119 involves an appeal from a February 2022 order by a Supreme Court judge certifying a class proceeding against the appellants arising out of alleged defects in the windows of the Shangri-La building in Vancouver. The class proceeding is grounded in allegations of breach of contract and breach of implied warranty. The proceeding was certified on behalf of purchasers of strata units in privity with the landowner/developer appellants.
- [3] The appellants challenge the certification order on three bases. They say the judge erred: (a) in finding the respondent, 0790482 B.C. Ltd., to be a suitable representative plaintiff; and (b) in concluding that the common issues advanced by the respondent are sufficiently common to "invoke the mechanism of a class action." The appellants also say the class proceeding has been brought for an improper purpose and constitutes an abuse of process.
- [4] File CA48381 involves an appeal from a June 2022 order made by the same judge denying the appellants leave to file third-party notices in the class proceeding against The Owners, Strata Plan BCS 3165 ("3165") and The Owners, Strata Plan BCS 3206 ("3206"). The third-party notices sought contribution and indemnity from 3165 and 3206 on the ground that the strata corporations failed to repair and adequately maintain the property at issue, thereby exacerbating any potential losses sustained by the class members. In their notice of

application, the appellants pleaded that 3165 and 3206 had a statutory duty to manage and maintain the common property and the common assets of their respective strata corporations "for the benefit of" the individual owners.

- [5] The appellants challenge the order denying leave to issue third-party notices on a number of grounds, including that the judge: (a) mischaracterized the nature of the proposed third-party claims; (b) mischaracterized the law that governs third-party proceedings; and (c) erred in finding that the third-party claims were bound to fail.
- [6] The relief sought in CA48119 is a stay of the class proceeding pending disposition of the appeal. In CA48381, the appellants also seek a stay of the class proceeding and ask that the two appeals be heard together. The appellants say there is substantial merit to their appeals and a "strong need to bring order to the proceedings [below] by pausing the [class] action until the [appeals are] adjudicated".

Legal Principles

- [7] Sections 10(2)(b) and 18(1) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 grant a justice the authority to stay all or part of ongoing proceedings in the Supreme Court while an appeal from an order arising out of those proceedings is underway.
- [8] The power to grant a stay is discretionary. It is generally exercised "only where necessary to preserve the subject matter of the litigation and pending final decision of the Court or to prevent irreparable damage, or where there are other special circumstances": *Contact Airways Limited v. De Havilland Aircraft of Canada Limited* (1982), 42 B.C.L.R. 141 at 143 (C.A. Chambers).
- [9] The onus is on the applicant to establish the entitlement to a stay: *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 at para. 9. A three-part test applies. In accordance with the principles established in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the applicant must show that:
 - a) there is a serious question to be resolved in the appeal;
 - b) the applicant would suffer irreparable harm without a stay; and
 - c) on balance, the inconvenience to the applicant if the stay is refused would exceed the inconvenience to the respondent if the stay is granted.
- [10] The threshold for the first of these criteria is not high. An applicant need only show that the appeal is neither frivolous nor vexatious. It is generally sufficient to show there is an "arguable case": *Tanguay v. Bridgewater Bank*, 2012 BCCA 234 at para. 18 (Chambers).
- [11] Irreparable harm is harm that cannot be quantified in monetary terms or cannot be cured: *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 24 (Chambers).

- [12] The final RJR-MacDonald criterion requires a weighing of the interests of the parties and a balancing of the potential harm should a stay issue or be refused: *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, 2013 BCCA 146 at paras. 36-37 (Chambers).
- [13] The ultimate consideration is whether granting the requested order is in the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607 at para. 9.

Discussion

- [14] There is extensive background to these appeals. I do not consider it necessary to detail that history for the purpose of these reasons. It has been comprehensively set out by the judge whose orders are under appeal in reasons indexed as 2021 BCSC 1761, 2022 BCSC 226, and 2022 BCSC 1095.
- [15] In addition to the class proceeding, there are four related actions that are ongoing in the Supreme Court specific to alleged defects with the Shangri-La windows. In two of those actions, 3165 and 3206 have sued multiple defendants, including the appellants, seeking the cost of repairs to or replacement of the windows. In the other two actions, 3165 and 3206 have sued National Home Warranty Group Inc. and Aviva Insurance Company of Canada for coverage under warranty arrangements. The sole shareholder and director of the representative plaintiff in the class proceeding, 0790482 B.C. Ltd., has been the strata council president for 3206 since March 2010.
- [16] The cumulative effect of the ongoing actions is that there are approximately 50 defendants and third-parties actively participating in the Supreme Court proceedings, including the class proceeding. All of the actions are being case managed by the same judge.
- [17] In February 2022, all parties consented to have the class proceeding and the related actions tried together. They are set for trial in October 2022. The trial will focus exclusively on liability and is scheduled for 130 days of hearing. Damages will be addressed separately in the event liability is proved. The parties agree there is substantial legal and evidentiary overlap between the class proceeding and the related actions. The claims are being tried together, at least in part, to avoid a multiplicity of proceedings arising out of the same factual circumstances and alleged delicts.

Position of the Appellants

- [18] In support of their application for a stay, the appellants say there is considerable merit to their appeals. They have filed a comprehensive factum in the appeal from the certification order and have principled and persuasive arguments to make in respect of both impugned orders, supported by relevant case authorities.
- [19] The appellants also say they will suffer irreparable harm if not granted a stay.

- [20] First, if forced to litigate the class proceeding before resolution of the appeals, the fact that the class proceeding and the related actions will be tried at the same time will likely "muddy the water" on costs should the appellants succeed at trial. They may be barred from recovering costs that, although necessary to defend the related actions, were also necessary to defend the class proceeding and may not be recoverable by operation of statute: Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 37.
- [21] Second, if the application for a stay is dismissed, the appeals will effectively be rendered moot. The trial is scheduled to commence on October 3, 2022. The earliest available date for a hearing of the two appeals is in late October 2022. If a division of this Court sets aside the certification order, the appellants say they will have "wasted time and money to prepare for and attend a [class action] trial and will have no means of recovering [those] funds".
- [22] Third, the appellants say the class proceeding amounts to an abuse of process. They argue that they "should not be forced to continue defending the action as though it were a good faith claim", rather than a blatant attempt by the respondent to increase pressure on the appellants for the purpose of a mediated resolution.
- [23] Fourth, specific to the denial of leave to file third-party notices, the appellants say they brought the third-party application to ensure they could advance their claims against 3165 and 3206 in the class proceeding "without having to bring a separate action, unnecessarily taxing the court system, raising the spectre of inconsistent findings of fact and law, and running the risk that the [a]ppellants will be made to pay a judgment that may later be found in whole or in part to be the responsibility of the [s]tratas." If 3165 and 3206 are not added as parties to the class proceeding, the appellants say there could be "300 separate "downstream" actions by class members seeking relief" against the strata corporations should the trial judge apportion some degree of liability to them. If that happens, 3165 and 3206 will likely bring third-party applications against the appellants, pull them back into the mix and force them to defend themselves through another trial process.
- [24] Finally, the appellants argue that a stay is necessary to prevent continued "chaos" in the underlying proceedings. From their perspective, a continually evolving theory of the class proceeding and related applications has resulted in the litigation becoming unwieldy. The appellants say it is distracting them from the contested issues in the related actions and unduly impeding the appellants' ability to prepare for those trials.
- [25] The appellants say the balance of convenience weighs heavily in favour of a stay. In particular, if this Court grants a stay, the related actions will still proceed to trial with the respondent's involvement. Should the appellants be found liable in those actions, the respondent will receive the benefit of that adjudication. As a result, there is no real prejudice to the respondent if the class proceeding is put on hold to await completion of the appeals. At best, doing so removes two discrete issues from the trial and these can easily be addressed at a later date should the appeals not succeed.

Respondent's Position

- [26] The respondent says the appellants waited too long to seek a stay. The certification order was made in February 2022. That same month, all parties agreed that the class proceeding and the related actions would be tried together. The appellants filed their notice of appeal from the certification order on February 24, 2022, and made no efforts to expedite a hearing of that appeal, even though they were aware of the October 2022 trial date. Instead, the appellants waited until June 2022 before first filing an application for a stay (which was then adjourned to July 13 for hearing). The respondent says the delay in seeking a stay speaks volumes about the credibility of the appellants' assertion of irreparable harm arising from the certification order.
- [27] It is the respondent's position that both appeals are frivolous and vexatious.
- [28] In particular, the respondent says the appellants' challenge to the certification order is heavily focused on an alleged conflict of interest arising from the fact that the sole shareholder and director of the representative plaintiff in the class proceeding is also the strata council president for 3206, a plaintiff in the related actions. The respondent argues that the relationship between the respondent and 3206 was known to the appellants when certification was argued. More importantly, at that hearing, the appellants abandoned their argument that a conflict of interest rendered the respondent's status as a representative plaintiff improper. The respondent says they cannot now, on appeal, re-package the conflict argument as a basis for having the certification order set aside. In any event, no conflict of interest has crystallized in the proceedings. The respondent's interest in the class proceeding and the interests of 3165 and 3206 are aligned. All three parties are represented by the same counsel.
- [29] Furthermore, the respondent submits that if the appellants are now contending that a conflict of interest only became clear post-certification because of ensuing developments and, until that point, they did not appreciate its true implications, the proper process for them to follow is to bring a motion for decertification in the trial court, not attempt to achieve the same result on appeal through an application for a stay. From the respondent's perspective, the appeal against the certification order represents a "premature end run around the trial court's adjudication".
- [30] In any event, argues the respondent, even if the appellants could establish a conflict, the certification is unlikely to be set aside. At most, leave would be granted to substitute a new representative plaintiff.
- [31] Finally, the respondent argues that severing the class proceeding from the related actions could cause significant prejudice to the class and to the ongoing litigation in the trial court. In its words: "The liability common issues [in the class proceeding] involve many if not nearly all of the same factual issues, many of the [same] legal issues, and a substantial body of evidence that will be tried in the [r]elated [a]ctions." Before me, respondent's counsel suggested that because of the interwoven nature of the proceedings in the Supreme Court,

there is a realistic potential that a stay of the class proceeding would lead to an adjournment of the October 2022 trials or, at the very least, multiple ancillary applications or proceedings as the parties try to unravel a carefully structured and court-endorsed plan that is designed to facilitate a combined hearing of five matters with significant procedural and evidentiary overlap.

- [32] Specific to the appeal from the denial of leave to file third-party notices, the respondent says the notices were precluded by the appellants' own pleading. The appellants have pleaded that 3165 and 3206 failed to properly advise the class members about defects with the windows and to recommend repairs. In other words, the appellants accept that 3165 and 3206 stood in an agency or advisory role to the class members and were in a position to assist with mitigating their damages. The respondent says the law is clear that a third-party notice cannot issue against a party that stands in an agency relationship with a plaintiff or "should have advised or assisted the plaintiff to mitigate [its] damages": *Adams v. Thompson, Berwick, Pratt & Partners* (1987), 39 D.L.R. (4th) 314 at 319 (B.C.C.A.). As such, the respondent says this appeal is bound to fail.
- [33] The respondent also notes that at the hearing of the application to issue third-party notices, the respondent made concessions that effectively negate any need for the proposed claims against 3165 and 3206. The judge set out these concessions in his reasons for judgment on the application to issue third-party notices:
- [111] During the course of the hearing, the representative plaintiff put on record its consent to the applicants amending their response pleading to advance their claims against the strata corporations, in accordance with the Adams Rule, as defences to the claims of the class members. The representative plaintiff also confirmed what it characterized as its admission of fact for this case, that the strata corporations acted as agents of the class members in respect of repair and maintenance of common property. As well, and in response to a concern raised by the applicants that such consent was only in respect of a defence that could be pleaded as opposed to an acknowledgement or admission by the class members that any proven delicts on the part of the strata corporations are attributable to the class members, the representative plaintiff also confirmed on record its agreement that any such delicts proven at trial shall bind the class and would, assuming an appropriate nexus is proven, impact on their claims for damages.
- [34] Notwithstanding these concessions, should the appellants continue to view third-party notices as necessary upon completion of the October 2022 trial, the respondent says they can make efforts to ensure that the appeal from the denial of leave is heard prior to the damages stage of the proceedings in the Supreme Court. If the appeal succeeds, the appellants can issue their notices prior to the second stage of the trial process. The appellants have not suggested in this application that doing so is either disallowed or not workable.

Analysis

- [35] At the hearing of the application and in response to a question posed by the Court, the parties agreed that application of the RJR-MacDonald test in the particular circumstances of this case stands or falls with the appellants' ability to establish irreparable harm should a stay be refused. In submissions, counsel for the appellants acknowledged that if the Court concludes that this aspect of the test has not been met, the finding is fatal to the request for a stay.
- [36] Accordingly, I have focused my analysis on the question of irreparable harm.
- [37] The appellants have not persuaded me of irreparable harm, even assuming they have met the threshold of showing there is merit to their appeals. As a result, and in consideration of the circumstances as a whole, the balance of convenience does not weigh in the appellants' favour and I do not consider it to be in the interests of justice to stay the class proceeding.
- [38] I have reached this conclusion fully appreciating that an applicant for a stay can establish irreparable harm by showing that their appeal would effectively become moot if the stay is not granted: *Romspen Investment Corporation v. Chemainus Quay and Marina Complex Ltd.*, 2012 BCCA 292 at para. 15 (Chambers); *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCCA 338 at para. 29 (Chambers). However, standing alone, this factor is not dispositive.
- [39] In this case, there are several factors that weigh against a finding of irreparable harm.
- [40] First, there is considerable merit to the respondent's suggestion that the claim of irreparable harm arising from the certification order is not compelling in the face of the appellants having waited more than three months before filing an application to stay the class proceeding. They knew when they filed their appeal of the certification order that all five actions were scheduled to proceed to trial in October 2022. By this time, all parties had agreed that the liability issues in the class proceeding and the related actions would be tried at the same time. A risk of "muddied" waters on costs would have also been obvious from the fact of a combined hearing. Yet, the appellants took no steps to seek a stay.
- [41] Second, it is apparent from the record (including the February 10, 2022 consent order), that the class proceeding and the related actions are tightly interwoven, both substantively and procedurally. They are being jointly case managed and all parties have been preparing for the October 2022 trial on the understanding that it will address the liability issues in all five matters. I accept that the class proceeding may involve some issues distinct to that proceeding (namely, breach of implied warranty and breach of the terms of pre-sale contracts); however, the underlying factual foundations surrounding the alleged window defects--which lay at the core of the claims against the appellants--are the same.

[42] I agree with the respondent that if this Court stays the class proceeding, it carries the realistic potential of interrupting the Supreme Court proceedings in a fundamental way, and will likely require an adjournment of the October 2022 hearing dates or give rise to a plethora of ancillary applications that seek to address procedural and evidentiary questions necessitated by the bifurcation.

[43] In *Kasian Estate v. Kasian*, 2021 BCCA 273 (Chambers), Justice Voith noted at para. 58 that:

The fact that the trial process and a trial will be delayed by granting a stay of an interlocutory order has been found to militate against the granting of the stay: *Kedia International Inc. v. Royal Bank of Canada*, 2007 BCCA 47 at paras. 26 and 29--though in that case the Court was of the view that the applicant would not suffer irreparable harm.

I find these comments apposite in the case before me.

[44] At present, 130 days have been set aside for the October trial. If a stay is granted and the liability trial adjourned, it will be difficult for the parties to have that same amount of trial time made available to them in the near future. In his submissions, counsel for the respondent referred me to the comments of Justice Low, writing for the Court in *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17. In that case, Justice Low accepted that the loss of trial dates can "involve significant prejudice" to a plaintiff:

[41] No evidence is required to reach that conclusion. The setting of a new trial date does not simply involve nudging the trial down the calendar. It is common experience that reservation of a large block of trial time would be well into the future, certainly a year, probably closer to two years. This is simply a reality of trial scheduling. The plaintiff should not lose the benefit it has diligently obtained for itself in getting this litigation ready for trial in a reasonable time. I also think that it is important to all litigants to have the issues tried while discovery evidence is relatively fresh.

Again, I find these comments apposite in the case before me.

[45] Finally, I accept the respondent's argument that the concessions made by the respondent in respect of the class proceeding likely work to substantially ameliorate any prejudice that would otherwise flow to the appellants from the denial of leave to file third-party notices against 3165 and 3206 (as recognized by the case management judge). The respondent has agreed to proceed on the basis of several liability only. It does not object to the appellants amending their response in the class proceeding to assert liability against the strata corporations as a defence to the claims advanced by the class members. The respondent has also conceded that any liability proved as against 3165 and 3206 shall bind the class and "would, assuming an appropriate nexus is proven, impact on their claims for damages". In light of these concessions, proceeding with the trials before this Court rules on the merits of the appeal from the denial of leave to issue third-party notices does not preclude the appellants from protecting themselves in much the same way they sought to do through the

notices.

[46] I recognize it is not precisely the same; however, I found the appellants' suggestion that notwithstanding these concessions there could still be 300 actions post-class proceeding in which class members try to bring individual claims against 3165 and 3206, who would in turn third-party the appellants, to be speculative. I also note that before me, the appellants did not seriously contest the respondent's suggestion that if the appellant succeeds on the third-party notice appeal, it can proceed with third-party notices before the damages stage of the proceedings below.

Disposition

[47] For all of the foregoing reasons, I find the appellants have not established irreparable harm, the balance of convenience does not weigh in their favour, and it is not in the interests of justice to grant a stay.

[48] I therefore dismiss the application for a stay of the class proceeding in both CA48119 and CA48381.

[49] Having heard no objection from the respondent, I order that these appeals be heard together.

"The Honourable Madam Justice DeWitt-Van Oosten"

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