

CANADA / JUDGMENT

Armstrong v. Kotanko

2023 BCCA 321

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 321 Armstrong v. Kotanko

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Armstrong v. Kotanko,

2023 BCCA 321

Date: 20230809

Docket: CA49153

Between:

Lloyd James Armstrong

Appellant

(Plaintiff)

And

Jerry Leonard Kotanko and Jerry Leonard Kotanko

as Executor of the Estate of Jean Irene Almgren

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Frankel

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated June 9,

2023 (Armstrong v. Kotanko, 2023 BCSC 989, Vancouver Docket S1711291).

Counsel for the Appellant:

K. Iacono

Counsel for the Respondents:

E.H. Fraser

Place and Date of Hearing:

Vancouver, British Columbia

July 7, 2023

Place and Date of Judgment:

Vancouver, British Columbia

August 9, 2023

Summary:

The appellant's mother gifted assets, including a townhouse, to the respondent, a long time friend. After his mother's death, the appellant moved into the townhouse and brought a claim that her intention was to create a secret trust with him as beneficiary or, alternatively, that a remedial constructive trust be imposed on the townhouse in his favour. The judge dismissed his claim and granted the respondent's counterclaim for occupational rent. The appellant applies for a stay of that order. The respondent seeks security for the costs of the appeal and the trial.

Held: Stay application granted in part; security for costs application granted. The appeal is devoid of merit. The judge's decision to proceed by way of summary trial was discretionary and unlikely to be interfered with on appeal. More importantly, the judge committed no material errors in finding that the appellant's evidence, even taken as its highest, could not establish the creation of a trust. On irreparable harm and the balance of convenience, the respondent would suffer greater harm if required to expend more unrecoverable funds, essentially to keep the appellant housed, in the context of a hopeless appeal. A time-limited stay is granted to give effect to the respondent's representation that he will give the appellant until August 31, 2023 to vacate the townhouse. Given the lack of merit in the appeal, the interests of justice militate in favour of granting security for costs of the appeal and trial.

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] This matter involves two applications arising out of unsuccessful claims brought in the Supreme Court of British Columbia by Lloyd James Armstrong against Jerry Leonard Kotanko in Mr. Kotanko's personal capacity and as executor of the estate of Mr. Armstrong's mother, Jean Irene Almgren. Those claims involved assets Ms. Almgren gifted to Mr.

Kotanko, including the townhouse Mr. Armstrong moved into shortly after his mother's death. Mr. Armstrong contended his mother's intention was to create a secret trust with him as beneficiary and Mr. Kotanko as trustee. In the alternative, he argued that a remedial constructive trust should be imposed on the townhouse in his favour. Following a summary trial, Justice Wedge dismissed those claims and ordered Mr. Armstrong to vacate the townhouse. She allowed Mr. Kotanko's counterclaim for occupational rent and for expenses he paid during the years Mr. Armstrong has lived there.

- [2] Mr. Armstrong has appealed the order dismissing his claims and now applies for a stay of that order pending the determination of his appeal. Mr. Kotanko applies for an order requiring Mr. Armstrong to post security for the costs of both the appeal and the trial.
- [3] For the reasons that follow, the application for a stay is granted but only for the short period Mr. Kotanko advised me he is prepared to give Mr. Armstrong to vacate the townhouse. The application for security for costs is granted.

Background

- [4] Ms. Almgren had two sons; Mr. Armstrong and Michael Harnden. She was estranged from Mr. Harnden and, although he was named as a defendant in Mr. Armstrong's action, he did not participate in the litigation.
- [5] Mr. Kotanko had been a close personal friend of Ms. Almgren and her husband, Gordon Almgren, going back to approximately 1980.
- [6] Ms. Almgren owned a townhouse in a strata development in Langley, British Columbia.
- [7] Carl D. Holm was Ms. Almgren's long-time solicitor. In 2007, he prepared a will for Ms. Almgren which gave Mr. Almgren a life estate in the townhouse and a bequest of \$15,000 annually. In the event Mr. Almgren predeceased her, the will distributed the residue of her estate to several beneficiaries, including 25 percent to Mr. Armstrong and 15 percent to Mr. Kotanko.
- [8] Mr. Almgren died in 2009. Ms. Almgren and Mr. Kotanko remained close platonic friends.
- [9] In 2011, Mr. Holm assisted Ms. Almgren in designating Mr. Kotanko the sole beneficiary of her registered income fund at a chartered bank.
- [10] With the assistance of Mr. Holm, Ms. Almgren arranged for her assets to pass to Mr. Kotanko upon her death. In 2012, she registered the townhouse in joint tenancy with Mr. Kotanko with a right of survivorship. At the same time, she executed a will in which Mr. Kotanko was named as executor and sole beneficiary. If Mr. Kotanko predeceased her, then his estate would be the beneficiary. Another provision allowed Mr. Armstrong to take any contents of the townhouse he wished to have.

- [11] In 2013, again with Mr. Holm's assistance, Ms. Almgren executed her final will. The only change from the 2012 will was that while Mr. Kotanko remained the sole residual beneficiary, in the event he predeceased her, the residue would go to Mr. Armstrong.
- [12] Ms. Almgren died in February 2017. After she died, Mr. Kotanko learned of what she had done in regard to her townhouse and registered income fund and that he was the sole beneficiary under her will.
- [13] Mr. Armstrong moved into the townhouse shortly after his mother died; prior to this he had lived across the street. He has lived in the townhouse ever since, consistently refusing Mr. Kotanko's requests that he vacate the property. Mr. Kotanko has paid for utilities and other expenses and, except for two years, the strata fees.
- [14] Mr. Armstrong commenced his action in December 2017, disputing the 2012 property transfer and the 2013 will. In early 2018, Mr. Kotanko filed a counterclaim, seeking, among other things, occupational rent.
- [15] On April 9, 2021, a master dismissed Mr. Armstrong's application to amend his pleadings to include a claim in resulting trust. On May 17, 2021, a judge dismissed Mr. Armstrong's appeal from the master's order.
- [16] On July 12, 2021, a judge granted an application brought by Mr. Kotanko, and struck Mr. Armstrong's claims relating to equitable fraud, the validity of the 2013 will, and a claim to vary that will.
- [17] On March 23, 2022, Mr. Kotanko served a summary trial application on Mr. Armstrong. Both parties filed comprehensive affidavits. The principal affidavits filed by Mr. Kotanko were his own and that of Mr. Holm. Mr. Kotanko also filed an expert report in support of his occupational rent claim. The principal affidavits of Mr. Armstrong were his own and that of William Nesteruk, Mr. Armstrong's long-time friend and sometimes employer.
- [18] Mr. Kotanko twice sought to have the summary trial application heard. The first time, the judge assigned refused to hear it because the time estimates were inadequate. It was not heard on the second occasion because there was no judge available.
- [19] A 10-day trial was scheduled to commence on January 30, 2023; Wedge J. was assigned as the trial judge. For health-related reasons Mr. Armstrong was unable to attend the trial and his counsel sought an adjournment. Mr. Kotanko opposed the adjournment and sought to have the matter heard as a summary trial. Justice Wedge adjourned the case to allow counsel to prepare written submissions on the suitability of the matter for summary trial. Following oral argument, she ruled the matter was suitable for summary trial and it proceeded. She granted each party leave to cross-examine the deponents of the other party's affidavits. Mr. Armstrong elected to cross-examine Mr. Kotanko and Mr. Holm. Mr. Kotanko opted not to cross-examine anyone.

- [20] The judge briefly discussed her decision to proceed with a summary trial in her reasons for judgment, indexed as 2023 BCSC 989:

A. Procedural Issues

- [4] For reasons that I will not go into in detail because they are not relevant to the outcome of the trial, this litigation began as a full trial of the matter, but was converted to a summary trial at the outset due to the illness of the plaintiff and his inability to attend the trial. Both plaintiff and defendant are elderly and in poor health, and there was some urgency in proceeding with the litigation.
- [5] By way of background, the matter had been filed by Mr. Kotanko to [proceed] summarily some months earlier but the judge assigned to the matter refused to proceed on that basis because the time estimated for the summary trial was woefully inadequate. An earlier trial had been bumped for lack of the availability of a judge. As a result, the litigation had been languishing for approximately two years. Both parties to the matter were elderly and, in particular, I was advised at the outset of the trial that Mr. Armstrong had just been admitted to hospital with a suspected heart attack. I accepted the position of Mr. Kotanko that the matter was suitable for summary trial based on the extensive affidavit material filed previously, and updated, with respect to the issues in dispute, so long as counsel for Mr. Armstrong could cross-examine the witnesses who had provided material evidence on behalf of Mr. Kotanko by way of affidavit. On that basis, the matter proceeded as a trial heard summarily. As a result, both Mr. Kotanko and the solicitor involved in the drafting of the various wills of the Deceased, were called to give viva voce evidence and subjected to cross-examination.
- [6] Counsel for Mr. Kotanko did not seek to cross-examine any of the witnesses advanced by Mr. Armstrong on their affidavits, taking the position that their evidence, even without challenge, did not establish the plaintiff's case for a secret trust or any other form of trust.

The Evidence

- [21] In his affidavit, Mr. Armstrong acknowledged he had no discussions with his mother about her estate planning. It was not until after his mother's death that he became aware of her 2013 will and of her having transferred the townhouse into joint tenancy with Mr. Kotanko. He denied having ever borrowed money from his mother.
- [22] Mr. Nesteruk deposed the following occurred while he was having lunch at a restaurant with Ms. Almgren, Mr. Almgren and Mr. Kotanko in 2009:
18. On this particular occasion, in the presence of Mr. Kotanko, Ms. Almgren expressed her concerns about [Mr. Armstrong's] ability to manage the properties (the "Properties") that she was planning to leave to him, which included [the townhouse claimed by Mr. Armstrong] as well as another townhouse unit located at [the same development]. Ms. Almgren stated in my presence that she had trust in Mr. Kotanko to manage the Properties for [Mr. Armstrong]

and to take care of [Mr. Armstrong] for her. Mr. Kotanko acknowledged these concerns in my presence and stated that he would take care of [Mr. Armstrong] as Ms. Almgren wanted. I recall Mr. Kotanko saying, "Don't worry, I will take care of it."

Mr. Kotanko denied ever being present at a lunch with Mr. Nesteruk, Ms. Almgren, and Mr. Almgren where such a conversation occurred.

[23] Mr. Nesteruk further deposed that shortly after Ms. Almgren's death, he heard from Mr. Armstrong that she had left her estate to Mr. Kotanko. He stated that following this:

21. I confronted Mr. Kotanko during this visit [to the townhouse] and pressed him about taking care of [Mr. Armstrong] with the Properties, as he had previously promised. In response, Mr. Kotanko stated that I should mind my own "f ing business" and that he was "taking care of it." We did not have any further conversation. I have not seen or spoken to Mr. Kotanko since this day.

Mr. Kotanko denied this incident took place.

[24] Mr. Nesteruk did not tell Mr. Armstrong about the 2009 overheard conversation until after Mr. Armstrong commenced his action.

[25] Merlyn West deposed that when she encountered Ms. Almgren by chance in a parking lot several months before her death, Ms. Almgren spontaneously told her that Mr. Armstrong would be "looked after" once she died. Ms. West further deposed Ms. Almgren said Mr. Armstrong "would not have to worry about anything because she knew he would be very upset when she dies. She did not state anyone else's name, or whether someone in particular would be taking care of [Mr. Armstrong]."

[26] Jack Nichols deposed that when Ms. Almgren was in poor health prior to her death, he asked to visit her and she agreed. He said that on one of his visits, Ms. Almgren informed her that she was "worried about [Mr. Armstrong] and had made arrangements so that he could be taken care of once she passed away." He further deposed that, to his recollection, "she did not mention anyone else's name or in what manner [Mr. Armstrong] would be taken care of."

[27] Mr. Armstrong also relied on the following from Mr. Kotanko's examination for discovery:

Q: All right. And you knew that Ms. Algren wanted to ensure that her assets weren't wasted by her son. That was something she communicated to you, perhaps not in those words, is that fair?

A: Yes.

Q: As a friend, she wanted you to help and make sure that her assets weren't wasted by her son; is that fair?

A: She didn't ask me to do that, no.

Q: She didn't mention that to you?

A: No. All she said to me was, when I asked her about Lloyd, she didn't -she said to me, if you'd--if you want to, you can buy him a boat to live on. Because Lloyd was, you know--and she said, what would that be, 20, 30 thousand? And then she said do whatever you want.

Q: Well, what you understood she was communicating to you is do whatever you thought was reasonable in terms of helping Lloyd with her money, isn't that what she was communicating to you?

A: No.

Q: Whatever you thought was reasonable, she was relying on you to decide?

A: Well, she--the way I understood it was that if I wanted to buy him a boat to live on, it was up to me.

[Emphasis added.]

[28] Mr. Holm has been a solicitor for over 40 years, and for the past 20 years has concentrated on wills and estates. He said he received clear and consistent instructions from Ms. Almgren. As is his practice, he screened her for capacity and undue influence and was satisfied her instructions represented her wishes. At no time did Ms. Almgren express an intention to have Mr. Kotanko hold assets for Mr. Armstrong's benefit. To the contrary, she expressed the intention that neither the townhouse nor her registered income fund be left to Mr. Armstrong. This was because, aside from the money Mr. Armstrong had borrowed from her, he was in significant arrears of his tax obligations. She told Mr. Holm she did not wish to leave her assets to Mr. Armstrong only to have them confiscated by the Canada Revenue Agency to satisfy his tax debts. With respect to the 2013 will, Ms. Almgren made Mr. Armstrong the alternate residual beneficiary of her estate because, in the event Mr. Kotanko predeceased her, she was of the view that since she had no one else in her life, Mr. Armstrong might as well have the money to pay his debts. She did not want Mr. Armstrong to know about her reasons.

Trial Judge's Reasons

[29] The trial judge found Mr. Holm to be credible and his evidence reliable given that: Ms. Almgren's statements were made at the same time as the transactions at issue; they were made in the context of her seeking professional assistance; Mr. Holm was a disinterested professional; there was corroborative documentary evidence; and Mr. Holm had screened Ms. Almgren for capacity.

[30] The judge ascribed no weight to Mr. Nesteruk's evidence. She found he was not a disinterested party. She also found his evidence of the overheard restaurant conversation questionable given that: it was difficult to understand why Ms. Almgren would have been discussing estate planning with Mr. Kotanko at a lunch while her husband was alive and present, given the conversation was premised on Mr. Almgren dying first; it was not evidence of contemporaneous intent; Mr. Nesteruk had not mentioned it until after the

litigation was commenced; there was no independent evidence to test its veracity nor circumstantial or evidentiary guarantees that it was inherently reliable; Mr. Kotanko denied any such lunch conversation; and, it did not accord with common sense or human experience, as accepting this evidence would require accepting that Ms. Almgren misled Mr. Holm and retained him to assist her in gifting her assets to Mr. Kotanko, while secretly intending to leave them to Mr. Armstrong.

- [31] The judge found Ms. West's and Mr. Nicholl's evidence to be "impossibly vague".
- [32] With respect to an express trust, she referred to the fact that the onus was on Mr. Armstrong to establish "three certainties": (i) certainty of intention; (ii) certainty of subject; and (iii) certainty of object. With respect to a secret trust, she referred to the fact that, in addition to the "three certainties", the onus was on Mr. Armstrong to establish that: (i) the donor communicated to the donee an intention that the property be dealt with in a specific way upon the happening of a specific event; and (ii) the donee accepted that obligation. In rejecting both of those claims she stated, in part:
- [54] Most importantly, however, is the fact that the evidence of none of these witnesses, including that of Mr. Nesteruk, establishes the Three Certainties, which must be established before any consideration of a secret trust. The evidence of Mr. Nicholls and Ms. West falls far short of establishing a trust. There is no certainty as to the nature or scope of the intended assets; nor is there certainty that Mr. Armstrong was to be the beneficiary of those assets. There is no mention in their evidence of the manner in which the Deceased intended to "provide for" or "take care of" Mr. Armstrong, and no suggestion that she intended to have a third person hold her assets for the benefit of Mr. Armstrong.
- [55] Aside from the lack of credibility of Mr. Nesteruk, his evidence also falls short of establishing the Three Certainties and the additional requirements of a secret trust. His evidence does not establish that the Deceased intended to bind Mr. Kotanko to a legally enforceable trust. At most, if his evidence is worthy of belief (which in my view it is not), it creates a moral obligation to assist Mr. Armstrong by "managing the Property" and "taking care" of Mr. Armstrong for her.
- [33] The judge dismissed Mr. Armstrong's constructive trust submission, which was based on Mr. Kotanko's discovery evidence. She found it was only Mr. Armstrong's "wishful thinking" that Mr. Kotanko had committed a wrongful act by representing to Ms. Almgren that he would buy Mr. Armstrong a boat and take care of him.
- [34] In allowing Mr. Kotanko's counterclaim, the judge determined it was just and equitable to award him occupational rent in the amount claimed (i.e., \$86,250.00), on the basis of the expert opinion concerning the fair market rent the townhouse would have commanded had it been available to rent, plus an additional three months' rent for Mr. Armstrong's occupancy from March to May 2023 (i.e., \$3,750), and the cost of utilities incurred by Mr. Armstrong (\$2,215.53). She gave Mr. Armstrong credit for the strata fees he paid in 2021 and 2022. She ordered Mr. Armstrong to vacate the townhouse no later than 15 days after her

order was pronounced.

Legal Framework

Stay of Execution

[35] Sections 30(c) and 33 of the Court of Appeal Act, S.B.C. 2021, c. 6 provide authority for a judge in chambers to grant a stay of execution:

30 In an appeal or other matter before the court, a justice may do one or more of the following:

(c) make interim orders to prevent prejudice to any person.

33(1) After an appeal or application for leave to appeal is brought, a justice may, on terms and conditions the justice considers appropriate, order a stay of all or part of proceedings, including execution, in the cause or matter from which the appeal is brought.

[36] The well-known test for a stay of proceedings or execution is set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. To succeed, the applicant must show:

(a) that there is some merit to the appeal in the sense that there is a serious question to be determined;

(b) that irreparable harm would be occasioned to the applicant if the stay was refused; and

(c) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

The threshold for determining whether there is a serious question to be tried is "a low one". A court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious; "a prolonged examination of the merits is generally neither necessary nor desirable": *RJR-MacDonald Inc.* at 337-338.

Security for Costs

[37] The jurisdiction to order security for costs is addressed in s. 34 of the Court of Appeal Act:

(1) A justice may order an appellant to pay into court security for one or more of the following:

(a) costs of the appeal;

(b) costs of proceedings in the court appealed from, in relation to the order being appealed;

(c) an amount under the order being appealed.

(2) A payment under subsection (1) must be in the amount and form determined by the justice.

- [38] The principles applicable on an application for security for appeal costs are well-established. They are set out in *Chung v. Shin*, 2017 BCCA 355 at para. 15, 15 C.P.C. (8th) 94, wherein Justice Hunter quoted with approval the following from the reasons given by the judge whose security for costs order was under review:
- [9] In *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285, Lowry J.A. (in Chambers) provided a concise statement of the relevant criteria on an application for security for costs of the appeal:
- [9] The jurisdiction to order security for costs of an appeal is found in s. 24 of the Court of Appeal Act, R.S.B.C. 1996, c. 77. The appellant against which such an order is sought bears the onus of showing why security should not be required: *Kedia v. Shandro Dixon Edgson*, 2007 BCCA 57 at para. 4 (C.A. Chambers), *Smith J.A.* Generally, the considerations are the appellant's ability to post security and the likelihood of costs awarded being recovered from it, as well as the merits and the timeliness of the application: *Southeast Toyota Distributors, Inc. v. Branch* (1997), 45 B.C.L.R. (3d) 163 (C.A.); *Milina v. Bartsch* (1985), 5 C.P.C. (2d) 124 at 125 (B.C.C.A. Chambers), *Seaton J.A.*; and *M.(M.) v. F.(R.)* (1997), 43 B.C.L.R. (3d) 98 at 101 (C.A. Chambers), *Esson J.A.*
- [10] In *Lu v. Mao*, 2006 BCCA 560 (Chambers), *Ryan J.A.* explained:
- [6] In determining whether security for costs should be ordered, the ultimate question to be answered is whether the order would be in the interests of justice. In this regard, Madam Justice Rowles in *Ferguson v. Ferstay* (2000), 81 B.C.L.R. (3d) 90 at para. 7; 2000 BCCA 592, (Chambers) identified the following as relevant considerations:
- (1) appellant's financial means;
 - (2) the merits of the appeal;
 - (3) the timeliness of the application; and
 - (4) whether the costs will be readily recoverable.
- [11] The onus is on the appellant to establish that the interests of justice require that security not be ordered: *Creative Salmon Company Ltd.*, at para. 9.

[Italics in original; underlining added.]

Those same considerations apply under the current Court of Appeal Act.

- [39] With respect to the interplay between an appellant's ability to post security for costs and the merits of the appeal, *Hunter J.A.* said this:
- [24] The significance of Mr. Chung's financial position is relevant to the third issue raised by the appellants, the merits of the appeal. On a security for costs application, the merits may be important in one of two ways. If the appeal appears to be meritorious and a security order might prevent an appellant without means from pursuing it, security for costs will generally

not be ordered: *Gardezi v. Canadian Union of Public Employees, Local 3495*, 2016 BCCA 462 at para. 10. On the other hand, if an appeal appears to be weak, the impecuniosity of an appellant will not prevent an order for security for costs from being issued, as "without an order for security for costs, the appeal is a gamble by the appellants with the respondents' money": *Daymax Management Inc. v. WHA 820 Holdings Ltd.*, 2004 BCCA 414 (in Chambers) at para. 24.

[Emphasis added.]

[40] Recently, in *Focken v. Fraser Health Authority*, 2023 BCCA 81 at para. 27 (Chambers), I stated the criteria for ordering the posting of trial costs as:

1. The onus is on the applicant (respondent) to show it is in the interest of justice to order posting for security of a trial judgment and/or of trial costs.
2. In determining the interests of justice, consideration is to be given to the merits of the appeal, the effect of such an order on the ability of the appellant to continue the appeal, and the prejudice caused to either party by granting or dismissing the application.

With respect to merits, after quoting para. 24 from *Chung v. Shin*, I stated:

[29] The merits threshold is a low one, and has been expressed in several ways. What an appellant must demonstrate is that the appeal "has some possibility of success", is not "virtually hopeless", "appears to have some merit", or is not "bound to fail": *Brule v. Rutledge*, 2014 BCCA 197 at para. 10 (Chambers), 355 B.C.A.C. 285; *Freshway Specialty Foods Inc. v. Map Produce LLC*, 2006 BCCA 592 at para. 14 (Chambers), 247 B.C.A.C. 93.

Analysis

Should a Stay be Granted?

[41] It is convenient to mention here that at the hearing of these applications, Mr. Kotanko advised me he is prepared to give Mr. Armstrong until the end of August to move out of the townhouse.

Merits of the Appeal

[42] I begin with a discussion of the merits of Mr. Armstrong's appeal. This factor is of critical importance to both the stay and security for costs applications. I will address each of Mr. Armstrong's proposed grounds in turn.

[43] Mr. Armstrong's primary argument is that a summary trial was not appropriate, as there were conflicts in the evidence. He points out there were conflicts in the affidavits and that Mr. Nesteruk's evidence was essential to his case, yet the judge found Mr. Nesteruk not credible without hearing viva voce testimony from him and chose to accept the evidence of Mr. Kotanko and Mr. Holm.

- [44] The decision to proceed by way of summary trial is a discretionary one, entitled to deference on appeal, absent an error of law or principle. As Justice Fitch noted in *Gill v. Gill*, 2022 BCCA 264, the fact that there are conflicting affidavits is not a bar to a matter being found suitable for a summary trial:
- [54] A summary trial will almost invariably involve the resolution of some credibility issues. The existence of conflicts in the evidence that cannot easily be resolved on affidavits does not necessarily entitle a party to a full trial: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*, (1989), 36 B.C.L.R. (2d) 202, at 215-216; 36 C.P.C. (2d) 199 (C.A.). The crucial question is whether the court can achieve a just and fair result in the context of a summary trial: *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270 at para. 22.

Accordingly, I consider the possibility of this Court interfering with the decision to proceed by way of summary trial to be remote.

- [45] More importantly, as indicated by the excerpt from the judge's reasons quoted in para. 32 above, taking Mr. Nesteruk's evidence at its highest (i.e., resolving all "credibility" concerns in his favour), she was not satisfied the conversation he deposed to having overheard in 2009 could establish the creation of trusts in 2011 and later. In reaching this conclusion, the judge committed no material errors of law or principle or palpable and overriding errors of fact. There is, accordingly, no basis on which this Court would interfere with this key finding.
- [46] Mr. Armstrong further says the judge erred by not expressly considering his relationship with his mother in finding that a secret trust had not been established with respect to the townhouse. However, this ground is bound to fail in light of the following: (i) any declaration in 2009 would not have been contemporaneous with the 2012 property transfer; (ii) there was no certainty of subject--indeed, Mr. Nesteruk deposed that the 2009 conversation concerned two properties, only one of which is now alleged to be part of a trust; and (iii) there is no evidence Ms. Almgren communicated to Mr. Kotanko a desire that he hold the townhouse in trust nor that he confirmed he would hold it in trust for Mr. Armstrong.
- [47] Finally, Mr. Armstrong alleges the proceeding was unfair because: (i) the judge made an adverse finding with respect to Mr. Nesteruk's credibility without his having been given an opportunity to testify; (ii) Mr. Kotanko and Mr. Holm were allowed to refer to their affidavits in direct evidence without first exhausting their memories; and (iii) Mr. Kotanko and Mr. Holm were allowed to give direct evidence that went beyond what was in their affidavits.
- [48] I do not need to consider the merits of the unfairness argument as it relates to Mr. Nesteruk's credibility since success on this point would not result in success on the appeal. This point is, in effect, moot because, as discussed above, the judge's ultimate conclusion did not rest on an adverse finding with respect to Mr. Nesteruk's credibility.

- [49] I am unable to place any weight on the complaints concerning how Mr. Kotanko and Mr. Holm testified, because those arguments were advanced in a vacuum. Mr. Armstrong was unable to provide me with any examples of how Mr. Kotanko and Mr. Holm improperly used their affidavits or how their direct examinations exceeded what would be proper in the circumstances.
- [50] It is for these reasons that I am of the view this appeal is devoid of merit and is bound to fail.

Irreparable Harm and Balance of Convenience

- [51] Mr. Armstrong submits that without a stay he and his partner will be forced to vacate their home. He deposes he is in poor health and that both he and his partner have modest incomes. His partner currently cares for him and there is uncertainty as to whether they will be able to find other housing together. He also says if a stay is not granted, then Mr. Kotanko will sell the townhouse and there is a strong possibility he would not be able to recover the sale proceeds should his appeal succeed.
- [52] Mr. Kotanko deposes he has clear title to the house in which he resides. He intends to sell the townhouse as soon as he can to minimize incurring further expenses in relation to it. He states he is responsible for the 2023 property taxes of approximately \$5,700 (due July 4, 2023) and that the property could be sold if the current property tax arrears of approximately \$2,100 is not paid by September 25, 2023. He is also required to pay for property insurance.
- [53] In my view, although Mr. Armstrong would suffer some harm if now required to vacate the townhouse, Mr. Kotanko would suffer greater harm if Mr. Armstrong is allowed to continue living there while he seeks to advance a hopeless appeal. Mr. Kotanko would be required to expend more money, essentially to keep Mr. Armstrong housed, in circumstances in which it is acknowledged that Mr. Kotanko would never be able to recover those funds.
- [54] Accordingly, the balance of convenience weighs strongly against granting a stay. However, as Mr. Kotanko advised me that he is prepared to give Mr. Armstrong until the end of August to vacate the townhouse, I will grant a time-limited stay to give effect to that representation.

Should Security for Costs be Ordered?

- [55] In a notice of application filed ten days after Mr. Armstrong filed his notice of appeal, Mr. Kotanko seeks an order requiring Mr. Armstrong to post \$10,000 as security for costs of the appeal, and \$70,000 as security for costs of the trial. The draft bills of costs included in Mr. Kotanko's material are for appeal costs of \$10,619, and trial costs of \$80,669.

- [56] Mr. Armstrong acknowledges he does not have the means to personally post any amount as security for costs. He deposes that Mr. Nesteruk has offered to post security for costs of the appeal. However, there is no indication as to the amount Mr. Nesteruk is in a position to post and whether his offer covers both appeal and trial costs. Mr. Armstrong further says he is not in a position to cover his own appeal-related expenses but that the law firm that acts for him is prepared to do so.
- [57] With respect to appeal costs, it is beyond question that Mr. Kotanko will be unable to recover those costs if this appeal proceeds. Given that the appeal lacks merit, it is also beyond question that Mr. Armstrong has not established that the interests of justice require that security for appeal cost not be posted. To the contrary, the interests of justice require that they be posted. To do otherwise would allow Mr. Armstrong to continue to gamble with Mr. Kotanko's money.
- [58] With respect to trial costs, the onus is on Mr. Kotanko to show it is in the interests of justice to require Mr. Armstrong to post security. Once again, the lack of merit militates in favour of such an order.

Disposition

- [59] The following term of the trial judge's order (entered July 5, 2023), is stayed up to and including August 31, 2023:
7. the Plaintiff shall deliver vacant possession of the Property to the Defendant Jerry Kotanko by no later than fifteen business days after the pronouncement of this Order (the "Vacancy Date");
- [60] Mr. Armstrong is ordered to post security in a form acceptable to the registrar of this Court, or in such form as the parties may agree, on or before August 31, 2023, in the following amounts:

Appeal costs:

\$10,000

Trial costs:

\$40,000

Total:

\$50,000

- [61] If security is not posted, then Mr. Kotanko is at liberty to apply to have this appeal dismissed as abandoned.

"The Honourable Mr. Justice Frankel"

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