

CANADA / JUDGMENT

Jiang v. Peoples Trust Company

2022 BCCA 40

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 40 Jiang v. Peoples Trust Company

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jiang v. Peoples Trust Company,

2022 BCCA 40

Date: 20220202

Dockets: CA47945; CA47946; CA47947

Docket: CA47945

Between:

Ying Jiang

Respondent

(Plaintiff)

And

Peoples Trust Company, Peoples Card Services Limited Partnership, Peoples Card Services Ltd.

Appellants

(Defendants)

And

Amex Bank of Canada, All Trans Financial Services Credit Union Limited, Vancouver City Savings Credit Union, and Citizens Bank of Canada

Respondents

(Defendants)

- and -

Docket: CA47946

Between:

Ying Jiang

Respondent

(Plaintiff)

And

Vancouver City Savings Credit Union and Citizens Bank of Canada

Appellants

(Defendants)

And

Peoples Trust Company, Peoples Card Services Limited Partnership, Peoples Card Services Ltd.,
Amex Bank of Canada, and All Trans Financial Services Credit Union Limited

Respondents

(Defendants)

- and -

Docket: CA47947

Between:

Ying Jiang

Respondent

(Plaintiff)

And

All Trans Financial Services Credit Union Limited

Appellant

(Defendant)

And

Peoples Trust Company, Peoples Card Services Limited Partnership, Peoples Card Services Ltd.,
Vancouver City Savings Credit Union, and Citizens Bank of Canada

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Marchand

(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 9, 2021 (Jiang v. Peoples Trust Company, 2021 BCSC 2193, Vancouver Docket S147229).

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Place and Date of Hearing:

Vancouver, British Columbia

January 5, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 2, 2022

Summary:

The applicants seek leave to appeal document disclosure orders made by the case management judge. If leave is granted, they also seek an order staying the document disclosure orders pending the hearing and determination of the appeal. Held: Applications dismissed. The proposed appeals are of some interest to the action and will not unduly hinder its progress, but they are of no interest to the practice, do not prevent the applicants from pursuing their defences and lack merit. The interests of justice favour a dismissal of the applications for leave to appeal and a stay.

Reasons for Judgment of the Honourable Mr. Justice Marchand:

Introduction

- [1] The applicants are defendants in this class action proceeding. They seek leave to appeal document disclosure orders made by the case management judge. If leave is granted, they also seek an order staying the document disclosure orders pending the hearing and determination of the appeals.
- [2] While the proposed appeals are of some interest to the action and will not unduly hinder its progress, they are of no interest to the practice, do not prevent the applicants from pursuing their defences and lack merit. In my view, it is in the interests of justice to dismiss the applications for leave to appeal and a stay.

Background

Procedural History

- [3] This application arises in the context of a class action proceeding commenced in September 2014, relating to the use of prepaid purchase cards (non-credit Visa or Mastercards) issued by various financial institutions. The plaintiff alleges that the defendants sold prepaid purchase cards with expiry dates and fees for the purchase and use of the cards, contrary to Part 4.1 of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA].
- [4] In March 2016, Justice Bowden, then the case management judge, dismissed the plaintiff's certification application on the basis that it did not meet certain requirements of the Class Proceedings Act, R.S.B.C. 1996, c. 50 [CPA]. His decision is indexed as 2016 BCSC 368. In March 2017, this Court allowed an appeal and remitted the certification application to Bowden J. for reconsideration. This Court's decision is indexed as 2017 BCCA 119. Upon hearing the remitted certification application, in March 2018 Bowden J. certified the

following as common issues:

1. Are the reloadable or non-reloadable prepaid cards (together, the "Prepaid Cards"), or both, issued and/or sold by the Defendants, "prepaid purchase cards" as defined in s. 56.1 of the BPCPA?
2. Does the BPCPA apply to the Prepaid Cards issued and/or sold by each of the Defendants to consumers in British Columbia?
3. Does the BPCPA apply to the Prepaid Cards issued and/or sold by each of the Defendants to consumers outside of British Columbia?
4. Did the Defendants charge any fees in relation to any of the Prepaid Cards contrary to s. 56.3 of the BPCPA?
5. Did the Defendants issue Prepaid Cards that have expiry dates contrary to s. 56.2 of the BPCPA?
- [5] The certification decision is indexed as 2018 BCSC 299 and was upheld by this Court: 2019 BCCA 149, leave to appeal to SCC ref'd, 38738 (14 November 2019).
- [6] In January 2020, the defendants served their lists of documents on the plaintiff. They disclosed, among other things, cardholder agreements, card packaging, disclosure statements and user guides. Their lists also contained boilerplate descriptions of classes of documents for which privilege from production is claimed. The descriptions did not identify or provide any detail about individual documents.
- [7] On August 11, 2020, the plaintiff brought an application before the current case management judge seeking additional documents from all defendants, except for Amex Bank of Canada, in three general categories:
 - a) documents related to marketing and advertising prepaid cards (the "Marketing Documents");
 - b) agreements with third-party distributors of the prepaid cards (the "Agreements"); and
 - c) information and documents relating to the number and value of prepaid cards sold during the class period, including fees charged and balances that were "seized" (the "Financial Documents").
- [8] The plaintiff also sought to require the defendants to amend their lists of documents to provide more information with respect to documents over which privilege from production had been claimed.
- [9] The defendants opposed the application for production of documents. They argued the documents were irrelevant, the scope of the demand exceeded the principles of proportionality, and privileged documents were properly listed and adequately described.

Reasons for Judgment

- [10] On November 9, 2021, the case management judge granted the orders sought by the plaintiff. The reasons of the case management judge are indexed as 2021 BCSC 2193.
- [11] The judge considered, at paras. 17-19 of her reasons, that a party demanding additional documents that are not material, but that relate to any or all matters in the action (often referred to as "second tier" documents), must satisfy the requirements of R. 7-1(11) and show the existence and possible relevance of the additional documents beyond a "mere possibility." She noted that the burden on a party seeking documents under R. 7-1(11) is low, and simply requires some "air of reality between the documents and the issues in the action."
- [12] The judge also considered that the proportionality principle in R. 1-3(2) requires the court to attempt to balance the burden of producing additional documents against their materiality and probative value: at para. 20.
- [13] In her analysis, the judge noted that for class actions, relevance is the animating principle in considering a request for additional document discovery. She explained that the question of relevance is "governed by the certified common issues, as informed by the pleadings, and subject to the principles of proportionality that apply alongside the principles that govern class action proceedings": at para. 22.
- [14] In the circumstances, the judge determined that the plaintiff's request for additional documents contained sufficient specificity to meet the requirements of R. 7-1(11) and noted that the defendants had acknowledged that, in many instances, the documents did exist: at paras. 25, 27.
- [15] The judge, at para. 31, held that the Marketing Documents and Agreements ought to be listed and produced because "they are clearly relevant to some of the common issues as informed by the pleadings." Notably, the judge found that the Marketing Documents were relevant to the issue of whether the plaintiff and other class members were consumers within the meaning of the BPCPA, which is a central issue in this class action. The judge also determined that the Marketing Documents and Agreements were relevant to issues raised in the pleadings, including statements about the defendants' involvement in the marketing and distribution of the prepaid cards: at paras. 28-31.
- [16] For the Financial Documents, the judge was satisfied that the plaintiff had "shown an air of reality and more than a mere possibility that the Financial Documents are relevant and they relate to the common issues and other issues raised in the pleadings": at para. 39.

- [17] The judge referred to *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867. *Bernstein* involved a similar class action in Ontario in which the plaintiff relied on similar documents to establish both the defendants' liability and damages. The judge rejected the defendants' argument that *Bernstein* was irrelevant because it involved different parties, different cards, and different legislation: at paras. 37-38.
- [18] The judge expressly rejected the defendants' argument that since this class action raises only narrow issues of statutory interpretation, the plaintiffs do not require any evidence beyond what was already disclosed. She explained:
- [34] Arguments that this action raises only narrow issues of statutory interpretation that require no evidence beyond the evidence already produced by the defendants is not an answer to the plaintiff's application. I say this because statutory interpretation must be undertaken in accordance with the modern principle of statutory interpretation "that is, that the words of a statute must be read 'in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" [emphasis added]: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 117, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1988] 1 S.C.R. 27 at para. 21.
- [35] Since the [BPCPA], like any other statute, is to be interpreted in accordance with the modern principle of statutory interpretation, it is not for the defendants to decide what evidence the plaintiff will advance to establish her case.
- [19] The judge also held that the possible relevance of the Financial Documents to the potential remedy of aggregate damages, which she noted was not a certified common issue, did not make them irrelevant for the purposes of the common issues: at para. 36.
- [20] The judge acknowledged that, in considering the scope of examination for discovery in a class action, the proportionality principle had to be considered alongside the principles that govern class action proceedings. Under R. 1-3, proportionality means to conduct the proceeding in a manner proportionate to the amount involved and the importance and complexity of the issues in dispute: at para. 42.
- [21] The judge decided that a broad scope should apply to the issue of document discovery in this case due to the large sum of damages at issue, the important issues raised, and the complexity of the factual and legal issues: at paras. 41-43.
- [22] The judge then weighed the burden of producing the demanded documents against their materiality and probative value. In doing so, she considered the nature of the claim and the position of the defendants as sophisticated financial institutions. She found that it was appropriate and proportionate to require the defendants to disclose the requested documents: at paras. 44-45.

- [23] While the judge ordered that the defendants list and produce the demanded documents, she made no determination on whether any particular document was in the possession or control of a defendant. She held that, if they arose, such issues were better left to be determined after the defendants provided an amended list of documents: at para. 46.
- [24] With respect to privileged documents, the judge noted that there was "no hard and fast rule regarding how much information must be included in the description of a document over which solicitor-client privilege is claimed." She further noted that the document must be sufficiently described so that, if challenged, it can be considered by a judge in chambers: at para. 50.
- [25] The judge observed that the authorities generally recognized that solicitor-client privilege can be maintained by requiring documents to be individually listed and described, even if generically. For documents subject to other privilege, more information is required to fulfill the requirements of R. 7-1(7): at para. 53.
- [26] Finally, the judge held that, in view of the Rules and the authorities, the defendants had failed to sufficiently describe the privileged documents in such a way that they could be considered by a judge in chambers. Therefore, to meet the standard required and enable the plaintiff to assess the validity of the claim of privilege, at paras. 54-56, she ordered the defendants to individually list and describe the documents in accordance with the court's guidance in *Gardner v. Viridis Energy Inc.*, 2013 BCSC 580.

Positions of the Parties

Applicants

- [27] The defendants/applicants argue that the judge erred in law by:
- a) ordering the production of documents that are irrelevant to the certified common issues, or alternately, to the pleadings;
 - b) ordering the itemized listing of privileged documents and communications; and
 - c) failing to give effect to the principle of proportionality.
- [28] One applicant, All Trans Financial Services Credit Union Limited ("All Trans"), says the judge erred by not making a threshold determination that the requested documents were in its possession or control.

Respondent

- [29] The plaintiff/respondent argues that the chambers judge did not make any legal error. Further, the respondent argues that the applicants have failed to satisfy the tests for leave to appeal and for granting a stay.

Legal Framework for Leave to Appeal

- [30] The Court of Appeal Act, R.S.B.C. 1996, c. 77, ss. 6(1), 6(2), 7(2), provide for a general right of appeal from any order, except limited appeal orders.
- [31] "Limited appeal orders" are defined in R. 2.1 of the Court of Appeal Rules to include orders relating to discovery and inspection of documents under Part 7 of the Supreme Court Civil Rules. There is no dispute that the judge's order is a limited appeal order.
- [32] The test for leave to appeal was set out by Justice Saunders in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (Chambers):
- [10] The criteria for leave to appeal are well known. As stated in *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
- (1) whether the point on appeal is of significance to the practice;
 - (2) whether the point raised is of significance to the action itself;
 - (3) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
 - (4) whether the appeal will unduly hinder the progress of the action.
- See also *Chavez v. Sundance Cruises Corp.* (1993), 77 B.C.L.R. (2d) 328, 1993 CanLII 2432 (C.A.); *V.F. v. E.B.*, 2011 BCCA 238 at paras. 19-21 (Chambers).
- [33] The overarching question is whether granting leave to appeal is in the interests of justice: *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).
- [34] The onus is on the party seeking leave to prove all the elements: *Gichuru v. Law Society of BC*, 2012 BCCA 159 at para. 16 (Chambers).
- [35] Most limited appeal orders involve exercises of discretion. Therefore, leave will typically only be granted where the order under review is clearly wrong, would cause serious injustice or demonstrates an error in principle or where the discretion was not exercised judicially: *V.F.* at paras. 22-23.
- [36] Where leave is sought to appeal discretionary orders made by a case management judge, the test is even more stringent: *Roback Industries Ltd. v. Gardner*, 2006 BCCA 395 at para. 12 (Chambers), cited in *British Columbia (Director of Civil Forfeiture) v. Day*, 2019 BCCA 160 at para. 11 (Chambers).
- [37] A document discovery order made by a case management judge is a discretionary order and therefore is subject to very limited appellate review: *Day* at para. 10; *Neufeld v. Foster*, 2000 BCCA 485 at para. 14 (Chambers).

Analysis

Criterion #1: Significance to the Practice

- [38] Where an area of law is already well settled, or where the order under appeal is very specific to the action, it will not be an issue of significance to the practice: *Re Canadian Petcetera Limited Partnership*, 2009 BCCA 255 at para. 19 (Chambers); *Gulamani v. Chandra*, 2009 BCCA 206 at para. 15 (Chambers).
- [39] In this case, the law on document production, including how to deal with claims of privilege, is well settled, and the order under appeal is very specific to the action. Indeed, the applicants largely complain about the breadth of the orders at issue, rather than the judge's articulation of the legal principles. I will address the applicants' concerns about the breadth of the orders when I turn to the merits of the proposed appeals.
- [40] The applicants also argue that the judge's comments on the potential relevance of the requested documents to questions of statutory interpretation represent a significant error in the application of the modern approach to statutory interpretation. The respondents acknowledge that "[i]t is unclear how [the requested documents] could be utilized in a modern statutory interpretation exercise." They say, however, that the applicants misconstrue the judge's reasons for judgment.
- [41] Either way, the law on statutory interpretation is well settled and the judge's decision does not involve an interpretation of the legislation at issue. In other words, even if the decision can be read to suggest that the requested documents could be used to inform the statutory interpretation exercise, that was not in fact done. In such circumstances, it is hard to imagine a few isolated lines from a document production decision (rather than a statutory interpretation decision) altering the trajectory of the development of the law of statutory interpretation.
- [42] Finally, All Trans argues that its proposed appeal will provide an opportunity for this Court to consider "the role that possession, power or control plays as a threshold to second tier disclosure." It appears that this issue has not been addressed by this Court (or the trial court) and could be of some interest to the practice. On the other hand, the issue is confined to the exercise of discretion by a case management judge, All Trans' arguments about possession and control have simply been deferred, not dismissed, and there is no suggestion the threshold issue All Trans wishes to raise is causing problems across the practice.
- [43] In all of the circumstances, I am unable to conclude that the proposed appeals are of significance to the practice.

Criterion #2: Significance to the Action

- [44] As recently outlined by Justice Fisher in *Melcer Estate v. Boxer*, 2021 BCCA 81 (Chambers):

- [34] Considerations under this criterion may include the significance of the appeal to the proposed parties: *West Bay SonShip Yachts Ltd. (Re)*, 2007 BCCA 419 at para. 12 (Chambers). However, where a point may be of significance to the party but not of significance to the action, leave may be refused: *Columbia National Investments Ltd. v. Abbotsford (City)*, 2007 BCCA 368 at para. 24 (Chambers).
- [45] In my view, the issues raised on appeal are significant to the parties and have some significance to the action. Document disclosure is an essential part of the litigation process. In this case, the orders compel production of a significant volume of documents that will cost all parties significant time and expense to review and may complicate and delay examinations for discovery and trial.
- [46] However, the orders under appeal do not prevent the defendants from pursuing their defences (Day at paras. 32-34) and do not make any final decisions on the law or facts going to the merits of the proceeding (*Saran v. Cartonio, Inc.*, 2020 BCCA 252 at para. 23 (Chambers)).

Criterion #3: Merits of the Appeal

- [47] To establish that an appeal is *prima facie* meritorious, the applicant must present an arguable case with some prospect of success. A vexatious, frivolous, or unnecessary case or one with no chance of success will not pass the requisite threshold: *Gichuru* at para. 22; *Teck Cominco Metals Ltd. v. British Columbia (Minister of Revenue)*, 2009 BCCA 3 at paras. 19-20 (Chambers).
- [48] Despite the vigour of the applicants' arguments, in my view, the proposed appeals have no chance of success.
- [49] In their responses to civil claim, the applicants put every substantive aspect of the respondent's claim in issue and the common issues are broad. As the judge indicated, the Marketing Documents, Agreements and Financial Documents are all relevant in the sense that they may tend to prove facts in issue.
- [50] Resolving the common issues will involve more than an abstract interpretation of the BPCPA. It will involve, among other things, determining whether the class members are consumers as defined by the legislation and whether prohibited fees were actually charged or cards actually expired contrary to the legislation. Though involving somewhat different legislative language, in *Bernstein*, the Court relied on the very types of documents ordered to be produced by the judge to support its liability findings: see *Bernstein* at paras. 233-234, 240-257. Perhaps the applicants will ultimately succeed in distinguishing *Bernstein* at trial, but that does not make the Marketing Documents, Agreements and Financial Documents irrelevant to the exercise of determining liability.

- [51] Similarly, neither the judge's comments on statutory interpretation nor the relevance of the documents to an issue that has not been certified (i.e., aggregate damages) make the documents irrelevant at this stage of the proceedings.
- [52] While there is no case law on the "threshold" issue raised by All Trans, no one was better placed than the case management judge to determine when and how best to examine the question of whether the documents ordered to be produced are in the possession or control of All Trans.
- [53] Regarding proportionality, the judge was clearly aware of the scope of the orders she was making and how they might be of assistance in determining the case on the merits. She was best placed to determine whether the orders were proportionate and appropriate.
- [54] Finally, the judge made an order in line with the prevailing authorities in requiring the applicants to provide some basis on which the respondent and the court could assess their claims of privilege.
- [55] All aspects of the judge's order were discretionary and are entitled to a high degree of deference. The applicants have not established that the orders were clearly wrong, would cause serious injustice or demonstrate an error in principle. The applicants have also not established that the judge's discretion was not exercised judicially.

Criterion #4: Will the Appeal Unduly Hinder the Progress of the Action?

- [56] Considerations under the fourth criterion include concerns as to timing and the sufficiency of the factual matrix, time-sensitive aspects of the litigation, or the possibility of settlement negotiations: Gichuru at para. 23.
- [57] The applicants argue that this appeal will not unduly hinder the progress of this action because it has been ongoing since 2014 and the appeal will not threaten any trial dates as none have been set down. Moreover, the applicants say that any inconvenience or delay resulting from the appeal is minimal and outweighed by the risk of requiring the applicants to exert a significant amount of time and resources to produce the documents they say have no relevance to the common issues at trial.
- [58] While the applicants are correct that this action was commenced in 2014 and that no trial dates have been set, that appears to be a function of the two certification hearings, the two appeals to this Court, the application for leave to appeal to the Supreme Court of Canada and the applicants' assertion that the scope of their documentary disclosure ought to be narrow. The time it has taken to get to this stage does not indicate that the respondent is uninterested in a timely resolution of the action or has not been diligent in pursuing it. The applicants' other arguments are just restatements of their relevance and proportionality arguments.

[59] Given the passage of time since this action was commenced, it behooves all parties to move promptly toward a trial on the common issues. That said, I cannot conclude that an appeal would "unduly" hinder the progress of the action. In particular, I accept that, if leave is granted, the applicants will work diligently to coordinate the earliest possible hearing date for an appeal.

Interests of Justice

[60] The proposed appeals are of some interest to the action and will not unduly hinder its progress. On the other hand, the proposed appeals are of no interest to the practice, do not prevent the defendants from pursuing their defences and lack merit. In all of the circumstances of the case, the interests of justice will be best served by deferring to the case management judge's exercise of discretion and dismissing the applications for leave to appeal.

Conclusion

[61] For all of these reasons, I dismiss the applications for leave to appeal. As a result, I also dismiss the applications for a stay of the orders at issue pending the hearing and determination of the appeal.

"The Honourable Mr. Justice Marchand"

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