

CANADA / JUDGMENT

Kasatani v. Matsubara

2020 BCSC 1960

COURT

Supreme Court of British Columbia

DECIDED

9 December 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 1960 Kasatani v. Matsubara

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kasatani v. Matsubara,

2020 BCSC 1960

Date: 20201209

Docket: Vancouver

Registry: S163804

Between:

Fusako Kasatani

Plaintiff

And

Kuniaki Matsubara, Motoko Driscoll, and Brian Laurence Driscoll

Defendants

Before: The Honourable Mr. Justice Gomery

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff, appearing by teleconference:

M. Morinaga

Counsel for the Defendant, Kuniaki Matsubara, appearing by teleconference:

K. Vimalasan

Counsel for the Defendants, Motoko Driscoll and Brian Laurence Driscoll, appearing by teleconference:

S. Boucher

Place and Date of Hearing:

Vancouver, B.C.

December 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 9, 2020

Introduction

- [1] This litigation concerns the estate and affairs of the late Teruji Matsubara, who died on December 20, 2015. In these reasons, for ease of reference and intending no disrespect, I will refer to all parties by their first names.
- [2] The central issue is the validity of a will made by Teruji on October 8, 2014 (the "October will"). The defendants are Teruji's son, Kuniaki, his daughter, Motoko, and Motoko's husband, Brian. They are the sole beneficiaries under the October will. They maintain that it is valid.
- [3] Teruji considered the plaintiff, Fusako, as his girlfriend. She was to receive his assets held with the Royal Bank of Canada under an earlier will made by Teruji August 15, 2014 (the "August will"), and the residue of his estate under a still earlier will made on May 7, 2014 (the "May will"). Kuniaki and Motoko were the residuary beneficiaries under the August will. Fusako seeks to propound the August will or, in the alternative, the May will.
- [4] Fusako also challenges the defendants' dealings with Teruji's assets, including dealings pursuant to an alleged power of attorney made concurrently with the October will. Fusako only has standing to pursue this challenge if she is a beneficiary under the August will or the May will.
- [5] The defendants' main answer to Fusako's claim is that the October will revoked all prior wills. Fusako asserts affirmatively that Teruji lacked testamentary capacity when he made the October will and says that it is therefore not valid. The defendants maintain, in the alternative, that if Teruji lacked capacity to make the October will, he also lacked capacity to make the earlier May and August wills.

- [6] At trial, the burden will be on the defendants to prove that Teruji was possessed of testamentary capacity--in the time-honoured formula, a sound disposing mind--when he signed the October will. The burden will be on Fusako to prove that Teruji had capacity when he signed the August will or, failing that, the May will.
- [7] While Teruji was a resident of Vancouver, the witnesses at the coming trial are geographically dispersed. Fusako lives in Japan. She visited Teruji in Vancouver on at least four occasions in 2014, before and at the time the May and August wills were made. She was not in British Columbia when Teruji gave instructions for and made the October will.
- [8] Motoko and Brian live in Comox, British Columbia. Kuniaki lives in New Zealand.
- [9] The trial is scheduled for ten days beginning January 25, 2021. Because of the COVID-19 pandemic, Fusako and Kuniaki are not, at present, permitted to come to Canada. The parties agree that it is highly probable that the border will continue to be closed to them when the trial is scheduled to begin.
- [10] In order that the trial may proceed as scheduled, Fusako applies for an order that she may testify at the trial by video conferencing. She also wishes to have Kuniaki give his evidence by video. The parties agree that Fusako, at least, is an essential witness and that, if she cannot testify by video, the trial must be adjourned. If it must be adjourned, it will be delayed until January 2022 at the earliest.
- [11] The defendants vigorously oppose Fusako's application. Adopting the language of s. 73(2)(a) of the Evidence Act, R.S.B.C. 1996, c. 124, they maintain that, in the circumstances of this case, to permit Fusako to testify by video would be "contrary to the principles of fundamental justice".

Background

- [12] A feature of this case is that Teruji spoke only Japanese. Japanese is the native tongue of Fusako and Kuniaki, who gave evidence on discovery through interpreters.
- [13] During her examination for discovery, Fusako's relationship and dealings with Teruji dating back to at least 2002 were canvassed. At trial, counsel will be addressing these matters with reference to a large number of handwritten letters and postcards exchanged between Fusako and Teruji over the years. All are written in Japanese.
- [14] The examinations for discovery were complicated by confusion as to the proper translation of phrases contained in Fusako's correspondence with Teruji. Counsel sometimes relied upon the interpreter, who was present to translate the oral evidence, to locate and translate particular passages in the correspondence. While this may not have been the best practice, it is clear that issues of interpretation and translation will make the trial challenging.

Legal framework

[15] Section 73(2) of the Evidence Act authorizes the receipt of testimony by any "technology that allows the court, the parties and the witness to engage in simultaneous visual and oral communication". I will call this "video evidence". The court may exercise a discretion to permit video evidence, where the necessary technology is available, unless "one of the parties satisfies the court that receiving the testimony in that manner would be contrary to the principles of fundamental justice". If there is an objection, subsection (3) lists the following factors for consideration in deciding whether to allow video evidence:

- (a) the location and personal circumstances of the witness;
- (b) the costs that would be incurred if the witness had to be physically present;
- (c) the nature of the evidence the witness is expected to give;
- (d) any other circumstance the court considers appropriate.

[16] The parties refer me to the following cases addressing the exercise of the court's discretion under s. 72(3):

- Nybo v. Kralj, 2010 BCSC 674 at paras. 8-12;
- Slaughter v. Sluys, 2010 BCSC 1576 at paras. 7-12;
- Seder v. Insurance Corporation of British Columbia, 2011 BCSC 823 at paras. 26-37;
- Miley v. Abulaban, 2014 BCSC 1905 at paras. 6-17;
- Grahovac v. Hartfiel, 2015 BCSC 1142 at paras. 34-73; and
- Singh v. Chad, 2018 BCSC 1860 at paras. 89-93.

In none of these cases did an objecting party satisfy the court that allowing video evidence would, in the circumstances of that case, be contrary to the principles of fundamental justice.

[17] Slaughter is the only one of these cases in which video evidence was not allowed, and it was a split decision in that Justice Beames exercised her discretion to permit video evidence in respect of some witnesses, but not others. At para. 10, she rejected an argument that proper and full cross-examination cannot take place where witnesses appear by video. In exercising her discretion, she took into account the extent to which the evidence would be contentious.

[18] In the past five years or so, there has been a great increase in the receipt of video evidence in civil litigation, as the necessary technology has improved and become ubiquitous. During the COVID-19 pandemic, video evidence is commonplace. It is not confined to witnesses testifying to routine or inconsequential matters. It is almost always tendered by consent. Judges have become accustomed to assessing the credibility and reliability of evidence given by a witness seen only on a video screen. Early concerns have been allayed, at least to some extent, by experience.

- [19] Because this application involves a stark choice between allowing video evidence and an adjournment, the law governing adjournment applications is relevant. A decision to adjourn a trial is discretionary. The paramount consideration is the interest of justice in ensuring that there will be a fair trial on the merits of the action; *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at para. 19. Consideration of the interest of justice includes consideration of the plaintiff's interest, and the broader interests of the judicial system, in having a case that the plaintiff set down for trial some time ago proceed as scheduled; *Henderson v. Fisher*, 2020 BCSC 886 at para. 23. Nevertheless, defendants should not be forced on to trial at the cost of having a fair chance to make out their case; *Navarro* at para. 19.
- [20] I think it is obvious that I should not permit evidence to be given by video if that would deny the defendants a fair trial on the merits. To do so would be contrary to the principles of fundamental justice. Conversely, as the defendants have conceded, there is no good reason for an adjournment if Fusako's application succeeds. What this underscores is that Fusako's application ultimately turns on the fairness of a trial process, in the particular circumstances of this case, in which Fusako and, possibly Kuniaki, would testify by video.

Analysis

- [21] I must be satisfied that the necessary technology is available. Fusako states, in her affidavit:
7. I live in the Tokyo metropolis. There are many international businesses here. For trial, I intend to book a professionally operated conference room with video conferencing technology that can accommodate the court's video conferencing requirements and be open during trial hours.
- [22] The defendants submit that this does not adequately address the technical requirements. I have no doubt that suitable facilities are available in Tokyo. I agree with the defendants that further technical matters must be addressed prior to trial, but that is not an obstacle to making an order at this time.
- [23] The defendants submit that the following considerations warrant a finding that permitting Fusako to testify by video will result in an unfair trial that is contrary to the principles of fundamental justice. They contend that the question of Teruji's testamentary competence will likely turn on the court's assessment of the rationality of his decision to remove Fusako as a beneficiary in the October will. In making the will, he provided an account of his dealings with Fusako that she contests. Her credibility is therefore a central issue.
- [24] Fusako's evidence is expected to last for three-and one-half or four days of the trial. From the point of view of time taken up, she will be the most significant single witness. The defendants emphasize, as well, that she is a party and not merely a witness.
- [25] The defendants point to the challenges resulting from the presence of relevant documents written in Japanese and the presence of an interpreter. They maintain that these features of the case exacerbate its difficulty and increase the risk of unfairness.

- [26] To my mind, some of these points are not at all persuasive. Fusako's status as a party is irrelevant. It might be relevant to the exercise of my discretion if Fusako's reason for not coming to testify in person were a matter of convenience, rather than hard necessity. As it is, her present difficulty was unforeseeable and is unanswerable.
- [27] I do not think that it matters that Fusako's evidence will take up a large part of the trial. The question has to do with the quality of the evidence, not its quantity.
- [28] The involvement of an interpreter was not an obstacle to the receipt of testimony by video in Grahovac, where Justice Griffin, then of this Court, found that simultaneous interpretation simply meant that, quite apart from the use of video technology, a certain constraint on the conduct of cross-examination at trial was inevitable. She stated:
- [58] Notably, the fact that an interpreter would have to be used with these witnesses, in any event, means that the pace of cross-examination and ability for eye contact when questioning the witness was already going to be hindered, even if the witnesses testified while present in the courtroom.
- [29] The use of documents written in Japanese complicated the conduct of the examinations for discovery, and gave rise to a certain amount of confusion. Often, documents to be put in cross-examination of a witness appearing by video are provided in advance, but counsel is justified in objecting to that in a case in which credibility is in issue. I expect that technical arrangements can be made to enable images of documents to be shown to the witness in real time during the examination. On that basis, I would expect the difficulties associated with the fact that the documents are in Japanese will be no greater with video evidence than they would be if the witness were present in court.
- [30] This brings me to the central question of the substance and importance of Fusako's evidence, in the circumstances of this case.
- [31] I accept that Fusako is an important witness and that the case may turn on her evidence. There will be other important witnesses as well, including the notary who drafted the May, August and October wills and a physician who saw Teruji on October 7, 2014, the day before he made the October will. The doctor stated, in a lengthy note:
- The patient states that he feels confused and bewildered, and wants assistance in managing his finances because he does not feel he has been capable and feels like things are out of his control currently.
- [32] The doctor's note states that Teruji told him about "a big row he had with his son just 3 days prior to this visit". Kaniaki and Motoko will potentially have evidence to give concerning their observations of Teruji's apparent competence at the time he gave instructions for and signed the October will.

[33] According to the notary's notes, on September 24, 2014, Teruji gave the following reasons for wanting to change his will so that he would no longer leave his assets to Fusako. He did not know what she had done with the August will, and was upset about that. He had gone to the bank and learned that Fusako had withdrawn money from his accounts, and had used his credit cards for her own purposes.

[34] I assume that the financial transactions in question are documented and it appears that Fusako's involvement in them is undisputed. She pleads that:

the fact of the matter was that he gave her access to his bank account, appointed her as power of attorney, and authorized her to use his credit card.

[35] Fusako will bear the burden of establishing that transactions from which she benefitted were righteous. Paraphrasing Griffin J. in Grahovac at para. 61, the risk to the defendants that their cross-examination of Fusako will be hampered if done by videoconference is at least equalled by the risk to Fusako that the evidence will not be as helpful to her as it might be if she were in court. Griffin J. added:

[61] It surely has to be the case that, all things being equal, the plaintiff would prefer to have his witnesses in court. If in court, the witnesses would have the opportunity to look directly at the jury and there would then be a greater chance that the sincerity of the evidence would resonate with the jury.

[36] The defendants have a good deal of material to work with in cross-examining Fusako. They have the records of her financial dealings, her correspondence with Teruji, and her evidence on discovery. Counsel will be in a position to make submissions as to her credibility having regard to the considerations canvassed in the well-known case of Bradshaw v. Stenner, 2010 BCSC 1398 at para. 186. They include the firmness of her memory, her ability to resist the influence of interest to modify her recollection, whether her evidence harmonizes with independent evidence, whether she changes her evidence during direct and cross-examination, whether her testimony seems unreasonable, impossible, or unlikely, whether she has a motive to lie, and her demeanor generally.

[37] Taking everything into account, I am not persuaded that the defendants will be denied a fair opportunity to confront Fusako and challenge her evidence in cross-examination, if her evidence is given by video. Fusako's evidence will not be received in a manner that offends the principles of fundamental justice.

Conclusion

[38] Any order I may make must be subject to the trial judge's discretion to put a halt to the proceedings if difficulties with Fusako's examination or cross-examination threaten the judge's ability to decide the case justly and fairly.

[39] With that important caveat, I am satisfied that the application should be allowed so far as it relates to Fusako's evidence. I order that Fusako may testify at trial by video conference provided that:

- a) The interpreter will be present in the courtroom in Vancouver;
- b) The video conferencing arrangements will include provisions enabling documents to be shown to the witness in real time;
- c) Fusako will identify the facility in Tokyo to be used for the video conference and provide to the opposing parties details of its technical capabilities in advance of the Trial Management Conference;
- d) This order may be supplemented or varied by the Judge or Master presiding at the Trial Management Conference or by the trial judge.

[40] So far as the application relates to Kuniaki's evidence, the evidence is that he resides in a small town in New Zealand. I have no evidence as to the availability of video facilities that would be open during court hours in Vancouver. It is not entirely clear that Fusako needs or intends to call Kuniaki as part of her case.

[41] I adjourn Fusako's application so far as it relates to Kuniaki. If Fusako wishes to pursue it with a view to calling Kuniaki as an adverse witness, she may file such further affidavit evidence as she deems appropriate and reschedule the application.

[42] If Fusako does not pursue the application and Kuniaki himself seeks leave to give video evidence, I would hope that the necessary arrangements could be settled by agreement between counsel.

[43] Kuniaki's application to adjourn the trial is dismissed.

"Gomery J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/19/2020BCSC1960.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/kasatani-v-matsubara-2020>

Prepared on 26 October 2026 · Esheria