
CANADA / JUDGMENT

Kasian Estate v. Kasian

2021 BCCA 273

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 273 Kasian Estate v. Kasian

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kasian Estate v. Kasian,

2021 BCCA 273

Date: 20210608

Docket: CA47500

Between:

Kelay Ohlhauser, Executrix of the Estate of Laura Kasian

Respondent

(Plaintiff)

And

Don Kasian

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Voith

(In Chambers)

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

May 11, 2021 (Ohlhauser v. Kasian, 2021 BCSC 892, Vancouver Docket S168444).

Oral Reasons for Judgment

Counsel for the Appellant

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(via teleconference):

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Place and Date of Hearing:

Vancouver, British Columbia

June 7, 2021

Place and Date of Judgment:

Vancouver, British Columbia

June 8, 2021

Summary:

Applications for leave (if necessary) to appeal an order that the appellant deliver to the respondents a list of solicitor-client privileged documents relevant to a limitation period issue, and for a stay of that order pending the determination of the appeal. Held: Leave to appeal is not required and the notice of application for leave to appeal is converted to a notice of appeal. Application for a stay of the order dismissed; the balance of convenience and interests of justice do not favour a stay in the circumstances of this case.

- [1] VOITH J.A.: Mr. Kasian advances two applications. The first (the "Leave Application") is for leave to appeal a decision of the Honourable Justice Winteringham, pronounced May 11, 2021 (the "Order"), with reasons indexed as 2021 BCSC 892, ordering Mr. Kasian to deliver to the respondents a list of solicitor-client privileged documents relevant to a limitation period issue, on the basis that he had waived privilege. A preliminary question is whether leave to appeal is required.
- [2] The second application (the "Stay Application") is brought for a stay of the Order pending the determination of the appeal if leave is granted or if leave is not required.

Background

- [3] Mr. Kasian and Laura Kasian were married for about 30 years. They became involved in a family law proceeding and were granted a divorce on January 24, 2013. Both were represented by lawyers throughout the family law proceeding. On November 22, 2013, they executed Minutes of Settlement following mediation, resolving various corporate financial matters outstanding between them. The Minutes of Settlement provided that Mr. Kasian would pay \$2 million to Ms. Kasian over a period of time, pursuant to a payment schedule. Mr. Kasian made some of the payments but stopped when Ms. Kasian died on December 4, 2015. He advised Ms. Kasian's estate (the "Estate") that, aside from interest accrued to the date of her death, he would not make further payments and that his obligation to make further payments was over.
- [4] On September 13, 2016, the Estate commenced the underlying action against Mr. Kasian for the balance not paid on the Minutes of Settlement. In his amended response to civil claim, Mr. Kasian raises various contractual defences, including rescission or variation of the Minutes of Settlement.
- [5] In May 2018, the Estate conducted an examination for discovery of Mr. Kasian. Mr. Kasian testified that in mid-2015 he had formed the view that the Minutes of Settlement were unfair and that he had told his lawyer he would be "looking at things."
- [6] On September 8, 2020, four years after the action commenced, Mr. Kasian filed an application (the "First Third-Party Application") seeking leave to file a third-party notice against his former lawyers who represented him during the family law proceeding, including the respondents Karen Thompson and Owen Bird Law Corporation (collectively, the "Owen Bird Parties"). In his application, Mr. Kasian addressed the issue of whether the limitation period had run on his third-party claim. In doing so, he said:

52. In the present Action, Mr. Kasian did not know and could not reasonably have known that a claim for contribution or indemnity could be made against the Third Parties until he had the opportunity to seek legal advice on disclosure of Ms. Thompson's file as it related to the Family Proceeding and Minutes of Settlement. Only subsequent to that disclosure was Mr. Kasian able to seek legal advice in respect of the causes of action advanced under the Third Party Notice against the Third Parties.
53. As Mr. Kasian did not and could not reasonably have known that a claim for contribution or indemnity could be made against the Third Parties, the applicable limitation period has not run. Mr. Kasian should be granted leave to file the Third Party Notice.
- [7] The Estate and the Owen Bird Parties filed responses to Mr. Kasian's application. The Owen Bird Parties, in their response, stated that Mr. Kasian's assertions in his notice of application "put his state of mind in issue and constitute a waiver of privilege." The Respondents, that being the Estate and the Owen Bird Parties, sought disclosure of the documents, over which they asserted a waiver of privilege.
- [8] The application was not scheduled for hearing. Mr. Kasian never filed an affidavit in support of the application, despite assurances that he would do so. Mr. Kasian purportedly "abandoned" that application and intended to bring a new third-party notice application (the "Second Third-Party Application") that did not contain the impugned portions of his first application, but the Second Third-Party Application was never filed.
- [9] In March 2021, the Owen Bird Parties and the Estate filed separate notices of application for production of material relating to Mr. Kasian's legal advice from the Owen Bird Parties. These are the applications underlying the Order. They contend Mr. Kasian waived solicitor-client privilege to documents and communications when he filed his First Third-Party Application because he voluntarily injected his understanding of his legal advice of the family proceeding into the estate litigation. They did not specify any of the Supreme Court Civil Rules as the basis for their applications. Mr. Kasian opposed the applications and denied that he waived privilege.
- [10] The applications were heard on March 26 and April 22, 2021. The judge pronounced her judgment on May 11, 2021, and granted the Order on the following terms:
- [61]
- a) Within 14 days of the date of this order, Mr. Kasian will deliver to the applicants an updated List of Documents listing in Part 1 all documents relevant to the issue of whether Donald Kasian knew or ought to have known that he had a potential claim against Owen Bird Law Corporation and Karen Thompson relating to the matters set out in Donald Kasian's Notice of Application dated September 8, 2020.
- [11] She also said:

- [53] The application before me is a narrow one. It excludes the aspects of the Privilege Application engaging legal advice Mr. Kasian may have received regarding his assertion that Ms. Thompson knew or ought to have known Mr. Kasian's wishes, objectives and intentions that all payments to Ms. Kasian under the Minutes of Settlement would cease upon her death. It also excludes Mr. Kasian's assertion that he relied on Ms. Thompson's legal advice on those topics. Rather, the narrow point before me on this application relates solely to the limitation period. That is, did Mr. Kasian waive privilege over advice he sought and received on this particular legal issue?
- [60] In my view, when I examine the totality of the material presented on this application, including the status of the First Third Party Application, I am satisfied that the applicants have established an implied waiver of solicitor-client privilege on the issue of the limitation period. Though the sanctity of solicitor-client privilege is indisputable, in the circumstances presented Mr. Kasian voluntarily injected the legal advice he received, and his reliance on it, into the litigation as it relates to his understanding of the Limitation Act and commencement of proceedings against the proposed third party.
- [62] This order is intended to capture material from any one of the three law firms acting for Mr. Kasian. That said, there may very well be documents where the privilege is intact, at least with respect to parts of the document. Production of the newly listed documents will occur in the usual fashion for Part 1 documents.
- [63] If there are issues regarding the scope or timing of this disclosure order, or if claims of privilege are to be determined regarding certain documents, the parties may request through scheduling an additional hearing.
- [12] The judge did not specify the jurisdictional basis on which the Order was made.
- [13] The Order dealt only with one aspect of the Estate's assertion that Mr. Kasian has waived privilege. The judge adjourned the Estate's application for a declaration of waiver of privilege over all documents communicating or recording advice given to and instructions received from Mr. Kasian concerning the negotiation and execution of the Minutes of Settlement. The Order, and consequently the present applications, deal only with waiver of privilege regarding the issue of the limitation period.
- [14] On May 21, 2021, the parties appeared before the judge to clarify aspects of the Order. The judge apparently confirmed the wording of the Order and that it was informed by paras. 53 and 60 of her reasons.
- [15] The judge also invited the parties to reappear before her on June 9, 2021, to address any issues regarding documents for which privilege may remain intact, consistent with para. 63 of her reasons. A hearing is currently scheduled for that date. Mr. Kasian apparently agreed to send the documents of concern with redactions to the Respondents by June 2, 2021, and to send both redacted and unredacted copies to the judge in advance of the June 9 appearance.

- [16] The trial of the underlying action is currently scheduled to begin on July 5 for "not more than 7 days". A summary trial scheduled to be heard in September 2020 and a trial scheduled to be heard in February 2021 were both adjourned for reasons related to Mr. Kasian's third-party applications. The Respondents allege counsel for Mr. Kasian has been routinely non-responsive to requests for disclosure or to communications related to the various applications, which contributed to the adjournments. They also allege counsel for Mr. Kasian has presented inconsistent or inaccurate explanations for the various delays throughout the proceeding, and has advanced inconsistent positions on various issues.
- [17] On May 25, 2021, Mr. Kasian filed his notice of application for leave to appeal. On May 28, 2021, he brought an application for an interim stay of the Order until determination of his leave application. On June 1, 2021, the parties appeared before Justice Saunders, in chambers, to argue the interim stay application. Instead, the parties agreed at the hearing that a stay application would proceed together with the leave application on June 7, 2021, with an "informal stay" of the Order in the interim. That informal stay was extended at the hearing of these applications until the pronouncement of this judgment.
- i) The Leave Application
- [18] The parties disagree about whether leave is required to appeal the Order. Where the requirement for leave is uncertain, the proper procedure is to submit an application for leave, and the presiding justice may order that the notice of application for leave to appeal stand instead as a notice of appeal, along with any necessary extensions of time: *Commencing an Appeal When Uncertain if Leave to Appeal is Required* (Civil Practice Directive, 8 May 2017).
- [19] Leave is required to appeal a "limited appeal order", as defined in Rule 2.1 of the Court of Appeal Rules. Rule 2.1(a)(ii) includes as limited appeal orders those made under Part 7 of the Supreme Court Civil Rules (Procedures for Ascertaining Facts), other than Rule 7-7(6) (application for order on admissions).
- [20] Again, the Order directed that Mr. Kasian deliver an updated list of documents listing all documents relevant to the limitation period issue. This may appear to have been issued pursuant to Rule 7-1(14) of the Supreme Court Civil Rules, which provides that the court may, on application, order a party to, inter alia, amend their list of documents.
- [21] Unfortunately, neither of the Respondents' applications, nor the judge's reasons, referred explicitly to Part 7 of the Supreme Court Civil Rules, or to any other jurisdictional basis for the Order. This Court has stressed that orders should state the jurisdictional basis on which they are founded; otherwise, this Court must determine the jurisdictional basis for the order: *Tri-City Capital Corp. v. 0942317 B.C. Ltd.*, 2016 BCCA 407 at para. 22; *Hu v. Ting*, 2017 BCCA 305 at para. 27; *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 104 at para. 12 [Araya #1]; *Etemadi v. Maali*, 2021 BCCA 117.

- [22] There have been a number of recent decisions of this Court considering whether leave is required from orders brought pursuant to applications seeking declarations that privilege has been waived over documents, with corresponding orders relating to disclosure.
- [23] In *Do Process LP v. Infokey Software Inc.*, 2014 BCCA 470 at paras. 8-11, Justice Goepel, in chambers, concluded that an order that at its heart went to the production of documents under Part 7 of the Supreme Court Civil Rules required leave to appeal, notwithstanding that the order sought had included a declaration of waiver of privilege (which, as declaratory relief, would not usually require leave). In that case, the applicants appear to have sought relief explicitly under Rule 7-1. Justice Goepel noted that where the jurisdictional basis of the order is in the express language of one of the enumerated parts of Rule 2.1 of the Court of Appeal Rules, that is usually conclusive of whether leave is required: *Clifford v. Lord*, 2013 BCCA 302 at para. 29.
- [24] In *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 8 at para. 12 [H.M.B. #1], Justice Tysoe, in chambers, questioned whether leave was required where the application had not referred explicitly to Rule 7-1. He nonetheless considered himself obliged to follow *Do Process* and required leave in the circumstances, which he granted.
- [25] However, in *Araya #1*, Justice Butler, in chambers, distinguished *Do Process* and found that leave was not required because the order on appeal had been made pursuant to the inherent jurisdiction of the court, not under Rule 7-1. As in *H.M.B. #1*, the parties' application had not been brought expressly under Rule 7-1. Justice Butler noted at para. 22 that Justice Tysoe's decision in *H.M.B. #1* "did not directly consider this issue because the parties assumed that the applicant required leave." He relied on the Court's reasons allowing the appeal in *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263 at paras. 33-36 [H.M.B. #2] and concluded that, as in *H.M.B. #1*, the application in *Araya #1* had sought a broader declaration of privilege than in the usual case, and therefore the jurisdictional basis for the order had been the court's inherent jurisdiction. He said:
- [26] In arriving at that conclusion, I appreciate that in most cases, an application seeking disclosure of documents based on a waiver of privilege will not have to rely on the court's inherent jurisdiction. Rather, the applicant will adopt the procedure described in *H.M.B. #2*: the privilege claimed over particular documents or questions on discovery will be challenged. In such cases, the jurisdictional basis for the order may well be Part 7 of the Supreme Court Civil Rules. However, that was not the procedure followed here. A much broader declaration was sought on the basis of waiver of privilege. The Order is, accordingly, not a limited appeal order.
- [Emphasis added.]
- [26] The Respondents suggest the Order in the present case may have been made pursuant to Rule 7-1, notwithstanding that the rule was not expressly invoked. They argue that the judge, in her reasons, recited the Court's caution in *H.M.B. #2* at paras. 44-47, demonstrating that she was alive to the issue identified by Justice Butler in *Araya #1*. However, the relevant

portion of H.M.B. #2 relied upon by Justice Butler was paras. 33-36, where the Court expressed concern over the procedure through which the question of waiver had arisen in that case and the jurisdictional basis for such an order. This aspect of H.M.B. #2 was not considered by the judge in the present case.

- [27] The Respondents also suggest the Order is narrower than the order in Araya #1 in that it is narrowly tailored to documents relating to the limitation period issue. I note that in Araya #1, the waiver of privilege similarly arose through a plaintiff's response to a limitation period defence, although the order was indeed more broadly worded than in the present case--a point I will return to. In any event, on my reading of the decisions, the breadth of the declaration sought is not, for present purposes, measured by the scope of the circumstances over which privilege is said to be waived. The question is whether, as described in H.M.B. #2 and Araya #1, waiver is said to extend to only particular documents or questions in discovery, or is sought over all documents pertaining to a set of circumstances, however narrow.
- [28] This conclusion is supported by a subsequent decision, Coburn and Watson's Metropolitan Home v. BMO Financial Group, 2019 BCCA 360, in which Justice Butler, in chambers, distinguished Araya #1, followed Do Process, found leave was required, and declined to grant leave. He succinctly explained the relevant differences between these cases as follows:
- [10] The applicant argues that this case is analogous to Araya in which I held that the jurisdictional basis for the application in question was the inherent jurisdiction of the court. In Araya, the applicants sought a broad declaration of waiver of privilege that was not directed to specific documents, but rather to particular circumstances. Relying on the decision of this Court in [H.M.B. #2], I concluded that the jurisdictional basis for the application was the inherent jurisdiction of the court and not Part 7 of the Supreme Court Civil Rules, which was not referred to in the notice of application.
- [11] The present application is distinguishable from Araya because in this case, the underlying notice of application specified the jurisdictional basis for the order being sought. This application is, thus, very similar to the application considered in [Do Process]. The applicant in Do Process sought leave to appeal from the chambers judge's dismissal of its application seeking a declaration that the defendants had waived privilege over documents relating to legal advice they received. The notice of application sought relief pursuant to Rule 7-1 of the Supreme Court Civil Rules. At para. 11, Justice Goepel found that, "[t]he fact the jurisdictional basis for the order under appeal is found in the express language of one of the enumerated Parts in R. 2.1(a) is conclusive of whether leave to appeal is required."
- [Emphasis added.]
- [29] I consider the present case is more analogous to Araya #1 than to Do Process or Coburn. As in Araya #1, the Respondents' notices of application did not refer to Part 7 of the Supreme Court Civil Rules, and the order sought and granted was not directed to specific privileged documents or questions on discovery, but rather to a set of particular circumstances,

namely, "all documents relevant to the issue of whether [Mr.] Kasian knew or ought to have known that he had a potential claim against [the Owen Bird Parties] relating to the matters set out in [his First Third-Party Application]".

[30] I recognize that the orders sought by the applicants in Do Process were also directed towards a set of circumstances, namely, all documents relating to legal advice received in respect of the ownership of a copyright. However, again, the applicants in Do Process sought relief explicitly under Rule 7-1, which will usually be conclusive of the issue. It is also notable that the judge in Do Process had dismissed the applications, so no declaration of a waiver of privilege had actually been made.

[31] Thus, I consider that the Order in the present case was made pursuant to the court's inherent jurisdiction. It is therefore not a limited appeal order, and leave to appeal is not required. Pursuant to the practice directive, I order that the notice of application for leave to appeal be converted into a notice of appeal: *Gonzalez v. British Columbia (Attorney General)*, 2019 BCCA 88 at para. 39.

i) The Stay Application

[32] Mr. Kasian seeks a stay of the Order pending the determination of the appeal. In order to obtain a stay, the requesting party must show: (1) that there is some merit to the appeal; (2) that they would suffer irreparable harm if the stay was refused; and (3) that the balance of convenience favours the granting of the stay: *Gill v. Darbar*, 2003 BCCA 3; *Continental Steel Ltd. v. CTL Steel Ltd.*, 2015 BCCA 501. The ultimate question on any application for a stay of execution is the interest of justice: *Coburn v. Nagra*, 2001 BCCA 607.

a) Merits of the Proposed Grounds of Appeal

[33] Mr. Kasian's submissions indicate that he intends to raise multiple grounds of appeal. In my view, none of these issues, recognizing that the standard is low and that "a prolonged examination of the merits is generally neither necessary nor desirable", raises a serious issue: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 338. I say this for the reasons that follow in relation to the various issues raised on behalf of Mr. Kasian.

[34] First, Mr. Kasian intends to argue that because the Owen Bird Parties had not yet been added as parties to the action, they had no standing on the waiver application. The chambers judge rejected this submission on several bases.

[35] She observed that on February 25, 2021, following the second adjournment of the trial, the parties attended at a case planning conference. That conference was overseen by Justice Lyster. A Consent Order was signed, which directed that the issues of waiver would be addressed, by way of a separate application, prior to Mr. Kasian bringing his application for leave to file third-party notices against the Owen Bird Parties. This, in my view, made good sense, because the waiver issue was relevant to whether any limitation period had expired in relation to the claims that Mr. Kasian sought to advance against the Owen Bird Parties. That issue, in turn, would be relevant on the application to add the Owen Bird Parties as third

parties.

- [36] There was no suggestion by Mr. Kasian at that time that the Owen Bird Parties lacked standing to bring their intended application. No such issue was raised until after the Owen Bird Parties filed their application materials on the waiver issue.
- [37] The chambers judge considered that it was "in the interests of justice that the proposed third party [be] entitled to be heard on the Privilege Application." This was on account of the delays that had been encountered to date, the difficulties the parties had had in trying "to organize themselves", and the "fast-approaching" trial date.
- [38] She rejected the suggestion that Mr. Kasian had been "taken by surprise by the Privilege Application or Owen Bird's standing to bring it", noting that the privilege issue had been raised more than seven months earlier. She relied on 888 Fort Street Holdings Ltd. v. Ross, 2017 BCSC 579, a decision that is, in some respects, apposite.
- [39] Finally, she considered that the history of the litigation, the earlier adjourned proceedings, and the materials before her militated in favour of her exercising her discretion to grant standing to the parties that were, at that point, the intended third parties in an imminent application to add them to the action.
- [40] Next, Mr. Kasian intends to argue that the judge erred in relying on the First Third-Party Application when he had made clear that he had "abandoned" that application and that he intended to rely on his Second Third-Party Application. The draft Second Third-Party Application had removed paras. 52 and 53, which underlay the Respondents' waiver application, and to which I have referred earlier.
- [41] There are several difficulties with this submission. I leave aside the respondents' submission that Mr. Kasian did not actually communicate that he had "abandoned" the First Third-Party Application until the hearing of the waiver application.
- [42] First, waiver of privilege cannot be unilaterally retracted: *Mayer v. Mayer*, 2012 BCCA 77 at para. 185. No waiver, if made, could be "abandoned" when the issue of Mr. Kasian's delay, and the reasons for that delay, remained live.
- [43] Second, and in a related vein, it was not open to Mr. Kasian to simply "abandon" the First Third-Party Application. Instead, he required the consent of the respondents or leave of the court to amend that application. He did not seek or obtain either of these things. At the time of the hearing before the chambers judge, the First Third-Party Application had been filed and the Second Third-Party Application was no more than a draft document.
- [44] Finally, as the chambers judge noted, Mr. Kasian continued to refer to the First Third-Party Application and the resulting chronology in his Second Third-Party Application when describing the factual basis said to support the orders sought. It is not quite clear how that could be done if the First Third-Party Application had been "abandoned".

- [45] Next, Mr. Kasian intends to argue that the order made by the chambers judge was overly broad. Specifically, he objects to the use of the word "relevant" in the Order and to the fact that the Order was not somehow time-limited.
- [46] In *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 205 [Araya #2], the defendant had pleaded that the plaintiffs' claims were time-barred. The plaintiffs, who were Eritrean refugees, pleaded that the start of any limitation period was postponed until after they had first met with Canadian legal counsel because they did not, prior to that point, have the requisite understanding of their legal rights. The defendant then argued, the plaintiffs accepted, and the case management judge agreed that the plaintiffs had waived solicitor-client privilege. The issue before the case management judge, and on appeal, was whether the scope of the waiver was too broad.
- [47] The order made by the chambers judge, reproduced at para. 13 of Araya #2, was considerably broader than the Order made in this case. Nevertheless, the Court concluded that the order that had been made was appropriate and said:
- [40] The postponement plea opens the door to an investigation of all matters raised by the Limitation Act 1996 and Limitation Act 2012. If the plaintiffs are of the view that an individual communication or document should not be produced or should be redacted, they can apply in the court below to have that specific claim of privilege considered.
- [48] The last sentence in that quote has particular relevance, in that it mirrors the form of direction that was made by the judge at para. 63 of her reasons and that I have referred to. Specifically, it remains open to Mr. Kasian to return before the chambers judge "regarding the scope or timing of this disclosure order, or if claims of privilege are to be determined regarding certain documents". This is, according to Mr. Kasian, the purpose of the hearing set before the judge for June 9, 2021.
- [49] Next, Mr. Kasian intends to argue that the chambers judge erred in considering the waiver of privilege on the basis of an application for leave to file a third-party notice, because it is inappropriate to consider evidence on such an application. Various cases do provide that on an application for leave to file a third-party notice, or an application to set aside a filed third-party notice, the claim is assessed on the basis of the pleadings, which are assumed to be true, and that evidence is neither necessary nor considered: see *McNaughton v. Baker*, 1988 CanLII 3036 at paras. 21-29 (B.C.C.A.).
- [50] However, Mr. Kasian misconstrues the breadth of this principle. It merely provides that, in assessing the merits of the third-party claim, the court is to consider the material facts pleaded are true, consistent with the approach to striking pleadings that disclose no claim under Rule 9-5(1)(a) of the Supreme Court Civil Rules. The merits of the claim, however, are only one of the factors considered by the court when exercising its discretion to grant leave under Rule 3-5. Other factors include prejudice to the parties, the expiration of a limitation period, delay, and timeliness: *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at para. 16. Evidence is not precluded in assessing such

discretionary factors. Indeed, the absence of evidence, for example, explaining any delay by the applicant in bringing the application or offering a later limitation period is a consideration that may be taken into account by the court in exercising its discretion: see, e.g., *Tyson Creek* at paras. 25-29; *Hadland v. Reems*, 2015 BCSC 115 at para. 26; *Hendrix v. Handa Travel Student Trip Ltd.*, 2016 BCSC 620 at para. 56.

- [51] Finally, Mr. Kasian intends to argue that though the chambers judge correctly described the importance of solicitor-client privilege and the principles that govern the waiver of such privilege, she misapplied those principles. Specifically, he intends to argue that the waiver must be "fundamentally determinative" or "essential" or "dispositive" of the application. In this case, because the passing of a limitation period is only one of several factors a chambers judge is to consider when deciding whether to exercise their discretion to allow a third-party notice to be filed, it cannot be said that the issue would be determinative or dispositive.
- [52] The cases that Mr. Kasian relies on do not support the propositions he advances. For example, in *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at paras. 29 and 53, the Court noted that a relevant (but not sufficient) consideration is whether the privileged documents are "material" to an issue before the Court. In *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2004 BCCA 512 at para. 31, the Court concluded that the materials in relation to which waiver was alleged were not "relevant to the determination" a trial judge would have to make. In *H.M.B. #2* at para. 46, the Court said that where reliance on legal advice is pleaded, "evidence of such reliance if it goes to a material issue may be sufficient".
- [53] Furthermore, the proposition that Mr. Kasian intends to advance would mean that a waiver of privilege, in relation to one of several factors in a discretionary decision, is necessarily immune to disclosure because it would not be dispositive of that discretionary decision. He does not advance any support for that proposition and I do not consider that it raises a serious issue.

b) Irreparable Harm

- [54] I am satisfied that irreparable harm is made out. In *H.M.B. #1* at para. 21, Justice Tysoe found irreparable harm because privilege would be lost with respect to documents produced pursuant to the order on appeal, and the appeal would become largely meaningless. More broadly, irreparable harm may be satisfied if the 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; *Provincial Court Judges' Association of British Columbia v. British Columbia (Attorney General)*, 2018 BCCA 338 at para. 29; *InterOil Corporation v. Mulacek*, 2016 YKCA 13.

c) The Balance of Convenience

- [55] The key issue here is the balance of convenience. The potential harm of a stay to the respondent is relevant at this stage: *RJR-MacDonald Inc.* at 340-41; *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, 2013 BCCA 146 at paras. 36-37. Depending on the circumstances, the balance of convenience may still favour refusing a stay, even if that would result in the appeal being rendered moot: see, e.g., *Mission Creek Mortgage Ltd.* at paras. 33-37; *Aldergrove Credit Union v. Hoessmann Estate*, 2013 BCCA 213 at para. 36, *aff'd* 2013 BCCA 263.
- [56] The Court may also consider the conduct of the parties when assessing the balance of convenience: *Canadian Commercial Bank v. Royal Oak Inn*, 1989 CarswellBC 1701 at para. 7 (C.A.); *Moon Development Corporation v. Pirooz*, 2014 BCCA 64 at para. 48; *Ganapathi v. The Law Society of British Columbia*, 2020 BCCA 340 at para. 63.
- [57] The principal factor that seems relevant in this case is the looming trial date on July 5, the passage of time since this action was commenced, and the fact that a summary trial and a trial in this matter have already been adjourned. I am satisfied, based on the record before me, that the adjournments were substantially due to these third-party issues. If a stay is granted, the trial will need to be adjourned again. If a stay is not granted, the documents will need to be produced and the trial would likely conclude before this appeal could be heard, rendering the appeal moot.
- [58] 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.
- [59] In this case, nearly five years have passed since the action was commenced. That action pertains to events that occurred approximately eight years ago. Mr. Kasian has purported to have concerns about the Minutes of Settlement he signed for more than a half decade. Whether intentionally or otherwise, the reality is that Mr. Kasian has filed or refiled third-party application materials on the eve of both the earlier summary trial and the earlier trial date that then led to adjournments. In such circumstances, I do not consider that the balance of convenience, or the interests of justice, favour the grant of the stay that he seeks. His application for a stay, pending the determination of the appeal, is dismissed.

"The Honourable Mr. Justice Voith"

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