

CANADA / JUDGMENT

Milly v. Kapelus

2021 BCCA 344

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 344 Milly v. Kapelus

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Milly v. Kapelus,

2021 BCCA 344

Date: 20210924

Docket: CA47518

Between:

Francois Milly and Prop A Lot Rental & Design Inc.

Respondents

(Plaintiffs)

And

Gordon Alexander Kapelus, Jeannine Marie Kapelus and

Janalex Investments Ltd.

Appellants

(Defendants)

Before:

The Honourable Mr. Justice Butler

(In Chambers)

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

May 11, 2021 (Milly v. Kapelus, 2021 BCSC 995, Vancouver Docket S197296).

Appearing in person, and on behalf of the Appellants:

(via teleconference):

G. Kapelus

Counsel for the Respondents:

D.L. Cayley

Counsel for Canadian Imperial Bank of Commerce:

R. McGowan

Place and Date of Hearing:

Vancouver, British Columbia

August 20, 2021

Place and Date of Judgment:

Vancouver, British Columbia

September 24, 2021

Summary:

The appellants apply for leave to appeal and to stay orders made by a judge in chambers denying a stay of a previous order for production of bank records that had not been appealed. The judge also dismissed the appellants' application that he recuse himself and ordered special costs. Held: The notice of application for leave to appeal is converted to a notice of appeal. The application for a stay of the three orders made by the judge is dismissed.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] The appellants, Gordon Kapelus, Jeannine Kapelus, and Janalex Investments Ltd. ("Janalex"), apply for leave to appeal and to stay execution of an order made by Justice Ross on May 11, 2021 (the "Ross Order"). The order refused a stay of an earlier order made on March 30, 2021 by Justice MacDonald (the "MacDonald Order") that required the Canadian Imperial Bank of Commerce ("CIBC") to produce the appellants' personal banking records to the respondents. The MacDonald Order is not the subject of this appeal. The Ross Order also dismissed the appellants' application that Justice Ross recuse himself and ordered that the appellants pay special costs of the application in any event of the cause.
- [2] To put the stay aspects of this application in proper perspective, the appellants seek a stay of the Ross Order in order to effect a stay of the MacDonald Order, a limited appeal order that has not been appealed and for which leave to appeal has not been sought. It would be anomalous and, I would suggest, unusual for this Court to do that. The stay of the judge's

refusal to recuse himself is equally problematic. The appellants ask this Court to stay a judge's ability to make an order that he has already made. The appellants may be able to ask this Court to set aside the judge's order on the basis that he should be disqualified because of a reasonable apprehension of bias. However, it is difficult to see how this Court could issue a stay that would have any effect, as the orders under appeal have been made. Similarly, a stay of the costs order would have no practical effect, as that order does not require costs to be paid forthwith.

- [3] For the reasons that follow, I conclude that the applications for leave to appeal stand as notices of appeal but dismiss the appellants' applications for a stay of the Ross Order.

Background

- [4] This application arises out of a claim brought by the respondents, Francois Milly and Prop A Lot Rental & Design Inc. ("Prop A"), a company he controls, against Mr. and Mrs. Kapelus and Janalex, a company they control. Mr. Kapelus, a retired lawyer, assisted Mr. Milly with regard to a dispute that arose between Mr. Milly and a bank over a line of credit. In the notice of civil claim filed June 27, 2019, Mr. Milly alleges that he transferred \$480,000 through Prop A to Janalex. Mr. Milly claims the funds were to be held in trust and that the appellants have refused to account for or return the funds. Mr. and Mrs. Kapelus deny that the funds were to be held in trust and say they were part of an investment scheme or joint venture.
- [5] In the course of the litigation, the respondents brought an application to obtain banking records. On January 16, 2020, Justice Groves ordered the production of corporate banking records but adjourned generally the application for the production of personal banking records.
- [6] Following the production of the corporate records, the respondents reset the application for production of the personal banking records. The respondents submitted that the Janalex records show that once the funds were received from Prop A, they were transferred to a personal account of the appellants. Justice MacDonald heard that application and made the MacDonald Order requiring CIBC to produce banking records for the accounts of Mr. and Mrs. Kapelus from October 1, 2016 to the date of the application.
- [7] On April 23, 2021, the appellants filed an application to dismiss the claim against Mrs. Kapelus, to cancel certificates of pending litigation, to vary an order made on January 16, 2020, and to set aside the MacDonald Order. The respondents opposed the application and, in their response, claimed special costs of the application in any event of the cause. On April 29, 2021, Justice Horsman adjourned the appellants' April 23, 2021 application generally and stayed the MacDonald Order pending the hearing of a further stay application to be brought by the appellants.

- [8] That application was brought on May 4, 2021. The appellants applied to stay the MacDonald Order pending the hearing of an application to set aside that order. On May 11, 2021, the judge dismissed the respondents' applications for a stay and for the judge to recuse himself and awarded special costs. He delivered separate reasons for the recusal application. The appellants seek to appeal the Ross Order and seek a stay of all three terms of the order.

The Recusal Reasons

- [9] In the recusal reasons, the judge addressed Mr. Kapelus' application for his recusal on the basis of "demonstrable bias". The judge noted that he had no interest in or relationship to the dispute and had no involvement with the matter prior to receiving materials in preparation for chambers. He addressed each of the eleven grounds upon which Mr. Kapelus sought recusal and concluded that there was no basis for the application. He declined to recuse himself.

The Reasons for Dismissal of the Application for a Stay

- [10] The appellants sought the stay to delay production of the personal banking records so they could bring an application to dismiss the respondents' claim and "set aside" the MacDonald Order at a future hearing. The judge considered and rejected the appellants' arguments.
- [11] The appellants argued that when Justice Groves adjourned the application for production of personal banking records, he did so on conditions and that once the conditions were fulfilled, the court was functus. The judge concluded this argument had "no merit". He was of the view that the Groves order envisioned incremental disclosure, beginning with corporate banking documents and moving to personal banking documents, if necessary.
- [12] The appellants argued they were not served with notice. The judge found this allegation was "demonstrably false". While the appellants were in a dispute with their counsel of record over fees at the time, counsel was properly served and the materials were delivered to the Kapelus' home address. The judge also dismissed the appellants' argument that Janalex was not properly served.
- [13] The appellants argued that the respondents misled Justice MacDonald, made misrepresentations, and failed to disclose relevant facts. The judge noted that it was not an ex parte application and that the appellants were served with the material and did not appear. The judge could see no basis for this submission. He further found no basis on which to vary the order, agreeing with the respondents' submission that the order had been entered such that the court was functus officio.
- [14] The judge set out the test for a stay. He observed that the appellants had presented no evidence of irreparable harm and that the balance of convenience favoured the respondents.

[15] The judge went on to note that "[i]t is evident to me that the defendants have put up roadblocks wherever possible to try and prevent Mr. Milly from obtaining the evidence he needs": at para. 18. He considered the stay application to be another such roadblock. He dismissed the stay application and granted special costs of the application to the respondents in any event of the cause, not payable forthwith.

Proceedings in this Court

[16] The appellants filed a notice of application for leave to appeal the Ross Order on May 31, 2021, and a notice of motion seeking "leave to appeal and a stay of execution" on June 30, 2021.

[17] On July 9, 2021, Justice Harris granted the appellants an extension of time to serve the application for leave to appeal. Because the respondents were not prepared to respond, Justice Harris adjourned the applications and directed that they be "brought as soon as reasonably possible". When the applications were not set down for hearing, counsel for the respondents wrote to the registry and asked that the Registrar reset the hearing of the motion for early August. Mr. Kapelus, on behalf of the appellants, objected to that course of action.

[18] On July 30, 2021, the respondents filed a notice of motion for an order that the appellants' notice of motion filed June 30, 2021 be reset for hearing on August 18, 19, or 20. At the hearing of that motion on August 10, 2021, Justice DeWitt-Van Oosten ordered that the applications be heard on August 20, 2021.

Legal Principles

Leave to Appeal

[19] The appellants seek leave to appeal the orders dismissing both the recusal application and the stay application. Leave is required for limited appeal orders, which are listed in Rule 2.1 of the Court of Appeal Rules, B.C. Reg. 297/2001 [Court of Appeal Rules]. This Court interprets Rule 2.1 strictly, as the "amended Act and Rules are intended to set out an exhaustive list of circumstances where leave to appeal is required": *Yao v. Li*, 2012 BCCA 315 at para. 27 (Chambers).

[20] If leave is required, the test for leave to appeal is:

- a) whether the point on appeal is of significance to the practice;
- b) whether the point raised is of significance to the action;
- c) whether the appeal is prima facie meritorious or whether it is frivolous; and
- d) whether the appeal will unduly hinder the progress of the action.

See *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers). The overarching concern when considering whether leave should be granted is whether it would be in the interests of justice to do so: *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538 at para. 2 (Chambers).

Stay of Execution

[21] A stay will be granted pending appeal if:

- a) there is some merit to the appeal in the sense there is a serious question to be tried;
- b) irreparable harm will be caused to the applicant if the stay is refused; and
- c) on balance, the inconvenience to the applicant if the stay is refused would be greater than the inconvenience to the respondent if the stay was granted.

See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

Parties' Positions

Appellants

[22] The appellants' submissions primarily challenge the merits of the Ross Order. They do not address the legal framework governing applications for leave to appeal or for a stay.

[23] The appellants seek to advance several issues on appeal, including whether Justice Ross erred: by finding the respondents' impeached evidence was not relevant; by disregarding the appellants' affidavit evidence and accepting the unsupported pleadings of the respondents; by allowing respondents' counsel to give evidence; by disregarding failures to comply with the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Supreme Court Civil Rules]; by failing to consider the appellants' privacy interests; by misinterpreting Justice Groves' order; by failing to address a confidentiality provision in the joint venture agreement; and "by addressing and being influenced by the matter of setting aside the Order of Madam Justice MacDonald which was not before him". The appellants also claim there was no evidence to support the application for production of personal bank records.

[24] With respect to the special costs award, the appellants submit there was no basis in law or fact for such an award, particularly where the respondents have disobeyed a court order. The appellants allege the respondents have failed to comply with the rules respecting service and filing affidavits. They also claim respondents' counsel disobeyed Justice Groves' order by sharing the corporate banking records. Viewed together, they say, this shows non-compliance or contempt of court. Additionally, the appellants argue special costs were not pleaded and that Justice Horsman granted an interim stay without mentioning costs.

- [25] Finally, the appellants allege reasonable apprehension of bias. They say Justice Ross "taunted" Mr. Kapelus to go to the Court of Appeal if Mr. Kapelus was dissatisfied with the handling of the proceeding, and that Justice Ross emphasized he had read the notice of civil claim and that the trust agreement was plausible.
- [26] In addition, at the hearing of the application before me, the appellants sought an adjournment on the basis of Mr. Kapelus' medical condition and his alleged inability to deal with the applications because of his deteriorating eyesight.

Respondents

- [27] The respondents take the position that the appellants require leave and oppose the application for leave to appeal and to stay the order under appeal. They also oppose the request for a further adjournment.
- [28] With regard to leave, the respondents submit that the Ross Order is of no significance to the practice and that the appeal raises no issues of significance to the action itself as the appellants merely challenge an order declining to grant a further stay of an interlocutory document production order.
- [29] Next, the respondents argue there is no merit to the proposed appeal as the dismissal of the stay application was discretionary and the appellants can identify no errors in the exercise of that discretion.
- [30] With regard to the application for a stay, the respondents note that the appellants can point to no evidence of irreparable harm, and say there is no "executory component" of the May 11, 2021 order that requires a stay.
- [31] Finally, the respondents submit that the appellants have appealed the wrong order. The March 30, 2021 production order has not been appealed and CIBC must comply with it. The respondents characterize this application as "simply another roadblock" and contend it is not in the interests of justice to grant a stay given the lack of merit.

Discussion

Adjournment

- [32] Before I address the merits of the application, I will indicate why I dismissed the appellants' request for an adjournment of the application.
- [33] The appellants raised three grounds for the adjournment. First, they said it should not proceed because the orders of Justice Harris and Justice DeWitt-Van Oosten have not been signed or entered. There is no merit to this argument. The transcripts of the rulings of both justices are available. As explained in those rulings, this is clearly a matter that, in Justice Harris' words, should be "brought on as soon as reasonably possible". The absence of entered orders from those preliminary applications is not a basis for an adjournment.

- [34] Second, the appellants state that they mistakenly advised Justice DeWitt-Van Oosten that Mr. Kapelus was available for the proposed hearing date of August 20, 2021. Mrs. Kapelus states in her affidavit that she believed Mr. Kapelus had a medical appointment on August 19, when in fact his appointment was scheduled for August 20, 2021. At the hearing of this application, Mr. Kapelus advised that when he learned of their mistake, he chose not to reschedule the medical appointment. Indeed, he attended that appointment prior to the hearing of the application and was able to attend the hearing of the application by telephone. He made submissions both as to the request for an adjournment and the substance of the application.
- [35] I have difficulty accepting Mrs. Kapelus' assertion that the appellants mistakenly confirmed Mr. Kapelus' availability particularly in light of the controversy about a hearing date and the steps that were taken by the respondents to set down the application to fix a date for the hearing of the appellants' leave and stay applications. Nevertheless, the medical appointment did not prevent Mr. Kapelus from attending the application and so his lack of availability is not a basis for an adjournment unless, as the appellants also argue, Mr. Kapelus' medical condition prevented him from making submissions and responding to the respondents' submissions. That is the third basis for the adjournment application.
- [36] As explained by Mr. Kapelus, the main reason the appellants sought an adjournment is his alleged inability to prepare for the hearing of the applications because of the deterioration of his eyesight and his need for surgery. The appellants raised this issue before Justice DeWitt-Van Oosten when they opposed the respondents' application to have the application set for late August. In her ruling, Justice DeWitt-Van Oosten quoted from the physician's letter regarding Mr. Kapelus' medical condition and stated at para. 11:

It states that "[i]n light of his medical condition, [Mr. Kapelus has been advised] to postpone any in person or remote legal matters till when he is able to do so after his treatment." Unfortunately, the letter does not particularize the medical condition or its related treatment. It does not provide a timeline for the treatment. Nor does it specify any sort of functional capacity nexus between the medical condition and the ability to make submissions at the application for leave to appeal and the request for a stay. I note that notwithstanding Mr. Kapelus' medical condition, the appellants were able to prepare and provide a written response and supporting materials for the application before me.

- [37] Mrs. Kapelus' affidavit of August 19, 2021, which was prepared in support of the adjournment request, attached a new letter dated August 18, 2021 from Mr. Kapelus' physician. The letter provides a little more information about his condition. The doctor indicates that "[c]ataract surgery is contemplated and further testing is planned. A timeline cannot be provided with the present uncertainty of hospital resources." However, there is no new information about any sort of "functional capacity nexus between the medical condition and the ability to make submissions" at the hearing of this application. Instead, the physician states that Mr. Kapelus "advises me he feels his vision is such that he can no longer see well enough to participate in a legal proceeding" and that he had "no reason to

doubt him". That is not a medical opinion connecting a diagnosed condition with an inability to function. It is nothing more than the doctor's acceptance of Mr. Kapelus' assertion that he cannot participate in a legal proceeding.

- [38] While Mr. Kapelus asserted an inability to participate in the proceeding, he made able submissions with regard to the adjournment application and the stay application without any apparent difficulty. While he indicated that he did not have an ability to read the materials because of eye drops he had received for the medical examination, he was nevertheless able to refer to specific portions of the material before the court. Further, I indicated to Mr. Kapelus that I would not rule on the application without taking the opportunity to review all of the material that the appellants had filed in support of their applications. I have done that.
- [39] I should note that counsel for CIBC also made brief submissions at the hearing of these applications. Counsel indicated that the bank is anxious to have matters resolved, as they are ready to deliver the bank records that were ordered to be produced. The delays have left CIBC in an uncomfortable position. It is concerned that it is in breach of the MacDonald Order, especially in light of the Ross Order, but it also wants to permit its customers, the appellants, to pursue available legal remedies before releasing the documents.
- [40] As Justices Harris and DeWitt-Van Oosten noted, this matter needs to be resolved. It concerns a rather routine order for production of bank records. I agree with Justice DeWitt-Van Oosten's observation that these documents appear to be highly relevant to the underlying action and the defences to that action. The MacDonald Order was not appealed. Accordingly, the appellants' attempts to challenge the respondents' ability to have access to the documents need to be dealt with promptly so that the underlying litigation can proceed. As the judge noted, the attempt to stay the MacDonald Order appears to be something of a roadblock thrown up by the appellants to stall the proceedings in the court below.
- [41] Of course, whether or not an adjournment should be granted is a matter of discretion and the question is whether it is in the interests of justice to grant an adjournment. I declined the appellants' request for an adjournment as I was of the view that it was very much in the interests of justice to have the applications proceed. They had been outstanding for some time. The appellants' application for leave to appeal was filed May 31, 2021. Because of the delay in bringing this application to a hearing, Justice DeWitt-Van Oosten took the unusual step of directing that the applications be heard on August 20, 2021. The appellants prepared and filed a detailed motion book for the applications that included a written memorandum of argument. In addition, Mr. Kapelus was able to make submissions regarding the adjournment and the substance of the applications. Given the way the hearing progressed, the application was adjourned for the lunch break after I dismissed the application for an adjournment. I indicated that I would hear further submissions on the substance of the applications after lunch. Mr. Kapelus indicated that he would not return after lunch to make further submissions. However, he did re-attend by telephone after the lunch break and made additional submissions on the applications and responded to the submissions of

respondents' counsel.

- [42] In those circumstances, I had no hesitation in concluding that Mr. Kapelus had a reasonable opportunity to make oral submissions in addition to the written submissions presented by the appellants and that it was not in the interests of justice to grant an adjournment.

Leave to Appeal

- [43] The appellants did not address whether leave to appeal is required. While the respondents did not do so in their written submissions, they took the position at the hearing that leave is required because the MacDonald Order concerns the production of documents and is thus a limited appeal order.
- [44] There is no doubt that the end goal of the application is to enable the appellants to overturn the MacDonald Order requiring production of their personal banking records. That order was sought under Rule 7-1(18) of the Supreme Court Civil Rules. Orders issued under Part 7 are limited appeal orders. However, by seeking to appeal the denial of a stay order, the appellants instead challenge an order made under Rule 13-2(31) of the Supreme Court Civil Rules; such orders are not limited appeal orders. Like Justices Harris and DeWitt-Van Oosten, I question whether the Court has jurisdiction to make an order that would affect the MacDonald Order--which is what the appellants are asking this Court to do. However, as I am dismissing the appellants' stay application, this question becomes moot. A refusal of the stay of the Ross Order means that the MacDonald Order remains a valid order and CIBC must produce the bank records.
- [45] I am also of the view that an order denying a recusal request is not a limited appeal order and therefore does not require leave. However, there is an additional issue about that order. The real question is whether it is an appealable order. This is because after the denial of the request for recusal, Justice Ross made an order dismissing the stay. If he was wrong to do that, then the issue of his disqualification for reasonable apprehension of bias becomes a ground of appeal; it is not a separate order from which an appeal can be taken. I note that Justice Dickson in *Mead v. Mead*, 2018 BCCA 405 (Chambers), questioned the jurisdiction of the Court to hear an appeal from a judge's refusal of a recusal request:
- [17] It may be argued that this Court does not have jurisdiction to entertain an appeal from a judge's refusal to recuse himself or herself. As noted by Justice Rowles in *D.M.M. v. T.B.M.*, 2011 YKCA 8 at paras. 31-33, some academics propose that a judge's "order" not to recuse himself or herself cannot be a "curial order" because it does not require a party to do or refrain from doing something, nor is it a decision enforceable or appealable on an interlocutory basis. In the absence of argument, she declined to decide the point, and, finding myself in the same circumstance, I also decline to do so.

- [46] As I have received no argument on this point, I will not rest my decision on this question. I am content to simply dismiss the application for a stay which leaves the question of disqualification for reasonable apprehension of bias to proceed should the appeal go forward.
- [47] Nor does the costs order require leave to appeal. Where an appeal concerns an order granting or refusing costs, and where the only matter being appealed is that grant or refusal, then it is a limited appeal order and leave to appeal is required: Court of Appeal Rules, Rule 2.1(f). However, a costs order is appealable as of right where it is a subsidiary ground of appeal, as is the case here: *MacLachlan v. Nadeau*, 2016 BCCA 410 at para. 20 (Chambers).
- [48] In light of these considerations, I direct that the notice of application for leave to appeal be converted into a notice of appeal.

Stay of Execution

- [49] I will first address the merits of a stay of the judge's denial of the request to recuse himself. As I have indicated, a stay of that order would have no effect as there is nothing more that the judge has to do, nor is there anything that the parties must do or refrain from doing in relation to that order. The judge had issued his rulings on the recusal application and the stay application. The appellants could challenge his refusal to grant the stay order on the basis that he should be disqualified because of a reasonable apprehension of bias. However, that argument is a ground of appeal, and nothing would be accomplished by issuing a stay of the recusal ruling.
- [50] Applying the test for a stay to this application for a stay of the recusal order, the appellants are unable to meet any of the criteria for a stay. The appeal (assuming it is based on whether the appellants could establish a reasonable apprehension of bias) is entirely lacking in merit. Further, the appellants are not able to point to any harm they might suffer, irreparable or otherwise, if a stay is not granted as the order has been made. Quite simply, there is nothing further to be done and a stay will not cause or prevent any additional harm.
- [51] In addition, as set out below, the balance of convenience weighs entirely in favour of the respondents.
- [52] Turning to the judge's dismissal of the application to stay the MacDonald Order, I would also conclude that the appellants have not established that it is in the interests of justice to grant a stay. There is no merit to the appeal. As I have already indicated, the appellants are attempting indirectly, through an appeal of the Ross Order, to obtain a stay of the MacDonald Order, which has not been appealed. The object of the Supreme Court Civil Rules is to "secure the just, speedy and inexpensive determination of every proceeding on its merits:" Rule 1-3(1). An order staying the dismissal of an application for a stay of an order that has not been appealed would hinder rather than support those objects.

- [53] The appellants cannot point to any harm that they will suffer by a denial of the stay. There is no doubt that the bank records are relevant to the issues raised in the action. The suggestion that there are privacy issues that the respondents are concerned about ignores the law regarding the implied undertaking of confidentiality that applies to discovery of documents produced in a civil action. I see no possibility of harm arising from the refusal to stay the Ross Order.
- [54] While I appreciate that a denial of a stay makes the appeal moot, and that this can factor into the irreparable harm stage of the test (*Jin v. Yang*, 2018 BCCA 90 at para. 18 (Chambers)), this does not weigh heavily in the analysis given the lack of merit to the appeal.
- [55] Further, the balance of convenience favours the respondents. The MacDonald Order was made on March 30, 2021. A stay of the Ross Order would delay the ability of the respondents (and the appellants) to pursue the litigation in the court below in a timely and cost effective way.

Disposition

- [56] I direct that the notice of application for leave to appeal be converted into a notice of appeal. I dismiss the application for a stay of the Ross Order.

"The Honourable Mr. Justice Butler"

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