

CANADA / JUDGMENT

Rabey v. Bowen

2022 BCCA 148

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 148 Rabey v. Bowen COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Rabey v. Bowen, 2022 BCCA 148 Date: 20220407 Docket: CA47701 Between: Leah Rabey Respondent (Plaintiff) And James Merton Bowen Appellant (Defendant) And Lloyd's Underwriters Respondent (Third Party) Before: The Honourable Madam Justice Bennett The Honourable Mr. Justice Goepel The Honourable Mr. Justice Grauer On appeal from: An order of the Supreme Court of British Columbia, dated August 6, 2021 (Rabey v. Bowen, 2021 BCSC 1529, Victoria Docket S201970). Oral Reasons for Judgment Counsel for the Appellant: P.J. Stanford Counsel for the Respondent, Lloyd's Underwriters: J. Forsythe Place and Date of Hearing: Victoria, British Columbia April 7, 2022 Place and Date of Judgment: Victoria, British Columbia April 7, 2022 Summary: This appeal arises from an order adjourning the appellant's application for an order compelling the respondent, Lloyd's Underwriters, to defend him from the claims being made against him in the underlying action. Held: Appeal quashed. The order under appeal is an adjournment and such an order is, by rule, a limited appeal order requiring leave to appeal which was not sought by the appellant. GOEPEL J.A.:

INTRODUCTION

- [1] The appellant, James Merton Bowen, appeals the order of the Chief Justice adjourning his application for an order compelling the respondent, Lloyd's Underwriters ("Lloyd's"), to defend Mr. Bowen in claims being made against him in the action. In its factum, Lloyd's submits that the order is a limited appeal order for which leave is required. In the absence of leave, they submit there is no jurisdiction for this Court to hear the appeal and that the appeal should be quashed.

BACKGROUND

- [2] The plaintiff, Leah Rabey, who takes no position on the appeal, was injured when she fell from a bridge. Mr. Bowen is the plaintiff's father, and it is alleged by her that he is liable for her fall due to his negligence or breach of the duties owed by him pursuant to the provisions of the Occupier's Liability Act, R.S.B.C. 1996, c. 337.

- [3] Mr. Bowen was an insured under a policy of insurance with Lloyd's. The policy covered the property where the plaintiff fell. Mr. Bowen brought third-party proceedings against Lloyd's seeking an order compelling Lloyd's to provide him with a defence to the plaintiff's claims, and an order it indemnify him in respect of any liability assessed against him at trial. Lloyd's resisted the claim on the basis that Ms. Rabey was an insured under the policy, and a clause in the policy excluded coverage for bodily injury to persons insured under the policy. In those circumstances, the third party pled that it is not required to defend or indemnify Mr. Bowen in the action.
- [4] On May 21, 2021, Mr. Bowen filed an application for an order compelling Lloyd's to defend the claim being made in the action. In its response, Lloyd's submitted the matter was not suitable for summary trial, and in the alternative, if the court concluded the matter ought to be determined by summary trial, the application should be dismissed.
- [5] The Chief Justice found that certain conflicts in the evidence could not be resolved on conflicting affidavits and concluded he was therefore unable to grant Mr. Bowen the relief he sought on the application. Rather than dismissing the application, he adjourned it to permit the parties to conduct document discoveries and examinations for discovery, and to provide the information that he believed was lacking in the material before him.
- [6] On the appeal, Mr. Bowen asserts that the Chief Justice erred in finding that the application sought a summary trial under Rule 9-7 to determine his right to be defended under the policy. He submits the judge was not being asked on the application to make a summary determination of his entitlement to a defence, rather, he was being asked for a more narrow ruling, that is that Lloyd's had no potential to prevail with its denial of a defence in the circumstances of this case. While he does not identify the rule upon which he is relying, to the extent that his submission is based on there being no genuine issue for trial with respect to the defence, it must fall under Rule 9-6, which is the rule that allows for summary judgments.
- [7] The respondent's position is that whether the application is brought under Rule 9-6 or 9-7, an order for an adjournment is a limited appeal order, and since leave has not been sought, the appeal must be quashed.
- [8] An appeal does not lie to this Court from a "limited appeal order" without leave: Court of Appeal Act, R.S.B.C. 1996, c. 77, s. 7(2). Limited appeal orders are defined in Rule 2.1 of the Court of Appeal Rules, B.C. Reg. 297/201: 2.1 The following orders are prescribed as limited appeal orders for the purposes of section 7 of the Act:
- (a) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Civil Rules: . . . (iii) Rule 9-7 (11), (12), (17) or (18) [adjournment or dismissal, preliminary orders, orders and right to vary or set aside order] . . .
 - (e) an order granting or refusing an adjournment or an extension or a shortening of time;

- [9] Appeals lie from orders, not reasons for judgment. In this case, the Chief Justice ordered an adjournment. Whether Mr. Bowen relies on Rule 9-6 or 9-7 is of little moment. The order under appeal is for an adjournment, and such an order is by rule a limited appeal order which requires leave to appeal: *The Owners, Strata Plan VR29 v. Kranz*, 2021 BCCA 32 at para. 60.
- [10] The appellant was put on notice in advance of the hearing that leave was required. He has not sought leave. In these circumstances, the proper order is to quash the appeal: *Wright v. Sun Life Assurance Company of Canada*, 2015 BCCA 312 (Frankel J.A., in Chambers). I would so order.
- [11] Lloyd's is entitled to its costs of the appeal. However, I would limit those costs to those that would have been incurred if Lloyd's had brought an application to quash the appeal upon receipt of the notice of appeal.
- [12] BENNETT J.A.: I agree.
- [13] GRAUER J.A.: I agree.
- [14] BENNETT J.A.: The appeal is quashed. The costs to Lloyd's is limited to those brought in an application to quash the appeal upon receipt of the notice of appeal. "The Honourable Mr. Justice Goepel"

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