

**COURT OF APPEAL FOR BRITISH COLUMBIA**

Citation: ***KRG Insurance Brokers (Western) Inc. v. Shafron,***  
2008 BCCA 411

Date: 20081022  
Docket: CA033390

Between:

**KRG Insurance Brokers (Western) Inc.**

Appellant  
(Plaintiff)

And

**Morley Shafron and Shaw Insurance Agency Ltd.**

Respondents  
(Defendants)

And

**Shaw Sabey & Associates Ltd. and  
Prosperous Financial Insurance Services Ltd.**

(Defendants)

Before: The Honourable Mr. Justice Donald  
(In Chambers)

C. Martin Counsel for the Appellant

N. J. Tuytel Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia  
September 16, 2008

Place and Date of Judgment: Vancouver, British Columbia  
October 22, 2008

**Reasons for Judgment of the Honourable Mr. Justice Donald:**

[1] Mr. Shafron applies for:

... an order, pursuant to Section 18 of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, that:

1. all proceedings by the Appellant to assess or otherwise pursue its costs in this Court be adjourned or stayed until the release of judgment by the Supreme Court of Canada in *Morley Shafron v. KRG Insurance Brokers (Western) Inc.*, file no. 31981; and
2. costs of this application, in any event of the cause.

[2] A difficult point arises on the motion concerning which statute governs applications for stays in this Court pending an appeal to the Supreme Court of Canada: the ***Court of Appeal Act***, R.S.B.C. 1996, c. 77, or the ***Supreme Court Act***, R.S.C. 1985, c. S-26.

[3] Mr. Shafron was granted leave to appeal to the Supreme Court of Canada on 6 March 2008. The appeal is to be heard on 16 October 2008.

[4] KRG Insurance Brokers (Western) Inc. brought an action against Shafron and his employer, Shaw Insurance Agency Ltd., for damages for breach of fiduciary duty and for breach of two restrictive covenants in agreements of employment. The action was dismissed at trial. On appeal, this Court found Mr. Shafron liable for breach of one of the restrictive covenants, and remitted assessment of damages to the British Columbia Supreme Court, as well as the question whether Shaw is vicariously liable for Mr. Shafron's breach.

[5] When KRG's appeal to this Court was pending, Mr. Shafron claimed his trial costs and KRG paid them. Mr. Shafron returned them after KRG succeeded in the appeal.

[6] Now KRG proposes to set down for hearing an assessment of the appeal costs. Mr. Shafron seeks a stay of the assessment on various grounds relating to the usual criteria for stays under section 18(2) of the ***Court of Appeal Act***: arguable case, irreparable harm, and balance of convenience. Section 18(2) reads:

- (2) After an appeal has been decided, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal was taken are stayed and the justice may make any other order to preserve the rights of the parties pending further proceedings.

[7] KRG argues that the request for a stay comes within section 65 of the ***Supreme Court Act***, in particular, sections 65(1)(d) and 65(4), but accepts that the same principles apply:

65. (1) On filing and serving the notice of appeal and depositing security as required by section 60, execution shall be stayed in the original cause, except that

\* \* \*

(d) where the judgment appealed from directs the payment of money, either as a debt or for damages or costs, the execution of the judgment shall not be stayed until the appellant has given security to the satisfaction of the court appealed from, or of a judge thereof, that, if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof with respect to which the judgment is affirmed, if it is affirmed only with respect to part, and all damages awarded against the appellant on the appeal.

\* \* \*

(4) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay of execution imposed by subsection (1).

[8] Mr. Shafron submits that section 65 of the ***Supreme Court Act*** only applies to applications for a stay of execution. As costs have not yet been assessed and certified, the stay is sought in relation to a proceeding, not an execution. He states that a stay of proceeding is not synonymous with a stay of execution and therefore section 65 is not the governing provision.

[9] KRG took the position that section 65.1(1) of the ***Supreme Court Act*** did not apply because leave to appeal has been granted. That provision reads:

65.1 (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

(2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.

(3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.

[10] I have concluded that the application must be decided under section 65.1(1). It was held by Mr. Justice Binnie in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, [1999] 1 S.C.R. 381, 71 D.L.R. (4th) 745 at para. 16, that "[t]he right to apply [under section 65.1(1)] is not cut off by the granting of leave." That case is also authority for the proposition that a stay of proceedings, which is what is sought in the present matter, is not automatic (as it would be if the application were for a stay of execution for collection of certified costs) but must be applied for.

[11] As between section 65.1(1) of the federal *Supreme Court Act* and section 18(2) of the British Columbia *Court of Appeal Act*, I am of the opinion that the former governs an application for a stay of proceedings. While the processes of both courts are involved in the matter, the closer connection is to the Supreme Court of Canada where the dispute now resides. Moreover, there is authority in this Court for the choice of the federal provision. In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 326, 198 B.C.A.C. 306 (Chambers), Madam Justice Rowles held that although the Executive Director of the Securities Commission applied for a stay under section 18(2) of the *Court of Appeal Act*, the matter had to be decided under section 65.1(1) of the *Supreme Court Act*. Rowles J.A. said:

[3] The Director's motion to stay execution pending determination of the leave application refers to s. 18(2) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, as providing jurisdiction to make such an order. However, s. 65.1(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, gives the court appealed from or a judge of that court the power to stay proceedings. Section 65.1(1) provides:

65.1(1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

\* \* \*

[5] The Director's motion also seeks an order that, if leave be granted, payment of the costs be stayed pending determination of the appeal. Section 65(1)(d) of the *Supreme Court Act* applies after leave has been granted and the appeal has been commenced. That section provides:

65.(1) On filing and serving the notice of appeal and depositing security as required by section 60, execution shall be stayed in the original cause, except that

\* \* \*

(d) where the judgment appealed from directs the payment of money, either as a debt or for damages or costs, the execution of the judgment shall not be stayed until the appellant has given security to the satisfaction of the court appealed from, or of a judge thereof, that, if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof with respect to which the judgment

is affirmed, if it is affirmed only with respect to part, and all damages awarded against the appellant on the appeal.

[12] Madam Justice Rowles went on to decide the application on the basis of the three-part test in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311.

[13] Applying those principles to the present case, I note that the threshold merits test is met by the fact that the Supreme Court granted leave to appeal. I am unable to see how Mr. Shafron can claim irreparable harm if a stay is not given. His argument comes down to a consideration of the balance of convenience, the interests of justice, or “special circumstances” (***Contact Airways Ltd. v. De Havilland Aircraft of Canada Ltd.*** (1982), 42 B.C.L.R. 141 (C.A.); ***Peter Kiewit Sons Co. v. Perry***, 2006 BCCA 259, 226 B.C.A.C. 280). In that regard, he submits he should not be vexed with costs while awaiting the judgment of the Supreme Court of Canada. The “special circumstances” include the imminent hearing in Ottawa; the wealth imbalance between him and KRG; the relentless pursuit by KRG of him and his employer, Shaw; his age, 72 years; and the emotional strain of the litigation, which would be exacerbated by having to attend an assessment while the appeal is outstanding.

[14] As KRG submits, there is nothing in Mr. Shafron's material that supports a plea of financial hardship. As to his personal circumstances, Mr. Shafron is a businessman, still active in business, and engaged in litigation related to that business. He claimed his costs when he won the trial and before the hearing of KRG's appeal. I do not see anything oppressive or harsh in KRG's proceeding to assess costs now.

[15] In the result, I dismiss the application for a stay.

“The Honourable Mr. Justice Donald”