In the Court of Appeal of Alberta

Citation: Patel v Alberta Securities Commission, 2021 ABCA 400

Date: 20211208
Docket: 1801-0229AC
Registry: Calgary

Between:

Ashmit Patel and Jonathan Levy

Appellants

- and -

Alberta Securities Commission

Respondent

- and -

Kilimanjaro Capital Ltd. now known as N1 Technologies Inc., John Charles Zang, Richard Kenneth Moore, Gregory Scott Buczynski and Zulfikar Rashid

Not Parties to the Appeal

The Court:

The Honourable Justice Barbara Lea Veldhuis
The Honourable Justice Sheila Greckol
The Honourable Justice Michelle Crighton

Memorandum of Judgment

Appeal from the Decision by
The Alberta Securities Commission
Dated the 5th day of July, 2018

Memorandum of Judgment

The Court:

I. Introduction

[1] The Alberta Securities Commission (ASC) issued a Notice of Hearing on October 11, 2017 alleging that the appellants, Ashmit Patel and Jonathan Levy, as well as a number of non-parties to this appeal, including Kilimanjaro Capital Ltd. (Kilimanjaro), Zulfikar Rashid and Gregory Buczynski, had engaged in a market-manipulation scheme in breach of various provisions of the *Securities Act*, RSA 2000, c S-4, as amended [the *Act*]. The ASC commenced this hearing process following an investigation by staff at the ASC that was conducted between March 2014 and April 2017.

[2] On July 5, 2018, the ASC issued an interlocutory decision finding that documents obtained by ASC staff in their investigation of Mr. Patel and his associates were not subject to solicitor-client privilege: *Re Kilimanjaro Capital Ltd.*, 2018 ABASC 106 [*Kilimanjaro* #1].

[3] Mr. Patel, Mr. Rashid, and Mr. Levy appealed that interlocutory decision. Mr. Rashid, however, has since filed a notice on October 29, 2021 that he "discontinues this appeal in whole against the Respondent". Moreover, since all allegations against Mr. Levy were either dismissed or withdrawn in the merits decision, he advised this Court on February 26, 2021 as follows: "I have been dismissed as a respondent by the ASC and therefore I have nothing to appeal". Accordingly, Mr. Patel is the one remaining appellant prosecuting *Kilimanjaro #1*, the interlocutory decision at issue in this appeal.

[4] On February 2, 2021, the ASC rendered its final decision on the merits in this matter, *Re Kilimanjaro Capital Ltd.*, 2021 ABASC 14 [*Kilimanjaro #2*], finding Mr. Patel, Mr. Rashid, and Kilimanjaro had breached provisions of the *Act* (at para 7):

> After considering the evidence and Staff's submissions, we determined that Patel contributed to a false or misleading appearance of trading in Kilimanjaro shares; Patel, Rashid and Kilimanjaro contributed to an artificial price for Kilimanjaro shares; Patel and Kilimanjaro breached an ASC order; and Rashid provided misleading statements to the ASC…

[5] Neither Mr. Patel, Mr. Rashid, nor Kilimanjaro appealed the merits decision. The ASC issued its sanctions decision on August 16, 2021: *Re Kilimanjaro Capital Ltd.*, 2021 ABASC 131 [*Kilimanjaro* #3]. Only Mr. Rashid appealed this sanctions decision. His appeal was filed on September 28, 2021 and is extant.

[6] The ASC submitted in its factum, filed September 20, 2021, that this appeal of *Kilimanjaro #1* is moot. By way of letter on October 18, 2021, this Court advised Mr. Patel that should he wish to provide further submissions on the issue of mootness, he must do so by October 25, 2021. However, Mr. Patel did not file further submissions.

[7] Mr. Patel wrote to this Court on October 28, 2021, requesting that this appeal be decided on a paper record only pursuant to Rule 14.32(2) of the *Rules of Court*. As the ASC did not agree, this Court confirmed on November 1, 2021 that the appeal would proceed by way of oral argument. Mr. Patel responded on November 2, 2021 that he would not be able to attend the hearing but noted: "I am explicitly not waiving my right to the requested relief, or ... waiving my [right] to have the panel rule on my written submissions".

[8] We have considered the issues raised by the appeal. However, we have concluded, for the following reasons, that this appeal is moot and should be dismissed on that basis.

II. Background

[9] Mr. Levy and Mr. Patel are attorneys licensed in California and the District of Columbia and Illinois. Both practiced from a law firm in Washington, DC. From November 2012 through October 2014, Mr. Patel held himself out as legal counsel or as chief operating officer for Kilimanjaro: *Kilimanjaro #2* at para 31. At times, Mr. Levy held himself out as Kilimanjaro's general counsel and acted as legal representative for various entities that entered into agreements with Kilimanjaro: *Kilimanjaro #2* at para 32. Mr. Rashid, who resides in Calgary, was a director, chief executive officer, and control person of Kilimanjaro: *Kilimanjaro #2* at paras 33-34.

[10] Between March 2014 and April 2017, ASC staff investigated a suspected market-manipulation scheme involving the publicly-traded securities of Kilimanjaro. In April 2015, the United States Securities and Exchange Commission, which was assisting ASC staff with their investigation, issued a subpoena to Mr. Patel requiring him to produce documents related to Kilimanjaro. Mr. Patel refused to comply, asserting privilege over such documents pursuant to American and Canadian law, and advised ASC staff to obtain the documents from other sources.

[11] In July 2015, the ASC sought an informed waiver of solicitor-client privilege (as per Canadian law) from Mr. Rashid regarding Mr. Levy and Mr. Patel. Mr. Rashid declined to waive the privilege.

[12] On October 11, 2017, the Executive Director of the ASC issued a Notice of Hearing alleging that the appellants, Mr. Patel and Mr. Levy, as well as Mr. Rashid and three other individuals had breached various provisions of the *Act* through their involvement with Kilimanjaro. The notice included the documents ASC staff were using to substantiate the charges. In response to this notice, Mr. Patel brought an application to the ASC ("Mr. Patel's application") alleging that ASC staff were basing their charges on documents they had obtained in violation of solicitor-client privilege that had not been waived. In this application, Mr. Patel asserted that both he and Mr. Levy had a solicitor-client relationship with Mr. Rashid, Kilimanjaro, and Mr.

Buczynski: *Kilimanjaro #1* at para 6. Mr. Buczynski, using the alias "Gregory Scott," operated a firm that had audited Kilimanjaro's financial statements: *Kilimanjaro #2* at para 35.

[13] On April 3, 2018, the ASC held a hearing management session to discuss the procedure for Mr. Patel's application. During this session, the ASC identified the issues it wanted the parties to address, including the need for evidence proving the foreign laws referenced in Mr. Patel's materials.

[14] On May 10, 2018, the ASC held another session to hear arguments in respect of Mr. Patel's application. The evidence before the ASC consisted of three affidavits: one from Mr. Patel, sworn on February 22, 2018; one from Mr. Rashid, sworn on February 27, 2018; and another sworn by an ASC staff investigator on April 27, 2018. Neither Mr. Patel nor Mr. Rashid's affidavit contained evidence of American law regarding solicitor-client relationships. Only Mr. Patel made submissions on his application; none of Kilimanjaro, Mr. Levy, Mr. Rashid or Mr. Buczynski appeared or made submissions: *Kilimanjaro #1* at para 16.

[15] The ASC dismissed Mr. Patel's application in a written decision dated July 5, 2018, finding that the impugned documents were not protected by solicitor-client privilege or, though they had been protected initially, said privilege had been waived: *Kilimanjaro #1* at para 8. Because the ASC did not have sufficient evidence about foreign law regarding solicitor-client privilege, it applied Alberta law to resolve the issue: *Kilimanjaro #1* at para 4.

[16] As noted, Mr. Patel, Mr. Levy, and Mr. Rashid appealed the ASC decision in *Kilimanjaro #1*. In response, the ASC applied to stay the appeal of the interlocutory decision. A single judge of this Court granted the stay: *Patel v Alberta (Securities Commission),* 2018 ABCA 292.

[17] The three individuals later applied to lift the stay when the scheduled hearing on the merits was delayed by nearly a year, but this application was dismissed: *Patel v Alberta (Securities Commission)*, 2019 ABCA 13.

[18] On February 2, 2021, the ASC rendered its decision on the merits, finding that Mr. Patel, Mr. Rashid, and Kilimanjaro had breached various provisions of the *Act*. The ASC found all three had engaged in a market-manipulation scheme, Mr. Patel and Kilimanjaro had traded Kilimanjaro securities in violation of a cease trade order against Kilimanjaro, and Mr. Rashid had misled ASC staff during their investigation: *Kilimanjaro #2* at para 7. They made no findings against Mr. Levy. The merits decision was not appealed by any party.

[19] Following *Kilimanjaro #2*, the ASC issued its sanctions decision on August 16, 2021, ordering that all trading and purchasing of securities or derivatives of Kilimanjaro cease and that Kilimanjaro cease trading in and purchasing securities or derivatives: *Kilimanjaro #3* at para 89.

[20] The ASC also ordered that Mr. Patel resign all directorship positions in trade-related organizations and cease all trading in securities. The ASC prohibited Mr. Patel from engaging in investor-relations activities, becoming or acting as a director in trade-related organizations, advising in securities or derivatives, from becoming or acting as a registrant, investment fund manager or promoter, and from acting in a management or consultative capacity in connection with activities in the securities market. The ASC ordered Mr. Patel to pay the ASC the $117,400.00 he had obtained by failing to comply with Alberta securities laws; an administrative penalty of $450,000; and $120,000 of the investigation and hearing costs: *Kilimanjaro #3* at para 87.

[21] The ASC ordered Mr. Rashid to resign all directorship positions in trade-related organizations up until and including August 16, 2031, though he was allowed to continue acting as a director or officer of Rodeo Express Delivery Limited, so long as it is wholly owned by one of him or his immediate family members, among other conditions. The ASC also ordered that, up until and including August 16, 2029, Mr. Rashid cease trading and purchasing securities or derivatives and that he be prohibited from acting in a management or consultative capacity in connection with securities market activities. Finally, Mr. Rashid was ordered to pay an administrative penalty of $75,000 and $30,000 of the investigation and hearing costs: *Kilimanjaro #3* at para 88.

[22] Mr. Rashid has filed a notice of appeal in respect of *Kilimanjaro #3*, though Mr. Patel has not: *Zulfikar Hussein Rashid v Alberta Securities Commission* (2101-0254AC). As mentioned, this appeal is still extant.

III. Grounds of Appeal

[23] The grounds of appeal are:

i) whether the ASC has violated the *Constitution Act, 1867* by extra-provincially prosecuting a foreign company and its foreign lawyers for market manipulation in foreign markets (Denmark and the United States) with deliberate disregard for parallel legal systems and comity;

ii) whether the ASC committed an error of law by applying the law of Alberta instead of applicable foreign law:

   a. to determine if an attorney-client relationship had been formed by Mr. Buczynski, a United States resident, with Mr. Levy and Mr. Patel, lawyers certified in the United States, when Mr. Levy and Mr. Patel supplied Mr. Buczynski with legal advice in the United States. In the alternative, the appellants submit that the ASC misapplied Alberta law;

b. by disregarding relevant foreign and Canadian laws governing the conduct of foreign attorney-client relationships;

iii) whether the ASC committed a factual error by unreasonably disregarding or misapprehending the context and content of the transcript excerpts of the ASC staff examinations of Mr. Rashid and Mr. Buczynski in Mr. Patel's affidavit and by ignoring Mr. Rashid's attempt to join Mr. Patel's application;

iv) whether the ASC committed a factual error by finding that:

a. Mr. Levy, Mr. Patel and Mr. Rashid were engaged in a joint venture of some sort instead of an attorney-client relationship based upon hearsay evidence of documents that were not before the ASC or entered into evidence, and the contents of which was not reasonably disclosed to the appellants;

b. Mr. Levy and Mr. Patel as legal counsel at Kilimanjaro operated under the supervision of an Alberta solicitor when no such person existed;

c. without any basis in fact or law, Mr. Rashid had no attorney-client relationship with Mr. Levy and Mr. Patel after he resigned as CEO of Kilimanjaro or any expectation of privilege in his discussions with legal counsel about the ASC and other proceedings after that resignation.

IV. Analysis

[24] Subsection 38(6) of the *Act* allows this Court to confirm, vary or reject the ASC's decision; to direct the ASC to re-hear the matter; or to make any decision the ASC could have made and substitute its decision for that of the ASC.

[25] The issue of whether this appeal should be dismissed on the basis of mootness must be decided first, because if the ASC succeeds on this issue, it is determinative and none of the grounds of appeal need to be addressed.

[26] The ASC submits that this appeal is moot in these terms:

> In their factum, the "Appellants seek a stay of proceedings until such time, if any, when the matter of solicitor client issues, conflict of laws, and extra-provincial regulation can be unentangled by a court."
>
> With respect, that time has long passed. The appropriate time to make those arguments was at the merits hearing, where there may have been a factual and contextual foundation for them and relief, if deemed appropriate, could have been granted. However, other than an unsuccessful adjournment application brought by

> Patel, the Appellants chose not to participate in the merits hearing, effectively waiving that option.
>
> Therefore, the issues raised in this appeal are largely (if not entirely) moot, and no remedy, including a stay, should be granted.
>
> (Factum of the Respondent at paras 47-49)

[27] Mr. Patel did not provide written submissions on the question of whether this appeal is moot, other than to submit that he wants the court to rule on his written submissions.

[28] Under the doctrine of mootness, the court may decline to decide a case which raises only a hypothetical or abstract question: *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342, SCJ No 14 (QL) [*Borowski* cited to QL]. *Borowski*, the leading authority on dismissal for mootness, sets out a two-step process: see paras 15-17, 28. First, the court must determine whether the case is moot on the basis of the "live controversy" test, which considers whether the required tangible and concrete dispute has disappeared and the issues have thus become academic. A case will be "moot" if no live controversy remains that affects, or may affect, the rights of the parties when the court is called upon to reach a decision. Second, if the case is found to be moot on the basis that there is no "live controversy", the court must go on to decide whether to exercise its discretion to hear the case nonetheless.

i) Has the tangible and concrete dispute disappeared rendering the issues academic?

[29] This is an appeal of an interlocutory decision of the ASC. The appeal was stayed until the ASC's decision on the merits had been made. The decision on the merits was made in *Kilimanjaro #2*; in that decision, the ASC found that Mr. Patel and others had violated various provisions of the *Act*. Mr. Patel allowed the statutory appeal timeline of 45 days to pass without challenging the merits decision: *Act*, s 38(2). Mr. Patel has appealed the interlocutory decision, but the result of this appeal will not change the decision on the merits in *Kilimanjaro #2*. Therefore, the tangible and concrete dispute has disappeared and the issues Mr. Patel raises on the appeal are academic: *Borowski* at paras 15-16. In short, this appeal is moot.

ii) Should the Court exercise its discretion to hear a moot appeal?

[30] Having determined the question of mootness in the affirmative, the court must then consider whether it should exercise its discretion to hear the moot appeal: *Borowski* at para 16. In doing so, the court should consider at least three factors: a) the presence of an adversarial context, b) the concern for judicial resources, and c) the awareness of the court's proper law-making function: *Borowski* at paras 31-41. Further, the court should consider the extent to which each of these factors is present. The factors may not all support the same conclusion. The presence of one or two of the factors may be overborne by the absence of the third, and vice versa: *Borowski* at para 42.

a) The presence or absence of an adversarial context

[31] We are of the view that an adversarial context in this case is absent. Such a context ensures "that issues are well and fully argued by parties who have a stake in the outcome": *Borowski* at para 31. When an adversarial context is present, the parties put their best case before the courts, adduce evidence, and pursue all available arguments: *Mental Health Centre Penetanguishene v R*, 2010 ONCA 197 at para 39 [*Penetanguishene*]. That appears to be lacking here. No matter the result of this appeal, it cannot affect the decision on the merits in *Kilimanjaro* #2 that has not been challenged by Mr. Patel. Therefore, this Court cannot be confident that both parties were motivated to put their best foot forward on this appeal.

[32] Mr. Patel submits that this is an exceptional case. He seeks a stay as a "minimum remedy" "until such time, if any, when the matter of solicitor client issues, conflict of laws, and extra-provincial regulation can be unentangled by the courts". Only the question of solicitor-client privilege is raised by this appeal of *Kilimanjaro #1*. If we were to embark on an examination of this question in the context of the ASC administrative proceedings, Mr. Patel's materials fall far short of what would be necessary to come to grips with this question. Even had all documents needed to determine the legal issue been before the court, and had Mr. Patel provided the elaborate factual and legal road map that would be necessary to determine the solicitor-client privilege issue, the answer would be wholly academic. The merits decision and sanctions decision would remain binding upon Mr. Patel. Nothing would have been accomplished by such a wild goose chase.

b) The concern for judicial economy

[33] We now turn to the concern for judicial economy, the second rationale underlying the mootness doctrine: *Borowski* at para 34. Unfortunately, judicial resources are scarce, and these resources must be rationed among competing claimants: *Borowski* at para 34. Judicial resources should not be used to resolve academic debate: *Penetanguishene* at para 40. Because the result of this appeal will not affect the rights of the parties (as it will not affect the decision in *Kilimanjaro #2 vis-a-vis* Mr. Patel), using judicial resources to resolve this appeal would be wasteful.

[34] This concern will be answered, however, if the special circumstances of the case make its resolution worthy of the application of scarce judicial resources: *Borowski* at para 34. For example, the use of judicial resources may be warranted in cases where:

1) the court's decision will have some practical effect on the rights of the parties, even without the effect of determining the controversy that gave rise to the action;

2) the appeal raises an issue that is capable of repetition, yet evasive of review; or

3) the appeal raises an issue of public importance where resolution is in the public interest: *Borowski* at paras 35-37.

[35] There are no special circumstances present on this appeal that warrant the use of scarce judicial resources. A decision on this appeal will not affect the rights of the parties; as just discussed, this appeal will not affect the final determination on the merits made by the ASC in *Kilimanjaro #2*. And the appeal does not raise a common issue that is evasive of review, nor one that is of public importance. The issue of solicitor-client privilege is commonly discussed by the courts and its law is settled. Solicitor-client privilege must be guarded sedulously and there is ample Canadian law to that effect. This Court has recently re-visited the important principles in *0678786 BC Ltd* v *Bennett Jones LLP*, 2021 ABCA 62 at paras 20-25.

c) The Court's proper law-making function

[36] To delve into the numerous issues and render a decision on the facts of this case would be to depart from the court's traditional law-making function. The concern for the court's proper law-making function is animated by a desire not to intrude into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of the parties. The court should be sensitive to the extent it may be departing from its traditional adjudicative role in hearing a moot case: *Borowski* at para 41. In this case, the court would be departing from this traditional role as there is no active dispute between the remaining appellant in this appeal, Mr. Patel, and the respondent ASC that will affect their rights: the dispute was settled in *Kilimanjaro #2* and Mr. Patel did not appeal that decision.

V. Conclusion

[37] In *Borowski*, the Supreme Court of Canada provided the analysis necessary to determine when the court may decline to decide a case which raises only a hypothetical or abstract question. Following the guidance of that case, we are of the view that hearing this moot appeal would contravene the three broad rationales underlying the doctrine of mootness.

[38] The fairness of this result is confirmed by the procedural facts: apart from an adjournment application by Mr. Patel, none of the respondents to the Notice of Hearing, including Mr. Patel, participated in the merits hearing: *Kilimanjaro #2* at paras 3, 6. Neither Mr. Patel nor Mr. Rashid nor Kilimanjaro, found to have violated the *Act*, appealed the merits decision. Only Mr. Rashid has appealed the sanctions decision (in *Kilimanjaro #3*) but he is no longer appealing the interlocutory decision (*Kilimanjaro #1*) that is the subject of this appeal.

[39] This is the context in which we assess Mr. Patel's fond wish that "the matter of solicitor client issues, conflict of laws, and extra-provincial regulation" be "unentangled by the courts". With respect, this submission misconstrues the role of the courts as impartial arbiters between parties in the adversarial process of litigation. We do not accede to requests by individual parties to pursue frolics of fancy to find answers to academic questions that lead nowhere, except where special circumstances make it worthwhile to apply scarce judicial resources to resolve them. This

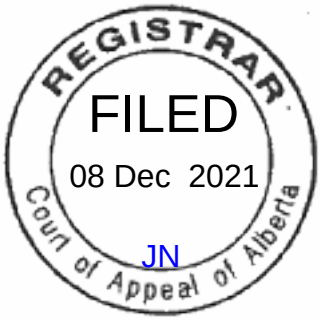
is not such a case. Our scarce judicial resources are required for parties who need answers to their pressing and live legal disputes.

[40] The appeal is dismissed.

Written Submissions filed by Appellants on August 21, 2018

Appeal heard on November 8, 2021

Memorandum filed at Calgary, Alberta
this 8th day of December, 2021



Authorized to sign for Veldhuis J.A.

Greckol J.A.

Crighton J.A.

Appearances:

C. Pillar/P.A. Verschoote
for the Respondent, Alberta Securities Commission

Appellants, In Person (no appearance)

Respondent, John Zang, In Person (no appearance)