COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kett v. Google LLC,*
2023 BCCA 350

Date: 20230908
Docket: CA48134

2023 BCCA 350 (CanLII)

Between:

Ryan Kett

Appellant
(Plaintiff)

And

Google LLC

Respondent
(Defendant)

And

Harondel J. Sibble

Respondent

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated February 1, 2022 (*Reid v. Google LLC*, 2022 BCSC 158, Vancouver Docket S188927).

Counsel for the Appellant: D.A. Klein

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Place and Date of Hearing: Vancouver, British Columbia
November 21, 2022

Place and Date of Judgment: Vancouver, British Columbia
September 8, 2023

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Justice Marchand

Dissenting Reasons by (Page 26, para. 86):
The Honourable Madam Justice Saunders

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Summary:

Appeal from an order staying a proposed class action (the "Kett Action") on grounds that it is a mere subset of a second, broader proposed class action (the "Sibble Action"). The chambers judge held that the Kett Action and Sibble Action were predicated on the same cause of action and thus stayed the former action pending a certification decision on the latter action. Both class actions concern Google's alleged misrepresentations about the ability of users to protect their privacy by changing various settings on devices running Google services. The appellant advances two grounds of appeal. First, that the chambers judge erred in concluding that the actions concern the same cause of action by ignoring the "core allegations" at the heart of the Kett Action. Second, that the chambers judge erred: (i) in applying the factors applicable on a carriage motion in deciding to stay the Kett Action; and (ii) did so without providing counsel for Kett the opportunity to lead evidence and make submissions, including on the appropriate framework to be applied on Google's stay application. This was said to result in a violation of the audi alterum partem principle and a corresponding breach of procedural fairness.

Majority (per Justice Fitch and Justice Marchand): Held: Appeal dismissed. With respect to the first ground of appeal, the appellant has failed to identify an extricable error of law justifying appellate intervention with the chambers judge's discretionary determination of the matter. The judge identified and applied the correct test—whether the two causes of action were about the same dispute or subject matter. The appellant's submission that the judge erred in law by failing to engage with the "core allegations" in the Kett Action is a disguised invitation to this Court to rehear the application and substitute its own judgment for the discretionary decision of a chambers judge. With respect to the second ground of appeal, Kett had ample notice of Google's application to stay the Kett Action. Despite this, Kett did not request additional time to make submissions on the appropriate stay considerations, nor did it lead evidence on the stay application. Moreover, even now, on appeal, Kett makes no argument that a different framework should have been applied. It thus cannot be said that the judge's decision to order a stay of the Kett Action was procedurally unfair.

Dissent (per Justice Saunders): Appellate review is justified on the basis that the judge erred by failing to address foundational principles and accordingly failing to give sufficient weight to all considerations. A stay was granted without proper attention to the RJR-MacDonald framework. Caution must be exercised in making a stay order where the asserted vexation arises through the conduct of a party other than the subject of the stay order. The stay order should be set aside and the matter remitted to the Supreme Court for determination.

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Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] This is an appeal from an order staying a proposed class action on grounds that it is but a subset of a second proposed class action brought in the same jurisdiction and founded on the same cause of action. The stay was ordered on abuse of process grounds. The underlying reasons are indexed as 2022 BCSC 158.

[2] The appellant asserts that the chambers judge erred by concluding the two proposed class actions advanced the same cause of action, that each concerned the same dispute or subject matter, and that, as a consequence, one of them should be temporarily stayed pending certification of the application permitted to proceed (the "First Issue").

[3] In the alternative, the appellant argues that if the chambers judge made no reviewable error in concluding that permitting both actions to proceed would give rise to an abuse of process, she nevertheless erred in determining the stay application by applying the factors traditionally considered on a carriage motion without giving counsel notice that such an analysis would be undertaken or the opportunity to make submissions and lead responsive evidence. This is said to have breached the *audi alteram partem* rule—that no party should be judged without being given a fair opportunity to respond (the "Second Issue").

[4] If the appellant prevails on the First Issue, he seeks an order setting aside the stay. If the appellant fails on the First Issue but succeeds on the Second Issue, he seeks an order remitting the stay application to a different judge of the Supreme Court to be adjudicated on appropriate materials.

[5] For the reasons that follow, I would dismiss the appeal.

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II. Background

1. Overview

[6] I will address only so much of the background as is necessary to frame the two grounds of appeal.

[7] The chambers judge had before her two applications pertaining to three proposed class actions against Google LLC ("Google") and related defendants: *Ryan Kett v. Google LLC* ("Kett"), *Brian Reid v. Google LLC* ("Reid"), and *Harondel Sibble v. Google LLC*, *Google Canada Corporation, and Alphabet Inc.* ("Sibble").

[8] Broadly speaking, each of the proposed class actions allege that Google: collected the personal information of users without their consent; misrepresented the ability of users to adjust their privacy settings to control access to and use of their personal information; and monetized users' personal information through advertising.

[9] It is common ground that the Sibble action is the broadest and most comprehensive of the three proposed class actions.

[10] Counsel in Sibble ("Sibble Counsel") applied for carriage of the claims set out in Reid, but not Kett.

[11] Google applied for an order pursuant to s. 13 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], ss. 8 and 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and Rule 9-5(1)(d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*], temporarily staying the Kett action pending determination of certification in either Sibble or Reid (depending on the outcome of Sibble's carriage application) or, in the alternative, temporarily staying Sibble or Reid pending determination of certification in Kett. Google's primary submission was (assuming Sibble was granted carriage of the claims in Reid) that Kett should temporarily be stayed on grounds that it was subsumed by Sibble. Google argued that to permit more than one action to proceed in relation to the same dispute or subject matter would be an abuse of process. Alternatively, if the test for abuse of process was not met, Google argued

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that a stay of all but one of the actions was necessary to "prevent unnecessary and costly duplication of judicial and legal resources": *Fantov v. Canada Bread Company*, *Limited*, 2019 BCCA 447 at para. 53, citing *Ainsworth Lumber Co. v. A.G. of Canada*, 2001 BCCA 105 at paras. 14–15.

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[12] The chambers judge, who was also the case management judge for all three actions, granted Sibble's carriage motion and ordered that Sibble Counsel have carriage of the claims in the Reid action. She was satisfied that Reid and Sibble shared the same cause of action and that the Reid claim was subsumed by the claim advanced in Sibble. As she put it:

> [98] Sibble and Reid both arise out of Google's alleged collection, use, and monetization of users' personal information. The claim periods overlap for some 11 years. Reid Data is a subset of Sibble Data. The Reid class is a subset of the Sibble class. The privacy claims advanced in Reid are advanced in Sibble. The factual situation that founds Reid is, as Sibble Counsel asserts, a "slice" out of the factual situation that founds Sibble.

[13] The judge considered but rejected the notion that the Reid class would be better served if the Reid action was permitted to proceed as a stand-alone proceeding, "carved out" of what counsel for Reid ("Reid Counsel") described as Sibble's "meta-claim". Reid Counsel argued that the Reid class was in a position analogous to the Aviva plaintiffs in *Workman Optometry Professional Corp. v. Aviva Insurance Co. of Canada*, 2021 ONSC 142, who were allowed to proceed on their own. The judge distinguished the case at bar from *Workman Optometry*, noting that if the Reid claim was permitted to proceed as a carveout, "Reid class members would continue to be Sibble class members and would continue to have legal claims about their browsing information covered by the Sibble action, and Google would have to defend both actions": at para. 107. She concluded that, "[n]o one will be denied access to justice if Reid does not proceed as a carve out: Sibble would advance the Reid claims": at para. 111. She also concluded that allowing both actions to proceed would be inconsistent with the objectives underlying the *CPA*. Doing so would force Google and the court system to unnecessarily expend time and resources in conducting duplicative actions: at para. 112.

[14] The chambers judge identified the factors to be considered on a carriage motion summarized in *Winder v. Marriott International Inc.*, 2019 ONSC 5766 and other cases. Her reasons on the carriage motion are captured in the paragraphs that follow:

> [114] Sibble and Reid are founded on the same cause of action. There is no policy basis for permitting both actions to proceed. Thus, this motion boils down to the usual carriage question – which matter should proceed.
>
> [115] Reid Counsel submit that the primary consideration should be the best interests of the Reid class. I do not agree. When, as here, the actions on the carriage motion propose dissimilar classes, it is the best interests of the totality of the putative class members that are relevant.
>
> [116] I am satisfied that Sibble's broader scope and case theory better serve the interests of the putative class, the objective of behaviour modification, and the common interests of the class members, the defendants, and the Court in the efficient use of time and resources. Reviewing the factors overall, I do not find the determination a close call. However, if it were, counsel experience and expertise would then lean in favour of Sibble.
>
> [117] I do not suggest that a broader claim should generally be preferred. Here, I consider it very telling that the Reid claim itself describes the collection of data aside from the Reid Data and the aggregation of Reid Data with that other data in order to describe the wrongdoing at issue. This gives credence to Sibble Counsel's argument that the Reid action – one focussed on a narrow subset of data and a discrete representation in the collection process – aspires to offer, at best, a glancing blow to the wrong it identifies.

[15] For these reasons, the judge ordered that the Reid action be temporarily stayed pending a final determination on certification in Sibble.

[16] The judge then turned to Google's stay application, noting that, with the resolution of the carriage motion, Google sought an order staying either Kett or Sibble pending the certification application brought in the other action.

[17] Kett and Sibble counsel asserted that the two actions advanced distinct claims, and that permitting both to proceed would not give rise to an abuse of process. While they acknowledged overlap between the two actions, counsel insisted that this could be addressed through application of the principle of *res judicata* and the rule against double recovery.

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[18] The judge concluded that Kett and Sibble are actions about the same dispute and subject matter and that the pleadings, although differently particularized, are variations on a single cause of action: at para. 159. She concluded, therefore, that a presumption of vexation arose: at para. 159. Kett does not challenge this aspect of the judge's legal analysis on appeal.

[19] The judge concluded that the presumption of vexation had not been displaced and that no policy reason had been advanced as to why both Kett and Sibble should be allowed to proceed. She concluded that Google had, therefore, established an abuse of process.

[20] While the judge recognized that she had the discretion to defer resolution of Google's stay application to the certification hearings, she determined that it was fair and appropriate to decide the stay application before certification. Again, Kett does not challenge the way in which the judge exercised her discretion on this issue.

[21] Neither Kett nor Sibble Counsel assisted the judge on the analysis that should be brought to bear if she concluded that one of the two actions would have to be stayed.

[22] The judge concluded that Reid and Kett "stand in the same shoes in terms of overlap with Sibble": at para. 174. By this, the judge obviously meant that, like Reid, Kett was subsumed by, or but a slice of, the broader claim advanced in Sibble.

[23] The judge granted Google's application and ordered that Kett be temporarily stayed pending a final determination on certification in Sibble.

[24] No appeal has been taken from the order granting Sibble Counsel carriage of the claims in Reid.

[25] Thus, the determination of Google's stay application forms the sole basis for this appeal.

[26] By order made May 25, 2022, Sibble was added as a respondent to the appeal on terms effectively restricting its participation to the Second Issue.

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2. The Kett action

[27] To put the First Issue in context, it is necessary to compare the pleadings in Kett and Sibble. Both actions pertain to the collection, use, and commodification of personal information obtained by Google from users of its services without their consent.

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[28] The Kett action was filed first, on August 15, 2018. The pleadings in Kett were summarized by the chambers judge:

> [28] Kett alleges that for an unknown period before January 1, 2019, Google collected location-based personal information without consent from individuals with a Google account whenever Google services were used on Android or Apple iOS smartphone devices.
>
> [29] Kett defines "Google services" as including:
>
>> Internet search (Google Search), map display and route guidance (Google Maps), email hosting (Gmail), notifications (Google Now), weather (Google Weather), photo management (Google Photos), and cloud-based file storage, editing and retrieval (Google Drive).
>
> [30] The personal information forming the subject matter of the [Kett] claim includes (without limitation): GPS coordinates, longitude and latitude, map location, geographical location, nearby Wi-Fi networks, IP addresses, or other markers of physical orientation ("Location Data").
>
> [31] Google is said to collect Location Data and aggregate it to create a timeline of where the individual user was physically situated. Kett alleges that, without consent, Google collected, retained, and commercialized Location Data by selling: advertising based on user location as shown by Location Data; Location Data; and user profiles (which profiles include Location Data):
>
>> 8.In addition to manipulating and presenting data to users, Google's Services and Apps have the ability to collect extensive information about the users themselves, including timing and frequency of use, and the place of use, and associating them with a user's Google Account.
>>
>> 9.Google makes most of its money from selling advertising to third parties based on its users' characteristics, including their location.
>
> [32] The Kett class includes persons who deactivated or disabled their location services or location history function ("Location History function"). <u>Kett alleges that Google allowed users to turn off the Location History function, but if the user did so, Google nonetheless collected their location history under a default setting in Web & App Activity. It asserts that Web & App Activity's collection of location history, and the fact that the Web & App Activity collection function could also be turned off, were not made apparent to the user.</u>
>
> [Underlined emphasis added.]

[29] Kett pleads that Google misrepresented the ability of users to protect their privacy, advising them that by turning off their Location History, "the places you go are no longer stored". Kett pleads that turning off Location History in smartphone settings or in a Google account did not prevent Google from collecting, storing or exploiting users' Location Data and that Google did so under a default setting in Web & App Activity. Kett alleges that Google's "deceptive settings" resulted in the unauthorized collection, retention, and use of the Location Data. Google is said to have been enriched by, among other things, selling advertising to third parties on the basis of the Location Data for display to users of Google services, selling Location Data to third parties, and selling customer profiles containing the Location Data to third parties.

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[30] Kett claims on behalf of all users located in Canada except Quebec residents. There is a Kett companion case for Québec residents: *Sergio Lima v. Google LLC* ("Lima").

[31] Kett seeks: (1) statutory damages for breach of the *Privacy Act* of British Columbia; (2) statutory damages or disgorgement for breach of the Privacy Acts of Saskatchewan, Manitoba, and Newfoundland; (3) damages for the tort of intrusion upon seclusion; (4) restitution or disgorgement of all benefits received by Google attributable to the unauthorized collection, retention and use of the Location Data based on the doctrine of unjust enrichment; (5) damages for the tort of unlawful means; (6) a declaration that Google's conduct contravened the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*] and a permanent injunction restraining Google from contravening that statute; (7) punitive damages; and (8) pre-judgment and post-judgment interest under the *Court Order Interest Act,* R.S.B.C. 1996, c. 79 [*COIA*].

3. The Sibble action

[32] Sibble was filed on August 17, 2020. The claim in Sibble is advanced on behalf of all Canadian users who used Google Services with devices (computers and Android and iOS smartphones), but excludes Ontario and Québec residents.

[33] Sibble Counsel are part of a national consortium. There are Sibble companion actions in Ontario (*Provost v. Google LLC, Google Canada Corporation and Alphabet Inc.*) and Québec (*Options Consommateurs c. Google LLC*).

[34] The pleadings in Sibble were summarized by the chambers judge:

> [8] Sibble Counsel describe Google's primary business as the sale and placement of targeted advertising, and allege the targeting is made possible by Google's collection, retention, aggregation, and use of personal information without consent. Sibble Counsel describe their claim as designed to grapple with a wrongful business model.
>
> …
>
> [10] Sibble asserts that Google collects information when people use "Google Services" (e.g., when they browse the internet using Google Chrome as a search engine), and when they access (using any search engine, e.g. Bing) a third party website that itself uses Google Services (e.g., Google Analytics or Google Ads).
>
> [11] Sibble defines "Google Services" as including Android, Chrome, Search, Maps, Gmail, and "other services." The information collected is asserted to include (without limitation), IP addresses, physical address, location, search terms, and web browsing history ("Sibble Data"). It is asserted that this multi-sourced data is then aggregated to create user profiles, and that Sibble Data and user profiles are then used in Google's targeted marketing business.

[35] As is apparent, Sibble pleads that Google collects a wide array of personal information without users' consent, including, but not limited to, Location Data.

[36] Sibble pleads that Google represented to class members that it would protect the privacy of their accounts. Google allegedly represented to class members that they could browse the Internet privately in Incognito mode, could limit Google's access to their personal information by enabling "Do Not Track", and could otherwise control their privacy by changing settings within their account. Sibble pleads that these features and settings did not actually prevent Google from collecting the personal information of class members, including Location Data, and that Google's representations materially misrepresented the extent to which users could protect their own privacy.

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[37] Sibble seeks, among other things: (1) statutory damages for breach of the *Privacy Act* of British Columbia; (2) statutory damages, an accounting, and an injunction for breach of the *Privacy Acts* of Saskatchewan, Manitoba and Newfoundland; (3) damages for the tort of intrusion upon seclusion; (4) damages for trespass; (5) damages for conversion; (6) damages for and a declaration that the defendants breached the *BPCPA* and the consumer protection legislation of other named provinces by making false, misleading, deceptive, and unconscionable misrepresentations amounting to unfair and unconscionable practices; (7) an accounting, disgorgement and restitution for unjust enrichment, conversion, trespass, and the breach of privacy legislation; (8) damages for breach of the *Competition Act*, R.S.C. 1985, c. C-34 [*CA*]; (9) costs relating to the investigation and prosecution of the proceedings pursuant to s. 36(1) of the *CA*; (10) punitive and exemplary damages; (11) a permanent injunction restraining the defendants from, among other things, taking any further action in contravention of the *BPCPA*, the consumer protection legislation of other named provinces, the *Privacy Acts* of British Columbia, Saskatchewan, Manitoba and Newfoundland, the *CA*, and the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5; and (12) pre-judgment and post-judgment interest under the *COIA.*

[38] This brief overview makes apparent that the claim in Sibble is broader than that advanced in Kett (a fact the parties themselves acknowledge). While Kett alleges the unauthorized collection of Location Data from users of Google's Services (like Google Maps, Google Search, Google Photos and Gmail), Sibble alleges the unauthorized collection of *all types* of personal information, including Location Data, from Google products, including Google Maps, Google Search and Gmail, as well as Google Analytics and Google Ads embedded on third-party websites.

[39] The alleged misrepresentations of Google as to the control users have over their Location Data are particularized differently in the two actions. On this issue, Kett alleges that turning off Location History did not prevent Google from collecting a smartphone user's Location Data under Web & App Activity. By comparison, Sibble pleads that using Incognito Mode or enabling Do Not Track did not shield users'

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private information from collection and subsequent use, contrary to Google's assurances. Sibble also pleads that "no matter what settings Class Members chose, the settings do not prevent Google's collection and use of the Personal Information for its own business purposes, the creation of a profile about the Class Member, or the monetization of the Personal Information".

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[40] The two pleadings overlap in terms of the alleged *source* of the misrepresentations. Both refer to the Google Privacy Policy, account settings, and Google Activity Controls.

[41] The proposed class definition in Sibble is also broader than in Kett, except that it excludes Ontario and Québec residents who are subject to the Sibble companion actions in those jurisdictions. The proposed Kett class consists of all individuals in Canada with a Google account who used Google services through Google Apps on smartphones running Android or iOS. The proposed Kett class includes users of the same Google services as well as non-users who visited third-party websites using a smart phone or computer.

[42] The class periods overlap, as do the causes of action and relief sought in each of the claims.

[43] The same individuals would be a member of both classes in relation to the same alleged wrongdoing—the unauthorized collection of that individual's Location Data, including by misrepresenting either how or the extent to which a user can go about protecting that data from being harvested and used by Google.

II. Reasons for Judgment on Google's Stay Application

1. Are Kett and Sibble actions on the same dispute or subject matter?

[44] The judge considered whether the Kett and Sibble actions were about the same dispute or subject matter. At paras. 86 and 144–146 of her reasons, she adopted, at Kett's suggestion, the definition of "cause of action" from *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54. There, the Supreme Court of Canada explained that "[a] cause of action has traditionally been defined as

comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court".

[45] The judge noted both Kett and Sibble allege that Google: engages in the unauthorized collection and use of personal information from users of Google Services without their consent, including users' IP addresses and Location Data (at paras. 151, 153); falsely represents that users can adjust their privacy settings to prevent this from happening (at paras. 152, 154); and aggregates Location Data with other Sibble Data in order to monetize it for targeted advertising (at para. 155).

[46] The judge concluded that the only difference between the two actions is that Kett particularizes Google's alleged misrepresentations as to the ability of users to protect their privacy in a way not specifically set out in Sibble's more general claim. She said this:

> [156] Kett and Sibble traverse the same factual ground, allege the same wrongdoing and claim for the same loss. The only point of difference is that the Location History misrepresentation alleged in Kett is not among the alleged misrepresentations (presently) particularized in support of Sibble's more general assertion of misleading misrepresentations made in the collection of Sibble Data.
>
> [157] Multiple causes of action do not materialize when a party omits (by choice or not) to make all possible factual allegations in support of their claim as filed. More accurately here, they do not materialize when a party omits (by choice or not) to particularize any given misrepresentation in support of an umbrella allegation of misrepresentation supported by other particulars.
>
> [Emphasis added.]

[47] The judge held that the way in which the Kett pleading was particularized did not result in a meaningful difference between the two actions.

[48] The judge thus applied the presumption that multiple actions in the same jurisdiction about the same subject matter or dispute were presumed to be an abuse of process. She was satisfied that Google had established that it would be an abuse of process to permit both actions to proceed. The judge then turned to consider which of the two actions should be stayed.

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2. Should Kett or Sibble be Stayed?

[49] As noted earlier, neither Kett nor Sibble Counsel made submissions on the principles the judge should apply in determining which of the two actions should be stayed.

[50] The judge determined to temporarily stay proceedings in Kett, explaining that the decision on which of Kett and Sibble to stay should follow the result in Reid versus Sibble on the carriage motion:

> [176] Google has left it to the Court to determine which action should be stayed and which should proceed. Google's neutral stance is appropriate in the circumstances.
>
> [177] Sibble and Kett Counsel have done likewise, with neither making submissions beyond the assertion that both should proceed. That is not appropriate. While this posture may foster goodwill across the class action bar, it is contrary to counsel's duty to assist the Court.
>
> [178] In the circumstances, it is appropriate to have recourse to the carriage motion framework. I am satisfied I can do that without further evidence.
>
> [179] I am prepared to assume that fee agreements, quality of proposed counsel and selection of defendants are neutral factors as between Kett and Sibble.
>
> …
>
> [182] The most notable difference in terms of the conventional carriage factors in Kett versus Sibble (as compared to Reid versus Sibble) is Kett's 2018 filing date.
>
> [183] While I consider the 2018 commencement date a significant factor favoring Kett, the ultimate outcome in Kett versus Sibble follows that in Reid versus Sibble. I adopt my reasons given under the carriage motion as being of parallel application here.
>
> [184] The Kett Action will be stayed.
>
> [Emphasis added.]

[51] In the result, the Kett and Reid actions were temporarily stayed pending the certification application in Sibble. It was within the judge's contemplation when she made these orders that the fate of Kett and Reid would be revisited following the resolution of Sibble's certification application.

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III. Analysis

1. The First Issue: Did the judge err in law by concluding that allowing both Kett and Sibble to proceed would constitute an abuse of process?

[52] Kett acknowledges that the standard of review applicable to an abuse of process finding is deferential. He asserts, however, that error in law in the application of the test for abuse of process attracts a correctness standard of review.

[53] Significantly, Kett concedes that by asking whether the two claims are about the same dispute or subject matter, the judge identified the correct analytical framework. He submits that error in principle may be found in her application of the correct test.

[54] Specifically, the appellant submits that the judge failed to engage with the "core allegations" pleaded in Kett relating to manipulation of the "Location History" and "Web & App Activity" settings by Google. Kett points out that these particularized allegations do not appear in the Sibble claim. Kett argues that success in Sibble does not depend on proof of the particularized allegations and material facts central to the claim in Kett. Conversely, success in Kett does not depend on establishment of the "core allegations" pleaded in Sibble.

[55] In essence, the appellant argues that the judge erred in principle by focusing on the most generic pleadings common to both actions, and by failing to engage, at the level of granularity required, with the narrower pleading in Kett. Had the judge engaged in the required analysis, Kett says she would have concluded that the actions were not "duplicative", that Kett is a distinct claim, and that both Kett and Sibble should proceed.

[56] In further support of his position, Kett cites *Option Consommateurs c. Google*, 2021 QCCS 4516, where Google sought the dismissal or stay of portions of that action (the companion case to Sibble) on grounds that it overlapped with the action

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in Lima (the companion case to Kett). In dismissing Google's application, Justice Bisson said this:

> [36] The comparison of the two lists of proposed common questions tend to show that there could be an identity of cause. However, in the Court's view, a detailed study of the factual allegations and of the causes of action on both files show that there is no identity of cause, for the following reasons.
>
> [37] The Lima Action alleges that Google mislead consumers and improperly collected location data from users of its applications in smartphones running the Android mobile operating system and Apple's iOS, when users had not enabled or had disabled location services or location history, in violation of the class members' privacy rights, causing compensatory damages, moral damages and/or punitive damages. The Lima Action alleges that Google falsely represented that it did not collect location data when users had not enabled or had disabled location services or location history, because it was actually collecting such personal information in such circumstances.
>
> …
>
> [39] In the Court's view, this is different than what [Option Consommateurs] alleges. Option Consommateurs alleges that Google refuses or omits to obtain sufficient consent from class members:
>
>> When not trying to obtain such a consent in the conditions of utilization or in the context of a very long and complex confidentiality policy;
>>
>> When ignoring the express requests of class members who chose the "Do Not Track" option in their web browser; and
>>
>> When falsely representing to class members that they can manage the personal information that Google collects on them, notably by saying that the private navigation mode allows them to surf the Web in confidentiality.
>
> [40] This has nothing to do with allegations of false representations related to "Location History" or "Location Services". The facts at the basis of both files are therefore different.
>
> [41] It is true that some of the terms used in [Option Consommateurs] could technically be stretched to include location data as part of personal information collected by Google. However, [Option Consommateurs] does not refer to the factual condition of users having not enabled or having disabled location services or location history on their phones; [Option Consommateurs] never refers to location. The issue of personal information collected in the specific factual contexts of location and of the cases when users had not enabled or had disabled location services or location history is specific to the Lima Action and it is not part of [Option Consommateurs].
>
> [42] As a result, there is no danger of contradictory judgments and there is therefore no identity of cause, in the Court's view.

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> [43] Option Consommateurs must therefore take note that the present file does not include the issue of personal information collected in the specific factual context of users having not enabled or having disabled location services or location history on their phones. This is in the Lima Action only.

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[57] The appellant relies on the decision of Bisson J. in *Option Consommateurs* in support of his submission that the chambers judge erred by failing to conclude that Kett and Sibble, while sharing similarities and having one or more material facts in common, advanced distinct causes of action.

[58] Google submits that Kett has failed to identify any extricable error in law in the judge's application of the test to the facts of this case. Absent this, Google argues that the application of a legal standard to a set of facts is a question of mixed fact and law subject to review on the deferential standard of palpable and overriding error: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 43 and 76; *Simpson v. Zaste*, 2022 BCCA 208. Further, Google argues that a discretionary order made by a case management judge who is intimately familiar with the relevant circumstances is entitled to a high degree of deference: *Fantov* at para. 47.

[59] Google emphasizes that the decision in *Option Consommateurs* is not binding on this Court and results from a different record, different submissions, and from a province governed by a different class actions regime. In addition, and perhaps most importantly for present purposes, Google argues that, given the applicable standard of review, the result in *Option Consommateurs* does no more than reflect the different views of two different case management judges regarding the proper management of overlap between two closely related actions.

[60] For the reasons that follow, I am unable to give effect to Kett's argument in relation to the First Issue.

[61] In my view, the appellant has failed to identify an extricable error in law justifying interference with the chambers judge's determination of the matter. In my view, the judge identified and applied the correct test—whether the two causes of action were about the same dispute or subject matter. The appellant's submission that the judge erred in law by failing to engage with the "core allegations" underlying

the Kett claim posits a different articulation of the same test, but one that is not recognized in the jurisprudence. Although presented as a legal error, I consider the appellant's submission to be a disguised invitation to hear the application a second time with the aim of having this Court substitute our view for the discretionary order made by the chambers judge. We cannot do this.

[62] I am also of the view that it was open to the judge to conclude that Kett and Sibble advance the same cause of action. Both Kett and Sibble plead the existence of the same factual situation entitling them to recover damages from Google—the unauthorized collection of Location Data from users of Google Services as a result of misrepresentations made by Google concerning the manner and extent to which users could protect their own privacy. Because the judge applied the correct legal framework, the judge's decision is entitled to deference and must reflect palpable and overriding error to warrant appellate intervention. I see no palpable and overriding error in the judge's conclusion that Kett and Google are about the same subject matter or dispute, and no proper basis upon which this Court could interfere with her discretionary decision.

[63] The result in *Options Consommateurs* is in no way determinative of this appeal. First, the pleadings in *Options Consommateurs* are not identical to the pleadings in Sibble. As the respondent points out, because the claim in *Options Consommateurs* is limited to Google Services that do not require the creation of a Google account, the pleading does not include Sibble's broader misrepresentation allegations that users' account settings do not prevent Google from collecting and using personal information for its own purposes.

[64] Second, it is noteworthy that despite Justice Bisson's conclusion that the two actions had different causes of action, he observed that "Option Consommateurs must therefore take note that [the Options Consommateurs action] does not include the issue of personal information collected in the specific factual context of users not having enabled or having disabled location services or location history on their phones", because "this [allegation] is in the Lima Action only": *Options*

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Consommateurs at para. 43. In this way, Bisson J. effectively carved out of the *Options Consommateurs* claim the specific allegation being advanced in Lima, implicitly recognizing an unacceptable overlap between the two that would produce an identity of cause.

[65] Finally, even assuming the claims in *Options Consommateurs* and Sibble are identical, the result in *Options Consommateurs*—which reflects the discretionary decision of a judge in another jurisdiction—provides no basis for interfering with the decision of the chambers judge. To hold otherwise would toss to the wind the discretionary standard of review applicable to this ground of appeal.

[66] For the foregoing reasons, I would not give effect to the appellant's arguments advanced in relation to the First Issue.

2. The Second Issue: Did the judge err by failing to give Kett Counsel an opportunity to address the factors to be considered on Google's stay application, and by deciding which of Kett and Sibble to stay based on the factors considered on a carriage motion?

[67] In the event he is unsuccessful on the First issue, I understand Kett to advance the following arguments: (1) that the judge's failure to provide him with an opportunity to address the factors to be considered on Google's stay application resulted in a breach of the *audi alteram partem* principle and a corresponding failure of procedural fairness; (2) that the judge erred in law by considering carriage motion factors on the stay application; and (3) even if the judge was right to have regard to the carriage framework in deciding the stay application, the matter should be remitted to the Supreme Court for re-argument on appropriate materials.

[68] Kett also asserts that the judge has prejudged the outcome of any subsequent application and that, as a consequence, the stay application should be remitted for determination by a different judge of the Supreme Court.

[69] Kett points out that questions of procedural fairness are reviewed on a standard of correctness: *Gupta v. Gadhri*, 2022 BCCA 75 at para. 34. Although not expressly addressed by Kett in his factum or in oral argument, I understand Kett to

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argue that error in the identification of the test applicable to Google's stay application also attracts a correctness standard of review.

[70] Google submits that Kett had ample notice that the chambers judge was being called on to stay Kett if Sibble was granted carriage of the claims in Reid. Google further submits that Kett had an opportunity to address the principles to be applied on the stay motion, but chose not to advocate for the application of any particular test or to adduce responsive evidence. In the absence of submissions as to the appropriateness of an alternative test for determining which action to stay, the chambers judge had recourse to the carriage motion framework. Google submits that Kett has pointed to no authority suggesting the application of carriage motion factors was inappropriate, that some other test should have been applied, or that application of an alternate test could reasonably have led to a different result.

[71] In addition, Google submits that the judge's decision to temporarily stay Kett is a discretionary order made by a case management judge which is entitled to high degree of deference. Google emphasizes that an appellate court may only intervene with a discretionary order where it is established that the judge erred in principle, failed to consider or weigh all relevant circumstances, clearly and demonstrably misconceived the evidence, or made an order resulting in a clear injustice: *Strohmaier v. K.S.*, 2019 BCCA 388 at paras. 21–22.

[72] Google says Kett has failed to establish that the stay application was procedurally unfair or that the judge erred in principle by employing the factors traditionally considered on a carriage motion.

[73] Sibble echoes Google's position. He submits that the judge properly exercised her discretion in staying the Kett action. Sibble submits that the factors considered on a carriage application were relevant to her decision to stay Kett. Indeed, Sibble submits on appeal that the carriage test would be applicable in this context even in the absence of a concurrent carriage motion. Further, staying Sibble would leave many class members unable to assert their claims, given the narrower ground covered by the Kett action. By contrast, staying Kett would leave no Kett

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class member behind as their claim would be encompassed by Sibble. Accordingly, no access to justice issue would arise.

[74] Like Google, Sibble also argues that the judge's decision to temporarily stay Kett turns on her indisputable finding (made in the context of the carriage motion but relied on by the judge on the stay application) that "Sibble's broader scope and case theory better serve the interests of the putative class, the objective of behaviour modification, and the common interests of the class members, the defendants, and the Court in the efficient use of time and resources": at para. 116 and 183.

[75] I begin my analysis of the Second Issue by observing that the *audi alteram partem* rule requires that a person be informed of the case against them and be given a reasonable opportunity to answer that case before the decision maker renders its decision. The rule contemplates notice of the order being sought and opportunity to be heard: *Halsbury's Laws of Canada – Administrative Law* (*2018 Reissue*) at Ch. IV.3.(4)(a); *Halsbury's Laws of Canada – Civil Procedure* (*2021 Reissue*), Ch. VII.2.(1).

[76] Kett had ample notice of Google's application and knew that the judge would be required to decide the stay application after determining Sibble's carriage motion.

[77] Despite being possessed of this knowledge, Kett did not ask that the proceedings be bifurcated and that the stay application be dealt with on a subsequent date after the carriage motion had been resolved. Kett did not file any evidence on the stay application. Kett did not seek an adjournment of Google's stay application to permit additional time to prepare evidence and submissions. Kett did not suggest that an analytical framework different from the framework governing carriage motions should be adopted on the stay application. Indeed, Kett Counsel did not even propose adoption of a different framework on appeal. Further, Kett did not seek a remedy as an alternative to a stay, including joinder or an order carving the Kett claim out of Sibble.

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[78] In short, Kett chose to make no submissions on how the chambers judge should decide which action should be stayed, adhering instead to his position that both actions should be permitted to proceed in tandem.

[79] Against this background, no procedural fairness issue arises and there is no merit to the appellant's contention that the manner in which the judge managed the stay application breached the *audi alteram partem* rule. The appellant had every opportunity to adduce evidence and make submissions in response to Google's stay motion. Apart from asserting that both actions should be permitted to proceed, he did not do so.

[80] In the absence of concerted submissions on this point, I consider it unwise, and unnecessary in this case, to conclusively determine whether the factors considered on a carriage motion mirror the factors that should be considered on a stay application that arises in this context.

[81] I do note that this is not the first case in which a judge has concluded that there is overlap in the framework to be applied in these two contexts: see, for example, *Asquith v. George Weston Limited*, 2018 BCSC 1557 at para. 9. For the purposes of this appeal, it suffices to say that I am not persuaded that the judge erred in principle in the factors she considered on the stay application, or that the application of a different framework could reasonably have resulted in a different conclusion on the findings she made.

[82] In addressing Sibble's carriage motion (and Google's stay application which was resolved through application of the same principles), the judge was careful to emphasize that she was not suggesting that the broader claim should generally be preferred: at para. 117. In my view, she was right to do so. The "spoils" in this context do not necessarily go to the largest, most expansively pleaded claim, but to the fittest claim having regard to the best interests of the putative class members and the objectives of class proceedings—access to justice, behaviour modification and judicial economy.

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[83] As a final point, I would note that even though Kett has been temporarily stayed, the order does not give rise to an irremediable injustice should matters materially change. The judge remains the case management judge over all three actions, with authority to make any order she considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination: *CPA*, s. 12; *SCCR,* Rule 5-3(1).

[84] If Sibble is not certified, or if it becomes clear on certification that Sibble will not advance the particularized claim pleaded in Kett, or if Sibble bogs down under its own weight, it is open to Kett (and Reid) to apply to vary the interlocutory order made by the judge: see *Equustek Solutions Inc., v. Google Inc.*, 2015 BCCA 265 at paras. 94, 107, 111; aff'd 2017 SCC 34 at para. 46.

IV. Disposition

[85] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Justice Marchand"

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Reasons for Judgment of the Honourable Madam Justice Saunders:

[86] I have had the benefit of reading my colleague's draft reasons for judgment. Respectfully, I have reached a different conclusion. I would allow the appeal, set aside the order, and remit the application to the British Columbia Supreme Court for fresh determination at a stage of the proceedings to be determined by that court.

[87] I refer to the two competing legal proceedings as Kett and Sibble/Reid.

[88] As my colleague observes, the order appealed is one made in the exercise of judicial discretion. This means our approach to reviewing it must be deferential. This Court may only interfere with an exercise of discretion where the judge has acted on a wrong principle or failed to give sufficient weight to all the considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76–77; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 587–88.

[89] Respectfully, in my view, the judge erred in her starting point when considering whether a stay should issue, and thus failed to give "sufficient weight" to all considerations. Therefore, as outlined in *Oldman River Society*, appellate intervention is justified.

[90] I readily acknowledge that the concerns I express below were not developed by counsel. Indeed, counsel stuck to the framework that the practice in this area seems to be applying. However, I consider that the issues I identify are so fundamental to the practice of stays, and so greatly affect the general freedom of plaintiffs to commence and prosecute their litigation within the provisions of the *Supreme Court Civil Rules* – and the *Class Proceedings Act* once an action has matured to the point of a certification hearing – that it is proper for me to address them.

[91] By ordering a stay, the judge elected to enjoin Kett – the first-in-time action – from proceeding rather than allowing it to proceed ahead of Sibble/Reid,

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consolidating the two proceedings under R. 22-5(8) of the *Supreme Court Civil Rules*, or utilizing other Rules to ensure the approach taken by the Kett plaintiffs remained before the court. While I do not consider that the judge committed a procedural error by failing to give the parties an opportunity to make submissions on whether the carriage assessment framework is applicable to a stay application, I conclude that the view taken by the judge on staying Kett was unduly narrow, amounting to the failure I have identified.

[92] I agree that on the authority of *Fantov*, it is open to a court to consider issuing a stay of proceedings for abuse of process due to multiple similar proceedings, before a certification order is made. However, I consider that absent the defining of common issues as performed in a certification hearing, significant caution is called for when staying one action in preference to another. This is especially so when the subject of the proposed stay was commenced a considerable time before the second action, in circumstances that cannot remotely be characterized as a foot race, and in a situation where the action subject to the stay was procedurally ahead of the second-in-time proceeding.

[93] The application for the stay was seated in the *Supreme Court Civil Rules*, the *Class Proceedings Act*, and principles of injunctions and abuse of process. Their combined import requires a deeper consideration than was given in the reasons, particularly in respect of the “first-in” factor, and the autonomy generally accorded to plaintiffs to pursue an action to the extent reasonably possible, absent vexatiousness on their part.

[94] The *Supreme Court Civil Rules* govern the procedures for litigation in the Supreme Court of British Columbia unless otherwise provided by legislation. This principle is confirmed in s. 40 of the *Class Proceedings Act*, which states that the *Rules* apply to actions intended as class proceedings to the extent the *Rules* do not conflict with the *Class Proceedings Act*. There is no provision in the *Class Proceedings Act* expressly addressing multiple proceedings or pre-certification applications. I conclude that the plaintiffs at this stage generally had the same

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freedom given to all plaintiffs to chart their own prosecution of the action within the bounds of the *Rules*.

[95] The *Rules* are powerful. The object of court proceedings is expressed in R. 1-3:

> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

[96] I see no conflict between the *Class Proceedings Act* and R. 1-3. In other words, the *Rules* are intended to secure the just, speedy, and inexpensive determination of the Kett action <u>on its merits</u>. The same applies to the Sibble/Reid action.

[97] The application at issue was for a stay for abuse of process. A stay is a particular form of injunction. Section 8 of the *Law and Equity Act* prohibits injunctions or prohibitions restricting a court proceeding, except that a court may stay a proceeding if it thinks it fit to do so: s. 8(2).

[98] A stay of proceedings restrains the parties from proceeding. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 334, the Supreme Court of Canada affirmed the parallel analysis for stays and interlocutory injunctions:

> Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores* [*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110], at p. 127, Beetz J. expressed the position in these words:
>
> > A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

[99] From this, I conclude that a judge considering whether a stay, in the words of s. 8(2) of the *Law and Equity Act*, is “fit”, should have an eye to the principles of interlocutory injunctions with appropriate modification to fit the circumstances. As

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outlined in *RJR-MacDonald,* the first step is demonstrating that there is a "serious question to be tried", a step that pertains to the alleged fault said to justify court intervention. Here, that is whether there is a serious question to be tried that the multiple proceedings create vexation in the form of abuse of process. Whether there is vexation is not contested and, it not being a high hurdle, we may take it that the first step is met. Therefore, for our purposes, the relevant steps on an *RJR-MacDonald* framework are whether the absence of a stay will create irreparable harm and whether the balance of convenience favours the application.

[100] In considering the *RJR-MacDonald* questions, I view the source of the vexation as relevant to both remaining steps and the exercise of discretion, although I would not say it is determinative. I thereby ask, at which point did the asserted vexation arise and from what source? I consider that caution should be exercised in making a stay order where the vexation was created by a party other than the subject of the stay order, as it was here since there is no suggestion that the Kett action in and of itself created a vexatious circumstance.

[101] The *RJR-MacDonald* framework I have outlined includes basic principles which I am not confident were considered in, or even guided the development of, the reasons on the stay order. As I read them, the judge applied a presumption of vexation without addressing its genesis, and then on the sole basis of the Kett claim being overlapped by Sibble/Reid, ordered Kett to be stayed. That is, the matter seemed to turn only on the first *RJR-MacDonald* question.

[102] The result here was opposed by counsel for both Kett and Sibble/Reid, yet the reasons do not meaningfully explore alternatives that may preserve a role for the plaintiffs in both actions, a possibility that may have emerged on consideration of the second and third of the *RJR-MacDonald* questions. The reasons do not, for example, exercise precision in sorting out the common issues between the actions, nor do they demonstrate consideration of whether these actions could be advanced without duplication. It seems to me that, in rushing to solve the identified vexation, the chambers judge failed to harness the court's capacity or the capacity of counsel

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to probe solutions to the vexatious litigation, beyond issuing a stay. The court did this even though these actions are in their nascent state and their character as class proceedings is wholly aspirational.

[103] Of equal concern to me is the lack of consideration of the order's effect on the object of the *Rules*. Can it be said that the order will advance resolution, and will it promote resolution on the merits of the claim?

[104] Last, I ask whether the lesson some may take from this case is that first pleaders should draft over-expansive pleadings, so as to defensively stretch beyond the particular delict that is the real source of the plaintiff's action, rather than aiming for neatly contained pleadings. Further, is the lesson to subsequent pleaders that one may take charge of a claim already identified in an action by broadening, not narrowing, the issues pleaded? If the answer to either question is yes, I am concerned that the outcome in this case has the possibility to undermine the object of the *Supreme Court Civil Rules*.

[105] My comments in the foregoing paragraph should not be taken to suggest that the Sibble/Reid litigation team has acted as I have described. Yet, cases such as these act as templates for the practice, and it is obligatory that the courts set standards that facilitate the objectives set out in R. 1-3. We know that class proceedings can be complex; herding a case to resolution on its merits is difficult to achieve. Whether a particular form of order streamlines a case or pushes resolution further away surely is a proper and necessary consideration that an applicant and the court must address.

[106] In my view, the result in the case at bar is reasons for a stay that do not address foundational principles for the remedy granted, and thus fail to give sufficient weight to all the considerations.

[107] I consider that a fresh look must be given to the application.

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[108] Accordingly, I would allow the appeal, set aside the order for a stay, and remit the stay application to the Supreme Court of British Columbia for determination.

"The Honourable Madam Justice Saunders"

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