

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kapelus v. Milly*,  
2023 BCCA 233

Date: 20230515  
Docket: CA48548

Between:

**Gordon Alexander Kapelus, Jeannine Marie Kapelus, and  
Janalex Investments Ltd.**

Appellants  
(Defendants)

And

**Francois Milly and Prop A Lot Rental & Design Inc.**

Respondents  
(Plaintiffs)

Before: The Honourable Mr. Justice Harris  
The Honourable Mr. Justice Fitch  
The Honourable Mr. Justice Voith

On appeal from: Orders of the Supreme Court of British Columbia, dated  
August 29–30, 2022 and October 5, 2022 (*Milly v. Kapelus*, 2022 BCSC 1729,  
2022 BCSC 1730, Vancouver Docket S197296).

## Oral Reasons for Judgment

No one appearing on behalf of the  
Appellants

Counsel for the Respondents:

L.J. Mackoff  
J.A. Greville

Place and Date of Hearing:

Vancouver, British Columbia  
May 15, 2023

Place and Date of Judgment:

Vancouver, British Columbia  
May 15, 2023

**Summary:**

*An application to have an appeal dismissed as abandoned, no steps having been taken to prosecute the appeal. Held: Application allowed, appeal dismissed as abandoned.*

[1] **HARRIS J.A.:** This is an application to have the appellants' amended notice of appeal, filed on November 4, 2022, dismissed as abandoned for failure to comply with the *Act* and *Rules*, or to quash it as devoid of merit or an abuse of process.

[2] The amended notice of appeal refers to a series of orders pronounced at the end of August, September 1, and October 5, 2022. The nature of the underlying dispute is set out in detail in the judgment of Justice Milman indexed at 2022 BCSC 1730. I do not propose to rehearse the details here. It is sufficient to note that the defendant, Mr. Kapelus, purported to advise the personal plaintiff wrongly that he had no obligation to pay back a line of credit owing to a bank. Mr. Kapelus negotiated with the bank, during the course of which he persuaded the plaintiff to transfer nearly \$500,000 into a corporation controlled by the defendants. The plaintiff sought the return of the money, which has not happened. The underlying action sought the return of the money. Judgment has been granted in favour of the plaintiffs.

[3] It is clear from the record below that the defendants failed to comply with their discovery obligations in the Supreme Court, including refusing to answer questions on examination for discovery.

[4] The matter came on for trial. On August 30, 2022, Justice Milman granted the plaintiffs' application to strike the defendants' pleadings. Justice Milman's oral reasons for judgment regarding this application are indexed at 2022 BCSC 1729. The foundation of the judgment was the failure of the defendants to respect or comply with their discovery obligations during the litigation process. At the conclusion of the trial, which focused on the assessment of damages, Justice Milman ordered the defendants to pay the plaintiffs pecuniary damages in the amount of \$641,955.71 and aggravated damages in the amount of \$30,000.00.

Additionally, the defendant, Mr. Kapelus, was ordered to pay the plaintiffs \$70,000.00 in punitive damages.

[5] The respondents have provided us with a table of the applications and appeals involved in this protracted proceeding. I will add that table as an appendix to these reasons. Among other matters, this table shows a total of seven appeals or applications for leave to appeal brought in relation to the underlying proceeding. For the most part, no steps were taken to advance those appeals, and a number of them have been placed on the inactive list and then dismissed as abandoned. This pattern of conduct has been repeated in this appeal.

[6] Since the filing of the amended notice of appeal, no steps have been taken to prosecute the appeal, notwithstanding the obligations which have accrued and passed to prepare and file and serve an appeal record and book of transcripts within 60 days, and appeal book and factum within a further 30 days.

[7] Having reviewed the reasons for judgment, I can detect no merit to the proposed appeal on the substantive issues decided. Those turned on issues of fact, and the defendants did not produce documents to corroborate their claims that the money was advanced as part of a joint venture. It is most improbable, in my view, given the procedural history of this matter, that this Court would interfere with the judge's discretionary decision to strike the pleadings and proceed to an assessment of damages.

[8] The notice of appeal alleges that the notice of trial had not been served on the defendants, and that the defendants were wrongly refused an adjournment. Whether to grant an adjournment is a discretionary matter. The critical portion of the judge's ruling is set out below:

[2] The defendants oppose the application. They say that whatever failure there has been on the part of the defendants does not justify the draconian relief sought by the plaintiffs. Instead, they urge me to adjourn the hearing of this application (a request I have already refused) or to dismiss the application and either adjourn the trial so that more fulsome discovery can take place for both sides, or to allow it to proceed in the time remaining this

week and next, relying if necessary on adverse inferences to remedy any deficiencies in the quality of the discovery that has been provided.

[3] The defendants have only recently retained their current counsel, who is on a limited retainer to deal with this application in isolation, rather than the merits of the case more broadly. The interests of justice can best be served, he argues, if he can be given time to regularise his retainer and prepare his clients' case for a more balanced trial on the merits.

[4] The application was heard on the first day of this nine-day trial, with submissions spilling over to the second day, where we are now. The parties previously appeared prior to the commencement of the trial before Justice Matthews on August 12, 2022. At that time, the defendant Mr. Kapelus, a former lawyer, appeared in person on his own behalf and on behalf of the other defendants, who are his wife and a company of which they are the principals. On that occasion, Matthews J. adjourned the application and ordered that it be heard on the first day of the trial. Although the content of her order is disputed, I am satisfied that she made both the trial date and the hearing of the application yesterday peremptory on the defendants. She also ordered Mr. Kapelus to produce a list of documents by August 15, 2022 and attend for an examination for discovery on August 17, 2022.

[5] Those orders were made necessary because Mr. Kapelus had failed to produce documents as previously ordered and failed to attend for his examination for discovery on two earlier occasions, June 17, 2022 and July 4, 2022, although the appointments setting those examinations had been duly delivered to his home, which is the defendants' address for delivery. Mr. Kapelus has repeatedly taken the position, now acknowledged by his counsel to have been unfounded, that he was not required to attend for his examination for discovery at those times because he had not been personally served. Indeed, the defendants have repeatedly ignored correspondence and legal notices on the basis that they were left at the door of their home rather than personally served on them, thereby requiring the plaintiffs to procure affidavits of delivery for all communications.

...

[26] Having considered the parties' submissions and the evidence that has been adduced on this application, I am satisfied that this is one of those egregious cases contemplated by the authorities in which the draconian order sought by the plaintiffs ought to be granted.

[27] In particular, I have not been given a satisfactory explanation for the defendants' repeated efforts to delay and hinder the court's process. What has occurred, on numerous occasions now, is a serious default in their obligations as litigants to the court.

...

[30] I also agree with the plaintiffs that no lesser sanction than the one sought by the plaintiffs today can suffice to remedy the dilatory and obstructive conduct that has occurred. The fact of the matter is that we are now at the commencement of a trial in which one side has not produced the documents essential to an adjudication of the central matter in dispute. That dispute concerns, at its core, two fundamental questions: one, the nature of

the arrangement under which the plaintiffs provided the defendant Janalex with the funds in issue; and two, what became of those funds thereafter.

[9] In the reasons dealing with quantifying damages the judge said this:

[34] In my oral reasons for striking the defendants' pleadings, I set out in detail the manner in which the defendants had obstructed, hindered and delayed the litigation process prior to the trial, making the action far more complicated and expensive than it should have been. Examples include the following:

- a) Avoiding service, requiring the plaintiffs to obtain an order for substituted service;
- b) Bringing applications and appeals that were devoid of merit, often repeating arguments that had previously been rejected;
- c) Advancing spurious and inconsistent allegations, including an amended counterclaim asserting, with no foundation, an interest in Mr. Milly's Victoria property, which was never properly served on the plaintiffs (Mr. Kapelus appears to have attempted service, after the transition, on the plaintiffs' former counsel, who refused to accept service on the plaintiffs' behalf);
- d) Failing twice to attend at the appointed time for an examination for discovery; and
- e) Refusing to provide documentary discovery or respond to questions during the oral examination for discovery when it did occur, despite successive orders of the court directing the defendants to do so.

[10] In all of these circumstances, I cannot see any prospect that this Court would find merit in the proposed grounds of appeal, and on the basis of the materials before us, I see none.

[11] In my view, this appeal should be dismissed as abandoned. In light of the procedural history of the underlying matters, and the failure to advance this appeal, I do not think the appellants have demonstrated a *bona fide* intention to appeal. The appeal is devoid of merit. It is not in the interests of justice to grant any extensions to permit it to proceed.

[12] It is unnecessary to conclude that the appeal should be quashed, though if it were necessary, I would quash the appeal. The appeal is without merit, and the pattern of conduct engaged in by the appellants has been abusive.

[13] I would dismiss the appeal as abandoned.

[14] **FITCH J.A.:** I agree.

[15] **VOITH J.A.:** I agree.

[16] **HARRIS J.A.:** The appeal is dismissed as abandoned.

“The Honourable Mr. Justice Harris”

Appendix

Date	Nature of Application/Appeal	Presider	Order(s)
<b>Milly v. Kapelus et al, S/C/B/C, Vancouver Registry/No. S197296</b>			
July 19, 2019	Plaintiffs' application for alternative service (without notice)	Master Vos	Plaintiffs obtained an order to be allowed to alternatively serve the notice of civil claim on the defendants by posting a copy of it to their front door at 3118 West 18 <sup>th</sup> Avenue, Vancouver BC, V6L 1B9 (the " <b>Vos Order</b> ")
August 16, 2019	Defendant Gordon Kapelus files a notice of appeal regarding the Vos Order.	NA	NA – hearing was set down for November 28, 2019 but did not proceed.
August 16, 2019	Defendant Jeannine Kapelus files a notice of appeal regarding the Vos Order.	NA	NA – hearing was set down for November 28, 2019 but did not proceed.
October 23, 2019	Plaintiffs' application for an order that the defendants prepare and serve a list of documents.	Justice Giaschi	The defendants Gordon and Jeannine Kapelus were ordered to prepare and serve a list of documents immediately (the " <b>Giaschi Order</b> ").
October 31, 2019	Defendant Gordon Kapelus' application to compel Francois Milly to attend for examination for discovery (without notice).	Justice Baker	The plaintiff Francois Milly was ordered attend at the appointment scheduled for November 5, 2019.

Date	Nature of Application/Appeal	Presider	Order(s)
January 16, 2020	Defendant Gordon Kapelus' application for summary judgment and cancellation of certificates of pending litigation.	Justice Groves	The application was dismissed.
January 16, 2020	Defendant Jeannine Kapelus' application for summary judgment and cancellation of certificates of pending litigation.	Justice Groves	The application was dismissed. Jeannine Kapelus was at liberty to re-apply if she provided evidence that funds used to pay the University of British Columbia came from a source other than the plaintiffs.
January 16, 2020	Plaintiffs' application for particulars of the defendant Gordon Kapelus' response to civil claim.	Justice Groves	Gordon Kapelus was ordered to serve a letter setting out various particulars of his response to civil claim.
January 16, 2020	Plaintiffs' application for production of defendants' CIBC banking records.	Justice Groves	CIBC was ordered to produce bank account statements pertaining to the defendant Janalex Investments Ltd. The plaintiffs' application to produce Gordon and Jeannine Kapelus' personal CIBC banking records was adjourned generally.
February 24, 2020	Defendants file a notice of appeal from Master, Registrar or Special Referee regarding an order of Registrar Nielsen, pronounced on February 10, 2020.	NA	This appeal appears to have been abandoned.
March 30, 2021	Plaintiffs' application for production of the defendants personal CIBC banking records.	Justice MacDonald	CIBC was ordered to produce Gordon and Jeannine Kapelus' personal banking records (the "MacDonald Order").
April 29, 2021	Defendant Jeannine Kapelus' application for: 1) summary judgment; 2) cancellation of certificates of pending litigation; 3) varying an order made January 16, 2020; and 4) setting aside the MacDonald Order.	Justice Horsman	The application was adjourned generally. The MacDonald Order was stayed pending the hearing of a stay application to be brought by the defendant Jeannine Kapelus on May 11, 2021 (the "Stay Application").
May 11, 2021	Defendant Jeannine Kapelus' Stay Application.	Justice Ross	At the hearing of the application, the defendants Jeannine Marie Kapelus and Gordon Alexander Kapelus applied for an order that Justice Ross to recuse himself. That application was dismissed. The application for a stay of the MacDonald Order was also dismissed (the "Ross Order"). The defendants were ordered to pay the plaintiffs special costs for this application.
June 23, 2022	Defendant Jeannine Kapelus' application for	Justice Skolrood	This application was dismissed (the "Skolrood Order").



Date	Nature of Application/Appeal	Presider	Order(s)
	summary judgment and cancellation of certificates of pending litigation.		
August 12, 2022	Plaintiffs' application to strike the defendants' pleadings.	Justice Matthews	This application was adjourned to the first day of trial. Gordon Kapelus was ordered, inter alia, to provide documents relating to and in support of the defendants' defence and counterclaim.
<b>Milly V. Kapelus et al, B.C.C.A. Vancouver Registry Appeal No. CA46526 ("Appeal 526")</b>			
November 22, 2019	Defendants file a notice of appeal regarding the Giaschi Order.	NA	By letter dated May 27, 2021, Court of Appeal Associate Registrar Littlejohn notified the defendants that this matter had been placed on the inactive list and if no steps were taken the appeal would stand dismissed as abandoned on November 19, 2021.
<b>Milly V. Kapelus et al, B.C.C.A. Vancouver Registry Appeal No. CA46554 ("Appeal 554")</b>			
December 4, 2019	Defendants file a notice of appeal regarding an order of Justice Affleck, pronounced on November 4, 2019.	NA	By letter dated June 10, 2021, Court of Appeal Associate Registrar Littlejohn notified the defendants that this matter had been placed on the inactive list and if no steps were taken the appeal would stand dismissed as abandoned on December 1, 2021.
<b>Milly V. Kapelus et al, B.C.C.A. Vancouver Registry Appeal No. CA46695 ("Appeal 695")</b>			
February 18, 2020	Defendants file a notice of appeal regarding an order of Justice Groves, pronounced January 16, 2020, dismissing Gordon Kapelus' summary judgment application.	NA	By letter dated August 24, 2021, Court of Appeal Associate Registrar Littlejohn notified the defendants that this matter had been placed on the inactive list and if no steps were taken the appeal would stand dismissed as abandoned on February 15, 2022.
<b>Milly V. Kapelus et al, B.C.C.A. Vancouver Registry Appeal No. CA46696 ("Appeal 696")</b>			
February 18, 2020	Defendants file a notice of appeal regarding an order of Justice Groves, pronounced January 16, 2020, compelling the production of Janalex Investments Ltd.'s CIBC banking records and particulars pertaining to Gordon Kapelus' response to civil claim.	NA	By letter dated August 24, 2021, Court of Appeal Associate Registrar Littlejohn notified the defendants that this matter had been placed on the inactive list and if no steps were taken the appeal would stand dismissed as abandoned on February 15, 2022.
<b>Milly V. Kapelus et al, B.C.C.A. Vancouver Registry Appeal No. CA47518 ("Appeal 518")</b>			
May 31, 2021	Defendants file a notice of application for leave to appeal and stay the Ross Order.	NA	NA
July 9, 2021	Defendants' application for leave to appeal and stay the Ross Order.	Justice Harris	The court ordered an extension for the defendants to apply for leave to appeal the Ross Order. The court declined to order a stay of the Ross Order due to potential

Date	Nature of Application/Appeal	Presider	Order(s)
			jurisdictional issues.
August 10, 2021	Defendants' application for leave to appeal and stay the Ross Order.	Justice DeWitt-Van Oosten	The court ordered the defendants' application for leave to appeal and stay the Ross Order be set for August 20, 2021.
August 20, 2021	Defendants' application for leave to appeal and stay the Ross Order.	Justice Butler	The defendants' application for leave to appeal the Ross Order was converted to a notice of appeal. The defendants' application for a stay of the Ross Order was dismissed. The defendants did not take further steps to advance the appeal of the Ross Order.
<b>Milly V. Kapelus et al, B.C.C.A. Vancouver Registry Appeal No. CA48447 ("Appeal 447")</b>			
July 25, 2022	Defendants file a notice of appeal regarding the Skolrood Order.	NA	The defendants have not taken any steps in advancing this appeal since filing the notice of appeal.
<b>Milly V. Kapelus et al, B.C.C.A. Vancouver Registry Appeal No. CA48548 ("Appeal 548")</b>			
November 4, 2022	Defendants file the notice of appeal that is the subject of this application.	NA	The defendants have not taken any steps in advancing this appeal since filing the notice of appeal.