

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Samadi v. Sayari*,  
2024 BCSC 1353

Date: 20240726  
Docket: S242935  
Registry: Vancouver

Between:

**Farid Yazdi Samadi and Noushin Naraghi**

Plaintiffs

And

**Farid Sayari, Nazila Kimiaee, North Royal Holding Ltd., Royal Palace  
Construction & Design Ltd., 1209661 BC Ltd., and Michael S. Menkes**

Defendants

Before: The Honourable Madam Justice Wilkinson

## Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

B. Ahmadian

Counsel for the Defendants Farid Sayari,  
Nazila Kimiaee, North Royal Holding Ltd.,  
Royal Palace Construction & Design Ltd.,  
1209661 BC Ltd.:

M.S. Menkes

No other appearance

Place and Date of Hearing:

Vancouver, B.C.  
July 10, 2024

Place and Date of Judgment:

Vancouver, B.C.  
July 26, 2024

[1] The plaintiffs apply for an order removing Michael S. Menkes as counsel in this action for the defendants Farid Sayari, Nazila Kimiaee, North Royal Holding Ltd., Royal Palace Construction & Design Ltd., 1209661 BC Ltd. (the “Borrower Defendants”).

[2] For the following reasons, the application is granted.

**Background**

[3] The Borrower Defendants and the plaintiffs are parties to a discharge and dispute resolution agreement dated February 13, 2024 (the “Agreement”), pursuant to which the parties agreed that, among other things, the plaintiffs will provide discharges of certain mortgages on certain properties (the “Discharges”), provided that the Borrower Defendants arrange for the net sale proceeds of the sale of those properties to remain in trust pending an agreement of the parties or an order of an arbitrator.

[4] The notice of civil claim filed May 6, 2024 by the plaintiffs (“NOCC”) sets out particulars of alleged non-compliance by the Borrower Defendants with the Agreement. This includes alleged late delivery of sale proceeds and allegedly causing deductions to be made from the gross sale proceeds, all contrary to the express terms of the Agreement, and all despite clear objections by the plaintiffs against such deductions and such late delivery of funds.

[5] The defendant Mr. Menkes acted as solicitor for the Borrower Defendants with respect to the Agreement and the conveyancing for the sale of the properties. In that process, the plaintiffs allegedly caused their solicitor to deliver to Mr. Menkes the Discharges on certain undertakings that Mr. Menkes accepted. This included an undertaking to deliver the net sale proceeds as set out in the Agreement, and to not file the Discharges until he had sufficient funds in trust from the closing of the sale.

[6] The NOCC sets out particulars of breaches of undertakings by Mr. Menkes as follows:

- a) causing the Discharges to be filed prior to having sufficient funds in trust;
- b) making deductions from the gross sale proceeds contrary to the Agreement and despite express objections of the plaintiffs; and
- c) failing to provide the net sale proceeds when they were due, despite time being of the essence in the Agreement.

[7] Furthermore, the NOCC sets out particulars of wrongdoings by Mr. Menkes that appear to form the foundation for a claimed cause of action against Mr. Menkes for civil fraud, knowing assistance, and knowing receipt, including the following:

- a) making a false representation to the plaintiffs that Mr. Menkes had withdrawn the improperly filed Discharges, when he had not done so and knew, or ought to have known, that the representation was false;
- b) continuing to represent the Borrower Defendants in the conveyancing of the sale of the properties pursuant to the Agreement, when he knew, or ought to have known, that he could not comply with his undertakings to the plaintiffs;
- c) distributing funds in trust improperly for the benefit of the Borrower Defendants and himself contrary to the Agreement, and contrary to the undertakings that the Mr. Menkes gave pursuant to the Agreement; and
- d) assisting the Borrower Defendants in fraudulent breach of trust while he knew that the gross sale proceeds were impressed with a trust.

[8] The NOCC also sets out particulars of wrongdoings by the Borrower Defendants that formed the foundation for a cause of action against the Borrower Defendants for breach of agreement and trust, civil fraud, and unjust enrichment, including the following:

- a) failing to carry out their obligations under the Agreement in good faith;
- b) making representations to the plaintiffs that they would comply with the provisions in relation to handling the sale proceeds under the Agreement, while knowing about, or being reckless as to, the falsity of the representation;
- c) failing to cause their legal counsel, Mr. Menkes, to deliver the net sale proceeds when they were due under the Agreement;
- d) causing their legal counsel Mr. Menkes to make deductions from the sale proceeds that were contrary to the express provisions of the Agreement; and
- e) receiving portions of the sale proceeds impressed with trust contrary to the express provisions of the Agreement setting out the permitted deductions.

[9] The NOCC sets out particulars of the losses that the plaintiffs have suffered as a result of the defendants' alleged wrongdoing. This includes loss of access to the full net sale proceeds for dispute resolution under the Agreement. The plaintiffs seek relief from Mr. Menkes for breach of undertaking, fraud, knowing assistance, and knowing receipt, and from the Borrower Defendants damages for breach of contract and fraud, and in the alternative, for unjust enrichment.

[10] The NOCC also sets out a claim for costs against the Borrower Defendants and special costs against Mr. Menkes.

[11] Ray Power is the counsel of record for, and has filed a jurisdictional response on behalf of, the defendant Mr. Menkes with respect to the NOCC.

[12] Mr. Menkes is the counsel of record for, and has filed a jurisdictional response on behalf of, the Borrower Defendants with respect to the NOCC.

[13] Both responses filed by the defendants dispute the jurisdiction of the court in dealing with the matters under the NOCC. Prior to the filing of this application, no

application for a stay in favour of arbitration pursuant to the Agreement had been filed by the defendants. At the hearing of the application before me, it was noted that such an application had been filed and was set to be heard later in July 2024.

[14] Mr. Menkes is not a party to the Agreement.

[15] Upon learning that the defendant Mr. Menkes intended to represent the Borrower Defendants in NOCC proceedings, the plaintiffs promptly demanded that Mr. Menkes withdraw due to conflict of interest. He refused.

[16] This application was filed June 21, 2024.

[17] The Borrower Defendants, represented by Mr. Menkes, filed a response opposing the application.

[18] The defendant Mr. Menkes, represented by Mr. Power, filed a response taking no position on the application. Mr. Power did not appear on the application.

**The court's inherent jurisdiction to remove counsel in controlling the court process**

[19] The plaintiffs rely on the inherent jurisdiction of the court to control the litigation process.

[20] An affidavit commissioned by Mr. Menkes and provided by Mr. Sayari states Mr. Sayari is authorized by all of the defendants to swear the affidavit. It also states "I have considered the position of the Plaintiffs concerning alleged conflict of interest between the Borrowers and Mr. Menkes and the Borrowers consent to Mr. Menkes continuing to act for us. We have no intention of waiving solicitor and client privilege in defending this action."

[21] I have concerns whether Mr. Sayari's affidavit is sufficient to show that each of the defendants has made an informed decision to provide such a consent. However, I need not decide the matter on that basis.

[22] Third party applications to remove counsel are rare. The court's ability to remove counsel is very limited in such applications.

[23] The Court of Appeal in *Gichuru v. Purewal*, 2017 BCCA 281 endorsed the chambers judge's analysis in considering such an application. This includes the following considerations:

[11] The chambers judge dismissed the application. She held as follows:

[4] Ms. Syer has not replied to the factual allegation concerning her alleged past representation of Mr. Purewal. She says the only factor germane to the current application is whether she represents Mr. Purewal at present. There is no evidence that she does. She says, at its highest, Mr. Gichuru's complaint is that she used to represent Mr. Purewal but no longer does so. She says these circumstances do not give rise to either an actual or apparent conflict, and that there is no basis for Mr. Gichuru's application for an order preventing her from acting for Ms. Purewal.

[5] Mr. Purewal did not appear and has taken no position.

[6] I agree with Ms. Syer. I am going to dismiss the applications, which, in my view, are premature at best. They are premature because it is not known whether Mr. Purewal has any objection to Ms. Syer's representation of his mother.

[7] The test that is typically applied on an application to disqualify counsel has been described as whether a reasonably informed person would conclude in the circumstances that a disqualifying conflict of interest exists such that there is a possibility of real mischief if counsel is not removed: *Talisman Resort GP Inc. v. Keyser*, 2013 ONSC 1901; *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. However, most applications to have counsel removed are brought by a client who is seeking to have his or her former lawyer disqualified from acting against him or her. Such cases have limited application here.

[8] In any event, a litigant will not be deprived of counsel of its choice without good cause. The standard to be met is high. It is necessary to balance factors that include a litigant's right to choose its counsel, the cost and delay caused by removing counsel, and the good faith of the party making the application. Ultimately, the competing interests are the maintenance of high standards of the legal profession and the integrity of the system of justice, versus the right of the parties to be represented by counsel of their choosing: *Jacks v. Victoria Amateur Swimming Club*, 2003 BCSC 845 at para. 12.

[9] The record before me simply does not persuade me that Ms. Syer's representation of Ms. Purewal gives rise to any concern about the integrity of the justice system. Mr. Purewal's position on the matter is not known. Once he has been served it will be known whether he is

going to take a position on Ms. Syer's representation of his mother. At this stage it is not known if there was any confidential communications passing between Mr. Purewal and Ms. Syer. On the record before me, the only inference I can draw is that there were none because Ms. Syer has said that she has never spoken to Mr. Purewal. Even if Ms. Syer previously represented Mr. Purewal, he may well consent to her ongoing representation of his mother, alone.

[10] In summary, on the record before me, there is no possibility of mischief arising from Ms. Syer continuing to act and, as I said, no concern arises as to the integrity of the justice system that would override the very significant interest in permitting Ms. Purewal to be represented by the counsel of her choosing. For those reasons I am dismissing the applications.

[24] The Court of Appeal goes on to specifically address factors applicable to third party applications:

[15] The obstacle that stood in the appellant's way was the fact that he could not establish, on the evidence before the Court, that there was a possibility of real mischief if counsel was not removed. That legal burden was properly placed upon him.

[16] The chambers judge was mindful of the jurisprudence setting out the test that should be applied when considering whether counsel should be disqualified by a conflict, or the appearance of a conflict, and referred to the leading cases: *Talisman Resort v. Keyser, Usling et al*, 2013 ONSC 1901; and *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. She also noted that these cases have limited application where the motion is brought by a third party. That is correct, in my view, as a third party does not have the same interest in and cannot assert the client's rights and privileges. The third party's principal interest on a removal application must be, in my view, as in *Bulloch-MacIntosh et al v. Browne*, whether there is "a substantial risk of a compromised trial process" (para. 28).

[17] In *Brown v. Silvera*, 2006 ABQB 647, the Court, correctly in my view, described a removal order as "an extraordinary remedy, to be approached with great caution and rarely invoked". The Court there cited the decision of the Alberta Court of Appeal in *Michel v. Lafrentz*, 1992 ABCA 311, [1992] A.J. No. 1067, where the Court said:

[5] The right of any litigant to retain (and continue with) counsel of his choice, while not absolute, is one which has significant weight. Disqualification of counsel, and his removal from the record in ongoing proceedings, civil or criminal, is a step that should not be undertaken where there is a clear, responsible alternative and where such an order is not mandated by fundamental fairness and the public interest in the due administration of justice, as interpreted in *Martin v. MacDonald, supra. ...*

[Emphasis added.]

**Should the court order that Mr. Menkes be removed as counsel for the Borrower Defendants?**

[25] Counsel were not able to find any authority considering this question in a situation of counsel being a co-defendant along the clients they represent.

[26] While it may well be in Mr. Menkes' clients' best interests to waive privilege, and name Mr. Menkes as a third party, I will accept that for now the Borrower Defendants are aware of this and any conflict of interest Mr. Menkes is in, and choose to continue to retain Mr. Menkes to defend their interests.

[27] Mr. Menkes clearly has a personal interest in the litigation. He is a named defendant, and damages and special costs are sought against him personally. Only he is alleged to have breach an undertaking.

[28] Mr. Menkes, on behalf of the Defendant Borrowers, submits that there is no mischief to be had since he will not likely be a witness. He submits this because everything he apparently could testify to would be covered by solicitor-client privilege which, per the affidavit of Mr. Sayari, will not be waived. This ignores the fact that the claim against him regarding his breach of undertaking involve non-privileged communications and actions. He is a party and the plaintiffs have a right to examine him for discovery. Whether he testifies or not at trial, he is personally exposed to findings of liability and costs.

[29] The Borrower Defendants also submit that there is no chance of the proceeding continuing because their application for a stay is bound to succeed, and as such, Mr. Menkes' role will be extremely limited going forward. However, he is apparently counsel for the Borrower Defendants on that application. As I noted above, Mr. Menkes is not a party to the Agreement. A stay would favour his personal interests as a defendant in this proceeding.

[30] Mr. Menkes has a clear personal and financial interest in these proceedings.

[31] Mr. Menkes may be tempted to prefer his own interests over those of the Borrower Defendants or over his duties to the court. This conflicts with Mr. Menkes'



duty to the court to maintain the integrity of the judicial process. This is a conflict which the Borrower Defendants cannot waive.

[32] I find that by acting for the Borrower Defendants as co-defendants along with himself in this action creates a substantial risk of a compromised trial process. I see no reasonable alternative to removing him as counsel in order to remedy the mischief.

**Conclusion**

[33] The application is granted.

[34] Michael Menkes is removed as the counsel of record for the Borrower Defendants in this action.

**Costs**

[35] The applicants have been successful. They are entitled to their costs. If the parties cannot agree on the type of costs and which defendants are liable, they may contact scheduling within 30 days of this judgment to arrange for a 30-minute hearing on the issue.

“Wilkinson J.”