COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gokturk v. Nelson,*
2023 BCCA 164

Date: 20230420
Docket: CA47981

Between:

Michael Gokturk

Appellant
(Defendant)

And

Scott Nelson

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux
The Honourable Justice Skolrood

On appeal from: Orders of the Supreme Court of British Columbia, dated April 30, 2021 (*Nelson v. Gokturk*, 2021 BCSC 813, Vancouver Docket S1911912), and November 25, 2021 (*Nelson v. Gokturk*, 2021 BCSC 2301, Vancouver Docket S1911912).

Counsel for the Appellant:	M.B. Funt F. Liedl
Counsel for the Respondent:	P.R. Senkpiel K. Strong
Place and Date of Hearing:	Vancouver, British Columbia January 13, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 20, 2023

Written Reasons by:
The Honourable Justice Skolrood

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Abrioux

Summary:

The respondent agreed to sell the appellant 50 bitcoin for $535,000 but was never paid. After the respondent filed a notice of civil claim, former counsel for the appellant served a filed notice of intention to withdraw, which included a new address for service for the appellant. He then filed a notice of withdrawal without serving it on respondent's counsel. Counsel for the respondent set down an application in writing pursuant to COVID-19 Notice 14 and sent unfiled materials to the address listed in the notice of intention to withdraw. The appellant did not respond, and judgment was granted for the respondent in a summary trial. The appellant filed a reconsideration application, which was dismissed by the judge. The appellant argues that the judge erred in finding that he was duly served, in granting the summary trial application by way of written submissions in lieu of a hearing, and in finding that the appellant failed to establish a meritorious defence or a defence worthy of investigation.

Held: Appeal dismissed. Though the judge erred in relying on the notice of intention to withdraw as effectively changing the address for service, the error did not materially impact her decision, as the appellant received the notice of withdrawal and was therefore aware of the address listed for service and failed to take steps to change it. It is unnecessary to resolve the issue of whether the judgment application was suitable for determination pursuant to Notice 14, as it was overtaken by and subsumed in the reconsideration application. The judge did not err in finding that the appellant failed to establish a meritorious defence or a defence worthy of investigation.

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Reasons for Judgment of the Honourable Justice Skolrood:

Introduction

[1] This appeal arises out of a dispute between the parties about a failed transaction for the purchase and sale of bitcoin ("BTC"), a form of cryptocurrency.

[2] The appellant, Mr. Gokturk, operated a cryptocurrency exchange, which is an online forum for trading in cryptocurrency, known as Einstein Exchange Inc. ("Einstein"). The respondent, Mr. Nelson, is a technology entrepreneur who trades in cryptocurrency.

[3] On June 7, 2019, Mr. Nelson agreed to sell Mr. Gokturk 50 BTC at an agreed total purchase price of $535,000. As I will return to, one of the issues in dispute between the parties is whether the agreement was between the parties personally, or between Mr. Nelson and Einstein.

[4] What is not in dispute is that Mr. Nelson transferred the 50 BTC shortly thereafter but was never paid, as a result of which he commenced this action by filing a notice of civil claim on October 22, 2019.

[5] On March 1, 2021, Mr. Nelson filed an application seeking judgment on the claim under both Rules 9-6 and 9-7 of the *Supreme Court Civil Rules*, B.C. Reg 168/2009 [*Rules*] (the "Judgment Application"). The application was made in writing pursuant to COVID-19 Notice No. 14 ("Notice 14"), which established a process for filing and determining applications in writing. Mr. Gokturk did not respond to the Judgment Application.

[6] On April 30, 2021, the chambers judge issued reasons for judgment, granting judgment in favour of Mr. Nelson (the "Summary Trial Decision").

[7] On June 14, 2021, Mr. Gokturk filed a notice of application pursuant to R. 22-1 seeking reconsideration of the Summary Trial Decision (the Reconsideration Application"). The Reconsideration Application was based in part on Mr. Gokturk's assertion that he had never been properly served with the Judgment Application.

[8] The Reconsideration Application was heard by the chambers judge on July 16, 2021, and on November 25, 2021, the judge issued reasons for judgment dismissing the application (the "Reconsideration Decision").

[9] On appeal, Mr. Gokturk submits that the judge erred both in granting judgment on the Judgment Application and in dismissing the Reconsideration Application.

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

Background

[11] Some additional background is necessary to put the issues on the appeal in context.

[12] Prior to the transaction in issue, Mr. Nelson had sold BTC to Mr. Gokturk on three other occasions.

[13] On June 7, 2019, Mr. Gokturk contacted Mr. Nelson about buying 50 BTC. Mr. Nelson agreed to sell the BTC for a total price of $535,000 and he transferred the BTC to Mr. Gokturk. Again, it is common ground that Mr. Nelson has never been paid for the BTC.

[14] On August 30, 2019, following a number of communications between Mr. Nelson and Mr. Gokturk about payment, Mr. Gokturk said in a text to Mr. Nelson:

> None of this is your problem and I owe you what I owe you.
>
> Keep these text messages and email records as proof. I am sorry I have been avoiding you. This has been the absolute worst year of my entire existence. These are not excuses, I just don't know what to tell you besides the truth.

[15] Mr. Nelson commenced this action on October 22, 2019. He had difficulty serving Mr. Gokturk and ultimately obtained an order for substituted service by email on December 10, 2019.

[16] On January 6, 2020, Mr. Gokturk filed a response to civil claim in which he alleged that the contract for the purchase of the BTC was between Mr. Nelson and Einstein, and not with Mr. Gokturk personally. Mr. Gokturk was represented by counsel at the time the response to civil claim was filed. By the time Mr. Gokturk filed his response, Einstein had ceased operations, its assets had been seized by the British Columbia Securities Commission, and a receiver had been appointed.

[17] Counsel for Mr. Nelson took steps to advance the action throughout the fall of 2019 and into 2020, including serving lists of documents in January 2020. Throughout the first half of 2020, he made several requests of Mr. Gokturk's counsel for the defendant's list of documents, which was not provided.

[18] On June 3, 2020, counsel for Mr. Nelson served a notice to admit ("NTA #1), which was responded to on June 17, 2020. In the response, Mr. Gokturk admitted many of the facts and documents set out in NTA #1 and denied others. On July 20, 2020, Mr. Nelson filed an application seeking an order requiring Mr. Gokturk to serve a list of documents and provide a verifying affidavit. On August 4, 2020, Mr. Gokturk provided a list of documents, comprising 11 documents and on August 17, 2020, Master Muir ordered that he provide a verifying affidavit.

[19] On November 2, 2020, counsel for Mr. Nelson contacted counsel for Mr. Gokturk to schedule examinations for discovery. On the same day, Mr. Gokturk's counsel advised that he was no longer acting for Mr. Gokturk. On November 3, 2020, counsel for Mr. Nelson served an appointment to examine Mr. Gokturk on his counsel, who had not yet withdrawn. The examination was scheduled for December 21, 2020.

[20] On November 17, 2020, counsel for Mr. Nelson received an email and letter from Mr. Gokturk's former counsel serving a filed notice of intention to withdraw ("NOI"). The NOI provided a new address for service for Mr. Gokturk on Matthews Avenue in Vancouver (the "Matthews Address").

[21] On November 25, 2020, counsel for Mr. Nelson wrote to Mr. Gokturk's former counsel inquiring whether an objection had been filed to the NOI in accordance with R. 22-6(5). No response was received and there is no indication that Mr. Gokturk filed an objection.

[22] On November 26, 2020, Mr. Gokturk's former counsel filed a notice of withdrawal ("NOW"), although he did not serve it on Mr. Nelson's counsel. In his factum on this appeal, Mr. Gokturk acknowledges in his chronology that the NOW was sent to him by email.

[23] On December 3, 2020, counsel for Mr. Nelson mailed a second notice to admit ("NTA #2") to the Matthews Address, which largely repeated facts that Mr. Gokturk had denied in his response to NTA #1. No response was received.

[24] On December 21, 2020, counsel for Mr. Nelson attended a court reporter's office for the examination for discovery of Mr. Gokturk, which had been scheduled by way of the appointment served on Mr. Gokturk's former counsel. Mr. Gokturk did not appear and counsel obtained a certificate to that effect.

[25] On March 1, 2021, counsel for Mr. Nelson set down the Judgment Application as an application in writing pursuant to Notice 14, reserving the "hearing date" of April 6, 2021. I will describe the contents and requirements of Notice 14 below. Also on March 1, 2021, counsel for Mr. Nelson submitted the notice of application and supporting affidavit of Mr. Nelson for electronic filing.

[26] Mr. Nelson's counsel mailed the unfiled notice of application and affidavit to the Matthews Address. According to counsel, he sent unfiled materials due to filing delays in the court registry due to the COVID-19 pandemic. In his cover letter to Mr. Gokturk, he advised that the matter had been set for hearing and that the materials had been submitted for filing.

[27] Counsel for Mr. Nelson received no response from Mr. Gokturk and accordingly submitted the materials for the Notice 14 hearing in writing on April 6, 2021. On April 30, 2021, the judge issued the Summary Trial Decision

granting Mr. Nelson judgment in the amount of $535,000. I will return to the Summary Trial Decision below.

[28] On May 10, 2021, Mr. Gokturk filed a notice of address for service listing an address on Granville Street in Vancouver as his address for service.

[29] On June 14, 2021, Mr. Gokturk filed the Reconsideration Application. On July 16, 2021, the judge heard the Reconsideration Application in chambers. On November 25, 2021, the judge issued the Reconsideration Decision, dismissing the Reconsideration Application.

Legal framework

[30] As stated above, Mr. Nelson brought the Judgment Application pursuant to Notice 14, which was subsequently rescinded effective April 11, 2022. Relevant provisions of Notice 14 included:

> (1) An application may be brought by way of written submissions in lieu of a hearing if i) the matter is limited to one disputed issue; and ii) the issue can be addressed on the basis of one affidavit filed per party, no more than 10 pages in length, inclusive of exhibits;
>
> (2) If the matter involves more than one disputed issue, a party may bring an application by way of written submissions in lieu of a hearing if i) the parties have reached consent on all but one issue or the party bringing the application has identified all of the disputed issues and has chosen one issue to proceed on; and ii) the issue can be addressed on the basis of one affidavit filed per party, no more that 10 pages in length, inclusive of exhibits;
>
> (3) The court retains its discretion to decide if the issue is appropriate for determination on the basis of written submissions;
>
> (4) The applicant must file a notice of application, not exceeding 10 pages, with certain modifications set out in the Notice;

(5) The applicant must list the single affidavit served with the notice of application and any other pleadings already in the court file that the applicant intends to rely on. Parties may not rely on previously filed affidavits;

(6) The applicant must serve copies of the filed notice of application, filed affidavit, written submissions, and a copy of Notice 14 on the respondent;

(7) A respondent wishing to respond to the application must, within 10 business days, file an application response and one sworn affidavit, not exceeding 10 pages inclusive of exhibits, and serve the materials on the applicant;

(8) An applicant wishing to reply must, within 4 days of being served a response, file a reply not exceeding 5 pages, on the respondent;

(9) The applicant must file a written submissions brief with the court not later than 4:00 pm on the business day that is one full day before the scheduled hearing date. The written submissions brief must include: copies of the notice of application, application response, supporting affidavits of the parties, written submissions, reply, if any, and any other pleadings to be relied on.

[31] Rule 22-6 of the *Rules* is also relevant. It deals with a change of lawyer. Subrule 22-6(3) provides that a lawyer may obtain an order declaring that they have ceased to act for a party. Subrules 22-6(4)-(7) set out an alternative procedure:

> **Notice of withdrawal**
>
> (4) As an alternative to proceeding under subrule (3), a lawyer who has ceased to act for a party who has not given a notice of change under subrule (1) may serve a notice of intention to withdraw in Form 112 on that party and on the other parties of record.

Filing of objection

(5) If a party on whom a notice of intention to withdraw is served under subrule (4) wishes to object to the withdrawal, the party must, within 7 days after service,

(a) file in the registry an objection in Form 113, and

(b) serve on the lawyer a copy of the filed objection.

Procedure if no objection filed

(6) A lawyer who serves a notice of intention to withdraw under subrule (4) on all parties of record to a proceeding may file a notice of withdrawal of lawyer in Form 114 if no objection, notice of change of lawyer or notice of intention to act in person is filed within 7 days after service of the notice of intention to withdraw.

Service of notice of withdrawal

(7) If a lawyer files a notice of withdrawal of lawyer under subrule (6), the lawyer ceases to be the party's lawyer when the notice has been served on all parties of record.

The decisions below

The summary trial decision

[32] Mr. Nelson's application under Notice 14 sought judgment in the amount of $3,084,393.15, or alternatively, $535,000 plus interests and costs. The higher number represented the alleged market value of the 50 BTC transferred by Mr. Nelson to Mr. Gokturk at the time of the application, whereas the $535,000 amount was the contract price for the BTC. As noted, Mr. Nelson brought his application under both R. 9-6 (summary judgment) and R. 9-7 (summary trial). The claim, as set out in the notice of civil claim, was founded in breach of contract and/or conversion.

[33] In her Summary Trial Decision, the judge stated that Mr. Gokturk had been duly served but had not responded to the application (at para. 1). She noted that the application was by way of written submissions under Notice 14 and was supported by Mr. Nelson's affidavit and admissions under notices to admit.

[34] The judge identified the central issue in dispute as the amount of damages (at para. 4). She reviewed the background facts, including Mr. Gokturk's acknowledgement set out above at para. 14. She also noted the defence advanced

in Mr. Gokturk's response to civil claim, that is, that Mr. Nelson contracted with Einstein and not with Mr. Gokturk personally (at para. 21).

[35] The judge said that she was able to find the facts, on the record before her, to determine the claim by way of summary trial under R. 9-7 (at para. 23).

[36] The judge found that a contract existed between Mr. Nelson and Mr. Gokturk for the sale of 50 BTC at a contract price of $535,000 (at paras. 24–25). She held that there was no evidence to support Mr. Gokturk's assertion that Einstein was party to the contract. The judge found that there had "patently been a breach of [c]ontract" by the failure to make the required payment (at para. 27). She found it unnecessary to decide the claim in conversion (at para. 42).

[37] The judge reviewed the law governing the assessment of damages and held that damages should be assessed as at the date of the breach of contract, hence the award of $535,000 (at para. 32). The judge also awarded Mr. Nelson interest and costs.

The reconsideration decision

[38] On the Reconsideration Application, Mr. Gokturk sought an order setting aside the Summary Trial Decision on the grounds that he had not received notice of Mr. Nelson's application and that it would be a miscarriage of justice to permit the Summary Trial Decision to stand.

[39] In her Reconsideration Decision, the judge set out a detailed summary of the background facts, including the facts relating to the withdrawal of Mr. Gokturk's former counsel. She noted (and Mr. Nelson conceded) that she had jurisdiction to reconsider the Summary Trial Decision since the order resulting from that decision had not yet been entered (at para. 24).

[40] The judge cited R. 22-1(3) which permits reconsideration of an order obtained in the absence of a party. It states:

Reconsideration of order

> If the court makes an order in circumstances referred to in subrule (2) [failure of a party to attend], the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

[41] The judge cited this Court's decision in *Rangi v. Rangi*, 2007 BCCA 352, leave to appeal to SCC ref'd, 32386 (27 March 2008), where it was held that a party applying under R. 52(5) of the former *Supreme Court Civil Rules*, B.C. Reg. 221/90 (equivalent of the current R. 22-1(3)) must satisfy the court that the failure to appear was not blameworthy (at paras. 72–73).

[42] Both parties before the judge agreed that the discretion as to whether to set aside a summary trial judgment when a defendant failed to appear should be exercised having regard to the framework established for setting aside a default judgment under R. 3-8(11). The judge cited *Grosz v. Royal Trust Corporation of Canada*, 2021 BCSC 1313, where Justice Forth provides a useful summary of the case law developed under R. 3-8(11). That case law includes the well-known decision in *Miracle Feeds v. D & H Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.) where the court set out three criteria that an applicant must meet when applying to set aside a default judgment:

a) the failure to file a response was not wilful or deliberate;

b) the party applied to set aside the default judgment as soon as reasonably possible after learning of the default judgment, or there is an explanation for any delay in bringing the application; and

c) the party has a meritorious defence, or one worthy of investigation.

[43] Justice Forth in *Grosz* also cited this Court's decisions in *Andrews v. Clay*, 2018 BCCA 50, and *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2020 BCCA 341 [*Forgotten Treasures*], where it was held that the *Miracle Feeds* criteria are appropriate indictors of whether it is in the interests of justice to set aside the default judgment, but are not a fixed or exhaustive list of the relevant considerations (*Andrews* at paras. 29–31; *Forgotten Treasures* at para. 17).

[44] The judge went on to consider whether Mr. Gokturk had been duly served with Mr. Nelson's Judgment Application and whether Mr. Gokturk's failure to respond was wilful and blameworthy. This required her to address the circumstances surrounding the NOI and NOW filed by his former counsel.

[45] The judge noted the following key facts about Mr. Gokturk's failure to respond to Mr. Nelson's judgment:

a) The NOI was filed on November 16, 2020, and served on Mr. Nelson's counsel the following day. The NOI listed the Matthews Address as Mr. Gokturk's address for service;

b) The NOI contained the following direction under "Notice to the Client" (found in Form 112 of the *Rules*):

> If you do not object to the lawyer withdrawing from the proceeding, then you may file in the registry and serve on the other parties of record a notice of change of lawyer in Form 110, or a notice of intention to act in person in Form 111.
>
> If you fail either to object or to file a notice in Form 110 or Form 111, service of all further documents on you may be made by other parties to the proceeding by mail to your last known address which is [the Matthews Address].

c) Mr. Gokturk did not file a notice of objection. He also did not file a document changing his address for service to the Granville Address until May 10, 2021. On this point, the judge held:

> [36] Once the NOI was filed, Mr. Gokturk was obliged to take positive steps to either prevent the Matthews Address from becoming his official service address or to change it from the Matthews Address to something else. Mr. Gokturk did neither. In the result, [Mr. Nelson's counsel] was entitled to regard the Matthews Address as his service address.

d) On November 26, 2020, Mr. Gokturk's counsel filed the NOW;

e) In his affidavit, Mr. Gokturk did not attest that his counsel had failed to serve the NOI on him. Rather, he said that he had recently attended the court registry and learned that when he had withdrawn, his counsel had given the

Matthews Address as the address for service, which did not make sense to Mr. Gokturk;

f) The judge characterized Mr. Gokturk's evidence about his relationship to the Matthews Address, as well as his excuse for not attending the examination for discovery in December 2020, as vague and ambiguous (at para. 45); and

g) Mr. Gokturk seemed to imply in his evidence that his former counsel was responsible for his failure to attend the summary trial hearing, but his affidavit contains no clear assertion, or evidence, that the counsel acted wrongly. The judge characterized this as "an ill-considered tactic" given that Mr. Gokturk bore the onus of establishing that the Summary Trial Decision should be set aside (at para. 47).

[46] Based on the facts found by the judge, she concluded that Mr. Gokturk had failed to prove that he had not been served with the NOI or that there was anything unfair about him being bound by the consequences that follow upon the filing and service of the NOI (paras. 48–49). She also held that Mr. Gokturk had failed to establish that his default in not responding to Mr. Nelson's application was not blameworthy (at para. 54).

[47] The judge then went on to consider Mr. Gokturk's defence that Mr. Nelson contracted with Einstein and not with him personally. The judge referred to documents relied on by Mr. Gokturk at para. 58, which she found did not support this defence. It is not clear what documents the judge was referring to and, whatever they were, they were not put before this Court. The judge noted Mr. Gokturk's assertion that he may find new documents that would assist him if he was able to retrieve Einstein's assets from its receiver (at para. 60). She found, however, that this did not assist him in that he could have sought to obtain any such documents for his Reconsideration Application but chose not to.

[48] The judge therefore concluded that Mr. Gokturk had not established that he had a meritorious defence or one worthy of investigation (at para. 61).

[49] Finally, the judge held that Mr. Gokturk had also failed to establish that the Summary Trial Decision should be set aside to avoid a miscarriage of justice (at para. 67). She specifically rejected his assertion that misleading arguments and materials had been put before her by Mr. Nelson on his application (at para. 65).

Issues on appeal

[50] On appeal, Mr. Gokturk challenges both the Summary Trial Decision and the Reconsideration Decision.

[51] With respect to the Summary Trial Decision, he alleges that the judge erred:

(1) in finding that Mr. Gokturk was duly served; and

(2) in resolving all of the issues in the action via summary trial by way of written submissions pursuant to Notice 14.

[52] With respect to the Reconsideration Decision, Mr. Gokturk alleges that the judge erred:

(1) in finding that Mr. Gokturk was duly served; and

(2) in finding that Mr. Gokturk had failed to establish a defence worthy of investigation.

[53] I propose to frame the issues on appeal as follows:

(1) Did the judge err in finding that Mr. Gokturk was duly served?

(2) Did the judge err in granting Mr. Nelson's summary trial application by way of written submissions in lieu of a hearing pursuant to Notice 14?

(3) Did the judge err in finding that Mr. Gokturk's conduct was blameworthy and that he had failed to establish a meritorious defence or one worthy of investigation?

Discussion

Standard of review

[54] Issues relating to the interpretation and application of the *Rules* involve questions of law and are reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *Main Acquisitions Consultants Inc. v. Prior Properties Inc.*, 2022 BCCA 102 at para. 19. The judge's decision about whether to reconsider the Summary Trial Decision involved the exercise of discretion based upon questions of mixed fact and law. As such, this Court may only interfere in that decision if the judge proceeded on an error in principle or otherwise made a palpable and overriding error: *Rangi* at para. 71.

(1) Did the judge err in finding that Mr. Gokturk was duly served?

[55] Mr. Gokturk submits that the judge erred in finding that he was served with the Judgment Application and that this error taints both the Summary Trial Decision and the Reconsideration Decision. Central to this ground of appeal is Mr. Gokturk's position that the judge misapprehended R. 22-6 and the effect of a NOI versus a NOW.

[56] In the Summary Trial Decision, there is no discussion of service apart from the judge's statement that Mr. Gokturk was duly served with the application but failed to respond (at para. 1). It appears that what the judge had before her on the Judgment Application was an affidavit of service sworn by Mr. Nelson's counsel stating that he had mailed the unfiled notice of application and supporting affidavit by regular mail to Mr. Gokturk's address for service at the Matthews Address and that he had received no response. Mr. Nelson's counsel made a similar statement in the written submissions filed in support of the application.

[57] On the Reconsideration Application, Mr. Gokturk argued that he had no notice or knowledge of the Judgment Application. However, the judge held that Mr. Nelson's counsel was entitled to rely on the Matthews Address as Mr. Gokturk's address for service and that there was nothing unfair in Mr. Gokturk being bound by

the consequences that follow upon the filing and service of the NOI (Reconsideration Decision at paras. 36, 49).

[58] On appeal, Mr. Gokturk submits that the judge misapprehended the requirements of R. 22-6, particularly when she found that once the NOI was filed, and in the absence of Mr. Gokturk filing an objection or taking positive steps to identify a new address, Mr. Nelson's counsel was entitled to regard the Matthews Address as the address for service (Reconsideration Decision at para. 36).

[59] Mr. Gokturk submits that this fails to account for R. 22-6(7), which provides that a lawyer ceases to be the party's lawyer when the NOW has been served on all parties of record. In other words, while a NOI initiates the withdrawal process by indicating the lawyer's intention to withdraw, the actual withdrawal is effected by way of the NOW, and then only upon service on all parties of record. That is also how and when the party's address for service changes: R. 22-6(8).

[60] Here, the NOW was not served on Mr. Nelson's counsel, thus, Mr. Gokturk submits, his address for service continued to be his former counsel's address. He submits that had Mr. Nelson's counsel served the Judgment Application on his former counsel, that counsel would no doubt have made sure that the application materials made their way to Mr. Gokturk.

[61] I agree with Mr. Gokturk's submission that the judge erred in finding that the NOI effectively changed the address for service to the Matthews Address. This error does not, however, in my view, warrant an order allowing the appeal.

[62] On the Reconsideration Application, Mr. Gokturk alleged in his affidavit that he only learned that his former counsel had provided the Matthews Address when he went to the court registry. While he does not specify when he went to the registry, presumably it was shortly before the date he swore his affidavit on June 14, 2021.

[63] As the judge noted, Mr. Gokturk, in his affidavit, does not say that he was never served with the NOI nor does he identify what documents he allegedly viewed

at the registry that alerted him to the address issue (Reconsideration Decision at para. 42).

[64] It emerged on the appeal, by way of an admission in the chronology set out in Mr. Gokturk's factum, that the NOW was sent to Mr. Gokturk by email on November 26, 2020, well before the Judgment Application materials were sent to the Matthews Address. Thus, it is apparent that Mr. Gokturk was fully aware that the Matthews Address was listed as his address for service and yet failed to take any steps to change it.

[65] In light of this admission, Mr. Gokturk was compelled to change his strategy on the appeal and make the argument referred to above that his address for service did not change from his former counsel's address to the Matthews address because the NOW was not served on Mr. Nelson's counsel.

[66] This is a new argument and, as this Court has held, the discretion to consider new issues or arguments will be exercised sparingly and only where the interests of justice require it. In assessing the interests of justice, it is appropriate to consider whether entertaining the new issue might lead to a different outcome: *Deng v. Zhang*, 2022 BCCA 271 at paras. 40–41, leave to appeal to SCC ref'd, 40390 (09 February 2023).

[67] For the reasons that follow, while I am prepared to entertain this argument on appeal, it does not lead to a different outcome.

[68] The intent of Rules 22-6(7) and (8) is to protect the interests of opposing parties who are entitled to use an existing address for service until receiving formal notice of a change. In this regard, having not been served with the NOW, Mr. Nelson's counsel could well have sent the application materials to Mr. Gokturk's former counsel and then taken the position that Mr. Gokturk had been properly served. However, this would have made no sense in the circumstances where he had been advised that counsel no longer acted for Mr. Gokturk, he had been served

with the NOI setting out the Matthews Address as Mr. Gokturk's address for service, and he had not been served with an objection.

[69] It is not reasonable for Mr. Gokturk to rely on his former counsel's oversight in not serving the NOW on Mr. Nelson's counsel to escape the consequences of his own failure to act on the NOI and NOW to provide a new address for service if the Matthews Address was not appropriate. The judge fairly characterized this as an "ill-considered tactic".

[70] Further, given that Mr. Gokturk received the NOW, I would characterize the lack of service on Mr. Nelson's counsel as an irregularity, given that both Mr. Nelson's counsel and Mr. Gokturk had effective notice that the Matthews Address had been listed as the address for service: R. 22-7(1). I would add that it is unlikely that Mr. Gokturk would have known whether his former counsel had served the NOW on Mr. Nelson's counsel, thus he could not have been under any belief that his former counsel's address remained his address for service.

[71] It must also be remembered that the service issue goes to the question of whether Mr. Gokturk's failure to respond to the Judgement Application was blameworthy, which is one element of the test for determining whether the Summary Trial Decision should have been set aside on the Reconsideration Application. That leads to the final reason why the service issue does not support an order granting the appeal. Mr. Gokturk did appear on the Reconsideration Application and had full opportunity to present his case. Thus, even accepting that there was an issue about whether Mr. Gokturk was formally served with the Judgment Application materials, that issue was addressed and cured by way of the Reconsideration Application.

[72] In this regard, I note that where a party seeks to challenge a step taken in litigation based upon an alleged failure to comply with the *Rules*, an application to that effect must be brought before the applicant takes a further step in the litigation: R. 22-7(4). This lends weight to the finding that any issues about service of the Judgment Application were overtaken by the Reconsideration Application, which was brought by Mr. Gokturk and in which he participated fully.

[73] This point also answers Mr. Gokturk's complaint that Mr. Nelson's counsel served him with unfiled and incomplete copies of the application materials. Leaving aside that Mr. Gokturk is challenging the validity of materials that he claims to have never been served with at all, I would again characterize these issues as irregularities that were cured by the Reconsideration Application.

[74] In summary on the service issue, while the judge erred in her interpretation of the effects of a NOI versus a NOW, that error did not materially impact her decision and it does not warrant intervention by this Court.

(2) Did the judge err in granting Mr. Nelson's summary trial application by way of written submissions in lieu of a hearing pursuant to Notice 14?

[75] Mr. Gokturk submits that the judge erred in granting judgment to Mr. Nelson on his application brought under Notice 14. He argues that there were numerous grounds on which the application fell outside of the limited scope of the Notice, including, in particular:

(1) The Notice permits a party to apply for determination of a single disputed issue, however Mr. Nelson sought determination of his entire claim which involved a number of issues including the existence of a contract, who the contracting parties were, liability for breach of contract and/or conversion, and the proper measure of damages; and

(2) The Notice restricts the evidence admissible on an application to a single affidavit of no more than 10 pages. In breach of the Notice, Mr. Nelson filed and relied on NTA #1 and NTA #2 in support of his application.

[76] It is unnecessary to address in any detail the type and scope of applications that could properly have been dealt with under Notice 14, given that the Notice was rescinded in April 2022.

[77] While it is arguable that the Judgment Application exceeded the scope of Notice 14 for the reasons advanced by Mr. Gokturk, it is equally arguable that the

judge had the discretion to decide the application in the circumstances before her, which involved a relatively straightforward claim and no response to the application from Mr. Gokturk.

[78] In my view, it is unnecessary to resolve this issue because the issue of whether the Judgment Application was suitable for determination pursuant to Notice 14 was also overtaken by and subsumed in the Reconsideration Application. As noted by Justice Saunders in *Morgan v. Thompson*, 2013 BCCA 329 (Chambers), where reconsideration is sought, any resulting appeal is from the order resulting from the reconsideration application (at para. 12).

[79] On that application, the onus was on Mr. Gokturk to establish that he met the test for reconsideration. I do not agree with Mr. Gokturk that the Reconsideration Application was limited to whether he had been properly served with the Judgment Application. Rather, it was incumbent upon him to advance any and all arguments available to him to support his position that the Summary Trial Decision should be set aside.

[80] I therefore would not accede to this ground of appeal. Rather, the appeal turns on whether the judge erred in her application of the test for reconsideration.

(3) Did the judge err in finding that Mr. Gokturk's conduct was blameworthy and that he had failed to establish a meritorious defence or one worthy of investigation?

[81] While Mr. Gokturk framed his first alleged error in the Reconsideration Decision as the judge erring in finding that he had been duly served, as I noted above, this goes to the issue of blameworthy conduct, one element of the test for reconsideration. I will not repeat my discussion of the service issue, as set out above at paras. 55–74. In light of my findings, Mr. Gokturk has not demonstrated that the judge erred in holding that Mr. Gokturk had failed to establish that his default was not blameworthy.

[82] With respect to the third element of the reconsideration test, Mr. Gokturk submits that the threshold requirement of establishing a meritorious defence or a

defence worthy of investigation is low, and was met by his affidavit evidence deposing that the contract for the purchase and sale of the BTC was between Mr. Nelson and Einstein.

[83] Mr. Gokturk cites *Forgotten Treasures*, where Justice Voith provides a succinct summary of this threshold requirement, in the context of an application to set aside a default judgment:

> [26] Once again, the starting point is understanding what an applicant who seeks to set aside a default judgment must show to establish that it has a defence that is "worthy of investigation."
>
> [27] In *Schmid v. Lacey* (1991), 7 B.C.A.C. 77 at para. 10 (B.C.C.A.), Locke J.A. said:
>
> > The leading case in setting aside a default judgment is that of *Bank of Montréal v. Erickson* (1984), 57 B.C.L.R. 72, a case in this Court. The phrase was used in there as to the third ground that the applicant "has a meritorious defence, or at least a defence worthy of investigation". In my opinion, the phrase "worthy of investigation" does not mean that one is merely entitled to make the allegation. One must, I think, descend to details such as to enable the judge to correctly exercise his mind upon whether there is indeed such a defence.
>
> See also *Andrews* at para. 44; *Rangi v. Rangi*, 2007 BCCA 352 at para. 81.
>
> [28] Further guidance is found in *Brar v. Sahota* (1998), 61 B.C.L.R. (3d) 194 (C.A.). The chambers judge had refused to set aside a default judgment because he considered that there was inadequate evidence of the defence that was to be advanced. On appeal, the Court concluded, at para. 11: "In my judgment, the averments of Mr. Sahota in his affidavit are sufficient to raise a defence that is worthy of investigation." The Court then said:
>
> > [12] It is not, in my view, necessary for a person seeking to set aside the default judgment to swear to all the evidence that he believes might support his defence. When it is a simple cause of action, and I do not say that to diminish the claim, but when it is a simple cause of action like an assault, it is sufficient, in my view, to plead that the defendant did not assault the plaintiff and he did not participate in any way in the assault. There could be particulars, and there could, of course, be discovery to add flesh to those allegations, but I think that that would be a defence that would withstand an application to have it struck out as being insufficient.
>
> See also *Klonarakis Estate*, 2013 BCCA 481 at paras. 35–36.
>
> [29] It is thus necessary for a defendant who seeks to set aside a default judgment to file some evidence that supports the defence it wishes to advance. In some straightforward or simple cases, a denial, in affidavit form, of the allegations in the notice of civil claim may be sufficient. In other cases, more may be required.

> [30] In neither instance does the chambers judge engage in a searching, extended, or detailed weighing of the evidence. The threshold the applicant must meet is, as the words “worthy of investigation” suggest, not onerous.

[84] Mr. Gokturk submits further that the judge erred in applying the wrong test when she held that the documents relied on by Mr. Gokturk on the Reconsideration Application did not suggest that the facts set out in the Summary Trial Decision were “clearly wrong” (Reconsideration Decision at para. 59).

[85] In my view, Mr. Gokturk has not established that the judge erred in finding that he had failed to establish a meritorious defence or one worthy of investigation. The judge noted in the Reconsideration Decision that the documents relied on by Mr. Gokturk did not provide clear support for his defence that the BTC contract was with Einstein. She noted as well Mr. Gokturk’s submission that he may at some point be able to find additional supporting documents, however, he had apparently taken no steps to do so. She was particularly dubious of Mr. Gokturk’s claim given that he had admitted in his affidavit verifying his list of documents that the receiver appointed for Einstein had, in fact, given him access to the Einstein documents.

[86] In his filed response to civil claim, Mr. Gokturk pleads the terms of a User Agreement allegedly entered into between Mr. Nelson and Einstein. In his affidavit filed in support of the Reconsideration Application, he refers to various client forms allegedly signed by Mr. Nelson in respect to transactions with Einstein. None of those documents are attached to his affidavit. As I noted (at para. 47), it is unclear what documents were before the judge, however, none of the documents referred to are in the record before this Court.

[87] Of particular note, Mr. Gokturk did not in his affidavit address his text exchange with Mr. Nelson, referred to above at para. 14, in which he acknowledges his debt. In light of this acknowledgement, it was open to the judge to require some documentary evidence supporting Mr. Gokturk’s bare allegation that Mr. Nelson had contracted with Einstein.

[88] Finally, while Mr. Gokturk did not expressly challenge the judge's finding that he had failed to establish that it was necessary to set aside the Summary Trial Decision in order to prevent a miscarriage of justice, he does assert that the interests of justice favour allowing his defence to be heard and determined on the merits.

[89] As held by this court in *Andrews* and *Forgotten Treasures* (see para. 42 above), the interests of justice are always a paramount factor on a reconsideration application. Here, the judge was aware of the history of the litigation, the essential nature of the claim, and, most significantly, the failure of Mr. Gokturk to produce any documentary evidence supporting his bald assertion that the contract for the purchase and sale of the BTC was between Mr. Nelson and Einstein. In the circumstances, the judge fairly concluded that it was not necessary to set aside the Summary Trial Decision so as to avoid a miscarriage of justice.

[90] Mr. Gokturk has failed to establish that the judge erred in finding that he had not met the test for reconsidering the Summary Trial Decision.

Disposition

[91] Accordingly, I would dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Abrioux"