COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *North Root Cannabis Ltd. v. 663466 B.C. Ltd.,* 2024 BCCA 105

Date: 20240306
Docket: CA49334

Between:

North Root Cannabis Ltd. and Steven Baskott

Appellants
(Plaintiffs)

And

663466 B.C. Ltd. and Gurmel Kainth

Respondents
(Defendants)

Before: The Honourable Madam Justice Stromberg-Stein
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated August 11, 2023 (*North Root Cannabis Ltd. v. 663466 B.C. Ltd.*, 2023 BCSC 1395, Vancouver Docket S2110430).

Oral Reasons for Judgment

The Appellant, appearing on his own behalf and as the representative of North Root Cannabis Ltd. (via videoconference):	S. Baskott
Counsel for the Respondents:	B. Shebib
Place and Date of Hearing:	Vancouver, British Columbia March 6, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 6, 2024

Summary:

The appellants filed a notice of appeal with respect to a chambers judgment dismissing their application for summary trial. The respondents apply to quash the appeal on the basis that leave is required. The appellants maintain that leave is not required, but alternatively apply to convert the notice of appeal into an application for leave to appeal, and for leave to appeal. Held: Application to quash dismissed, application to convert the notice of appeal into application for leave to appeal granted, and application for leave to appeal dismissed. Leave is required to appeal an order made pursuant to R. 9-7(11) of the Supreme Court Civil Rules. In these circumstances, the interests of justice are better served by the parties getting on with the action in the court below rather than appealing the discretionary order of the chambers judge.

STROMBERG-STEIN J.A.:

Introduction

[1] The respondents, 663466 B.C. Ltd. and Gurmel Kainth, bring an application to quash this appeal.

[2] The appellants, North Root Cannabis Ltd. and Steven Baskott, bring an application to convert their notice of appeal to an application for leave to appeal. In the event the application to convert the notice of appeal into an application for leave to appeal is granted, the appellants also seek leave to appeal.

Background

[3] North Root Cannabis Ltd. (“North Root”) is a company incorporated under the laws of British Columbia. Steven Baskott is the sole director and officer of North Root.

[4] 663466 B.C. Ltd. (“663 Ltd.”) is a company incorporated under the laws of British Columbia, and is the owner and landlord of a commercial premises located in New Westminster, British Columbia (the “Premises”). Mr. Gurmel Kainth is the sole director of 663 Ltd.

[5] In September 2018, the parties entered into discussions concerning a proposed cannabis retail store at the Premises. In November 2018, North Root

applied to obtain a Cannabis Retail Store License (the "License") from the British Columbia Liquor and Cannabis Regulation Branch (the "LCRB").

[6] On or about March 1, 2021, Mr. Kainth signed a Letter of Intent (the "LOI") with Mr. Baskott and North Root to lease the Premises. The LOI provided that the parties would execute the intended lease agreement upon the City of New Westminster rezoning the property for cannabis retail sales, on or before November 1, 2021. The LOI further provided that upon signing the lease, North Root and Mr. Baskott would "pay an additional amount towards rent to total 3 month's pre-payment of rent".

[7] On June 7, 2021, the City of New Westminster rezoned the Premises to allow cannabis retail sales. On July 15, 2021, the LCRB issued North Root a one-year approval in principle for the License.

[8] Between August 2021 and November 2021, the parties engaged in negotiations concerning the terms of a lease agreement for the Premises.

[9] On November 7, 2021, Mr. Kainth's son, Paul Kainth, sent an email to Mr. Baskott requesting payment of $12,463 for rent arrears by 5:00 PM on November 8, 2021, before Mr. Kainth would "consider signing a lease" with North Root (the "November 7 Email").

[10] On November 9, 2021, Mr. Baskott delivered Mr. Kainth two copies of a proposed lease for the Premises, in addition to a personal cheque for rent arrears.

[11] On November 11, 2021, Mr. Kainth signed the proposed lease with some revisions (the "Lease") and provided the Lease to Mr. Baskott to be signed, along with a letter requesting that Mr. Baskott "sign the copies and return to me one signed copy by noon, Monday the 15th of November 2021".

[12] On November 12, 2021, the respondents deposited the personal cheque into their bank account.

[13] On the evening of November 15, 2021, Mr. Baskott attended the home of Mr. Kainth with a signed copy of the Lease and a certified check in the amount of $12,463. The certified cheque was to replace the cheque previously issued to Mr. Kainth on November 9, because Mr. Baskott had placed a stop payment on the November 9 cheque.

[14] On November 18, 2021, the respondents wrote to the appellant notifying them that the respondents repudiated the Lease and there was no agreement between the parties. The letter provided, in part:

> …I agreed to enter into a lease with you and your corporation based upon detailed and specific terms. You failed in the fulfilment of those terms and provided me with materially misleading information. It is in those circumstances that I find it necessary to inform you that you have no valid lease for the subject premises…
>
> …I made it clear to you throughout that the lease must be signed no later than November 1, 2021, and that, in any event, the deemed start date of the lease would be September 1, 2021.
>
> …
>
> Despite not having met the terms of signing the lease and paying up the due rent by November 1, 2021, I told you that I would grant an extension to November 15, 2021 at noon, but this time and date would be strictly enforced.
>
> On November 9, 2021, you presented me with two copies of a lease and with a personal cheque for the overdue rent … I did sign the lease on November 10, 2021, having crossed out the six-month escape clause, and in reliance upon your personal cheque … I again informed you that the lease must be signed and presented no later than noon on November 15, 2021.
>
> On Friday, November 12, 2021, I deposited your personal cheque which you provided in payment of back rent. On November 15, 2021, your partner, Jay, told me that the bank would not honour your cheque. On November 16, 2021, the bank confirmed that a stop payment had been entered on your cheque. It follows that there is not a valid lease, nor would there possibly be a valid lease unless the overdue rent was paid by noon on November 15, 2021.
>
> … It is entirely evident that you provided your personal cheque to me in order to induce me to sign the lease. It is also evident that you had no intention of having your cheque honoured by your bank. In effect, you engaged in a false pretense in order to induce me to sign the lease...
>
> Finally, on November 15, 2021, at about 8:30 PM, I was presented with a copy of the lease signed by you, and a replacement payment for the overdue rent. This was over 8 ½ hours after the time at which I made it clear to you, in writing, that was the absolute final moment for presentation of the lease and completion of the overdue rent payment.

> It is in the totality of the circumstances that I inform you that you have failed to comply with the agreed terms for entry into a lease of the premises…

[15] On November 30, 2021, the appellants filed a notice of civil claim, alleging that the Lease was binding and seeking, *inter alia*, specific performance of the Lease and, in the alternative, damages for breach of the Lease.

[16] On July 26, 2022, the appellants filed a notice of application for summary trial under R. 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The appellants sought declarations that the Lease is a valid and binding contract and that the respondents breached the Lease.

[17] The summary trial application was set to be heard on August 15, 2022, but was adjourned to October 21, 2022. The application did not proceed on October 21, 2022, because there was no judge available, and was ultimately heard by Justice Tindale over seven days between November 30, 2022 and February 15, 2023.

The Summary Trial Decision

[18] In reasons dated August 11, 2023, and indexed at 2023 BCSC 1395 (“RFJ”), the chambers judge dismissed the summary trial application.

[19] The respondents opposed the summary trial application on the grounds that it was not appropriate to sever the issue of Lease validity from the other issues raised in the claim; that the Lease validity issue was not suitable for summary trial; and that the Lease was not valid because (1) there was a condition precedent that was not adhered to, (2) the appellants had breached the duty of good faith, and (3) the appellants had induced the respondents into signing the Lease through misrepresentations.

[20] The chambers judge agreed that the matter was not suitable for summary trial because there were unresolvable conflicts in the evidence, and there was “no good reason to decide the issue of the Lease’s validity in isolation from the other issues”.

[21] The judge's findings concerning the conflicts in the evidence can be summarized as follows:

a) There was a conflict in the evidence concerning whether Mr. Baskott received the November 7 Email (RFJ at paras. 94, 111).

b) There was a conflict in the evidence of Mr. Kainth, Mr. Baskott, and Mr. Baskott's brother-in-law, Mr. Teranishi, concerning the events that occurred on November 15, 2021, and whether Mr. Kainth extended the 12:00 PM deadline for providing the rent arrears payment and executed Lease (RFJ at paras. 95, 99–101, 112).

c) There were significant credibility issues, which included issues relating to Mr. Baskott's placement of the stop payment on the personal cheque delivered to Mr. Kainth on November 9, and his explanation for doing so (RFJ at para. 97).

d) There was a conflict in the evidence concerning whether Mr. Baskott had provided incomplete information to the LCRB respecting the source of his funding for North Root (RFJ at paras. 114, 117–119).

[22] With respect to whether it was appropriate to "hive off" the issue of Lease validity from the other issues, the chambers judge stated:

> [124] On this summary trial application I am unable to resolve the conflict in the evidence with regard to the condition precedent alleged by the defendants nor am I able to resolve the conflict in the evidence regarding whether or not there have been misrepresentations in relationship to the plaintiff's regulatory application.
>
> [125] I appreciate that there is some urgency in this matter being concluded however the plaintiffs have been successful in obtaining extensions for the License in the past and currently there is an extension to January 15, 2024.
>
> [126] In my view this matter is complex. This case does not involve a simple determination of whether or not the Lease was signed. There are many credibility issues and nuanced arguments with regard to the condition precedent and potential misrepresentations on the plaintiffs' regulatory application.

> [127] I am also of the view that the credibility issues are intertwined with the issue of whether or not the Lease is valid and any remedies that would be sought if the plaintiffs are successful.
>
> [128] Determining whether the Lease is valid on a summary trial application may reduce the length of the trial however I am not satisfied that a conventional trial would still not be necessary given the position of the parties on this application. It is still likely that there would be a prolonged trial for damages or specific performance of the Lease.
>
> [129] I am also concerned that if the issue of the Lease's validity is determined in isolation of the other issues in this action which include a claim by the plaintiffs for specific performance of the Lease this could result in further court actions and appeals if it is ultimately determined that the plaintiffs' application for the License was flawed.
>
> [130] In my view there are further investigations which need to be taken particularly with regard to the regulatory process that the plaintiffs participated in.
>
> [131] It is also clear to me based on the number of affidavits that were filed by both parties shortly before this application commenced and after now having time to consider all of the extensive arguments made by the parties this matter was not ready to proceed as a summary trial application.
>
> [132] For all the above noted reasons in my view there is no good reason to decide the issue of the Lease's validity in isolation from the other issues in this trial.

The Appeal

[23] The appellants filed their notice of appeal on September 8, 2023. The notice of appeal specifies that leave is not required. Here, it is relevant to note that the appellants were represented by counsel in the Supreme Court proceedings, but Mr. Baskott is representing himself and North Root in the appeal.

[24] After the notice of appeal was filed, a disagreement arose between the parties concerning whether leave to appeal is required. It is unnecessary to discuss the substance of the parties' disagreement and communications in detail. Suffice it to say, the appeal was set down for a hearing on February 15, 2024, without the parties' agreement as to whether leave was required or whether the appeal should proceed on that date.

[25] The respondents contacted the Registry to request an adjournment pursuant to R. 45 of the *Court of Appeal Rules*, B.C. Reg. 120/2022. The Registrar adjourned

the appeal and set a case management hearing for February 8, 2024. At the case management hearing, the Registrar ordered that that parties shall have the present applications heard in chambers.

Issues

[26] The applications raise the following issues:

1. Is leave to appeal required?

2. If so, should the appeal be quashed, or should the notice of appeal be converted into an application for leave to appeal?

3. If the notice of appeal should be converted into an application for leave to appeal, should leave to appeal be granted?

Analysis

Is Leave to Appeal Required?

[27] The first question that must be answered is whether the appellants require leave to bring an appeal from the order dismissing their application for summary trial.

[28] An appeal to this Court does not lie from a limited appeal order without leave of a justice: *Court of Appeal Act*, S.B.C. 2021, c. 6, s. 13(2)(a).

[29] Limited appeal orders are defined in R. 11 of the *Court of Appeal Rules*. The purpose of defining limited appeal orders is to provide certainty as to when leave is required: *Bentley v. The Police Complaint Commissioner*, 2012 BCCA 514 at para. 5 (Chambers). Thus, only orders specifically provided for in R. 11 are capable of being limited appeal orders: *Yao v. Li*, 2012 BCCA 315 at para. 27 (Chambers).

[30] The relevant part of R. 11 provides that an order granting or refusing relief under R. 9-7(11) of the *Supreme Court Civil Rules* is a limited appeal order:

> 11 For the purposes of the definition of "limited appeal order" in section 1 of the Act, the following orders are prescribed as limited appeal orders:
>
> (a) an order granting or refusing relief for which provision is made under any of the following Parts or rules of the Supreme Court Civil Rules:
>
> …
>
> (iv) Rule 9-7 (11), (12), (17) or (18) [*adjournment or dismissal, preliminary orders, orders, and right to vary or set aside order*];
>
> …

[31] Rule 9-7(11) of the *Supreme Court Civil Rules* provides:

> (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
>
> (a) adjourn the summary trial application, or
>
> (b) dismiss the summary trial application on the ground that
>
> (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
>
> (ii) the summary trial application will not assist the efficient resolution of the proceeding.

[32] The appellants' position is that the chambers judge dismissed the application for summary trial under R. 9-7(15) of the *Supreme Court Civil Rules*, which is not a limited appeal order. Rule 9-7(15) provides:

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
>
> (c) award costs.

[33] The appellants say that because the respondents did not apply pursuant to R. 9-7(11) for dismissal of the summary trial application, the order dismissing the summary trial application was made pursuant to subrule (15), rather than subrule (11). Further, the appellants refer to the following paragraphs of the RFJ, which they say expressly incorporates the wording in R. 9-7(15):

> [133] This matter is not suitable for summary trial primarily because I am not able to find the facts necessary to determine the issues of the condition precedent nor the alleged misrepresentations by the plaintiffs in their application to the LCRB.
>
> [134] It would be unjust to determine the issue of the Lease's validity on a summary trial application for all of the above noted reasons.
>
> [Emphasis added.]

[34] Finally, the appellants rely on *Creyke v. Creyke*, 2014 BCCA 519 (Chambers). In *Creyke*, Justice Lowry granted leave to appeal an order dismissing an application for summary trial, on the basis that leave is not required to appeal an order made pursuant to R. 9-7(15). Crucially, the chambers judge in *Creyke* had "expressly dismissed the Respondent's application under subrule (11) … then proceeded to hear the merits of the summary trial application and … dismissed the Appellant's application pursuant to Rule 9-7(15)": at para. 2.

[35] The respondents say that the question of whether leave is required in these circumstances is a settled issue. They rely on *696591 B.C. Ltd. v. Madden*, 2014 BCCA 517 (Chambers) [*Madden*] and *Michael Wilson & Partners, Ltd. v. Desirée Resources Inc.*, 2016 BCCA 296 (Chambers), aff'd 2017 BCCA 139 [*Michael Wilson*].

[36] In *Madden*, Justice Groberman interpreted R. 9-7 and addressed the interplay between subrule (11) and (15), but without reference to the *Creyke* decision:

> [5] It is obvious that where a party brings a formal application to dismiss a summary trial application under Rule 9-7(11), an order granting that relief is an order made under that subrule. It seems to me that where a party defends an application under Rule 9-7 by raising the issue of suitability, the raising of such a defence will amount to an informal application under Rule 9-7(11). Therefore, if the summary trial application is dismissed on the basis that the

> issues are unsuitable for summary determination, the order will be an order made under Rule 9-7(11), and leave will be required to appeal the order.
>
> [6] Indeed, I would go further, and suggest that even if the issue of suitability is raised of the chamber's judge's own motion, a determination that the issues raised by a summary trial application are not suitable for summary disposition will be an order under Rule 9-7(11). Only orders actually granting judgment in favour of a party (either on an issue or generally) are properly characterized as being made under [R]ule 9-7(15).

[37] In *Michael Wilson*, Justice Bennett was confronted with a situation much like the present. The appellant relied on *Creyke*, and argued that the order dismissing his summary trial application was made pursuant to R. 9-7(15), and was therefore not a limited appeal order. The respondents relied on *Madden*, and argued that leave was required because the order was made pursuant to R. 9-7(11). Justice Bennett held that the order was made pursuant to R. 9-7(11), and that *Creyke* should be confined to its facts:

> [26] …after hearing a summary trial application, the judge is left with three alternatives: adjourn, dismiss, or grant judgment in favour of either party. The corollary of granting judgment is that the matter is suitable for summary trial because it does not offend subrule 9-7(15)(i–ii). If judges dismiss or adjourn a summary trial application, they do so pursuant to Rule 9-7(11); if judgment is granted by way of a summary trial, it is done so pursuant to Rule 9-7(15).
>
> [27] The judge's formal order in this instance makes clear that he *dismissed* Wilson's summary trial application: "[Wilson]'s application filed on March 19, 2015 is dismissed" (emphasis added). Of course, Wilson did not apply to have its own summary trial application dismissed—the respondents did. I conclude that the dismissal was made pursuant to Rule 9-7(11).
>
> …
>
> [29] I agree with the respondent that Lowry J.A.'s chambers decision in *Creyke* is confined to its facts. In that case, the court below took the unusual position that it was explicitly not making a determination under Rule 9-7(11) but instead Rule 9-7(15), despite dismissing the summary trial application on the issue of suitability. Reading Lowry J.A.'s brief oral reasons, it appears that the propriety of a court explicitly dismissing a summary trial application under subrule (15) was not before him.
>
> [30] I would agree with the reasons of Groberman J.A. and adopt his conclusion that only orders actually granting judgment in favour of a party after summary trial proceeding are properly characterized as being made under Rule 9-7(15). Accordingly, in this case leave to appeal is required.

[38] In this case, I agree with the respondents that leave to appeal is required. The chambers judge may have described the basis for the order using language found in

R. 9-7(15), but the order is clearly one *dismissing* the application for summary trial, the authority for which is found in R. 9-7(11). This is not like *Creyke*, where the reasons can only be interpreted as dismissing the application pursuant to R. 9-7(15).

Should the Appeal be Quashed, or Should the Notice of Appeal be Converted into an Application for Leave to Appeal?

[39] Having concluded that leave to appeal is required, the next question that must be answered is what to do with the appeal, which, as it presently stands is a nullity given that leave to appeal was required but not sought.

[40] The following remarks of Justice Griffin in *Liu v. Du*, 2021 BCCA 221 (Chambers) are relevant:

> [39] A notice of appeal filed in respect of a limited appeal order is a nullity, and a single justice of this Court may quash such an appeal, as is apparent in the decision of *Bacon*. A judge also has the discretion to convert a notice of appeal into a notice of application for leave to appeal: *Island Savings Credit Union v. Brunner*, 2016 BCCA 308 at para. 3 (Chambers). This is the relief sought by the applicants in their reply argument. However, Mr. Liu objects on several grounds, including on the ground that the applicants did not file any application materials seeking such relief today, even in the alternative.
>
> [40] The required practice when counsel is uncertain as to whether leave is required is to seek leave: *Commencing an Appeal When Uncertain if Leave to Appeal is Required*, Civil Practice Directive, 8 May 2017. Counsel for Mr. Liu took the position with the applicants that leave was required and drew this practice direction to the attention of the applicants' counsel, but the applicants brought no application in this regard. The applicants say this was because they were confident that no leave was required.
>
> [41] While perhaps the applicants were unwise in their confidence, I am willing to be somewhat lenient with the applicants in the circumstances where there was more than one possible source of authority for the order…

[41] In my view, the present circumstances are analogous to *Liu.* I accept that, for a self-represented litigant like Mr. Baskott, the source of authority for the chambers judge's order may not have been as clear as the respondents submit. Mr. Baskott was perhaps unwise to double down on his position. However, in my view, it is in the interests of justice that I exercise my discretion to convert the notice of appeal into an application for leave to appeal. As a corollary, I would not exercise my discretion to quash the appeal.

Should Leave to Appeal be Granted?

[42] In *Saran v. Cartonio, Inc.*, 2020 BCCA 252, Justice Griffin summarized the applicable legal principles in an application for leave to appeal an order dismissing a summary trial application:

> [14] In *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10 (Chambers), Saunders J.A. set out the following criteria to consider on an application for leave to appeal:
>
> a) whether the point on appeal is of significance to the practice;
>
> b) whether the point raised is of significance to the action itself;
>
> c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> d) whether the appeal will unduly hinder the progress of the action.
>
> [15] The above criteria are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Saunders J.A. in Chambers).
>
> [16] An appeal will not usually raise an issue of significance to the practice where the area of law is well-settled: *Re Canadian Petcetera Limited Partnership*, 2009 BCCA 255 at para. 19 (Frankel J.A. in Chambers).
>
> [17] The merits threshold is generally low: *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16 (Prowse J.A. in Chambers).
>
> [18] However, where leave to appeal is sought from a discretionary order, the analysis of whether the appeal is *prima facie* meritorious takes into account the standard of review from the exercise of judicial discretion: *Landmark Solutions Ltd. v. 1082532 B.C. Ltd.*, 2020 BCCA 74 (Chambers).
>
> [19] This means that where the order sought to be appealed is a discretionary order, the Court will only grant leave if there is an arguable case that the judge erred in principle, made an order not supported by the evidence, or that the order will result in an injustice: *Hagwilneghl v. Canadian Forest Products Ltd.*, 2011 BCCA 478 at para. 31 (Chambers); see also *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502.
>
> [20] Where the appeal has no prospect of success, the Court will perform a gatekeeper function in refusing leave: *Teck Cominco Metals Ltd. v. British Columbia (Minister of Revenue)*, 2009 BCCA 3 at para. 27 (Chambers).

[43] I will proceed by considering each of the criteria from *Goldman, Sachs & Co.*, beginning with the merits of the proposed appeal.

Merits of the Appeal

[44] In my view, the appellants have not demonstrated "a good arguable case of sufficient merit to warrant scrutiny by a division of this Court": *Johnston v. Matheson* (also known as *A.L.J. v. S.J.M.*), 1994 CanLII 2614, 46 B.C.A.C. 158 at para. 10 (B.C.C.A. Chambers).

[45] The chambers judge concluded that the matter was unsuitable for summary trial on the basis that there were direct and unreconcilable conflicts in the evidence concerning whether Mr. Baskott received the November 7 Email, the events of November 15, 2021, and North Root's LCRB application. The judge also held that there was "no good reason to decide the issue of the Lease's validity in isolation from the other issues", and that it would be unjust to do so.

[46] While I have some concerns with the judge's reasons regarding whether Mr. Baskott's receipt of the November 7 Email was an unresolvable evidentiary issue, and also whether the alleged misrepresentations in North Root's LCRB application, if any, are relevant to the validity of the Lease, I do not see these issues as capable of supporting a different outcome on appeal. Nor do I agree that the judge erred in considering whether there was a condition precedent.

[47] The chambers judge was entitled to find that there were gaps in the evidence, and credibility issues that were not suited for resolution on summary trial. These included Mr. Baskott's issuance of the stop payment on the cheque given to Mr. Kainth on November 9, 2021, as well as the events on November 15, 2021.

[48] I agree that the issue is not whether Mr. Kainth signed the Lease, but whether there is any merit to the defences raised by the defendants that the Lease was invalid as a result of a condition precedent that was not adhered to, misrepresentations made by Mr. Baskott to Mr. Kainth to induce his signature, or a breach of a duty of good faith. This is not a case like *Harrison v. British Columbia (Children and Family Development)*, 2010 BCCA 220, in which the outstanding evidentiary issues have nothing to do with answering the question of liability.

[49] The chambers judge was also entitled to find that it would be inappropriate to determine the issue of Lease validity in isolation from the other issues, having regard to the factors discussed in *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83. The judge acknowledged there was urgency, but noted that the appellants had been successful in obtaining extensions for North Root's License in the past. The complexity of the matter, potential for multiple appeals and duplicity of proceedings, and likelihood that a lengthy conventional trial would still be necessary weighed against isolating the issue of Lease validity for summary determination.

[50] From my review of the materials before the chambers judge, and given the chambers judge's remarks, I find it unlikely that a division of this Court would say that the judge was clearly wrong in declining to consider the numerous issues raised on a summary basis. This was a highly discretionary decision. In my view, the merits of the appeal do not weigh in favour of granting leave to appeal.

Importance of the Proposed Appeal to the Practice

[51] The appellants submit that the proposed appeal would provide this Court with the opportunity to reiterate the importance of proportionality and the efficiency of using summary procedures. However, the proportionality principle does not appear to have featured significantly in the parties' arguments, nor was it directly addressed by the chambers judge. The fact that a proposed appeal would tangentially deal with a comment-worthy issue does not mean that it is of significance to the practice as a whole: *Angus v. Themis Program Management and Consulting Ltd.*, 2011 BCCA 37 at paras. 11–12 (Chambers).

[52] In my view, the importance of the proposed appeal to the practice does not weigh in favour of granting leave to appeal.

Importance of the Proposed Appeal to the Action

[53] There is some suggestion that the importance of the proposed appeal to the action may include the importance of the appeal to the parties: see *West Bay SonShip Yachts Ltd. (Re)*, 2007 BCCA 419 at para. 12 (Chambers). However, other

authorities distinguish between importance to the parties and importance to the action itself: see *Columbia National Investments Ltd. v. Abbotsford (City)*, 2007 BCCA 368 at para. 24 (Chambers).

[54] The appellants submit that the parties have spent considerable time and resources pursuing a determination of the validity of the Lease, and that a determination on the Lease validity issue would reduce the number and complexity of issues for trial. Additionally, the appellants say that there is still an element of urgency, because further delay may result in North Root losing its License.

[55] Relying on *Jiang v. Peoples Trust Company*, 2022 BCCA 40, the respondents submit that the appeal is of no significance to the action, because the chambers judge did not make any final decision on the law or the facts going to the merits of the parties' dispute. The respondents further submit that the specific details concerning the present status of North Root's License are not properly before the Court.

[56] I accept that the appeal is of some significance to the action given the importance of a speedy determination of the Lease validity issue and the potential for prejudice to North Root if it was to lose the License. However, the weight of this criterion is qualified, in my view, by the appellants' limited prospects of obtaining a remedy on appeal which could directly address the potential lapse of North Root's License. Even if the appellants were to be successful on appeal, the most likely result would be to remit the matter back to the trial court with directions as to the suitability of a summary trial application.

[57] This criterion, in my view, at best weighs slightly in favour of granting leave to appeal.

Whether the Appeal would Unduly Hinder the Action

[58] Historically, this factor has been characterized as the most important of the four: *Hockin v. Bank of B.C.*, 1989 CanLII 2751 (B.C.C.A.) at para. 20, 37 B.C.L.R. (2d) 139. The relevant considerations include concerns as to timing and the

sufficiency of the factual matrix, time-sensitive aspects of the litigation, or the possibility of settlement negotiations: *Jiang* at para. 56.

[59] The appellants are seeking from this Court the orders sought in the application for summary trial. If leave to appeal is granted, the parties appear unlikely to continue preparing for the trial of the action, because the outcome of the appeal could render any further trial preparations moot. In my view, there is a real risk that granting leave to appeal would simply delay a final determination and give rise to the potential for future appeals, which does not weigh in favour of granting leave to appeal.

The Interests of Justice

[60] I conclude that it is not in the interests of justice to grant leave to appeal. None of the criteria I have just discussed weigh strongly in favour of granting leave, and I think there is a real risk that the parties could be tied up by an appeal which has little prospect of assisting the parties in resolving their dispute. I appreciate that the summary trial proceeding was anything but expedient. However, in my view, justice is better served by the parties getting on with the action below, rather than spending additional time appealing the highly discretionary order of the chambers judge.

Disposition

[61] For the foregoing reasons, I would make the following orders:

a) the respondents' application to quash the appeal is dismissed;

b) the notice of appeal is converted into a notice of application for leave to appeal; and

c) the application for leave to appeal is dismissed.

Costs

[62] Given the divided success, the parties will bear their own costs.

"The Honourable Madam Justice Stromberg-Stein"