# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Universal Supply Co. Ltd. v. Lockerbie & Hole Contracting Limited,* 2023 BCCA 280

Date: 20230711
Docket: CA47982

2023 BCCA 280 (CanLII)

Between:

**Universal Supply Co. Ltd. and Universal Supply Co. Inc.**

Appellants
(Defendants)

And

**Lockerbie & Hole Contracting Limited**

Respondent
(Plaintiff)

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Fitch
The Honourable Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated November 29, 2021 (*Lockerbie & Hole Contracting Limited v. Universal Supply Co. Ltd.*, 2021 BCSC 2321, Vancouver Docket S151680).

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|---|---|
| Counsel for the Appellants: | B. De Vita, K.C.<br>K.A. McGoldrick |
| Counsel for the Respondent: | S. J. Hammel, K.C.<br>A.M.L. Wong |
| Place and Date of Hearing: | Vancouver, British Columbia<br>April 21, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>July 11, 2023 |

**Written Reasons by:**
The Honourable Chief Justice Bauman

**Concurred in by:**
The Honourable Mr. Justice Fitch
The Honourable Justice Griffin

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***Summary:***

*The appellant supply company appeals the order of the chambers judge dismissing its application for summary judgment and granting leave to the respondent contracting company to modify its admitted facts. The appellant alleges the judge could have found the facts necessary to dismiss the action, and further alleges there is no triable issue that would justify the modification of admissions. Held: Appeal dismissed. The judge properly exercised his discretion to decline to decide the matter summarily and made no reviewable error in allowing the admission to be qualified. The factors of complexity and the amount involved support a traditional trial.*

**Reasons for Judgment of the Honourable Chief Justice Bauman:**

## I. Overview

[1] The summary trial rule [Rule 9-7(15)] in the Supreme Court of British Columbia directs the application judge so:

> **Judgment**
>
> (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,

[2] The sub-rule calls on the judge to undertake a suitability analysis in determining whether a particular case is appropriate for summary disposition.

[3] Here the defendants, Universal Supply Co. Ltd. and Universal Supply Co. Inc. (collectively “Universal”) sought a dismissal of an action brought by Lockerbie & Hole Contracting Limited (“Lockerbie”).

[4] Lockerbie’s action sought significant damages for the supply by Universal of allegedly defective copper pipe which was then incorporated into Lockerbie’s contract works for the new hospital in Abbotsford.

[5] After a two-day hearing, the summary trial judge concluded that he could not find the facts necessary to decide the issues before him; he dismissed the application.

[6] Universal appeals from that dismissal and essentially argues that the judge erred in permitting Lockerbie to withdraw an admission of fact, that if not withdrawn would put the issue of liability beyond doubt and properly lead to a dismissal of the action.

[7] I do not agree and would dismiss the appeal.

## II. Background

[8] Lockerbie was awarded a contract to install the plumbing and mechanical systems for a new hospital in Abbotsford (the "Project"). It contracted with Universal to supply 2" L-hard copper pipe (2" pipe) for the Project. In 2005 and 2006, Universal delivered three shipments of pipe totaling 5,364' of 2" pipe to Lockerbie. The hospital was completed in May 2008.

[9] During the relevant timeframe, Lockerbie was the mechanical contractor on 21 projects involving copper piping in Greater Vancouver and Victoria.

[10] The timing of the purchase orders and deliveries was not disputed. On 18 May 2005, Lockerbie issued a purchase order to Universal, including for 2" pipe. This order did not specify quantities.

[11] On 11 August 2005, Universal ordered 3'360' of 2" pipe from a Canadian manufacturer, Wolverine, for the purposes of filling Lockerbie's order. It received this shipment from Wolverine on 6 September 2005.

[12] On 21 January 2006, Universal ordered a further 2,040' of 2" pipe from Wolverine for the purpose of filling Lockerbie's order, which it received on 10 February 2006.

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[13] On 8 May 2006, Lockerbie made a second purchase order specifying 2,004' of 2" pipe from Universal.

[14] Universal delivered 2" pipe to Lockerbie in three shipments:

a) 1,560' of 2" pipe on 25 August 2005;

b) 1,800' of 2" pipe on September 20, 2005; and

c) 2,004' of 2" pipe on June 5, 2006.

[15] In 2013, the 2" pipe in the hospital began to leak. Much of the pipe installed by Lockerbie was defective and had to be removed. The defective pipe originated from a Chinese manufacturer Qingdao Hongtai Copper Co. Ltd. ("QH"). Much, if not all, of the defective pipe was stamped "NDL".

[16] Lockerbie claims that the defective QH pipe was supplied by Universal and that Universal is liable for its costs in replacing the pipe, as it says Universal was the only supplier of 2" pipe for the Project.

[17] Universal sought judgment dismissing Lockerbie's claim on a summary trial. Lockerbie said the case was not suitable for resolution by summary trial.

## III. Chambers Judgment

[18] The judge began by reviewing of the law regarding suitability for summary procedure under Rule 9-7(15) of the *Supreme Court Civil Rules* [*Rules*]: at paras. 10–14.

[19] The judge summarized the parties' positions. Lockerbie submitted that Universal must have supplied the defective pipe from inventory while it was awaiting delivery of the pipe from Wolverine. Universal contended that Lockerbie must have diverted QH pipe that it had obtained from another supplier for another project, of which Lockerbie had several ongoing at the time.

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[20] On its application for summary dismissal, Universal submitted that the second and third shipments were sourced from shipments of pipe recently received from Wolverine and did not contain QH pipe. It further submitted that QH pipe could not have been supplied in the first shipment, in part because, it argued, that shipment was not big enough to account for all the defective 2” pipe removed from the Project (with the result that at least some of the defective pipe would have had to come from another source, undermining Lockerbie’s claim).

[21] The judge agreed that, on the evidence, it was plausible and would be open to him to find, on a balance of probabilities, that the second and third shipments did not contain QH pipe: at para. 32. Notably, however, the judge did not actually make this finding of fact.

[22] With regard to the first shipment, the amount of defective pipe removed from the Project, in contrast to the total amount of pipe removed, was the subject of what the judge found to be contradictory evidence from Mr. Meldrum, a Lockerbie employee who participated in the removal project. The judge found that Mr. Meldrum’s evidence disclosed two possibilities: either 2,232’ of 2” pipe in total had been removed, of which only a portion was defective pipe (and a portion was good pipe wasted in the removal process), or 2,232’ of defective 2” pipe was removed, which would be less than the total amount removed, including wastage.

[23] I reiterate for clarity that the first of these possibilities would support the plausibility of Lockerbie’s claim that Universal supplied the total amount of defective pipe in its first shipment of 1,560’ of pipe. The second would tend to undermine Lockerbie’s claim.

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### Lockerbie's Application to Withdraw and Qualify Admissions

[24] In the course of submissions addressing this point, Lockerbie applied to withdraw and qualify two admissions with leave of the court under Rule 7-7(5)(a) of the *Rules*:

> [40] In its notice to admit dated May 3, 2021, Universal defined pipe manufactured by QH and stamped "NDL" as "Hongtai" pipe and sought the following admissions:
>
>> 2. At least 2,232 ft of 2" L-Hard Hongtai copper pipe was removed from the Project during remediation efforts.
>>
>> 3. The above figure is an underestimation of the amount of pipe supplied to the Project due to wastage during the installation process.
>
> [41] By response to notice to admit dated May 14, 2021, Lockerbie gave admissions as follows, without the underlined words by which it now seeks to qualify its admissions:
>
>> 2. In response to paragraph 2 of the Notice to Admit, the Plaintiff agrees that approximately 2,232 feet of <u>pipe which included the</u> defective 2" Type L-Hard Hongtai copper pipe was removed from the Project during remediation efforts.
>>
>> 3. In response to paragraph 3 of the Notice to Admit, the Plaintiff agrees that Universal supplied more than 2,232 feet of <u>pipe which included the</u> defective 2" Type L-Hard Hongtai copper pipe in order for the Plaintiff to install that amount in the Project.

[25] The judge noted the significance of this amendment at para. 42:

> …If Lockerbie is permitted to qualify its admissions, it can plausibly argue that the defective pipe was all supplied in the first shipment sourced by Universal from inventory.

[26] The judge set out the legal test for withdrawal or qualification of an admission, noting the test is whether it is in the interests of justice that the admission be withdrawn, taking into account a number of factors, including whether the truth of the admission is a triable issue.

[27] The judge found that, on the evidence, there was a triable issue as to the quantity of defective pipe removed from the Project. The judge also found that Lockerbie had made the admissions carelessly, without thinking the point through, and it was clear to him that the potential significance of the admissions only came into focus for Lockerbie's counsel at the hearing: at para. 45.

[28] The judge concluded that it was "in the interests of justice that this case be decided on the evidence, and not on the basis of a careless admission": at para. 48. He noted that any prejudice to Universal, who had relied on the admission in bringing its application for summary dismissal, could be addressed in costs.

[29] The judge accordingly allowed Lockerbie's application to withdraw and qualify its admissions in the manner indicated.

[30] Regarding suitability for summary trial, the judge went on to state at para. 49:

> On the record on this application, I am unable to find as a fact that the first shipment was not large enough to account for all the defective pipe that was later removed from the project.

***Universal's Evidence***

[31] Universal called two witnesses, Mr. Pudney, who was the manager of Universal's Surrey branch and involved in supply and sourcing for Lockerbie's order, and Mr. Reed, Universal's director of purchasing in 2005 and 2006.

[32] If accepted, their evidence would establish that all of Universal's QH pipe in stock had been segregated as defective by the time of the first shipment on 25 August 2005. Mr. Reed testified that Universal had never purchased pipe from NDL Industries Inc., a small local importer which purchases pipe from China, and that NDL is the only importer he knows of that stamps its name onto pipe it imports.

[33] In addition, they testified that there was an understanding between Universal and Lockerbie that only North American pipe would be supplied. However, Lockerbie witness Mr. Mussbacher, an employee who was directly involved in the project, denied that such an understanding existed.

[34] To support their assertion that only North American pipe was delivered, Mr. Pudney and Mr. Reed relied on photographs of unwrapped pipe (characteristic of locally manufactured pipe) in a seacan, which they said contained the first shipment. They testified that pipe shipped from overseas is generally wrapped in plastic to protect it from salt contamination.

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[35] Overall, the judge found their evidence "carries substantial weight but it is not conclusive". Universal conceded that it was impossible to tell from the seacan photo whether the pipe was 2" pipe. The judge further noted that the events in question had taken place 16 years earlier, and questioned the witness' memory of the timing and details of the segregation of the QH pipe. Notably, he concluded that "[n]either witness' evidence has been tested by the kind of cross-examination that takes place at a trial": at para. 60.

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### *Lockerbie's Evidence*

[36] Mr. Mussbacher asserted that all 2" pipe used in the construction of the Project was supplied by Universal, arguing that there were no purchase orders placed by Lockerbie for 2" pipe to any other supplier. He further relied on evidence of records extracted from Lockerbie's "material ordering program" ("MOP"). Universal criticized the MOP records as unreliable, pointing to an internal email exchange in which a Lockerbie employee noted discrepancies. Mr. Mussbacher offered explanations for these discrepancies and pointed out that in any event, the discrepancies were not large enough to account for the amount of defective pipe in the Project.

[37] Universal further pointed to documentation showing that Lockerbie transferred small quantities of pipe between projects in 2006 and 2007. The judge found that these small transfers did not discredit Lockerbie's case.

[38] The judge concluded that Universal's critiques of Lockerbie's evidence were "not compelling", stating at para. 70:

> While it may be true that Lockerbie's records are not reliable and the absence of documentation of a transfer of a significant quantity of 2" pipe from another project to the Abbotsford hospital project is not significant, I cannot come to that conclusion on the record before me.

### *Burden of Proof*

[39] Finally, the judge addressed the question of whether the burden of proof required a decision in Universal's favour. Noting that, in a conventional trial, he

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would be bound to decide the case for Universal because Lockerbie bears the burden of proof, he stated that in a summary trial, Lockerbie's inability to prove its case is not necessarily fatal. The judge asked "whether there is a reasonable prospect that a conventional trial would enable Lockerbie to prove that which it cannot now prove": at para. 73.

[40] The judge reiterated that he was unable to find as a fact that the first shipment was not large enough to account for all the defective 2" pipe that was later removed from the Project, and therefore whether or not Universal was the supplier of the defective pipe. The judge summarized at para. 75:

> In short, I am unable to decide the critical question of fact necessary to resolve this action. I think there is a reasonable prospect that a conventional trial featuring a lengthier and deeper investigation of the facts, supported by cross-examination of the witnesses, would permit findings that would resolve the issue. In that light, it would not be just to decide the case summarily on the basis that Lockerbie has failed to discharge its burden of proof.

[41] The judge further stated that he had considered whether there were orders he could make to facilitate resolution of the action, and that he was not confident that cross-examination of key witnesses would suffice to resolve the factual issues. The judge again stated that justice is more likely to be achieved by a trial.

[42] The judge accordingly dismissed Universal's application for summary trial, but awarded it costs of the application in any event of the cause, in recognition that Universal had brought the application on the basis of Lockerbie's original admissions, the qualification of which likely determined the outcome: at para. 79.

## IV. Issues

[43] Universal contends the judge erred in:

1. Finding there was a triable issue with respect to Lockerbie's admitted facts, and therefore in allowing Lockerbie to amend its admissions;

2. Applying the wrong test for the suitability of a summary trial and finding there was a reasonable prospect Lockerbie could prove its claim through a full trial; and

3. Reversing the applicable burden of proof, requiring Universal to prove it did not supply the defective pipe.

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## V. Discussion

### i. Withdrawal and Modification of Admissions

#### *Positions of the Parties*

##### *Appellant*

[44] Universal submits that whether there is a triable issue, and thus whether it is in the interests of justice that an admission be withdrawn, will depend on whether there is evidence that the admitted fact is untrue: *Bank of Montreal v. Quality Feeds Alberta Ltd.*, 1995 CanLII 808 (BC CA) at para. 43; *Hamilton v. Ahmed*, [1999] B.C.J. No. 311, 1999 CanLII 7029 at para. 15. It cites a number of recent cases in the BC Supreme Court to the effect that, where a party has not provided evidence to substantiate its newly advanced claim, its application to withdraw an admission has been denied.

[45] Here, Universal says there was no evidence that the fact first admitted by Lockerbie, that “approximately 2,232 feet of defective 2” Type L-Hard Hongtai copper pipe was removed from the Project” was untrue, and thus that there was no triable issue. Accordingly, it says the application to withdraw and qualify admissions should have been dismissed.

[46] The crux of this argument is that the judge was mistaken in finding the evidence was inconclusive that less than 2,232’ of defective pipe was removed from the Project, when in fact all the evidence established that 2,232’ of <u>defective</u> pipe were removed and that <u>more</u> than 2,232’ of total pipe were removed.

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[47] Universal takes particular issue with the judge's finding that Mr. Meldrum gave conflicting evidence on this point. The judge at para. 35 describes an email copied to Mr. Meldrum on 5 May 2016, in which the judge states Mr. Meldrum is said to have estimated that "a total of 2,232' of 2" pipe had been replaced": at para. 35. In light of Mr. Meldrum's evidence in examinations for discovery confirming that there was wastage in the removal process, the judge at para. 38 stated "…it seems clear that less than 2,232' of defective 2" pipe was removed".

[48] Universal says, on the contrary, that the e-mail in fact stated that "the total estimated linear feet of "2" NDL pipe to be replaced" was 2,232'". It submits that "the only possible reading of this evidence is that 2,232' of defective pipe was removed", and that this misapprehension drove the judge's conclusion that Mr. Meldrum's evidence in examinations for discovery was inconsistent with his later testimony on discovery that "2,232 feet of the Chinese pipe, the NDL pipe, was identified and had to be removed": at para. 38.

[49] Further, Universal says the judge failed to refer to a spreadsheet that stated 2,232 was the "total footage of Chinese NDL Copper pipe to be replaced including new found pipe". It says he similarly did not mention Mr. Mussbacher's evidence, which was that the remediation required Lockerbie "to remove and replace approximately 2,232' of defective pipe", and referred to the May 5th email in support of this statement. It emphasizes that neither Mr. Meldrum's nor Mr. Mussbacher's evidence has been corrected.

[50] In summary, Universal says that all of the evidence supported that 2,232' of defective pipe was removed, and thus the judge was wrong to conclude that there was a triable issue on this fact.

[51] Alternatively, even it was a triable issue, Universal submits that the size of the first shipment could not account for all the defective pipe removed, due to the large discrepancy between the 1,560' shipment and a 2,232' total. It says it was unchallenged that "almost all" of the pipe removed from the Project had the NDL

stamp on it, and that there would therefore be a small amount of non-NDL pipe removed incidentally with the defective pipe.

***Respondent***

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[52] Overall, Lockerbie submits the determination of the chambers judge to allow the withdrawal and qualification of the admission is a discretionary decision and this Court should not interfere unless the judge erred in principle.

[53] It contests the allegations of misapprehension and failing to consider evidence, arguing that the judge did consider the spreadsheet as well as the 5 May 2016 email which contained the author's written and contemporaneous explanation of the spreadsheet. It says the spreadsheet was a matter of interpretation, and the judge's reasonable interpretation is that the 2,232' figure in that document was referring to all of the pipe, defective and non-defective, removed from the Project.

[54] Lockerbie further affirms the judge's finding that Mr. Meldrum's discovery evidence upon examination was that the 2,232' of pipe removed was both defective and non-defective pipe, and that this was inconsistent with his later discovery evidence.

[55] As such, Lockerbie submits it cannot be said that the judge had no evidence on which to base his conclusion that a triable issue existed that only a portion of the 2,232' of removed pipe was defective pipe and that any admission to the contrary would be untrue and should be withdrawn.

[56] As to the quantity of the first shipment, Lockerbie contests Universal's assertion that the discrepancy between the amount of pipe in that shipment and the amount of defective pipe is so large that there is no triable issue as to whether the first shipment could account for all the defective pipe.

[57] It says this submission is based on Mr. Meldrum's evidence that "almost all" of the pipe removed had the NDL stamp on it, but it is not confirmed that all pipe with an NDL stamp was defective pipe.

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[58] Further, Lockerbie asserts that Universal had 2” QH pipe in its inventory at the time of the second shipment in September 2005, and therefore whether the first shipment was large enough to account for all the defective pipe is not the only triable issue. It asserts that it is entitled to damages against Universal for any portion of defective pipe that it is able to prove was supplied by Universal.

[59] It says it is in the interests of justice for it not to be deprived of a trial on the merits where the evidence discloses a fair issue to be tried, and where the only prejudice to the other party is that of being deprived of relying on the admissions occasioned through the inadvertence of a solicitor: *Weiss v. Koenig*, 2010 BCSC 1292 at para. 26.

***Analysis***

[60] Rule 7-7(5) of the *Rules* provides:

> **Withdrawal of admission**
>
> (5) A party is not entitled to withdraw
>
> (a) an admission made in response to a notice to admit,
>
> (b) a deemed admission under subrule (2), or
>
> (c) an admission made in a pleading
>
> except by consent or with leave of the court.

[61] As Justice Newbury confirmed in *Sidhu v. Hothi*, 2014 BCCA 510 at para. 26, allowing an application to withdraw an admission may help ensure the plaintiffs' claim will be heard on the merits — an overarching objective referred to in Rule 1-3 of the Supreme Court Civil Rules.

[62] The test for leave to withdraw or qualify an admission, as set out in *Hamilton v. Ahmed*, [1999] B.C.J. No. 311, 1999 CanLII 7029, and clarified in *Sidhu* at paras. 11 and 25, is whether there is a triable issue which, in the interests of justice, should be determined on the merits and not disposed of by an admission of fact.

[63] In applying that test, all the circumstances should be taken into account including the following factors:

> (a) whether the admission was made inadvertently, hastily, or without knowledge of the facts;
>
> (b) whether the "fact" admitted was or was not within the knowledge of the party making the admission;
>
> (c) where the admission is one of fact, whether it is or may be untrue;
>
> (d) whether and to what extent the withdrawal of the admission would prejudice a party; and
>
> (e) whether there has been delay in the application to withdraw the admission and any reason offered for such delay.

[64] The heart of the issue goes to the judge’s findings on Mr. Meldrum’s evidence from paras. 35–39 of the reasons.

[65] In my view, Universal is correct that the judge started this analysis at para. 35 by misquoting the 5 May 2016 email in which Mr. Meldrum estimates that the “Total estimated LF of…2" NDL pipe to be replaced” is “2,232 feet”.

[66] The statement in the email in fact appears to support Mr. Meldrum’s discovery evidence that “2,232 feet of the Chinese pipe, the NDL pipe, was identified and had to be removed”. His earlier evidence in examination for discovery is not inconsistent with this, but merely leads to the conclusion, as the judge properly observed at para. 37, that 2” pipe that was not defective was also removed in the remediation.

[67] As Lockerbie notes, Mr. Meldrum’s evidence that 2,232’ of NDL pipe was removed seems to be further supported by Mr. Mussbacher’s affidavit.

[68] But what this extended discussion of the evidence overlooks is that, as Lockerbie has noted, there is no evidence to the effect that all NDL pipe, that is pipe

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so stamped, was indeed defective. Mr. Meldrum did not say at any time that "2,232 feet of defective 2" Type L-Hard Hongtai copper pipe was removed from the Project during remediation efforts" and that is what the original admission of Lockerbie, which it sought to modify, asserts. While the notice to admit defines pipe manufactured by QH and stamped "NDL" as "Hongtai" pipe, it is possible that Universal could have supplied pipe stamped NDL that was not defective QH pipe. The judge found that Universal's witness Mr. Reed had over-stated the extent of his personal knowledge in connection with the "NDL" markings.

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[69] Accordingly, Lockerbie's original admission strictly speaking may be untrue.

[70] That said, I cannot gainsay the judge's exercise of discretion allowing the qualification of the original admission. The judge weighed the various considerations relevant to that exercise, including making a costs order to offset any prejudice to Universal, and no reviewable error is at all apparent.

### ii. Suitability for Summary Trial

#### ***Positions of the Parties***

[71] Universal submits that the judge recognized that, if this were a conventional trial, he would be bound to dismiss the claim because Lockerbie had not proven its case. In this light, it says the judge erred in determining it would be unjust to decide the case summarily because there was a "reasonable prospect" that a full trial would allow Lockerbie "to prove what it cannot now prove".

[72] Universal says it is trite law that a summary trial is a trial, and that the parties are required to take every reasonable step to put their best case forward: *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275; *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 32–33; *Harrison v. British Columbia (Children and Family Development)*, 2010 BCCA 220 at paras. 40–41. It says that whether the plaintiff might be able to prove its case at trial when it could not do so at summary trial is not a basis for finding injustice, as this conflicts with the above principle.

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[73] Universal further says that the judge did not identify "head-on" conflicts in the evidence that would require *viva voce* testimony to resolve them. It questions what evidence Lockerbie could lead to establish its claim and submits Lockerbie is simply hoping that "something might turn up", contrary to established summary trial principles.

[74] Lockerbie asserts the judge properly exercised his discretion in finding he could not grant judgment under Rule 9-7(15)(b), and clearly set out the basis for this conclusion: that it would be unjust to dismiss an action when he was unable to make a finding of fact that was critical to the action: at para. 74.

[75] It challenges Universal's position that there was no conflicting evidence requiring a trial, pointing to Lockerbie's evidence that there was no other supplier of 2" pipe and Universal's evidence that all 2" QH pipe was segregated and not shipped to Lockerbie. It also says that to determine whether Universal supplied defective pipe would require assessing the credibility of Universal's witnesses regarding their efforts to segregate QH pipe, as well as Lockerbie's witnesses regarding their evidence that there was no other supplier of pipe.

### *Analysis*

[76] As Lockerbie points out, a decision as to the suitability of summary trial is discretionary and is owed a high degree of deference. An appeal court will only interfere with such a decision if the judge wrongly exercised their discretion, in that no or insufficient weight has been given to relevant considerations, or if the decision is clearly wrong and may result in an injustice: *Gichuru* at para. 34.

[77] Appellate intervention is justified if the decision not to grant summary judgment was "clearly wrong". As stated in *Harrison*, "if all of the facts necessary to support the defendant's application for dismissal could have been found in the evidentiary record, and it would not have been unjust for the trial judge to have done so, this Court will be entitled to substitute its opinion and dismiss the action": at para. 42.

[78] However, "[t]here is no absolute rule that a plaintiff who has failed to lead sufficient evidence to prove its case, or a defendant who has failed to lead sufficient evidence to meet the case against it, will have judgment granted for or against them by virtue of that fact alone": *Middelaer v. Delta (Corporation)*, 2013 BCCA 189 at para. 14.

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[79] In *Creyke v. Creyke*, 2016 BCCA 499, Justice Dickson, noting the deferential standard of review applicable to a decision not to proceed by summary trial, stated:

> 45 Whether the necessary facts can be found or it would be unjust to decide the issues raised on a summary trial application are separate, but related, questions. Although it would not be just to determine a matter where necessary facts cannot be found, in some circumstances it may be unjust to do so even if, on the whole of the evidence, it is possible to find the necessary facts.
>
> [Citations omitted.]

[80] Dickson J.A. concluded that the judge was not clearly wrong in declining to give summary judgment. The judge found that the factual and legal issues were complex, some of the principal actors were deceased and that the parties had not fully directed their minds to the legal concepts involved in their dispute: at para. 63.

[81] In *Harrison*, the plaintiff sought damages against the defendants in negligence, defamation, and misfeasance in public office. The parties had all applied to have the matter determined by summary trial, and agreed that their affidavit and transcript evidence provided an adequate basis to properly resolve the issues: at para. 5. The chambers judge declined to do so on the basis that he could not find the necessary facts and that there were "unanswered questions" related to aspects of a defendant's testimony.

[82] On appeal, this Court found that the impugned unanswered questions were not material to the issues of liability, and that the record did disclose the facts necessary to determine the legal issues. Specifically, the claim of negligence could not have succeeded as the defendant did not owe the plaintiff a duty of care, nor was there evidence of the bad faith necessary for a finding of either defamation or

misfeasance. Accordingly, the Court found it would not have been unjust to grant summary judgment and dismiss the action.

[83] This is not a case such as *Harrison* where the outstanding evidentiary issues have nothing to do with answering the legal question of liability. Here, the issue of liability is tied to which party's evidence the judge accepts.

[84] The judge, after a careful and comprehensive review of the record before him and after a two-day hearing, in comprehensive reasons for judgment, concluded he could not find the facts necessary to decide the issues of fact and law before him and that it would not be just to grant summary trial judgment in such circumstances.

[85] While, as I have related, he apparently erred in inferring the precise nature of Mr. Meldrum's evidence, that evidence properly understood still does not answer the critical question: was all of the 2,232' of NDL pipe removed from the Project defective, thus lending credence to Universal's argument that the first shipment could not, because of its size, have been the source of the defective pipe? Nor does it answer the question of whether the second shipment might have contained defective QH pipe; while the judge hinted at a conclusion he could reach in that regard, he made no such explicit finding.

[86] In my view this is a clear case of an evidentiary record that raises a number of triable issues that cry out for exposure in a traditional trial. In my view many of the considerations that properly guide the suitability for summary disposition analysis favour the judge's exercise of discretion here. Those considerations include the complexity of the issues and the amount involved, which in this case mean that a conventional trial would not be disproportionate. These factors support the judge's conclusion that it would not be just to dismiss the case summarily and that justice "is more likely to be achieved by a conventional trial": at para. 76.

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### iii. Burden of Proof on Summary Trial

#### *Positions of the Parties*

[87] In support of its argument that the judge reversed the burden of proof, Universal refers to the judge's statement at para. 74 that it had "offer[ed] reasons to think it is likely that the first shipment did not contain defective 2" pipe, but it is not conclusive". Universal says it was not required to conclusively prove that it did not supply the defective pipe, and that the question should have been whether Lockerbie had proven on a balance of probabilities that it had.

[88] Universal further argues that the judge's statement that Lockerbie's evidence "tends to establish that the defective pipe must have been supplied by Universal because it did not come from any other supplier" is incorrect. It says the simple absence of purchase orders from other companies cannot be determinative in the face of the MOP evidence which suggests the pipe may have come from Lockerbie's stock.

[89] Universal submits that, given the MOP evidence, even aside from the issue of the amount of defective pipe, Lockerbie cannot prove that all the pipe on the Project came from Universal.

[90] For its part, Lockerbie submits that Universal's argument conflates the burden of proof in the merits of the case with the test for suitability to determine the matter on summary trial. It says the judge clearly applied the correct law in exercising his discretion not to decide the matter summarily.

#### *Analysis*

[91] On an application for summary trial by the defendant, the plaintiff retains the onus of proof of establishing its claims on a balance of probabilities: *Gichuru* at para. 35, citing *Miura v. Miura* (1992), 66 B.C.L.R. (2d) 345 (C.A.) at 352.

[92] The judge correctly noted that Lockerbie bears the burden of proof, but that in the context of a summary trial, Lockerbie's inability to prove its case is not

necessarily fatal: at para. 73. I do not think this amounts to a reversal of the burden of proof, and is consistent with the above cited principle from *Middelaer* and *Creyke*. In my view, this is a case where the judge's discretion not to proceed by summary trial should not be disturbed.

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## VI. Disposition

[93] I would dismiss the appeal.

[94] I say further to Lockerbie's submission to the effect that it may demonstrate at trial that at least a portion of the defective pipe was supplied by Universal (thereby proving some proportionate liability on the part of Universal) – that submission might have its day in court after any amendments (if necessary) to Lockerbie's pleadings are sought and granted.

"The Honourable Chief Justice Bauman"

**I agree:**

"The Honourable Mr. Justice Fitch"

**I agree:**

"The Honourable Justice Griffin"