# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Horseshoe Valley Ranch Ltd. v. Pillar Capital Corp.,* 2023 BCCA 379

Date: 20231012
Docket: CA48877

Between:

**Horseshoe Valley Ranch Ltd., Elvern Kenneth Esau, Stacy Elvern Esau, and Leanne Alma Esau**

Appellants (Respondents)

And

**Pillar Capital Corp.**

Respondent (Petitioner)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher

On an application to vary: An Order of the Court of Appeal for British Columbia, dated May 18, 2023 (*Horseshoe Valley Ranch Ltd. v. Pillar Capital Corp.*, Vancouver Docket CA48877).

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|---|---|
| Counsel for the Appellants: | B. La Borie |
| Counsel for the Respondent: | J.B. Ross |
| Place and Date of Hearing: | Vancouver, British Columbia<br>September 26, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>October 12, 2023 |

**Written Reasons by:**
The Honourable Madam Justice Fisher

**Concurred in by:**
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock

***Summary:***

*This is an application to vary the order of a single justice in chambers denying the appellants leave to appeal. The respondent commenced a foreclosure proceeding seeking an order nisi based on collateral mortgages granted by the appellants. Before the chambers judge, the appellants raised six defences and sought an order that the proceeding be referred to the trial list. The chambers judge found that three of the six defences raised triable issues, but exercised his discretion to order the issues be resolved through hybrid procedures. The appellants sought leave to appeal to this Court, arguing the chambers judge erred in finding that their misrepresentation defence did not raise a triable issue and in failing to order discovery on the misrepresentation issue and the triable issues. The justice denied the appellants' application for leave, holding that an appeal at this juncture in the proceedings is premature and not in the interests of justice. Held: Application dismissed. The appellant has not established that the justice was wrong in law, wrong in principle, or misconceived the facts. She considered all the factors relevant to granting leave to appeal and properly exercised her discretion in concluding that it would not be in the interests of justice to grant leave to appeal at this time.*

**Reasons for Judgment of the Honourable Madam Justice Fisher:**

[1] The appellants are respondents in a foreclosure proceeding in which they sought an order referring the matter to the trial list. The chambers judge concluded that some of the matters in dispute raised triable issues but could be determined using hybrid procedures rather than pleadings and discovery. The appellants sought leave to appeal that order but their application was dismissed. They now seek an order under s. 29 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, to vary the order of the justice denying them leave to appeal.

[2] The basis of the underlying foreclosure proceeding is a loan agreement entered into between the respondent Pillar Capital Corp. (Pillar) and a non-party, Tyran Transport Ltd. (Tyran), that was guaranteed by collateral mortgages over parcels of land owned by the appellant Horseshoe Valley Ranch Ltd. and the personal appellants.

[3] Tyran defaulted on the loan agreement and Pillar then brought foreclosure proceedings against the appellants. The appellants opposed Pillar's application for an *order nisi*, raising six defences, and sought to move the petition to the trial list.

**The chambers judge's decision**

[4] The chambers judge exercised his discretion pursuant to Rules 22-1(7)(d) and 21-7(5)(k) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], which permit the court, in a foreclosure proceeding, to:

> … order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

[5] In reasons indexed as 2023 BCSC 82, the chambers judge applied the principles established by this Court in *Cepuran v. Carlton*, 2022 BCCA 76 [*Cepuran*], that a judge hearing a petition that raises triable issues is not required to refer the matter to trial but rather has discretion to do so or to use hybrid procedures within the petition proceeding itself, such as limited discovery of documents or cross-examination on affidavits. He considered the factors relevant to this question, summarized in *Phaneuf v. 0896459 B.C. Ltd.*, 2022 BCSC 1706, to include:

> [46] … the undesirability of multiple proceedings, the desirability of avoiding unnecessary costs and delay, whether the particular issues involved require an assessment of the credibility of witnesses, the need for the Court to have a full grasp of all the evidence, whether there is some urgency or the matter is highly time sensitive, and whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

[6] The chambers judge concluded that three of the defences raised by the appellants were bound to fail but three other defences raised triable issues. The appellants take issue with the judge's determination that one of their defences, a claim of misrepresentation, was not a triable issue, as well as his failure to order discovery.

**Misrepresentation claim**

[7] The appellants alleged that they were induced to enter into the guarantees and collateral mortgages by a misrepresentation made by Pillar as to the amount to be secured by the collateral mortgages. This arose from the negotiations between

the parties leading up to the signing of the loan agreement, guarantees and security documents in February 2016. The chambers judge described the evidence:

> [23] On or around December 22, 2015, Pillar issued a commitment letter. The commitment letter contemplated that mortgage security would be granted by the guarantors for the entire amount of the debt.
>
> [24] Stacy Esau deposed that in January 2016, he engaged in several communications with Mr. Dizep [the President of Pillar], in which they discussed the idea that the loan was to be structured into two facilities whereby one loan would be secured by equipment and the other against real property.
>
> [25] The misrepresentation claim is based on an email dated January 19, 2016 to Stacy Esau from Mr. Dizep, which states as follows:
>
> > I will follow up with a call but in order to proceed, we will have to amend as follows:
> >
> > Total loan (as agreed) = $2,800,000
> >
> > Segment 1) $2,280,000
> >
> > - this is supported by equipment at an advance of 75% against value
> >
> > - all terms remain the same, with the exception of principal payments.
> >
> > - blended principal and interest payments of $62,500 monthly are required, balloon end of term
> >
> > Segment 2) $520,000
> >
> > - this Segment is supported by a 2nd position against real estate owned, including all personal and commercial
> >
> > - interest only, priced at 2% per month, facility fee of 4%
> >
> > - interest reserve to be funded from loan advance for the minimum term (4 months)
> >
> > - 50% of loan ($260,000) to be repaid by end of minimum term (4 months)
> >
> > …
> >
> > The equipment portion is straightforward. However, the real estate portion of the loan is a stretch and require the above amendment in order to proceed. The personal real estate value is undetermined as we have no 3rd party assessments / appraisals completed. The commercial real estate (Kicking Horse) has limited equity based on purchase price and vendor note.

[8] The appellants contended that this email constituted a misrepresentation because the loan agreement, as finally presented and signed, included unlimited mortgage security over both facilities.

[9] The chambers judge held that this claim could not succeed at law. He found the January 19, 2016 email to be ambiguous, but accepting the appellants' interpretation, the best that could be said "is that the email set out what Mr. Dizep contemplated the Loan Agreement would say": at para. 30. He set out the law as follows:

> [31] Generally speaking, in order to be actionable, a false representation must be one of fact. There is an exception in relation to statements of future intention but in order for that exception to be operative, the claimant must prove that the other party deliberately misstated their present intention: see *Satnam Education Foundation v. MB Dream Construction & Supplies Ltd.*, 2020 BCSC 1089 at para. 30.

[10] The judge found the alleged misrepresentation was not a misrepresentation of fact, as it was not a falsely made statement of future intention. He added:

> [33] No authority has been brought to my attention in support of the proposition that pre-contractual negotiations as to what a future written contract between the parties is intended to say can ground a claim in misrepresentation.

[11] He concluded that the defence based on misrepresentation could not succeed at law and was thus bound to fail, and therefore there was no triable issue in respect of this claim.

**Hybrid Procedures**

[12] The chambers judge accepted that three defences raised triable issues: (1) Pillar received an annual rate of interest in breach of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46, (2) Pillar improvidently realized on its security, and (3) Pillar made mistakes in calculating the amount due and owing. In concluding that these issues did not warrant a referral to the trial list, he reasoned:

> [71] In [*Phaneuf v. 0896459 B.C. Ltd.*, 2022 BCSC 1706] at para. 46, which is cited at para. 12 of these reasons, the Court listed the factors to be

> considered in determining both whether to convert a petition to an action and whether to use hybrid procedures within the petition proceeding.
>
> [72] Further, as required by *Cepuran* and *Phaneuf*, it is important to balance the interests of proportionality and access to justice while preserving the court's ability to fairly determine a case on the merits. The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far, as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues and the complexity of the proceeding.
>
> [73] I have considered these factors and I have concluded that these three issues do not require pleadings and discovery to resolve, and can be fairly determined by use of a more limited process …

[13] The chambers judge granted the parties leave to exchange expert evidence and further affidavits and to conduct cross-examinations in support of their positions on the issues of criminal interest rate and improvident realization. Following these steps, he referred the matter to the Registrar under Rule 18-1 to determine the amount owing.

[14] The order of the chambers judge states in part:

> THIS COURT ORDERS AND DECLARES that:
>
> 1. There is no triable issue with regard to the Respondents' misrepresentation claim.
>
> …
>
> 3. There are three triable issues on the Petition:
>
>  a. whether there has been a breach of s. 347 of the *Criminal Code*, and if so, what impact that has on the Loan Agreement or the amount owing to the Petitioner (the "Criminal Interest Rate Issue");
>
>  b. whether the Petitioner improvidently realized on its security, and if so, what impact that has on the Loan Agreement or the amount owing to the Petitioner (the "Improvident Realization Issue"); and
>
>  c. what is the amount owing to the Petitioner (the "Amount Owing");
>
> 4. The parties are granted leave to exchange expert evidence in relation to the Criminal Interest Rate Issue, and to conduct cross-examinations on that evidence.
>
> 5. The parties are granted leave to exchange further affidavit evidence, including expert evidence, in relation to the Improvident Realization Issue, and to conduct cross-examinations on those affidavits.

> 6. The Respondents shall deliver their affidavit evidence first, and the Petitioner's evidence shall be responsive to that evidence. Cross-examinations, if any, shall be conducted following the exchange of affidavits.
>
> 7. Once the exchange of evidence and cross-examinations are complete, either party will be at liberty to apply to the Court for determination of the Criminal Interest Rate Issue and the Improvident Realization Issue.
>
> 8. Following the above processes, and absent a resolution, the matter will be referred to the Registrar for a determination of the Amount Owing and that the result be certified by the Registrar.
>
> 9. The hearing of the Petition is adjourned generally. The Parties are at liberty to apply for directions. Mr. Justice K. Loo is seized of future hearings in this matter.
>
> …

[15] Counsel advised us at the hearing that this order had not yet been entered, and there was some discussion about whether the inclusion of a declaratory order properly reflects the orders granted by the chambers judge in light of the applications before him. It is important to emphasize the importance of having an entered order before us on appeal (and before the justice on an application for leave to appeal). However, as I indicate below (at para. 34), for the purpose of this review, I do not consider the form of the order to be material as we are able to address this application without resolving any issue arising from the wording of the order.

## Application for leave to appeal

[16] In chambers in this Court, the appellants argued that the chambers judge failed to recognize the merits of the misrepresentation claim. The justice described the argument as follows:

> [16] … the chambers judge failed to consider a line of authorities that concern how a pre-contractual representation with respect to a guarantee can vitiate that guarantee, despite the written agreement … [and] failed to observe that there were additional documents that could reveal Pillar's intentions during the negotiation of the loan agreements.

[17] The appellants asserted that the chambers judge ought to have awaited a full factual record and his conclusion was premature.

[18] They also argued that the chambers judge made a palpable and overriding error in finding the other issues did not require discovery in light of an admission by Pillar that there were relevant, undisclosed documents. They contended that this amounted to injustice and unfairness.

[19] The justice set out the correct test for leave to appeal:

> [20] …
>
> 1) whether the point on appeal is of significance to the practice;
>
> 2) whether the point raised is of significance to the action itself;
>
> 3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> 4) whether the appeal will unduly hinder the progress of the action.
>
> The criteria for leave are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang,* 2007 BCCA 280 at para. 10.

[20] She noted that at least part of the proposed appeal takes issue with the chambers judge's exercise of discretion "relating to key case management powers that are firmly within his domain" and went on to say:

> [21] … This Court will not substitute its own view concerning the process of litigating the underlying issues to resolve this relatively complex dispute. An appellate court will consider whether the judge erred in principle, made an order unsupported by the evidence, or made an order that would result in an injustice: *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 319 at para. 47.

[21] She considered further appellate guidance on the use of hybrid procedures to resolve triable issues in foreclosure proceedings was likely to be of little use, as in *Cepuran*, a five-judge division of this Court expressed reluctance to provide guidance on the factors to consider, preferring to defer to the courts to do so on a case-by-case basis. Given that these determinations will be fact specific, she did not consider this factor to weigh in favour of granting leave: at paras. 23–24.

[22] The justice was also of the view that granting leave to appeal would lengthen the proceedings and would frustrate the purpose of the powers afforded to the chambers judge under Rule 22-1(7)(d) to manage actions efficiently:

> [26] … I would not give effect to the Horseshoe Parties' argument that the significant length and complexity of the existing proceedings is ground to further bloat this action beyond what is necessary.

[23] The justice found that the proposed appeal met the relatively low merit threshold on the question of misrepresentation but noted that the only order made in respect of the misrepresentation defence was a declaration that "there is no triable issue", which appeared to be unenforceable: at paras. 27–28. She did not consider the appellants' argument that the chambers judge made a palpable and overriding error in failing to order discovery to be of sufficient merit to warrant scrutiny by a division of this Court:

> [30] It is unclear if this argument amounts to anything more than a request that this Court reconsider, *de novo*, the appropriate procedure for resolving these triable issues. As noted, *Cepuran* determines that it is the province of the chambers judge to make orders on the appropriate procedures.

[24] It was her view that the points raised by the appellants are not of interest to the practice and have been well settled.

[25] In dismissing the application, the justice summarized her reasons as follows:

> [32] In summary, an appeal would unduly hinder the underlying foreclosure proceeding, which is designed to be a summary process, but which has evolved into a lengthy convoluted proceeding. What is at issue is akin to mid-trial rulings, as the petition has not yet been decided. At best, the Horseshoe Parties seek leave to appeal discretionary decisions relating to procedural issues, and orders made during the course of the proceeding by the judge who has conduct of the petition proceeding. I would deny the Horseshoe Parties' application for leave to appeal. It is not in the interests of justice to grant leave at this point in time in the underlying proceedings. The proper time to launch an appeal is following a final resolution of the petition, and, at that point, the Horseshoe Parties can raise their concerns about the process.

**Application to vary**

[26] An application under s. 29 of the *Court of Appeal Act* is not a rehearing of the application for leave to appeal. The appellants must demonstrate that the justice was wrong in law, wrong in principle, or misconceived the facts in refusing to grant leave: *Ghag v. Ghag*, 2021 BCCA 366 at para. 15; *Seattle Environmental Consulting Ltd. v. Workers' Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 6–8.

[27] The appellants before us repeat the arguments they made before the justice. They rely on *Bauer v. The Bank of Montreal*, [1980] 2 S.C.R. 102, and several cases following it to argue that the chambers judge should have considered whether Pillar made a representation that induced them to enter into the guarantees and collateral mortgages. They submit the question of whether misrepresentation is a triable issue is not simply a procedural decision but a substantive one, as it affects their litigation rights. They say the justice erred in determining that such questions are premature and should not be appealed until the petition has been resolved in the court below.

[28] The appellants also argue that failing to order discovery was unfair and unjust given the uncontroverted evidence that Pillar had in its possession documents relevant to the misrepresentation defence and the triable issues. They say this is, again, not a purely procedural matter but rather affects their ability to access relevant documents and "have their day in court" on the issues.

[29] In Pillar's submission, the justice did not determine that there was no ability to appeal the finding that the misrepresentation defence was not a triable issue, but rather that the leave factors as a whole weighed against granting leave to appeal at this time. It points out that the judge's order overall was a procedural one, made in the course of hearing Pillar's petition for an *order nisi* and the appellants' application to move the matter to the trial list. Pillar says further that the justice was correct in concluding that the chambers judge was best positioned to determine whether not ordering discovery would cause injustice to the appellants and finding no basis to interfere with his exercise of discretion.

**Analysis**

[30] I consider it important that the order on which leave to appeal is being sought was made by a chambers judge with conduct of a foreclosure proceeding after hearing a petitioner's application for an *order nisi* and a petition respondents' application to refer the matter to the trial list. As this Court noted in *Cepuran*, the *Supreme Court Civil Rules* contemplate a summary procedure for matters brought by way of petition and the mere fact that there is a triable issue is no longer a good reason to dispense with a petition's summary procedure in favour of an action. Judges hearing petition proceedings that raise triable issues are no longer required to refer the matter to trial, but rather have discretion to do so or to use hybrid procedures to assist them in fairly determining the issues: at paras. 158–160.

[31] I see no error in principle in the justice's analysis of the chambers judge's decision to use hybrid procedures on the triable issues he identified. I agree that the chambers judge was best positioned to decide what further evidence he needed to determine the issues before him and what procedures would enable him to do so fairly and effectively.

[32] On the misrepresentation defence, the justice accepted that there was some merit to the appellants' argument but did not expressly assess this independently of the issue of the hybrid procedures. She raised the question of whether the declaration made in the order below was enforceable but left it at that.

[33] I accept that the chambers judge's conclusion that the misrepresentation defence raises no triable issue is not a merely procedural matter, as it effectively determined that issue in the petition. However, the context of the chambers judge's conclusion on this point is important. It is a conclusion reached in the course of conducting an analysis as to the appropriate procedure to address the issues in a petition proceeding, in accordance with *Cepuran*.

[34] Regardless of the form of the order (i.e., whether a declaration that the misrepresentation defence does not raise a triable issue is enforceable), the chambers judge's order effectively adjourned Pillar's application for an *order nisi*,

dismissed the appellants' application to refer the petition to trial and ordered instead hybrid procedures he considered necessary to resolve the petition.

[35] In this context, I see no error in principle in the justice's conclusion that an appeal on these issues is premature. It is not yet known how the hybrid procedures ordered will play out. The appellants will have an opportunity to launch an appeal after the petition has been finally determined should they consider it necessary. At that time, the question of the correctness of the chambers judge's determination on the issue of misrepresentation can be addressed, along with any other matters that raise questions about the fairness of the procedures employed.

[36] The justice considered all the factors relevant to granting leave to appeal and properly exercised her discretion in concluding that overall, those factors did not favour the appellants and it would not be in the interests of justice to grant leave to appeal.

[37] I would therefore dismiss the application to vary the order of the justice.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Willcock"