COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *McDonald v. Comox (Town),* 2024 BCCA 180

Date: 20240509
Docket: CA48850

Between:

Kenneth R. McDonald and Norine L. McDonald

Appellants
(Plaintiffs)

And

Town of Comox

Respondent
(Defendant)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated January 5, 2023 (*McDonald v. Comox (Town)*, 2023 BCSC 18, Victoria Docket S203981).

Counsel for the Appellants:	C. Tollefson L. Young, Articled Student
Counsel for the Respondent:	A. Bookman M. MacNeil
Place and Date of Hearing:	Victoria, British Columbia April 17, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 9, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

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

Summary:

Appellants seek an order setting down a hearing on a point of law under Supreme Court Rule 9-4 ahead of a civil trial concerning riparian rights. Defendant City took the position that all such rights have been extinguished by the Province. Chambers judge applied the factors set out in Alcan Smelters (1977) and dismissed appellants' application. He was not satisfied resolution of the question of whether the appellants are entitled to assert riparian rights would result in savings to the parties or in court time.

Held: Appeal allowed. The chambers judge failed to give weight, or gave no sufficient weight, to the fact that the appellants committed to discontinue the action if they were unsuccessful on the point of law. Since a discontinuance would result in saving the entire trial, this factor militates strongly in favour of deciding the point of law. The principle of proportionality, including recognition that the appellants are financially disadvantaged in comparison to the defendant City, also favoured granting the application.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] Since 2014, the plaintiffs Mr. and Mrs. McDonald have owned a home in the Town of Comox on Vancouver Island. A creek known as Golf Creek runs through their property. According to the McDonalds' pleading, it is a small stream with unrecorded water that was once a natural stream in a forested watershed. In recent years, however, the "urbanization" of the watershed has resulted in a higher peak flow rate and total volume than the creek would have had in its natural state, resulting in erosion downstream where the plaintiffs' property is located. Again according to the pleading, this made it necessary for them to construct an erosion control wall on their property at their expense.

[2] In the fall of 2018, the plaintiffs began sampling the quality of water in the Creek during "first flush" periods, when contaminants are allegedly washed out through Comox's stormwater system. Samples taken by the plaintiffs contained levels of fecal coliforms and metals that exceeded provincial water quality standards. In fact, the plaintiffs allege, the contaminants exceeded levels considered safe for human contact by "orders of magnitude above the provincial and federal guidelines." Mrs. McDonald suffers from a chronic lung disease and is thus particularly susceptible to contaminants in the environment.

[3] In December 2016, the plaintiffs commenced an action in nuisance in the Small Claims Court against the town of Comox. The action was eventually transferred to the Supreme Court of British Columbia in May 2019 when the plaintiffs decided to assert a claim for damages in negligence as well. However, their original Notice of Civil Claim in the Supreme Court, filed on July 8, 2019, was later superseded by an Amended Notice of Civil Claim filed in February 2022. The new (and last) pleading removed the negligence claim, leaving allegations of nuisance and breach of common law and statutory riparian rights.

[4] The amended pleading asserts that the plaintiffs are riparian owners who are entitled to receive "water that is substantially undiminished in quality and flow from its natural state"; and that they have a common law right of access to the watercourse, a right to use water for various consumptive and non-consumptive purposes, and a "right to take steps to prevent erosion caused by water flows." The plaintiffs also plead the *Water Sustainability Act*, S.B.C. 2014, c. 15, which they say "protects the right to use unrecorded water for domestic purposes". They assert that the acts or omissions of Comox, including its stormwater management system, have prevented them from exercising their lawful rights and that the town is therefore liable to them for damages.

[5] In its Amended Response to Civil Claim filed on March 8, 2022, Comox denies having created a nuisance and pleads that the Province has abolished common law riparian rights in British Columbia (citing *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154 at para. 44) and that all unrecorded water is now vested in the Province (again citing *Rio Tinto Alcan.)* As well, the town asserts a defence of statutory authority under ss. 639 and 744 of the *Local Government Act*, R.S.B.C. 2015, c. 1.

[6] On March 1, 2022 (i.e., just prior to the defendant's filing of its amended Response), the plaintiffs filed an application under R. 9-4 of the *Supreme Court Civil*

Rules, B.C. Reg. 168/2009. Rule 9-4 is headed “Proceedings on a Point of Law” and provides:

> Point of law may be set down for hearing
>
> (1) A point of law arising from the pleadings in an action may, by consent of the parties or by order of the court, be set down by requisition in Form 17 for hearing and disposed of at any time before the trial.
>
> Court may dispose of whole action
>
> (2) If, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off or counterclaim, the court may dismiss the action or make any order it considers will further the object of these Supreme Court Civil Rules.

It is unusual for the Rule to be invoked by a plaintiff and indeed I note it has often been said that the Rule was “designed to eliminate claims that have no hope of success.” (See e.g., *B.C. Power Corp. v. British Columbia (Attorney General)* (1962) 38 W.W.R. 657 at 675 (B.C.C.A.)) But it is open to a *plaintiff* to invoke it in order to test whether a claim has no hope in law and thus possibly save the expense and time of a trial.

[7] Here, the plaintiffs’ application under R. 9-4 stated the point of law to be decided, as follows:

> Is there an unabrogated riparian right at common law in British Columbia to receive water of a quality substantially undiminished from its natural state?

The plaintiffs went on to state in their application that:

> A central feature of the underlying action is an allegation that the defendant has breached the plaintiffs’ common law riparian right by impairing the quality of water that the plaintiffs receive downstream. Therefore, resolving the question of whether a downstream riparian owner in British Columbia still retains a right at common law to sue for diminution of water quality caused by an upstream riparian owner can be dispositive of a substantial part of the underlying action.
>
> Furthermore, the proposed point of law clearly arises from the pleadings. To answer this question of law, the Court does not need to make any findings of disputed fact or weigh the evidence. The proposed point of law is a purely legal question, which asks whether the riparian right to water quality that exists at common law has been abrogated by statute in British Columbia. [Emphasis added.]

[8] Importantly, the plaintiffs undertook, at para. 34 of the application, to discontinue their action if, at the conclusion of the R. 9-4 hearing, the Court finds there are no unabrogated rights to water quality in British Columbia and all appeals have been exhausted with respect to that decision. The application continued:

> In the present case, the plaintiffs have set out the "essential allegations" that give rise to the proposed point of law in their Further Amended NoCC: see paras. 10–15 *supra*. The "essential allegations" giving rise to this point of law are not disputed by the Town, namely: the Town operates a stormwater management system that includes Golf Creek, while the plaintiffs are downstream riparian owners along the same watercourse. Although the Town disputes whether its conduct adversely impacts Golf Creek and whether it is liable to the plaintiffs, the Rule 9-4(1) hearing is not to resolve these factual disputes. The legal question to be determined is only whether riparian owners in this province can assert an unabrogated right to water quality at common law against an upstream user.
>
> Assuming the undisputed allegations to be true, a question does arise as to whether those allegations support a claim based on riparian rights at common law, particularly given judicial treatment in recent years regarding the status of riparian rights at common law in British Columbia. [Emphasis added.]

[9] Comox opposed the application on many bases — that common law rights in respect of watercourses had been abolished in British Columbia (citing *Rio Tinto Alcan* at paras. 44–7); that in any event, "legal issues with respect to matters that have far reaching consequences (such as watercourse riparian rights) … should be tested in a trial setting"; that a 15-day trial had been set down to begin on May 30, 2022; and that many of the facts on which the plaintiffs' claims were based, are disputed and will require a full trial.

[10] Since the application was filed, the trial date has been lost and has not yet been re-scheduled.

Chambers Judge's Decision

[11] The application under R. 9-4 came before the chambers judge on December 8 2022, and he issued reasons, indexed as 2023 BCSC 18, on January 5, 2023. He noted the proposed question of law which the plaintiffs sought to set down for hearing and then set out five principles to be considered by a court when determining an application under R. 9-4(1). These had been paraphrased at

para. 23 of *Can-Dive Services Ltd. v. Pacific Coast Energy Corp.* (1993) 77 B.C.L.R. (2d) 128 (C.A.) from the earlier decision of *Alcan Smelters and Chemicals Ltd. v. Canadian Association of Smelter and Allied Workers, Local 1* (1977) 3 B.C.L.R. 163 at 165 (S.C.). They were the following:

> 1. The point of law to be decided must be raised and clearly defined in the pleadings.
> 2. Rule 9-4 is appropriate only to cases where a question arises as to whether allegations in a pleading, assumed to be true, support a claim or defence in law.
> 3. The facts related to the point of law are not in dispute, and the point of law must be capable of resolution without receiving evidence.
> 4. Rule 9-4(1) calls for the exercise of discretion, and it must appear that determination of the question of law will be decisive of the litigation or a substantial question raised in it.
> 5. The Court will consider whether determining the question of law before trial will immeasurably shorten the trial or save substantial cost. [At para. 2; citations omitted.]

The chambers judge went on to observe:

> In *Hunt v. T&N, plc* (1991), 77 D.L.R. (4th) 375 at 378 (B.C.C.A.), on the subject of the effect on the litigation of a proposed pre-trial determination of a point of law, Lambert J.A. said "the question that is proper for the Court to consider is <u>whether there will be a saving of expense to the parties, and a saving of time of the Court itself, in separating out the question of law</u>; or whether the question of law ought properly to be determined in the main proceedings." [At para. 3; emphasis added.]

[12] The judge said that it went without saying that the point of law in question must be arguable. He found that this requirement was met. The question, he said, was one of statutory interpretation. While Comox argued that s. 5(1) of the *Water Sustainability Act* had vested in the government "the right to the use and flow of all the water at any time in a stream in British Columbia", the issue was whether the language of "use and flow" affected the "riparian right to receive water substantially undiminished in quality." (At para. 6.)

[13] In *Rio Tinto Alcan*, Tysoe J.A. for the Court had stated at para. 44 that the Province had abolished common law riparian rights in the Province. The plaintiffs contended that this statement was *obiter* and that neither of the sources relied upon

by Tysoe J.A. supported the conclusion that common law riparian rights had been "extinguished". Indeed, two more recent decisions, *Bryan's Transfer Ltd. v. Trail (City)* 2010 BCCA 531 and *Fonseca v. Gabriola Island Local Trust Committee* 2021 BCCA 27, had left the question open. *Bryan's Transfer* had not been mentioned in *Rio Tinto Alcan* but had been approved in *Fonseca*. Although those two cases were, in the judge's words, "markedly different cases on their facts", clear legislative language was necessary to remove or abridge property rights. Accordingly, he found that the plaintiffs' arguments were "tenable" or "arguable". (At para. 13.)

[14] The judge was also satisfied that the first and second 'hurdles' established by *Alcan Smelters* were met: a point of law was raised and clearly defined in the plaintiffs' pleading and, assuming the truth of the allegations in the pleading, a question did arise whether the asserted riparian right to undiminished quality of water is supportable in law. (At para. 14.)

[15] The third factor — whether the point of law was capable of resolution without evidence — was put aside by the chambers judge in order to address the "substantial concerns" he had regarding the fourth and fifth factors from *Alcan Smelters* and Lambert J.A.'s remarks in *Hunt v. T&N.* The judge reasoned:

> ... The plaintiffs attempt to allay these concerns, common to many cases where a party proposes to "litigate in slices," by deposing that if they lose on the point of law, and all appeals on the point of law are exhausted, they will discontinue the action in its entirety.
>
> I must try to predict the effect a Rule 9-4(1) order authorizing a point of law determination would have on this litigation. The trial of the case was adjourned by consent; it has not as yet been reset. The litigation was commenced over six years ago and it ought to be brought to the finish line sooner rather than later.
>
> If the point of law were decided before trial and in favour of the plaintiff, the defendant may attempt to have an appeal heard before trial. If an appeal were to be heard and decided, it is possible that an application for leave to appeal the Court of Appeal's decision. [*Sic*.] If the plaintiff prevailed at the end of the interlocutory point-of-law proceedings including appeals, the case would then go forward to trial, with only a small measure of savings of trial time resulting from the interlocutory interruption. This small saving of trial time (principally by shortening closing argument) could be at the cost of considerable delay.

> The prospects for the flow of this litigation could be nearly as dire if the plaintiffs were to lose the point of law in this Court. If this were to happen, my impression is that the plaintiffs would take an appeal. If this Court's decision were reversed, the case would then proceed to trial after delays occasioned by the appeal or appeals, with only a small saving of trial time. [At paras. 15–18; emphasis added.]

[16] The judge also noted the possibility that findings of fact might be made by the trial judge that would "effectively divert the flow of the litigation away from the proposed point of law" — describing this as a "wasteful detour" were it to occur. This prospect, he said, underscored the merits of a cautious approach to proceeding under R. 9-4.

[17] In the end, the chambers judge said he found it difficult to "predict the path" the case might take. On balance, however, he was "sceptical" that the determination of the point of law would result in savings to the parties or savings of court time. He found it more likely that the severance of the point of law would "hinder the just, speedy and inexpensive determination of the dispute on its merits." As far as the public interest in obtaining an answer to the proposed question was concerned, he concluded that *if* the public interest was relevant to his determination, it did not weigh heavily in either direction and if at all, weighed against severance of the point of law. He dismissed the plaintiffs' application.

On Appeal

[18] In this court, the plaintiffs contend that the chambers judge misdirected himself on the proper approach to determining whether to set down a question of law under R. 9-4 as follows:

> a. by failing to consider and weigh or, alternatively, giving insufficient weight to the circumstances relevant to whether setting down a matter under Rule 9-4 would "immeasurably" save time and resources;
>
> b. by failing to consider and weigh the principle of proportionality in declining to order that a matter be set down under Rule 9-4; and
>
> c. by giving any or, alternatively, undue weight under the Rule 9-4 test to judicial concerns about "litigating in slices" that are more properly considered under Rules 9-6 and 9-7

Alternatively, the plaintiffs say the judge erred by rendering a decision that is "clearly wrong and amounts, in the circumstances, to an injustice."

[19] The plaintiffs acknowledge that decisions made under R. 9-4 are discretionary and that the standard of review applicable in the circumstances is deferential. As stated in *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19 at para. 27 and in *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at 76–7, an appellate court may intervene only where the court below misdirected itself, came to a decision that is so "clearly wrong that it amounts to an injustice", or gave no or insufficient weight to relevant considerations.

[20] The purpose of R. 9-4 (previously R. 34 of the former *Supreme Court Rules*) and its operation were described by Mr. Justice Esson, as he then was, in *B.C. Teachers' Federation v British Columbia (Attorney General)* (1986) 7 B.C.L.R. (2d) 316 (C.A.) In his words:

> Rule 34(1) is sometimes called the "demurrer" rule. Its predecessor rules provided for demurrer in substance while abolishing it in name: *Harris v. Elliott* (1913), 28 O.L.R. 349, 12D.L.R. 533. The facts on which it proceeds are not hypothetical; they are the facts alleged by the plaintiff. The essential purpose of R.34(1) is to provide a way to determine, without deciding the issues of fact raised by the pleadings, a question of law which goes to the root of the action. As Wilson J.A. put it, on such an application every averment of fact in the statement of claim must be taken to be true. To require the applicant to finally admit the truth of those averments would, in most cases, rob the rule of all utility. [At para. 10.]

The concern that the Rule is not to be used to decide issues of fact that are "intimately tied to the factual matrix" is of course reflected in the third 'hurdle' from *Alcan Smelters*.

[21] The plaintiffs say the chambers judge was correct to consider the five factors set out in *Alcan Smelters*, but they submit that he erred in law in finding they had failed to satisfy the fourth and fifth criteria. In particular, the plaintiffs say the judge failed to "consider and weigh" three important items, the first of which is the plaintiffs' "Commitment to Discontinue" their action in its entirety if they are unsuccessful on the point of law and all appeals on that point are exhausted. (Parenthetically, I understand this to refer to any appeal they decide to take — not to mean that if an

appeal is available but is not pursued, the Commitment does not apply.) The chambers judge referred to the Commitment only in passing at para. 15 of his reasons and did not comment on it directly. Rather, he emphasized that the litigation had been commenced over six years ago and that the trial date had not yet been reset.

[22] He considered that the savings in time would be small either if the plaintiffs succeeded on the point of law and the defendant appealed, or if the plaintiffs prevailed and the trial followed. In both situations, the savings in time would be small. The remaining possibility — that the plaintiffs might lose on the R. 9-4 application but appeal successfully — would also yield little in the way of savings, in his view. The judge did not consider, however, the savings that would result if the plaintiffs failed on their application and either elected not to appeal or failed as well on an appeal — i.e., if the Commitment were invoked and the action was discontinued in its entirety. In this sense, I agree with the plaintiffs that the judge's comparative analysis on this point was incomplete.

[23] The plaintiffs also contend that although this litigation has been pending for six years, it has not progressed far at least in terms of expense: many of the costs that may be expected in respect of expert evidence and reports have not yet been incurred, and as already mentioned, the trial date has not yet been reset. Thus the application under R. 9-4 carries the "potential to avoid costly pretrial expenditures", which the plaintiffs as private individuals can ill afford. Further, a determination of law might lead the unsuccessful party to consider and seek to negotiate a settlement of the plaintiffs' claim, assuming the plaintiffs' Commitment to Discontinue is not engaged. Again, if it *is* engaged, the entire trial would be avoided.

[24] This brings us to the plaintiffs' argument that the chambers judge failed to consider and weigh the principle of proportionality in his analysis of the application

before him. Proportionality has of course now been enshrined in R. 1-3 of the *Supreme Court Civil Rules*:

> Object
>
> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> Proportionality
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[25] Counsel also referred us to the comments of the Supreme Court of Canada in *Hryniak v. Mauldin* 2014 SCC 7, which concerned the application of a rule of the Superior Court of Justice of Ontario regarding summary trials. Karakatsanis J. for the Court began her reasons thus:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (Ontario *Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, address the proper interpretation of the amended Rule 20 (summary judgment motion).
>
> In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a

> conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims. [At paras.1–5; emphasis added.]

This court has confirmed that the principles discussed in *Hryniak* may be relevant to applications for summary judgment (see *Morin v. 0865580 B.C. Ltd.* 2015 BCCA 502 at para. 49) and in my view, there is no reason to exclude questions of law under R. 9-4 from that principle.

[26] In the plaintiffs' submission, the principle of proportionality required the chambers judge not to focus simply on "savings" *in terms of trial time* but to "compare and evaluate" the effect that setting down the proposed question of law might have on the *whole course of the litigation*. A lengthy and expensive trial might not be the best way to resolve the parties' dispute. If there is a good chance that a hearing under R. 9-4 will resolve the dispute entirely, make settlement more likely, or shorten the trial, it may well be sensible to risk delaying the trial to pursue one of those solutions.

[27] As the plaintiffs suggest under their third ground of appeal, moreover, the fear of "litigating in slices" should not be a concern because it is only questions of law that may be determined under R. 9-4. The Court would not be interpreting and determining facts — as may often happen under R. 9-6 (summary judgment) or R. 9-7 (summary trial); rather, as observed in *B.C. Teachers*, the Court would assume the facts pleaded by the plaintiffs for purposes of the application. If the judge hearing the application finds that it is not possible to answer the question of law with a simple 'yes' or 'no', his or her response may be qualified with reference to factual conditions in which the 'yes' or 'no' would apply. These conditions need not be related in any way to the pleaded facts: that would be a matter for counsel to consider and explain to their clients.

[28] Comox disagrees that the chambers judge focused "exclusively" on scenarios in which the point of law would ultimately be determined in favour of the plaintiffs. In particular, it notes that at para. 18, he observed that the "prospects for the flow of this litigation could be nearly as dire if the plaintiffs were to lose the point of law". The judge had the impression that in that event, the plaintiffs would take an appeal and that if it were successful, the trial would have been delayed by the appeal(s) with only a small savings of court time. I read his reasons as essentially setting the Commitment to discontinue aside, given that he did not include the possibility of the discontinuance of the entire action in his analysis in paras. 17–18. Obviously, if the Commitment were invoked, a considerable "saving of trial time" would be realized and the parties would be saved a great deal of expense.

[29] Nevertheless, the judge found at para. 20 that on balance, it was more likely that the severance of the legal issue would "hinder the just, speedy and inexpensive determination of the dispute on its merits." Relying on this quotation from R. 1-3, Comox contends that the chambers judge did consider the principle of proportionality. However, his concern that the trial judge might make findings of fact that would "divert" the litigation away from the point of law proposed by the plaintiffs, led him to conclude that the severance of the legal issue should not be granted. I must say that this seems a remote possibility, given the clear question of law formulated by the plaintiffs.

[30] As Mr. Justice Veale stated in *Re Ministerial Order Against Imperial Oil Ltd.* 2002 YKSC 14, it is always difficult to determine "whether a proceeding on a point of law will shorten the trial or result in substantial savings of costs. The answer to this question is largely in the hands of the parties." (At para. 20.) In my respectful opinion, the fact that the plaintiffs have undertaken to discontinue the proceeding in the event that they do not succeed on the point of law (either in this court or upon available appeals) should have been given substantial weight in the analysis that the judge had to conduct. As I have already suggested, if the ultimate result of the R. 9-4 application is that the plaintiffs do not have a cause of action, much time and expense, both in terms of the parties and the justice system, will have been saved.

Even if the plaintiffs are successful, the possibility of settlement once the applicable law is known may well increase.

[31] Finally, the chambers judge did not consider that when compared to the Province (which seems likely to become involved in the issue of riparian rights in this proceeding in one way or another) the plaintiffs are at a distinct disadvantage in financial terms. Contrary to Comox's argument, I regard this financial inequality as implicit in the fifth factor in *Alcan Smelters,* and as a legitimate concern in light of cases such as *Hryniak*.

[32] For these reasons, I conclude respectfully that the chambers judge failed to give weight, or gave no sufficient weight, to the circumstances included in the plaintiffs' first ground of appeal.

Disposition

[33] In the result, I would allow the appeal and grant leave to the plaintiffs to set the question down for hearing in the Supreme Court under R. 9-4, with thanks to counsel for their able submissions.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Abrioux"

I agree:

"The Honourable Mr. Justice Grauer"