COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ursuliak v. Collins,*
2025 BCCA 71

Date: 20250312
Docket: CA50012

Between:

Howard Ursuliak

Appellant
(Plaintiff)

And

Phillip Collins and Janine Mendes

Respondents
(Defendants)

Before: The Honourable Mr. Justice Abrioux
The Honourable Madam Justice Horsman
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated June 24, 2024 (*Ursuliak v. Collins*, 2024 BCSC 1392, Vancouver Docket M176419).

Counsel for the Appellant:	M.C. Ohama-Darcus A. Bilenkey, Articled Student
Counsel for the Respondent:	R. Hodgins K. Starnes
Place and Date of Hearing:	Vancouver, British Columbia February 4, 2025
Place and Date of Judgment:	Vancouver, British Columbia March 12, 2025

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Madam Justice Horsman
The Honourable Justice Fleming

Summary:

The appellant challenges an order to enforce a settlement agreement arising out of an action brought following a motor vehicle accident. Mr. Ursuliak submits that the judge erred in granting the respondents' application summarily, as there was a genuine triable issue as to whether the settlement agreement was valid and enforceable.

Held: The appeal is allowed. The judge's decision to grant the application and enforce the settlement agreement was an exercise of discretion entitled to deference. However, she misdirected herself as to the question she had to answer, and did not engage with the requisite test before deciding the case in a summary manner. There was a genuine issue for trial going to the formation and enforceability of the settlement agreement. The order is set aside, and the application is dismissed.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] On May 26, 2023, the appellant, Mr. Ursuliak, accepted a settlement offer (the "Agreement") delivered by the respondents' insurer, the Insurance Corporation of British Columbia (ICBC). The settlement offer arose out of the underlying personal injury litigation concerning a motor vehicle accident involving the parties. The offer was for $240,000, plus costs and disbursements in an amount to be agreed to or assessed. In consideration for these payments, Mr. Ursuliak agreed to provide a release of his claims in tort and under Part 7 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 and *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83.

[2] The respondents brought an application in the Supreme Court for the Agreement to be enforced summarily under s. 8(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 (the *LEA*) and the Court's inherent jurisdiction. The relief sought included a declaration that a binding settlement had been reached, and an order staying the action except as necessary to implement the settlement. The chambers judge granted the application. She ordered that the Agreement was valid, enforceable, and binding on the parties, and that the underlying action be stayed except to the extent necessary to carry out the terms of the Agreement.

[3] In his factum on appeal Mr. Ursuliak submitted that the sole issue on appeal was whether it was "a reversible error for the chambers judge to grant an order enforcing a settlement agreement in the absence of consideration for the legal doctrine of duress". However, during the hearing of the appeal, the appellant's focus changed. He raised an alternative argument that the Agreement should not have been enforced summarily because there was a genuine issue to be tried going to the validity of the Agreement. Accordingly, he submits that the judge erred in not dismissing the application and ordering a trial of that issue.

[4] This raises two additional questions on appeal:

1) whether this constitutes a new issue on appeal and, if so, whether it is in the interests of justice for the appellant to be granted leave to advance it; and

2) the procedure to be followed when an application is brought to enforce a settlement summarily under s. 8(3) of the *LEA* and the court's inherent jurisdiction.

[5] For the reasons that follow, I would conclude that:

(a) Whether the judge erred in proceeding summarily is not a new issue on appeal;

(b) The judge did err in deciding, on a summary basis, that the Agreement was enforceable;

(c) The appeal should be allowed and the respondent's application dismissed.

Background

[6] The facts are not in dispute.

The collision and subsequent legal claim

[7] Mr. Ursuliak is an artist who is now in his mid-60s. On August 19, 2015, a vehicle driven by him was struck by a vehicle driven by the respondent, Phillip Collins (and owned by the respondent, Janine Mendes).

[8] On August 1, 2017, Mr. Ursuliak filed a notice of civil claim in which he sought damages against the respondents for personal injury arising from the accident (the "Claim").

[9] At the time of bringing the Claim, Mr. Ursuliak was represented by Mr. Marc Kazimirski, K.C.

[10] On November 22, 2017, the respondents filed a response to civil claim, admitting that the accident was caused by their negligence, but denying that Mr. Ursuliak sustained any injury, loss, damage or expense as a result of the accident.

The context for ICBC's May 2023 settlement offer

[11] The Claim was originally scheduled for trial to commence on January 27, 2020, but was later adjourned, first to May 30, 2022, and then to June 19, 2023, for a 16-day trial. Both adjournments were at Mr. Ursuliak's request. The first was consented to by the respondents, the second opposed.

[12] Mr. Ursuliak was examined for discovery by respondents' counsel on April 10, 2019, and March 7, 2022.

[13] On April 11, 2023, the parties and their counsel attended a Mediation via Zoom, with Bruce Josephson, K.C. as mediator. At the mediation, Mr. Kazimirski represented Mr. Ursuliak and Mr. Hodgins represented the respondents. The last settlement offer at mediation made on behalf of the respondents was in the amount of $215,000, plus taxable costs and disbursements, to settle the appellant's tort and Part 7 claims.

[14] On May 16, 2023, the respondents made a further settlement offer of $221,000, plus taxable costs and disbursements.

[15] On May 18, 2023, one month before the scheduled trial date, Mr. Kazimirski wrote to counsel for the respondents by email to advise that he had filed a notice of intention to withdraw as counsel of record. Less than an hour later, however, he sent a further email advising that Mr. Ursuliak was objecting to his withdrawal as counsel, and that he intended to remain as counsel of record until the application was heard. The next day, Mr. Ursuliak filed a formal notice of objection to Mr. Kazimirski's notice of intention to withdraw.

[16] An application for Mr. Kazimirski to withdraw as counsel of record for Mr. Ursuliak was set for hearing for May 29, 2023, by Mr. Gavin Cameron of Fasken Martineau LLP, counsel for Mr. Kazimirski.

[17] On May 24, 2023, Mr. Hodgins emailed Mr. Kazimirski, stating:

> Further to our discussions, I have obtained instructions to make a best offer on behalf the Defendants. Please present the offer to Mr. Ursuliak.
>
> The Defendants are prepared to offer **$240,000.00 plus taxable costs and disbursements,** to settle both tort and Part 7.
>
> Payment in exchange for a suitable release executed by the Plaintiff.
>
> The offer is open for acceptance until 4 pm on Wednesday, May 31, 2023, after which it expires.
>
> If the offer is not acceptable to the Plaintiff, the Defendants intend to deliver a Formal Offer to Settle at an amount significantly reduced from the current offer.
>
> We look forward to the Plaintiff's response.
>
> [Bold emphasis in original.]

[18] On May 26, 2023, Mr. Cameron emailed Mr. Hodgins, stating:

> As you know, I act for Mr. Kazimirski. I do not act for Mr. Ursuliak, who I have copied on this email.
>
> However, Mr. Ursuliak and I have exchanged correspondence, and he has advised me he wishes to accept the offer your clients have made below.
>
> I expect you will want him to reply all saying "I so confirm", and I expect he will do so.

> This obviates the need for Monday's hearing, and a trial. As Mr. Kazimirski's counsel, I will deal with TC&D with you, which I anticipate we can reach agreement on.
>
> **Mr. Ursuliak, can you please reply all to confirm this is so?**
>
> [Bold emphasis in original.]

[19] Later that day, Mr. Ursuliak replied:

> I so confirm to accept this most current offer from ICBC.

Accordingly, Mr. Kazimirski's application to withdraw did not proceed and he remained as counsel of record for Mr. Ursuliak until June 4, 2024. On May 29, 2023, Mr. Hodgins filed a requisition adjourning the June 19, 2023 trial date.

ICBC's application to enforce the Settlement Agreement

[20] On May 1, 2024, the respondents filed an application seeking the following relief:

> Part 1: ORDERS SOUGHT
>
> 1. An order that the settlement agreement entered into on May 26, 2023 is a valid and enforceable agreement which is binding on the parties.
> 2. An order that the Plaintiff's claim against the Defendants is stayed, except to the extent that further steps are necessary to carry out the terms of the settlement agreement made May 26, 2023, or to enforce the terms of these orders.
> 3. An order that the Defendants pay the agreed upon settlement amount of $240,000.00 into this Court, to be released to the Plaintiff by Court order.
> 4. An order that the Plaintiff be deemed to have signed the release attached as Schedule A to this Application.

[21] The legal basis identified in Part 3 of the Notice of Application included:

> 2. The Court can determine the enforceability of a settlement summarily, as long as there is no genuine issue as to whether the settlement agreement has been reached under the law of contract…
>
> [Emphasis added.]

[22] On June 19, 2024, Ms. Priti Khurana, in her capacity as Mr. Ursuliak's agent, filed an application response opposing the relief sought, which contained the following:

> Part 5: LEGAL BASIS
>
> 4. The Respondent (Plaintiff) generally adopts the legal basis provided by the Applicant (Defendants). However, the Respondent would also add the following regarding the Release
>
> > "...no party is bound to execute a document...which contains terms or conditions which have not been agreed upon and are not reasonably implied in the circumstances" (*Norwich Union Life Ins. v. MGM Insurance Group Inc.*, 2003 MBQB 282, para. 18.
>
> [Emphasis added.]

[23] The respondents' application was heard on June 24, 2024, with Ms. Khurana appearing as Mr. Ursuliak's agent.

The appellant's evidence regarding the Settlement Agreement

[24] In opposing the relief sought by the respondents, Mr. Ursuliak gave affidavit evidence concerning his circumstances and state of mind in May 2023. He deposed that, at the time that he accepted the settlement offer by email, he was "under significant stress and pressure, which caused anxiety and other emotional symptoms", felt "overwhelmed by the Court process and the impending trial, especially since [he] did not have legal representation", and was further "concerned that ICBC would significantly reduce their offer with a formal offer".

[25] Mr. Ursuliak deposed that he "had difficulty finding a lawyer who would handle [his] case/trial on short notice", and that "[s]ince on or about May 18 or 19, 2023, [he had] not received legal advice regarding any offers from ICBC from Marc Kazimirski, K.C., or any other lawyer". He deposed that, upon sending his May 26, 2023 email, he "did not understand the terms and implications of the Settlement Offer".

[26] As exhibits to his affidavit, Mr. Ursuliak provided letters from his family doctor and clinical counsellor confirming (as he characterized it in his affidavit) that he was "under duress when [he] sent the email on May 26, 2023" and copies of four

medical-legal reports (including two reports from the psychiatrist Dr. Stephen Wiseman).

[27] In his March 14, 2023 report, Dr. Wiseman opined that Mr. Ursuliak exhibited "disabling and severe psychiatric symptomatology". He wrote:

> 9. Mr. Ursuliak remains very ill from a combination of psychiatric conditions, probable Chronic Fatigue Syndrome/Myalgic Encephalomyelitis [CFS/ME], and any additional physical issues as may be diagnosed by others.
>
> 10. He is fully disabled, in my opinion, from his psychiatric conditions alone-irrespective of other factors or diagnoses — and I believe that this will not change in the foreseeable future given the chronicity and entrenchment of the issues.
>
> 11. Mr. Ursuliak vehemently disagrees with my opinion. From my perspective, his lack of insight is a significant component of his disabling and severe psychiatric symptomatology.
>
> 12. As I have previously opined, the 2015 accident markedly aggravated this man's pre-existing psychiatric conditions of SSD and FNSD and he has remained in a more symptomatic and dysfunctional state since that time accordingly. His overall day-to-day functional capacity, and his ability to pursue his occupation, have all been severely impacted by the results of the 2015 accident —although not in the way he believes them to have been.

[28] In their submissions to the chambers judge, the respondents also referred to certain medical-legal reports. As the respondents' counsel stated to the judge:

> I note that the expert evidence that was put forward by both the plaintiff and defendant, none question the capacity or competency of Mr. Ursuliak in the instances. There's certainly psychiatric diagnoses that are made by both sides, which are actually quite similar in terms of the findings of their diagnoses. Where it differs is in terms of the impact of the accident.

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[29] The judge began by considering two points: first, whether the parties entered into a binding settlement agreement and, second, if there was such an agreement, whether she had any discretion to refuse to enforce it: at para. 17.

[30] Relying on *Nobert v. Origin At Longwood Retirement Community Inc.*, 2021 BCSC 1485, the judge observed that "the court can determine the enforceability of a settlement summarily, as long as there is no genuine issue as to whether the settlement agreement has been reached under the law of contract": at para. 14,

citing *Nobert* at para. 8. The test to determine whether the parties have reached a binding settlement agreement contemplates whether all essential terms have been agreed to: at para. 18, citing *Nobert* at para. 9.

[31] The judge found that the parties had agreed on all the essential terms of the agreement. While she acknowledged that the parties had not agreed to the specific quantum of taxable costs and disbursements, she was not of the view that this constituted an essential term, since the parties could seek an assessment in the absence of agreement on that issue: at para. 19.

[32] The judge turned next to the question of enforceability, noting that the court has discretion to refuse to enforce a settlement agreement only in "limited circumstances": at para. 21, citing *Nobert* at para. 10. She referred to Mr. Ursuliak's affidavit, in which he deposed that, owing to a combination of personal circumstances and his lack of legal representation, he "was not in a position to make a well-informed decision regarding the settlement offer", he "did not fully understand the consequences of [his] email [or] the process, and [he] felt intimidated": at para. 22.

[33] While the judge declined to admit the three letters from Mr. Ursuliak's treatment providers as expert opinion evidence on the application, she accepted his "own evidence that the disruption in his solicitor/client relationship was stressful": at para. 26. She also noted that the record was "clear that Mr. Cameron was acting at this time for Mr. Kazimirski and not the plaintiff": at para. 26.

[34] The judge found a disparity in bargaining power between Mr. Ursuliak and the respondents but ultimately determined that this disparity was not "so stark as to warrant setting aside the settlement agreement": at para. 28. She observed that the respondents presented a "short-fuse" offer to Mr. Ursuliak, knowing that his representation by counsel was in question: at para. 24. Against this, however, the judge found that Mr. Ursuliak was well educated and intelligent, and that while his solicitor-client relationship was compromised at the time the offer was made and accepted, he had the benefit of legal advice over several years, including in respect

of past settlement negotiations: at para. 25. Given these considerations, and in light of the fact that there had been no evidence or argument presented to show that the settlement was substantively unfair, the judge was not prepared to set aside the agreement and ordered that it be enforced: at paras. 28–29.

On Appeal

Parties' Positions

(i) Mr. Ursuliak

[35] In his factum Mr. Ursuliak submits that the judge erred in law by failing to apply the doctrine of duress. He says that the doctrines of unconscionability and duress are distinct and it was reversible legal error for the judge to determine enforceability on the basis of unconscionability alone, without regard for the doctrine of duress. Mr. Ursuliak does not dispute the judge's conclusion that he failed to establish that the Agreement was "substantively unfair". Rather, he says, the error was in failing to consider the separate doctrine of duress, which does not require an unfair bargain.

[36] He contends that, based on all of the evidence and submissions before her, the judge should have gone on to consider whether Mr. Ursuliak had established the type of "coercion of… will" sufficient to meet the test for duress. He refers to respondents' counsel's submissions to the judge, which included:

> Once the existence of a binding settlement agreement is established the court must enforce the agreement, unless there's a ground for setting the agreement aside, such as fraud or duress, lack of capacity or mutual mistake is established.
>
> [Emphasis added.]

[37] He submits that duress having been raised, the judge erred in not considering whether the doctrine applied. He says it is not necessary for this Court to remit the question as to whether duress had been established to the trial court, because the record is sufficient for this Court to make that finding and it is in the interests of justice to do so.

[38] However, as I indicated above, appellate counsel for Mr. Ursuliak also advanced an alternative argument at the hearing of the appeal, namely that the judge erred in determining the enforceability of the settlement summarily. Counsel contended that if such an error was established, this Court should remit the issue of the Agreement's enforceability to the Supreme Court rather than decide it on the record before us.

(ii) The respondents

[39] The respondents submit that the judge exercised her discretion in not considering the issue of duress, which, in any event, was not argued at the application. They say the standard of review that relates to the exercise of discretion applies, and that the decision should not be reversed unless the judge misdirected herself, made a palpable and overriding error in her assessment of the facts, or came to a decision that is so clearly wrong that it amounts to an injustice: *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27; *Stephens v. Altria Group, Inc.*, 2021 BCCA 396 at para. 4.

[40] They also submit that Mr. Ursuliak should not be permitted to raise for the first time in this Court the argument that the judge erred in proceeding to determine the issue of enforceability summarily. They say this is clearly a new issue on appeal, and the interests of justice do not warrant that it be considered.

New issue on appeal

[41] In *Mills v. O'Connor*, 2025 BCCA 34 this Court recently discussed the test to be applied in considering whether to hear a new issue on appeal:

> [71] This court's discretion to entertain a new issue on appeal will generally be exercised in exceptional circumstances "where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so": *Quan v. Cusson,* 2009 SCC 62 at para. 37; *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 51. As a general rule, a court of appeal should avoid considering new issues on appeal unless it is clear that, "had the question been raised at the proper time, no further light could have been thrown upon it": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.,* 2002 SCC 19 at para. 32, citing *Lamb v. Kincaid* (1907), 28 S.C.R. 516 at 539.

> [72] The test for determining whether a new issue should be considered on appeal has three components, as framed by Saunders J.A. in *Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2016 BCCA 457 at para. 45. The court should consider whether:
>
> a) The issue is truly "new";
>
> b) The evidentiary record is sufficient to decide the issue; and
>
> c) The interests of justice support granting an exception to the general rule against hearing new issues, considering the potential prejudice to the opposing party.

[42] A new issue or argument is "legally and factually distinct from the issues litigated at trial": *Quan v. Cusson*, 2009 SCC 62 at para. 39.

[43] It cannot be said, in my view, that the question of whether the judge erred in proceeding to decide the enforceability of the Agreement summarily is a new issue on appeal in the sense that it is "legally and factually distinct from the issues litigated" at the hearing of the application: *Quan* at para. 39.

[44] As I have noted, the respondents' notice of application specifically refers to the court's ability to enforce a settlement summarily "as long as there is no genuine issue as to whether the settlement agreement has been reached under the law of contract". The judge noted the same precondition for the summary process in her reasons: at para. 14. Since the judge and both parties noted that the question of there being a "genuine issue" for trial was part of the analysis to be conducted, the question of whether the judge erred in proceeding summarily is not "legally and factually distinct from the issues litigated" before her and is not a new issue on appeal.

[45] As the judge did in fact purport to exercise the Court's ability to enforce the settlement agreement, she either implicitly made a finding that there was no genuine issue that required a trial, or else erred in failing to consider the precondition she had identified to the analysis she undertook. Either way, the question of whether there was a genuine issue requiring a trial was squarely before her, and it is open to the appellants to argue that she erred in proceeding summarily on that basis. Whether or not counsel made submissions to that effect before the judge, there can be no

question that the issue now raised is not legally or factually distinct from the issues litigated on the application.

Did the judge err in proceeding summarily?

[46] The first issue we must consider is not whether the judge erred in failing to consider the doctrine of duress, but whether she erred in deciding that the enforceability of the Agreement could be determined summarily. As with the standard of review that applies where a judge considers whether to grant summary judgment under the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, *(Rules*) this is a discretionary decision that attracts deference: *Hyrniak v. Mauldin*, 2014 SCC 7 at paras. 81–84; *British Columbia (Director of Civil Forfeiture) v. Conrad*, 2024 BCCA 10 at para. 94. The question for this Court is whether the judge's decision to proceed summarily was based on any palpable and overriding error of fact or any error of law, or was so clearly wrong as to amount to an injustice: *Hyrniak* at para. 83; *Stephens* at para. 4.

The Legal Framework

[47] In *Nobert*, Justice Mayer explained:

> [10] This Court has the discretion to refuse to enforce a settlement agreement only in the following circumstances: there was a limitation on the instructions of counsel for the settling party known to the offering party; there was a misapprehension by counsel for the settling party of their instructions or there are facts which would make it unjust to enforce a settlement agreement; there is evidence of fraud or collusion; or, where there is an issue to be tried as to whether there is such a limitation, misapprehension, fraud or collusion in relation to the settlement agreement: *Hawitt v. Campbell*, [1983] CanLII 307 (B.C.C.A.) at para. 19.
>
> [Emphasis added.]

[48] *Hawitt v. Campbell*, (1983) 46 B.C.L.R. 260 (C.A.) is of assistance in considering this issue. In that case, the defendant had received and accepted an offer to settle a personal injury claim from the plaintiff's solicitor. The plaintiff had been unaware of his solicitor's offer and refused to abide by the offer when informed of the appellant's acceptance. The judge who heard the application to enforce the offer concluded that the offer, based on the solicitor's misunderstanding of the extent

of his client's injuries, "might very well be inordinately low and therefore unfair to the plaintiff": *Hawitt* at para. 7. The judge dismissed the application, and the defendant appealed.

[49] In upholding the decision on appeal, Justice Macfarlane concluded:

> [18] It appears to me that once the matter is before the court (e.g., for a stay) the judge has a discretion — it being a summary application — to refuse or grant the stay.
>
> [19] The judge may refuse the stay if:
>
> 1. There was a limitation on the instructions of the solicitor known to the opposite party;
>
> 2. There was a misapprehension by the solicitor making the settlement of the instructions of the client or of the facts of a type that would result in injustice or make it unreasonable or unfair to enforce the settlement;
>
> 3. There was fraud or collusion;
>
> 4. <u>There was an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement.</u>
>
> [20] Refusal of a stay would leave the parties to their remedy in the action or in an action on the settlement.
>
> [21] <u>My fourth point arises from an analogy between a summary application to stay, and an application for summary judgment. In either case, if there is a triable issue then the parties ought to be left to their remedy at trial.</u>
>
> [Emphasis added.]

[50] As indicated in *Hawitt*, an analogy can be drawn between a summary application to enforce a settlement pursuant to s. 8(3) of the *LEA* and an application for summary judgment under Rule 9-6. *Hawitt* refers to an "issue to be tried" and a "triable issue", whereas the authorities under Rule 9-6 and its predecessor rule generally use the language of Rule 9-6(5)(a), i.e., there being "no genuine issue for trial": see for example *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 46–47; *Sakwi Creek Hydro Limited Partnership v. Dickin*, 2023 BCCA 188 at para. 24 [*Sakwi Creek*].

[51] As I have observed, the judge in this case, citing *Norbert* stated the test as being that "the court can determine the enforceability of a settlement summarily, as

long as there is no genuine issue as to whether the settlement agreement has been reached under the law of contract": at para. 14.

[52] In my view, when considering an application to enforce a settlement under s. 8(3) of the *LEA* and the Court's inherent jurisdiction, nothing turns on whether the "triable issue", "issue to be tried", or the Rule 9-6(5)(a) language of "no genuine issue for trial" is used. This is because on an application to enforce a settlement the threshold issue for the judge to consider is whether a summary process is appropriate in light of the issues and evidentiary record, and all three expressions of the test adequately capture this exercise.

The Judge's Analysis

[53] It is of assistance to set out in detail the judge's analysis which lead her to conclude the Agreement should be enforced. She began by noting that:

> [17] I approach the issue before me by first determining whether the parties did enter into a binding settlement agreement. If there was a binding settlement agreement, I have to then determine whether I have any discretion to refuse to enforce it.
>
> [18] As noted by the court in *Nobert* at paragraph 9, the test to determine if parties have reached a settlement agreement is whether parties have agreed on all essential terms.
>
> [Emphasis added.]

She concluded that an unambiguous offer addressing all the essential terms had been accepted. She then went on to consider whether any of the "limited circumstances" outlined in *Nobert* applied under which she could refuse to enforce the settlement agreement: at para. 21. She found that "[w]hether there was an obvious disparity of bargaining power between the plaintiff and ICBC is a consideration in determining whether the settlement should be rescinded": at para. 23.

[54] The judge noted that "[t]he defendants presented a short-fuse offer to the plaintiff… at a point in time when they knew that the plaintiff's solicitor/client relationship was in question": at para. 24. She considered the plaintiff's education and intelligence, as well as his history of past legal representation. She did not admit

the appellant's medical letters, attached to his affidavit on the application, but accepted "the plaintiff's own evidence that the disruption in his solicitor/client relationship was stressful and that he did not take legal counsel on this particular offer before accepting it": at para. 26. On this basis, she drew the following conclusion:

> [28] While I am persuaded that there was a disparity in the bargaining power in this case for those reasons, I do not find that it was so stark so as to warrant setting aside the settlement agreement. It was the plaintiff's onus to show why it should be set aside, and there is no evidence and no argument presented that it was a substantively unfair settlement.
>
> [29] In those circumstances, having read and considered all the materials before me and the submissions of counsel, I am granting the order sought by the defendants, which, again, are found in the notice of application at paragraphs 1 to 4.
>
> [Emphasis added.]

Discussion

[55] Respectfully, in my view the judge's analysis reflects material error.

[56] The judge's "first" task was not to decide "whether the parties did enter into a binding settlement agreement", but rather whether the respondent applicants had established that there was no genuine issue to be tried as to whether the parties had entered into an enforceable agreement. The judge's direction to herself ignored this preliminary, threshold question that had to be answered in the negative before proceeding summarily.

[57] Although the judge stated that "the Court can determine the enforceability of a settlement summarily, as long there is no genuine issue as to whether the settlement agreement has been reached under the law of contract", she did not consider the legal framework that relates to what in fact constitutes "a genuine issue to be tried". Reading the reasons contextually and as a whole, the judge decided the issue of enforceability on the merits, as if the application before her was a summary trial as opposed to one for summary enforcement of a settlement agreement.

[58] In light of the conflicts in the evidence, and the substantial body of medical evidence that appeared to cast doubt on Mr. Ursuliak's capacity to understand and consent to the settlement, the judge ought to have considered whether summary determination was appropriate. I acknowledge that the judge's decision to proceed summarily was a discretionary one, which ordinarily attracts a high level of deference. Here, however, the judge appears not to have turned her mind to the core threshold question to be considered.

[59] I am mindful of the purposes of the summary procedure under s. 8(3) of the *LEA* and the goal of avoiding a multiplicity of proceedings. But this is counterbalanced by the requirement that if genuine triable issues exist the matter should not be heard summarily. Having regard to the record that was before the judge on this application, there are, in my view, certain genuine issues to be tried.

[60] The first relates to the formation and enforceability of the Agreement when considered within the context of Mr. Ursuliak's medical condition and mental health at the time he accepted the respondents' offer. It is not clear from the record what medical reports were properly before the judge, and why she excluded certain reports from consideration.

[61] In his reply submissions to the judge at the hearing of the application, the respondents' counsel stated:

> A couple of points just on Dr. Peach and Dr. Kortikow, in our submission, it's not admissible evidence that's being put forward in terms of opinion evidence in this case, and the court should not consider those opinions.
>
> I note that the expert evidence that was Dr. Peach is clearly an advocate for the plaintiff, opines outside the scope of his expertise, in commenting on cognitive function, medical capacity….there are three letters that were sought and received from Dr. Peach in the course of this litigation, in assistance for seeking a trial adjournment. So it's a pattern in the same type of behaviour – plaintiff seeking to adjourn, not to proceed, and Dr. Peach writing supporting letters of that nature, saying that Mr. Ursuliak is not able to go forward.
>
> [Emphasis added.]

[62] The judge gave no explanation for her decision not to admit into evidence the reports of Dr. Peach, who was Mr. Ursuliak's family physician. I would first observe

that the requirements relating to experts set out in Rule 11 of the *Rules* do not apply to applications for summary trial, other than to the limited extent provided for in R. 9-7(7), but the Rule does not explicitly consider an application for summary enforcement of a settlement agreement. It may have been the case that the judge's ruling was grounded in part on an acceptance of counsel's submission that Dr. Peach was an advocate. While that submission could perhaps be made at a summary trial, it is difficult to conceive how it could be considered at a summary enforcement application where the threshold question is whether there is a genuine issue for trial. In any event, as the judge gave no reasons for her conclusion that the medical evidence was not admissible, there is little point in engaging in speculation on the point.

[63] It is also clear from the reasons that the judge's findings regarding the inequality of bargaining power and their effect on the legal issues to be considered was contentious. The judge's finding that, while there was a disparity in the bargaining power, it was not "so stark so as to warrant setting aside the [Agreement]" underlines why the Agreement ought not to have been enforced summarily: see para. 28. The judge was clearly assessing the reliability of the evidence and its legal effect in concluding that the Agreement was not substantively unfair. It was not possible, on the face of the evidence in this case and without weighing or assessing the evidence, to conclude that there was no genuine issue for trial as to whether that imbalance was sufficient to justify setting aside the Agreement.

[64] Furthermore, the judge, in my view, made a palpable and overriding error when she stated there was "no evidence… that it was a substantively unfair settlement": at para. 28. There was evidence—the plaintiff's own evidence—which, when considered in the context of the medical evidence, raised a genuine triable issue relating to that question.

[65] Simply put, it could not be said on this evidentiary record that there was no genuine issue for trial in relation to either the formation or the enforcement of the

Agreement. There was evidence and argument from the plaintiff to support his position that the Agreement should not be enforced.

[66] For these reasons, I would conclude that the judge erred in not dismissing the application for enforcement of the Agreement and a stay. The dismissal of the application will leave the respondent to pursue a remedy in the action or in an action on the settlement: *Hawitt* at paras. 21, 27. In my view, the record before this Court is sufficient to permit us to substitute an order to that effect. In light of the existence of triable issues, the summary procedure under s. 8(3) of the *LEA* is not open to the respondent under these circumstances.

[67] An issue that need not be addressed on this appeal is whether the weighing of evidence is ever possible on an application to enforce a settlement under s. 8(3) of the *LEA*. To state the question another way, although an "analogy" can be drawn between a summary application to enforce a settlement and one for summary judgment under Rule 9-6, both of which involve genuine triable issues, does the well-established limitation being "[t]he judge is not permitted to weigh evidence on a Rule 9-6 application beyond determining whether it is 'incontrovertible'" apply on an application such as this: see *Sakwi Creek* at para. 25.

[68] In *Kuo v. Kuo*, 2017 BCCA 245, Justice Dickson observed:

> [37] There is a strong public interest in favour of resolving lawsuits by agreement. As Abella J. observed in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 11, "[s]ettlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation". As a result, the policy of the courts is to promote settlement and to enforce settlement agreements: *Catanzaro v. Kellogg's Canada Inc.*, 2015 ONCA 779. This judicial policy contributes to the effective administration of justice: *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.).

[69] In *Sanesh v. L.B. Chapman Construction Ltd.*, 2013 BCSC 1521, Justice Fleming (as she then was), in dismissing an application to enforce a settlement brought pursuant to s. 8(3) of the *LEA*, stated:

> [42] …In all of the circumstances, including my decision set out below regarding the plaintiffs' application to amend the statement of claim, and given the authorities discussed above, I find there is not enough evidence before the court to properly determine the circumstances of settlement and therefore whether summary enforcement of the settlement would be unjust, unreasonable or unfair. I therefore exercise my discretion not to enforce the settlement and grant a stay of proceedings. Accordingly, the defendants are left to their remedies in the action whether grounded on the settlement or any other substantive defences that may be available to them…
>
> [Emphasis added.]

[70] The enforcement of settlements engages public policy considerations which are to be viewed in the context of what is fair, reasonable and just under the circumstances. The ultimate question is whether it is in the interests of justice to enforce the putative agreement: *Ertl v. Morrison*, 2024 BCSC 1521 at para. 120. Without offering an opinion on the issue, since it was not argued on this appeal, it may be that the Court, in the exercise of its discretion, and without converting the summary application into a summary trial, is permitted to engage in a limited weighing of the evidence to accomplish these goals.

Disposition

[71] I would allow the appeal and substitute an order dismissing the respondent's application.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Fleming"