COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cai v. Ping,*
2025 BCCA 205

Date: 20250605
Dockets: CA50047; CA50048

Docket: CA50047

Between:

Sun Guo Cai and Wang Xia

Appellants
(Plaintiffs)

And

Ding Xi Ping and Chen Zhi Yi

Respondents
(Defendants)

- and -

Docket: CA50048

Between:

Sun Guo Cai and Wang Xia

Appellants
(Plaintiffs)

And

Hummingbird Cove Lifestyles Ltd., Trinity Agriculture Inc., and Pacific Aquaculture International Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Fisher
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated July 17, 2024 (*Xia v. Hummingbird Cove Lifestyles Ltd.*, 2024 BCSC 1290, Vancouver Dockets S206273; S206183).

Oral Reasons for Judgment

Counsel for the Appellants: F. Lamer

Counsel for the Respondents:	T.J. Delaney H. Nie
Place and Date of Hearing:	Vancouver, British Columbia June 5, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 5, 2025

Summary:

The applicants (plaintiffs in the court below) seek leave to appeal an order dismissing their applications for judgment against the defendants under Rule 9-7 of the Supreme Court Civil Rules as not suitable for summary determination. The applicants say the judge erred in dismissing the applications on the basis of a conflict in the evidence without adequately considering their legal argument which accepted the defendants' version of the facts.

Held: Application dismissed. The point on appeal is not significant to the practice or the parties and there is no arguable case that the judge made a reviewable error in exercising his discretion to dismiss the applications as unsuitable. He considered a number of factors in determining that the matter was unsuitable for summary trial, and did not fail to consider the applicants' legal argument. The appeal risks hindering the progress of the underlying action, and it is not in the interests of justice to grant leave.

FISHER J.A.:

Overview

[1] Before me are two applications for leave to appeal orders dismissing applications under Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 as not suitable for summary determination.

[2] The underlying litigation concerns two debt actions against related personal and corporate defendants. The plaintiffs (here the applicants) contend that payments they made to the personal and corporate defendants were loans, and they seek repayment. The defendants (here the respondents) take the position that many of the payments were "equalization" payments that do not form part of any loans.

[3] The applicants concede that the discretionary decision of the chambers judge to dismiss an application for summary trial as unsuitable is owed deference

on appeal. They say, however, that the judge erred in principle in concluding that he could not find the facts necessary to decide the legal issue in the case by misapprehending or failing to consider their position on the summary trial application. The respondents submit that the judge properly exercised his discretion in finding that summary trial was unsuitable.

Factual Background

[4] The applicants, Sun Guo Cai (Mr. Sun) and Wang Xia (Mrs. Wang), are the plaintiffs in three underlying actions concerning their investment in a shellfish farming business. Two of these actions seek judgment in the amount of approximately $10 million for debts allegedly owing by the personal and corporate defendants. The third is a petition seeking liquidation and winding up of the corporate defendants and other related corporations. The applicants and personal defendants were at material times shareholders in the parent companies controlling all the corporate parties, carrying on business in British Columbia related to the shellfish farming business.

[5] The two debt actions concern payments made by the applicants to the defendants between 2014 and 2018. The dispute between the parties concerns the legal character of these payments. The applicants say they were loans now due and owing; the defendants say they were “equalization payments” or capital contributions and were part of joint contributions between the applicants and personal defendants to the corporate defendants.

[6] On the summary trial applications, the applicants sought judgment for the debts alleged to be due and owing. They also sought relief under the petition on a summary basis. In addition to dismissing the summary trial applications as unsuitable, the chambers judge referred the petition to the trial list.

Summary Trial Application

[7] In reasons for judgment indexed as *Xia v. Hummingbird Cove Lifestyles Ltd.*, 2024 BCSC 1290 (*RFJ*), the chambers judge found he was unable on the evidence before him to find the facts necessary to decide the legal issues raised by the actions, and also that it would be unjust to decide those issues summarily.

[8] The judge reviewed the applicable legal principles on the question of suitability for summary trial. He concluded the debt actions were not suitable for summary determination for several reasons.

[9] First, the judge expressed concern that there was no affidavit evidence from Mrs. Wang, who was present during the discussions about an alleged “verbal equalization agreement”, a key issue in the debt actions. He stated that the absence of evidence from a “central witness who is a plaintiff” gave him pause in considering whether he could decide the debt actions justly: *RFJ* at para. 15. Related to the absence of evidence, later in his reasons, the judge found some merit in a submission from the corporate defendants that the plaintiffs had not adduced adequate evidence to enable the court to determine the issues: *RFJ* at para. 44.

[10] Second, the judge found a material conflict in the evidence about this “verbal equalization agreement” allegedly made on January 18 and 19, 2018. Ms. Ding’s evidence was that the parties agreed that the applicants would advance a sum of money, the quantum of which would be determined at a later date, to “reimburse [the personal defendants’] investments” in the corporate defendants: *RFJ* at para. 17. She deposed that they entered into a handwritten agreement to this effect, but the only copy remained in Mr. Sun’s possession. The judge found this evidence to be in direct conflict with the evidence of Mr. Sun, who, while acknowledging that the parties discussed equalizing advances, denied that any agreement was reached in the January 2018 discussions, and denied that he and Mrs. Wang signed a handwritten agreement: *RFJ* at para. 19.

[11] On this point, the applicants argued that Ms. Ding’s evidence was inadmissible and conclusory, and even if the facts alleged in her affidavit were accepted, they did not constitute a defence because they did not establish the existence of the “equalization” agreement. The judge considered this argument, and found that there was a conflict in the evidence about an important issue relating to the defence of the actions, and he could not justly determine what words were exchanged between the parties on January 18–19, 2018 to determine if a valid and enforceable equalization agreement was reached: *RFJ* at paras. 21, 27.

[12] With respect to the conflict in the evidence as to whether the parties signed a handwritten agreement following the January 18–19 discussions, the judge considered that if such a document existed, it would be unjust to determine the issue without "at least considering such a document": *RFJ* at para. 29.

[13] Finally, the judge noted that there was another document, signed by the parties and dated January 24, 2018, that in its opening lines stated "[t]he personal company agreement between [Mr.] SUN and [Ms.] DING is revised": *RFJ* at para. 30. The parties disputed what "personal company agreement" referred to and the judge found he could not justly make the necessary findings to determine the parties' rights and obligations on the summary trial.

[14] The judge expressly referred to the plaintiffs' argument that the asserted equalization agreement did not exist because all the essential terms had not been demonstrated to have been agreed to but found he was unable to find the facts necessary to decide that question: *RFJ* at para. 37. He expressed concern that the conflicts and gaps in the evidence occurred in a context of a substantial claim of approximately $10 million. He also gave some weight to the substantial size of the claim and the lack of urgency in assessing suitability.

[15] The judge found he was unable, and it would be unjust, to make findings related to the existence of any equalization agreement and its terms, whether the advances were loans or capital contributions, or the meaning of "personal company agreement" in the agreement of January 24, 2018. He also considered that any attempt to resolve the other issues in the actions would be an attempt to litigate in slices, which would also be unjust: *RFJ* at para. 46.

[16] As for the petition, the judge found that the evidence and factual issues were "intertwined" with the evidence and facts in the debt actions, and the same conflicts in the evidence prevented summary disposition of the petition. In addition to dismissing the applications for summary trial as not suitable, he referred the petition—which he ordered to be converted to an action—to the trial list.

Legal Framework

[17] As a preliminary matter, I note that the chambers judge expressly framed his order as being made under Rule 9-7(15): *RFJ* at para. 62. Subrule (15) provides:

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

[18] However, Rule 9-7(11) deals with dismissal of a summary trial application as unsuitable:

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

[19] As the applicants rightly note, an order dismissing an application for summary trial as unsuitable is made under Rule 9-7(11) for the purposes of determining whether it is a limited appeal order within the meaning of Rule 11 of the *Court of Appeal Rules*, B.C. Reg. 120/2022: *Michael Wilson & Partners, Ltd. v. Desirée Resources Inc.*, 2016 BCCA 296 at para. 26, aff'd 2017 BCCA 139; *North Root Cannabis Ltd. v. 663466 B.C. Ltd*., 2024 BCCA 105 at paras. 36–38. As such, leave to appeal is required.

[20] Counsel advised me at the hearing that the applicants have filed an appeal as of right of the judge's order referring the petition to the trial list, and urged me to grant leave to appeal these orders to enable all three matters to be dealt with together, as they were before the chambers judge. Counsel for the respondents counter this with a submission that this is not a relevant consideration, as granting leave will bolster the appellants' position on appeal and denying leave will do the opposite.

[21] In my view, the fact that the order in the petition is under appeal has a limited bearing on whether leave should be granted to appeal the orders

dismissing the summary trial applications, but I have considered this within the criteria to be applied on an application for leave to appeal.

[22] That test is well established. The applicant must satisfy the court on the following four criteria, which are all considered under the rubric of the interests of justice:

a) Whether the point on appeal is of significance to the practice;

b) Whether the point on appeal is of significance to the action itself;

c) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

d) Whether the appeal will unduly hinder the progress of the action.

Goldman, Sachs & Co. v. Sessions, 2000 BCCA 326 at para. 10; *Vancouver (City) v. Zhang*, 2007 BCCA 280 at para. 10 (Chambers).

[23] In *Dehydration Research LLC v. EnWave Corporation*, 2022 BCCA 347, Justice Fitch summarized the scope of the merits threshold in the context of a discretionary decision:

> [54] The merits threshold on an application for leave to appeal has been described as "relatively low": *Bartram v. Glaxosmithkline Inc*., 2011 BCCA 539 at para. 16 (Chambers); *William v. Taseko Mines Ltd*., 2019 BCCA 479 at para. 17 (Chambers) [*Taseko Mines*]. The question is whether the applicant has identified an arguable case of sufficient merit to warrant scrutiny by a division of the Court: *A.L.J. v. S.J.M.*, [1994] B.C.J. No. 1450, 1994 CanLII 2614 (B.C.C.A.) at para. 10 (Chambers). The merits component of the test has also been understood as requiring an applicant to establish a reasonable possibility that a division of the Court would grant the appeal on its merits: *MacRae v. Woermke*, 2019 BCCA 355 at para. 4 (Chambers), citing *Webb v. Canada (Attorney General)*, 2019 BCCA 288 at para. 15 (Chambers).
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> [55] Despite the relatively low merits threshold, this Court is reluctant to grant leave to appeal from discretionary orders: *Taseko Mines* at para. 17. In the case of a discretionary order, leave will only be granted where the applicant shows an arguable case that the order is clearly wrong, a serious injustice will occur, or the discretion was exercised on a wrong principle or not exercised judicially: *Independent Contractors and Businesses Association v. British Columbia*, 2018 BCCA 429 at paras. 35–36 (Chambers) [*Independent Contractors*].

[24] I endorse these comments. The applicants must identify an arguable case of sufficient merit to warrant scrutiny by a division of this Court, i.e., an arguable case that the orders are clearly wrong, a serious injustice will occur, or the discretion was exercised on a wrong principle or not exercised judicially.

Position of the Parties

[25] The applicants say “the Chambers Judge identified one reason only for his decision to remit the summary judgment applications to trial, namely the difference between Ms. Ding’s testimony and Mr. Sun’s testimony”. They say the judge made an error in principle in failing to “give any proper weight” to the applicants’ argument that even if Ms. Ding’s testimony concerning the “verbal equalization agreement” was accepted, it did not support the existence of a legally enforceable contract. They submit the judge erred in concluding he could not find the required facts, when they never suggested he should adopt a different version of events, but instead argued that, on the description of the “verbal equalization payment agreement” in Ms. Ding’s affidavit, essential elements were not agreed upon and as such no enforceable contract arose.

[26] On this basis, the applicants submit that the point on appeal is of significance to the practice, as it bears on the broader law concerning the formation of contracts. They say it is of significance to the action itself, because if the appeal is allowed, it will resolve the only defence raised by the respondents, and avoid the costs of trial.

[27] The applicants further submit the appeal is meritorious, because (as noted above) the judge failed to consider their position that the evidence of Ms. Ding, accepted at face value, did not establish a legal defence to the debt action. They argue that on Ms. Ding’s own evidence, the essential terms of the alleged equalization agreement were never agreed upon, meaning that the “agreement” was not an enforceable contract. They say such an agreement, even if it existed as alleged, would not provide a defence to the debt action because it did not provide that the applicants would not be able to demand repayment of their loans. They also point out that the alleged agreement could not provide a defence for loans made after February 2018, since those loan agreements provided for fixed deadlines for repayment.

[28] Finally, the applicants submit that the appeal will not hinder the progress of the action because the trial is already set down for June 2026, leaving plenty of time to conduct the appeal without delaying the trial. They say that if the appeal is allowed, it will expedite the action by effectively disposing of the only defence raised by the respondents.

[29] The respondents submit that the appeal has no significance to the practice. They say it also has no significance to the action, since the order under appeal made no final determination of fact or law that bore on the merits of the parties' dispute.

[30] The respondents submit that the appeal is unmeritorious because the applicants are wrong to say that the "only" basis for the chambers judge's decision was the conflict in the evidence. They note that he found several other reasons for which it would be unjust to proceed summarily, and that this was a discretionary decision subject to a highly deferential standard of appellate review. They submit the chambers judge's reasons were amply supported on the record, which demonstrates the rather complex context of the relationship between these parties, and there is no prospect of the applicants demonstrating any error in principle or misapprehension of the evidence or arguments capable of justifying appellate intervention.

[31] The respondents also submit that an appeal would delay the final determination of the action and potentially give rise to more proceedings and future appeals, although they concede that if the applicants were ultimately successful in having the actions determined summarily, this factor would weigh in their favour.

Analysis

[32] In my opinion, none of the criteria weigh strongly in favour of granting leave to appeal.

[33] First, I do not consider the point on appeal to be significant to the practice. The applicants have not pointed to any principle of contract law that stands to be clarified by this Court. Nor have they suggested it is important to the use of the summary trial procedure. The judge made no binding findings of fact or legal conclusions. His decision that the summary trial was unsuitable is a discretionary decision based on the particular circumstances of this case. This criterion does not weigh in favour of granting leave to appeal.

[34] Second, the point on appeal is significant to the action only in the sense that the relief sought by the applicants—repayment of the alleged debts—could determine the action if they were successful. However, even if the applicants were

successful in this appeal, the most likely result would be to remit the matter back to the trial court with directions as to suitability. This criterion weighs slightly in favour of granting leave.

[35] Third, while the merits threshold is a low one, I am not satisfied that the applicants have shown an arguable case that the judge exercised his discretion to dismiss the summary trial as unsuitable on a wrong principle or that his decision was clearly wrong. He cited all the applicable principles of law on the question of suitability.

[36] From my reading of the judge's reasons, he did not dismiss the applications solely on the basis of the conflict in the evidence in respect of the alleged equalization agreement, nor did he misapprehend the plaintiffs' position. There were other agreements in evidence that related to the financial relationships among the parties. He was concerned not only about conflicts but also about gaps in the evidence, including a lack of evidence on key matters from the plaintiffs themselves. I find it somewhat telling that he found some merit to a submission by the corporate defendants that the plaintiffs had not adduced adequate evidence to enable the court to determine the issues.

[37] Importantly, the judge expressly referred to the plaintiffs' submission at para. 21 of his reasons:

> … The Plaintiffs submit that the Court should disregard the inadmissible portions of Ms. Ding's affidavit evidence and consider what remains, and that the Court should conclude that Ms. Ding's evidence does not rebut Mr. Sun's evidence of debt claims and does not establish a defence. The Plaintiffs' written submissions contend:
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> > … this defense does not raise any issue of fact because much of the affidavit adduced by the Personal Defendants is inadmissible argument and conclusory in nature and because, even if one were to take the facts (as distinguished from their arguments) asserted by the Personal Defendants at their face value, those facts do not establish the existence of the alleged "equalization" agreement.

[38] He read Ms. Ding's affidavit as deposing that discussions occurred with one or both plaintiffs on January 18 and 19, 2018 and during these discussions, the parties had communicated to each other that there was an equalization agreement. He in turn read Mr. Sun's affidavit to depose that there was a discussion about equalization but the parties did not objectively communicate to each other that an agreement was reached, and he referred to Mr. Sun's

statement that he did not sign a handwritten agreement: *RFJ* at paras. 25–26. He found this conflict important, as well as the conflict as to whether the parties signed a handwritten document. The judge's interpretation of the evidence was open to him on the record before him.

[39] In addition to the conflicts and gaps in the evidence, the judge also took into account the context of the dispute among these parties and the substantial size of the claim (over $10 million). He also found there was no real urgency to determining the actions.

[40] A decision under Rule 9-7 that a matter is unsuitable for summary trial is highly discretionary. The judge's conclusion that he could not find the facts necessary to determine whether the advances from the plaintiffs were loans or capital contributions is fully grounded in the record. I agree with the respondents that this is not a simple debt claim given the context of the business relationship among these parties over an extensive period of time. Moreover, that business relationship was not well documented and the judge had to examine the affidavit evidence in that light. This conclusion, as well as the judge's conclusion that it would be unjust to decide the issues, are subject to considerable deference on appeal. I find it highly unlikely that a division of this Court would conclude that the judge was clearly wrong in finding the matter unsuitable for summary trial. In my view, the merits of the proposed appeal do not weigh in favour of granting leave.

[41] Fourth, I do think that an appeal could very well hinder the action. Of course, an ultimately successful summary determination of the actions would put an end to this litigation. However, the applicants are unlikely to achieve this on appeal given the likely remedy of a remit back to the trial court in the event they succeed. In my view, however, there is a real risk that granting leave to appeal would simply delay a final determination and give rise to the potential for future appeals. This criterion weighs to some extent against granting leave.

[42] Finally, in the overall analysis, I conclude that it is not in the interests of justice to grant leave to appeal. In my view, the parties could well be sidetracked by proceeding with an appeal that is very unlikely to assist them to resolve their dispute. They would be better served by getting on with the actions below.

[43] The fact that the petition order is under appeal does not, in the end, sway this consideration. Although the three matters were heard together below, the judge's decision on the debt actions is distinct and not intertwined with the petition.

Disposition

[44] Therefore, for all of these reasons, the application for leave to appeal is dismissed.

"The Honourable Madam Justice Fisher"