COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Shuswap Association for Eco Development and Fairtrade v. Olympia Trust Company (A50545),* 2025 BCCA 217

Date: 20250513
Docket: CA50158

Between:

Shuswap Association for Eco Development and Fairtrade

Appellant
(Respondent)

And

Olympia Trust Company (A50545) and Peter Barry Kerr

Respondents
(Petitioners)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Donegan
The Honourable Justice Warren

On an application to vary: An Order of the Court of Appeal for British Columbia, dated December 10, 2024 (*Shuswap Association for Eco Development and Fairtrade v. Olympia Trust Company (A50545)*, Vancouver Docket CA50158).

Oral Reasons for Judgment

Appearing as Representative on behalf of the Appellant Company:	I. Zbarsky
Counsel for the Respondents (via videoconference):	A.A. Edwards
Place and Date of Hearing:	Vancouver, British Columbia May 12, 2025
Place and Date of Judgment:	Vancouver, British Columbia May 13, 2025

Summary:

The appellant society applies to vary an order of a single justice of the Court of Appeal sitting in chambers. The chambers justice dismissed the appellant's application for leave to appeal an order of a justice of the Supreme Court, which itself dismissed the appellant's appeal of orders made by an associate judge of the Supreme Court pertaining to an order nisi. The appellant submits that the Court of Appeal justice erred by refusing to accept its arguments regarding violation of the constitutional or procedural fairness rights, payments allegedly made toward the mortgage in question prior to the commencement of this litigation, and allegations that one of the respondents has been extorted into advancing these proceedings.

Held: Application dismissed. The Court of Appeal justice applied the appropriate legal test, and did not err in law or misconceive the facts in doing so. The appellant has not identified any reviewable errors, but instead effectively seeks to reargue its application on the merits.

DONEGAN J.A.:

Introduction

[1] This is an application brought by the proposed appellant, Shuswap Association for Eco Development and Fairtrade ("Shuswap"), to vary the order of a single justice dismissing its application for leave to appeal an order of a Supreme Court justice made September 11, 2024. For the reasons that follow, I would dismiss the application.

Background

[2] This matter relates to protracted foreclosure proceedings commenced by the respondents, Olympia Trust Company ("Olympia Trust") and Peter Kerr, relating to a mortgage dated May 12, 2005, registered in the Kamloops Land Title Office under No. CA71061 (the "Mortgage").

[3] The Mortgage is administered by Olympia Trust, but Mr. Kerr is the lender in his personal and individual capacity. By the terms of the Mortgage, Shuswap granted the respondents a charge over three properties. The Mortgage provides for monthly payments of principal and interest in the amount of $200.33. It also provides that upon default of payment, the principal and interest is due and payable, at the option of the respondents.

[4] Shuswap stopped making payments on the Mortgage years ago. In October 2021, following failed negotiations, the respondents made a formal written demand for payment of the outstanding balance of principal, interest and other charges owing under the Mortgage. Shuswap was instructed that any payments and/or correspondence in response to the demand letter be directed to counsel for the respondents. When Shuswap did not respond, the respondents filed a petition commencing foreclosure proceedings on December 22, 2021. Shuswap did not initially file a response.

[5] On February 1, 2022, the petition came on for hearing in front of Associate Judge Schwartz, who granted the order *nisi*, with a six-month redemption

period. Although properly served, advised of the hearing date and time, and provided with the MS Teams link to appear remotely, no one appeared on behalf of Shuswap at this hearing.

[6] As Shuswap had not attended the hearing, out of an abundance of caution, counsel for the respondents scheduled a further hearing on March 1, 2022 to confirm the order *nisi*, when a representative of Shuswap could be present. Two of Shuswap's directors attended the hearing virtually that day. The associate judge considered Mr. Zbarsky's interventions so disruptive that his line had to be disconnected. The other director remained, but made no submissions. The order *nisi* was confirmed. Despite the other director's presence at the hearing that day, counsel for the respondents nevertheless emailed Mr. Zbarsky to advise him of the outcome, and of the court's encouragement that Shuswap seek legal advice if it wished to properly pursue a variation or cancellation of the order *nisi*.

[7] Shuswap failed to redeem the Mortgage within the prescribed time and the respondents filed an application on September 16, 2022 seeking an order for conduct of sale. Three days before this (and although the time for doing so had long-since expired) Shuswap filed a response to petition in which it opposed the granting of all orders sought in the petition, some of which had already been granted. Shuswap's response essentially acknowledged the Mortgage, the debt, and the default, but took issue with the role played by Olympia Trust, both as mortgagee and in the termination of earlier negotiations.

[8] On October 25, 2022, Associate Judge Schwartz heard the respondents' application for conduct of sale. Mr. Zbarsky filed a response to the application on behalf of Shuswap, in which he primarily questioned the validity of the order *nisi*. He also appeared in person at the hearing and, although disruptive to the point of sheriff's intervention, made submissions. The court granted the conduct of sale orders sought by the respondents.

[9] On November 25, 2022, Shuswap filed a notice of appeal, appealing from both the February 1, 2022 order *nisi* and the October 25, 2022 order for conduct of

sale. Although the parties agreed Shuswap's appeal would be heard on March 24, 2023, Shuswap failed to schedule the hearing date and took no further steps to advance any appeal from these orders for another year and a half.

[10] In the meantime, in June 2023, the respondents retained a realtor and listed the properties for sale. An offer was accepted, subject to court approval, in March 2024. When preparing their application to have the sale approved, the respondents learned that Shuswap had been dissolved the previous summer, on July 30, 2023, for "failure to transition" under the new *Societies Act,* S.B.C. 2015, c. 18. This forced the respondents to take steps (including initiating a separate court action) to restore Shuswap as a society in order to allow the foreclosure proceedings to continue. Shuswap was restored on July 17, 2024 and the respondents filed their application to have the sale approved on August 2, 2024, with a hearing date of September 3, 2024.

[11] Shuswap responded by filing a second notice of appeal from the order *nisi* and order for conduct of sale. It set the appeal for hearing on September 4, 2024, in Vancouver rather than Vernon, without any consultation with counsel for the respondents on either the date or venue. The respondents received a copy of the notice of appeal just before 4:00 p.m. on Friday, August 30, 2024, before the Labour Day long weekend.

[12] On September 3, 2024, the parties appeared before Schwartz A.J. in Vernon to speak to the respondents' application to approve a sale of the property. The hearing was adjourned to September 17, 2024, so that Shuswap's appeal could proceed first.

[13] This brings us to the order from which Shuswap sought leave to appeal in this Court.

[14] On September 11, 2024, Justice Kirchner heard Shuswap's appeal from the orders of Schwartz A.J., and dismissed it in oral reasons for judgment: *Olympia Trust Company (A50545) v. Shuswap Association for Eco Development and*

Fairtrade (11 September 2024), Vernon S57450 (B.C.S.C.). Justice Kirchner held that the appeal was without merit, warranting dismissal of both the substantive appeal and an application to extend time for filing same. In reaching this conclusion, Kirchner J. considered each of the grounds advanced by Shuswap, including that: (a) Olympia was not a proper party to the proceeding; (b) Mr. Kerr was being coerced into the proceeding; (c) Shuswap had been restricted from communicating with Mr. Kerr; (d) the respondents failed or refused to continue negotiations before the demand for payment was made; and (e) Shuswap's *Charter* and/or procedural fairness rights had been violated because it's representative was unable to attend court in person (at paras. 24–25, 28–36). Justice Kirchner further found that Shuswap's delay in pursuing the appeal had been "substantial and prejudicial" to the respondents (at para. 37), such that the application to extend time should be dismissed in any event.

[15] With the appeal dismissed, the respondents' application for approval of sale proceeded on September 17, 2024. The order was granted, with closing to occur 21 days later. However, before closing could occur, Shuswap filed a notice of appeal from the order of Justice Kirchner. This forced the respondents to extend the closing dates.

[16] On November 1, 2024, Shuswap filed an application seeking leave to appeal the order of Justice Kirchner (the "Leave Application").

[17] Justice Fleming heard, and dismissed the Leave Application on December 10, 2024. In so doing, Fleming J.A. referred to the test for a leave to appeal from a limited appeal order made under Rule 21-7 of the *Supreme Court Civil Rules*, and the well-settled factors to be considered, as set out in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326. In considering those factors, Fleming J.A. determined that: (a) the legal issues on appeal respecting foreclosure and principles of delay were well established and that the balance of issues were largely factual in nature and not of significance to the legal practice; (b) the issues on appeal, while important to the appellant, were not of significance to the action; (c) there was no

merit in the appeal; and (d) that granting leave to appeal would unduly hinder the action. Overall and in consideration of these factors, Fleming J.A. concluded it was not in the interests of justice to grant leave to appeal (at paras. 51–53).

[18] Shuswap filed the within review application the following day, but did not serve it upon the respondents.

Discussion

[19] The sole issue for determination is whether Justice Fleming erred in refusing to grant leave to appeal the order of Justice Kirchner.

[20] A review application is not a rehearing of the original application. As set out in *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para. 7, a division of the Court reviewing an order of a single justice will intervene only if the justice erred in law or in principle, or misconceived the facts. The division is not to hear the application afresh or substitute its views in place of the conclusion of the justice: *Albu v. The University of British Columbia*, 2018 BCCA 185 at para. 9.

[21] Shuswap says the justice made several errors that permit this Court to intervene. I would group its various complaints into three categories. It contends the justice failed to consider that: (a) Shuswap's *Charter* rights were violated and/or it was denied procedural fairness; (b) Shuswap made payments toward the Mortgage in 2018 and 2019, and would have resumed payments if negotiations had been successful and if it had been told how to make those payments; and (c) Mr. Kerr has been "extorted" by Olympia Trust into pursuing these foreclosure proceedings.

[22] The errors alleged by Shuswap involve considerations related to one of the factors considered on the Leave Application—the merits of the appeal. As Fleming J.A. correctly identified, establishing this factor engages a relatively low threshold (at paras. 31–33). In concluding that Shuswap had failed to meet this threshold, Fleming J.A. distilled, and considered, all of the arguments raised by Shuswap, some of which are raised again on this application.

[23] Respectfully, the arguments raised by Shuswap in this application do not involve assertions of legal or other errors. They simply repeat arguments made before Justice Kirchner and Justice Fleming.

[24] Justice Fleming fully considered Kirchner J.'s findings and conclusions related to Shuswap's ability to participate in these proceedings, and determined there was no merit to the assertion that Kirchner J. erred in concluding Shuswap's *Charter* and procedural fairness rights had not been violated (see paras. 40–43). Shuswap does not identify any particular error in this determination. Rather, the submissions of its representative make clear that Shuswap is simply asking us to exercise our discretion differently than Fleming J.A., which is not our role. Despite its own, repeated, failures to follow procedural rules throughout the proceedings below, Shuswap has been afforded considerable latitude, and ample opportunity, to be heard and to present its case. I see no error in Justice Fleming's conclusions in this regard.

[25] Shuswap further alleges that Fleming J.A. erred by misconceiving the facts relating to Shuswap's historical payments under the Mortgage. Shuswap asserts that it made payments towards the debt in 2018 and 2019. I see no such error, but in any event, as the respondents observe, Shuswap has tendered no evidence in the underlying proceedings that would support a finding that Shuswap made these payments (apart from assertions they were made, which was noted by Kirchner J.). It is uncontentious that Shuswap has made no payments toward the debt after the time of the demand in October 2021. It is also uncontentious that the demand clearly set out how Shuswap was to make any further payments.

[26] Shuswap also contends Fleming J.A. misconceived the facts regarding the negotiations between the parties and/or that Mr. Kerr has somehow been "extorted" into pursuing this litigation. I do not agree. Justice Fleming found there was no basis for Shuswap's assertion that Kirchner J.'s findings on these matters were unreasonable, unsupported by the evidence, or based on a misapprehension of the evidence: at paras. 37–38. No particular error is identified here, and I see none.

[27] Justice Fleming gave comprehensive reasons in dismissing the Leave Application. She applied the correct test and addressed the arguments raised by Shuswap, including those raised on this application. Shuswap has not demonstrated that Fleming J.A. erred in law or in principle, or misconceived the facts. It is clear from Shuswap's memorandum of argument and its representative's oral submissions that we are being asked to substitute Fleming J.A.'s exercise of discretion with our own, which we are not permitted to do.

[28] I would dismiss Shuswap's application to vary the December 10, 2024 order of Justice Fleming.

[29] **WILLCOCK J.A.**: I agree.

[30] **WARREN J.A.**: I agree.

[31] **WILLCOCK J.A.**: The application to vary the December 10, 2024 order of Justice Fleming is dismissed.

"The Honourable Justice Donegan"