COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Crazy Greek Chick Food Limited v. Chakroborty,* 2026 BCCA 31

Date: 20260120
Docket: CA50660

Between:

Crazy Greek Chick Food Limited and Zoe Caverly

Appellants
(Plaintiffs)

And

Shounak Chakroborty also known as Roop, Marcel Schmitt, Sabrina Schmitt, and Monika Schmitt

Respondents
(Defendants)

Before: The Honourable Madam Justice Horsman
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated April 8, 2025 (*Crazy Greek Chick Foods Limited v. Chakroborty*, Abbotsford Docket S06288).

Oral Reasons for Judgment

Counsel for the Appellants:	D.M. Klassen
Counsel for the Respondent, Shounak Chakroborty also known as Roop Chakroborty:	D.J. Winterton J.C. Fu
Place and Date of Hearing:	Vancouver, British Columbia January 7, 2026
Place and Date of Judgment:	Vancouver, British Columbia January 20, 2026

Summary:

The appellants apply to adduce fresh evidence on appeal, while the respondent applies to strike portions of the appellants' factum to which the fresh evidence primarily relates. The impugned portions of the appellants' factum raise a new issue based on an alleged abuse of process arising from the fact that the respondent was represented in the court below by a lawyer appointed by the Lawyers Indemnity Fund. Held: The application to strike part of the appellants' factum is allowed and the application to adduce fresh evidence is dismissed. It is clearly not in the interests of justice to allow the appellants to their objection to LIF-appointed counsel for first time on appeal. As the proposed fresh evidence primarily relates to the new issue, it should not be admitted on appeal.

[1] **HORSMAN J.A.**: There are two applications before me: (1) the respondent's application to strike part of the appellants' factum; and (2) the appellants' application to adduce fresh evidence on appeal.

[2] These applications arise in unusual circumstances. This appeal is from the order of a Supreme Court judge in chambers setting aside a default judgment that had been obtained by the appellants against the respondent, Shounak Chakroborty. In their factum on appeal, the appellants raised a new issue concerning what they characterize as "abuse of process by maintenance" arising from the fact that the respondent was represented on the application in the court below by counsel appointed by the Lawyers Indemnity Fund ("LIF"). The appellants' proposed fresh evidence primarily relates to this new issue.

[3] After the appellants' factum was filed, the parties attended a case management conference before Justice Dickson. The respondent requested a referral of the appeal or of the maintenance issue alone for summary determination pursuant to s. 21 of the *Court of Appeal Act*, S.B.C. 2021, c. 6. Alternatively, he sought an order that the appellants' fresh evidence application and the respondent's application to strike part of the appellants' factum be heard together in advance of the hearing of the appeal.

[4] Justice Dickson provided oral reasons for judgment on September 25, 2025, which are indexed at 2025 BCCA 395. She concluded that setting a date to hear the applications before a single justice in advance of the appeal was a "proper and

efficient way to deal with the maintenance issue": at para. 20. She acknowledged that the Court's usual practice was to hear fresh evidence applications when the appeal is heard, but found the circumstances of this case to be exceptional. Justice Dickson also granted the respondent an extension of time to file his responding factum on the appeal to a date within five days of the determination of these applications.

[5] Pursuant to Justice Dickson's order, the parties have now exchanged application material and written argument on the two applications.

Background

[6] The underlying action relates to a dispute over an oral contract between the parties relating to a commercial tenancy. The appellants filed a notice of civil claim on October 10, 2024, and an amended notice of civil claim on October 28, 2024 (the "Claim"). They alleged that Mr. Chakroborty had breached the oral contract in failing to provide tenant improvements to the property within the agreed-upon time.

[7] On January 13, 2025, the appellants served Mr. Chakroborty with the Claim. On January 15, 2025, Mr. Chakroborty retained Kenneth Smith to defend the Claim.

[8] Due to an inadvertent error on Mr. Smith's part, he did not file a response to civil claim on Mr. Chakroborty's behalf or request a waiver of default judgment without reasonable notice within the 21 days for a response set out in R. 3-3(3) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

[9] On February 11, 2025, Mr. Smith realized his error and sent correspondence to Peter Loewen, counsel of record for the plaintiffs, to advise that he had been retained by Mr. Chakroborty and to request that default judgment not be taken without reasonable notice.

[10] On February 12, 2025, Mr. Smith received an email from Justin Klassen at Linley Welwood LLP advising that he was representing the plaintiffs rather than Mr. Loewen. Mr. Klassen further advised that he had already applied for and obtained default judgment against Mr. Chakroborty on February 11, 2025.

[11] Mr. Smith then promptly took steps to report the circumstances to LIF, and outside counsel was retained in relation to the plaintiffs' default judgment.

[12] On April 8, 2025, the outside counsel appointed by LIF brought an application on behalf of Mr. Chakroborty to set aside the default judgment. Mr. Smith swore an affidavit in support of the application confirming that the failure to file a response to civil claim in time was due to his error, which could not be attributed to Mr. Chakroborty. He described taking steps to report to his insurer and retain outside counsel after realizing his error. Mr. Chakroborty also swore an affidavit confirming that it was always his intention to defend the Claim and he had relied on Mr. Smith to take appropriate steps in defence of the Claim.

The chambers judgment

[13] The application to set aside the default judgment came before the chambers judge on April 8, 2025. She issued oral reasons the same day.

[14] The chambers judge cited the well-established test from *Miracle Feeds v. D. & H. Enterprises Ltd.* (1979), 10 B.C.L.R. 58 (Co. Ct.), [1979] B.C.J. No. 1965, that applies on an application to set aside a default judgment. She noted there were three factors that Mr. Chakroborty had to establish to her satisfaction through affidavit evidence:

a) he did not wilfully or deliberately fail to enter an appearance or file a defence to the Claim;

b) the application to set aside the default judgment was made as soon as reasonably possible after obtaining knowledge of the default judgment or there were reasons for the delay; and

c) he has a meritorious defence or, at least, a defence worthy of investigation.

[15] There was no dispute that Mr. Chakroborty's application to set aside the default judgment had been made as soon as reasonably possible. Therefore, only

the first and third of the *Miracle Feeds* factors were live issues before the chambers judge.

[16] The chambers judge was satisfied that Mr. Chakroborty's failure to file a response to civil claim within 21 days of service of the Claim was not wilful and deliberate. She accepted the evidence of Mr. Chakroborty and Mr. Smith that Mr. Chakroborty intended to defend the Claim, engaged counsel to do so, and the failure to file a response within the time required was solely attributable to counsel's mistake.

[17] The chambers judge was also satisfied, based on Mr. Chakroborty's evidence, that he had a defence worthy of investigation.

[18] The chambers judge thus ordered that the default judgment be set aside, with leave to Mr. Chakroborty to file a response to civil claim within 14 days.

The appeal

[19] On May 7, 2025, the appellants filed a notice of appeal of the order of the chambers judge.

The appellants' factum

[20] The appellants filed their factum on August 1, 2025. In the factum, they advance four grounds of appeal. Two of the grounds relate to alleged errors of law or fact by the judge in her analysis of the third limb of the *Miracle Feeds* test. A third ground relates to an alleged breach of procedural fairness arising from the chambers judge's interruptions of the submissions of the appellants' counsel during the hearing. These three grounds of appeal are not the subject of the application to strike. The appellants can proceed with their appeal on these grounds regardless of the outcome of the present applications.

[21] The fourth and final ground of appeal is the subject of the application to strike. This ground is framed as follows in Part 2 of the appellants' factum:

> The chambers judge erred by…[u]nintentionally committing or was caused to commit an error of law by not being provided with the information that the application was brought at the funding, instruction, and direction of a non-party (LIF) for purposes that are an abuse of process by maintenance. And for which the intermeddling of the non-party is likely a conflict of interest and to the prejudice of court resources, the appellant, and arguably the respondent.

[22] In the impugned passages of the appellants' factum, the appellants expand on this ground by suggesting that the application before the chambers judge "was not done at the funding, instruction, or for the interest of the respondent but for the respondent's lawyer Mr. Smith and the Lawyer's Indemnity Fund's ("LIF") interests". The appellants describe LIF as a non-party who injected themselves into private litigation—and committed maintenance—for the sole purpose of minimizing their potential future liability for Mr. Smith's error. The appellants characterize LIF's actions as "officious intermeddling". They argue that LIF's failure to disclose their "active funding, instruction, and control of the application" to the chambers judge led her into error.

The proposed fresh evidence

[23] On August 5, 2025, the appellants filed an application to adduce fresh evidence on the appeal. The fresh evidence consists of the affidavit of Justin Klassen, sworn July 16, 2025. Mr. Klassen's affidavit includes the following evidence:

a) emails that Mr. Klassen exchanged with LIF's claim counsel indicating LIF's intention to take steps to have the default judgment set aside;

b) an email Mr. Klassen received from a lawyer at Guild Yule LLP stating that she was retained "on behalf of Mr. Chakroborty" in relation to the default judgment, and serving application material;

c) correspondence from Mr. Klassen to LIF inviting them to intervene in the appeal;

d) a draft response to civil claim said to have been provided to the chambers judge at the April 8, 2025, hearing; and

e) the response to civil claim and counterclaim subsequently filed by the respondent.

[24] It is common ground between the parties that the proposed fresh evidence—with the exception of the draft response to civil claim, the filed response and counterclaim—is related to the abuse of process by maintenance issue.

The application to strike part of the appellants' factum

The arguments

[25] As directed by Justice Dickson, the parties scheduled the present applications in chambers and exchanged written arguments in advance.

[26] In his argument on the strike application, the respondent contends that: (1) the appellants have not met the test for raising new issues on appeal, and (2) there is no merit to the allegation of abuse of process by maintenance in any event because LIF had a duty, as an indemnifier of Mr. Smith, to mitigate his potential liability by appointing outside counsel to bring the application to set aside the default judgment. There was a conflict of interest in Mr. Smith speaking to the application himself because the default judgment was the result of his inadvertent mistake in failing to request a waiver of default from opposing counsel. The respondent says that it is not maintenance for LIF to fulfill its mandate to defend private practice lawyers in British Columbia against potential professional negligence claims.

[27] The appellants' 30-page responding argument significantly expands on the issues raised in the impugned portions of their factum. Among other things, the appellants argue that LIF's Indemnification Policy with Mr. Smith—and every other private practice lawyer in the Province of British Columbia—authorizes LIF to do no more than defend lawyers (the indemnified party) against actual lawsuits. The appellants submit that the terms of LIF's Indemnification Policy do not permit LIF to

take steps, such as applying to set aside a default judgment, directed at minimizing potential future liability. The appellants go further and suggest that LIF, by extending their services to a client of a covered party, is breaching its own contract with lawyers by effectively assigning Mr. Smith's coverage to Mr. Chakroborty.

[28] The appellants concede that this is an additional new argument not presently addressed in their factum. If permitted to raise the issue of abuse of process by maintenance, the appellants would have to obtain leave to amend their factum and to file a further fresh evidence application to put the 2025 version of the LIF Indemnification Policy before the Court. The appellants have included the 2025 Policy in their book of authorities for the purpose of having it before the Court on these applications.

Legal principles

[29] Pursuant to R. 60(1)(a) of the *Court of Appeal Rules*, B.C. Reg. 120/2022, a party may apply to strike part of a factum. Rule 60(4) provides that such application must be heard at the time of the hearing of an appeal unless a justice otherwise orders. As I have reviewed, Justice Dickson has ordered otherwise in this case.

[30] A chambers judge must exercise their jurisdiction to strike out part of a factum sparingly so that "the division which hears the appeal is not deprived of full argument on the issues properly raised": *Poon v. Yuen*, 2024 BCCA 296 at para. 21, citing, among other authorities, *Perron v. R.J.R. MacDonald Inc.* (1996), 81 B.C.A.C. 2, 1996 CanLII 2023 (C.A. Chambers) at para. 15 and *Gould v. Sandau*, 2004 BCCA 90 (Chambers).

[31] Justice Butler observed in *Poon* that while the decisions in *Perron* and *Gould* were decided prior to the inclusion of R. 60(1)(a) in the *Rules*, these decisions continue to provide some guidance: *Poon* at para. 22. In *Perron*, the respondents successfully applied in chambers to strike the appellant's reply factum on the basis that it raised new issues that could have been, but were not, argued at trial.

[32] As a general rule, a party cannot raise a new issue on appeal. An appellate court may depart from the general rule and entertain a new issue only 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, quoting *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 184 O.A.C. 84 at para. 102, 2004 CanLII 15484 (C.A.). Leave will generally be denied unless all the relevant evidence is in the record: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 51.

[33] This Court undertakes three inquiries in determining whether to permit a party to raise a new issue on appeal: (i) is the issue truly new; (ii) is the existing evidentiary record sufficient for the Court to address the new issue; and (iii) do the interests of justice support making an exception to the general rule that a new issue cannot be raised on appeal: *1193652 B.C. Ltd. v. New Westminster (City)*, 2021 BCCA 176 at para. 86.

Analysis

[34] I will address each of the three inquiries.

[35] The issue of abuse of process by maintenance is clearly new. The application before the chambers judge proceeded on a straightforward application of the *Miracle Feeds* test. Although the appellants were, on their own evidence, aware of LIF's role in appointing counsel to bring the application to set aside the default judgment, they did not raise the issue of LIF's involvement with the chambers judge. No argument based on abuse of process by maintenance was advanced.

[36] The existing evidentiary record is not sufficient to address the new issue. The appellants concede as much by bringing an application to adduce fresh evidence on appeal to allow the new issue to be determined. Notably, even the fresh evidence application that is before me is not sufficient to allow for a full adjudication. The appellants' arguments on abuse of process by maintenance are dependent on the proposition that LIF had no genuine interest in this proceeding because the terms of its Indemnification Policy did not require, or indeed allow, LIF to intervene at this stage of the proceeding. The proposition, as I understand it, is that the

Indemnification Policy permits LIF to defend a professional negligence action once it is filed but does not permit LIF to take steps to avoid a professional negligence action.

[37] I have significant doubt that the appellants' proposed interpretation of the Indemnification Policy is viable. However, the more important point for present purposes is that the chambers judge was not asked to interpret the provisions of the Policy. No evidence was adduced before the chambers judge on this issue. Instead, the appellants' new arguments would require this Court to interpret the Indemnification Policy for the first time on appeal in the absence of findings by the judge below or evidence of the relevant context.

[38] This leads me to the third inquiry that governs an application to raise a new issue on appeal, which is the interests of justice. It is clearly not in the interests of justice to permit a party to raise a new issue on appeal that: (1) was not raised in the court below for reasons that are unexplained; (2) would require the receipt of new evidence and original fact finding by this Court to resolve; and (3) is of general importance to all lawyers in the Province of British Columbia who pay for, and receive, indemnification coverage from LIF. Further, if the paragraphs of the appellants' factum addressing this new issue are struck, there is no concern that the division hearing this appeal will be deprived of full argument on issues that are properly raised on appeal. The issue of abuse of process by maintenance does not engage any of the factors in the *Miracle Feeds* test and is unconnected to the remaining issues on appeal.

[39] Accordingly, I conclude it is appropriate in the exceptional circumstances of this appeal to grant the respondent's application and make an order striking the impugned portions of the appellants' factum. As Justice Dickson observed, the issue of abuse of process by maintenance, and the fresh evidence it would require, would significantly complicate an otherwise straightforward appeal.

[40] Given my conclusion that the appellants should not be permitted to raise this issue on appeal, it is unnecessary for me to address the respondent's alternative

argument that it is plain and obvious that LIF has not committed an abuse of process by maintenance.

[41] However, I do wish to comment on one aspect of the appellants' argument. The appellants propose to argue on appeal that where LIF appoints counsel in circumstances such as these, counsel must at least provide evidence to the court to demonstrate that they have authority to act on the party's behalf and that the party has had an opportunity to seek independent legal advice. In their factum, the appellants allege that "it is open to suspect" that the respondent's counsel—both Mr. Smith and counsel appointed by LIF—may be motivated by self-interest to provide one-sided legal advice to Mr. Chakroborty.

[42] Counsel for the respondent raised the understandable objection that such allegations improperly impugn the ethics of counsel without any evidence. At the hearing before me, the appellants stated that it was not their intention to impugn the ethics or professionalism of counsel. However, this is the clear implication of some of the arguments they seek to advance.

[43] It may be an abuse of court process for a lawyer appointed through LIF to attempt to continue litigation after the named party they purport to represent has withdrawn their consent: *Martin Estate v. Dediu*, 2025 BCCA 218 at para. 20. However, there is no evidence in this case that Mr. Chakroborty did not provide his full and informed consent to outside counsel acting for him on the application to set aside the default judgment.

[44] The appellants submit that an abuse of process by maintenance should be presumed where there is no evidence that the named party gave consent to LIF to act on their behalf and that they did so after having an opportunity to seek independent legal advice. However, they cite no authority, in case law or legal principle, for the proposition that there is an onus on counsel in these circumstances to prove their authority to act on behalf of a party. Counsel are officers of the court, and when they appear in court on behalf of a party it may be presumed that they have the full and informed consent of the party to do so.

[45] There is the clear potential for mischief in an argument premised on a proposition that is antithetical to the proper operation of our justice system; that is, that counsel's representations to the court that they have authority to act for a party should be disbelieved until they are proved with evidence. This potential mischief is a further reason why it is not in the interests of justice to permit the appellants to raise the issue of abuse of process by maintenance on this appeal.

[46] Finally, the parties agreed that if I were to allow the application to strike, then the timeline for the respondent to file a response factum that was ordered by Justice Dickson should be varied. The parties jointly proposed that the appellants should have 14 days from today to file an amended factum that deletes the impugned paragraphs and adds no new issues. The respondent would then have five days from the date of the filing of the amended factum to file a response factum.

The application to adduce fresh evidence

[47] As I have noted, it is common ground that much of the proposed fresh evidence—Justin Klassen's affidavit—relates to the abuse of process by maintenance issue. However, the appellants contend that the draft response to civil claim and the filed response to civil claim and counterclaim that are exhibited to Mr. Klassen's affidavit are relevant to the remaining issues on appeal.

[48] The relevance is not clear to me. Nor is it clear why it is necessary for the appellants to tender an affidavit to put the filed pleadings in this case before the Court. In any event, Mr. Klassen's affidavit cannot, in its current form, be adduced as fresh evidence on appeal. Most of the information it contains is irrelevant to the remaining issues on appeal.

[49] Accordingly, I order that the application to adduce Mr. Klassen's affidavit as fresh evidence on appeal is dismissed, without prejudice to the appellants' ability to file a new fresh evidence application relating to the remaining issues on appeal. If such an application is filed, it will be for the division to determine whether the fresh evidence should be admitted.

Disposition

[50] For the foregoing reasons, I make these orders:

a) The respondent's application to strike portions of the appellants' factum is allowed and the following paragraphs (as set out in the respondent's notice of application) are struck:

   i. Opening Statement: paragraphs 2 and 3;

   ii. Part 1: paragraphs 19, 20, 24–25, 29, 31 and 32;

   iii. Part 2: subparagraph 33(iii); and

   iv. Part 3: paragraphs 36(iii), 53–67, 75 and 77.

b) Justice Dickson's September 25, 2025 order that the respondent shall file a response factum within five days of the date of this decision is varied and replaced with the following terms:

   i. Within 14 days of today's date, the appellants will file an amended factum that deletes the struck portions and adds no new issues; and

   ii. Within five days of the filing of the amended appellants' factum, the respondent shall file a response factum.

c) The appellants' application to adduce Mr. Klassen's affidavit as fresh evidence is dismissed, without prejudice to the appellants' ability to bring another fresh evidence application in relation to the remaining issues on appeal.

"The Honourable Madam Justice Horsman"