

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Liu v. Choi*,  
2024 BCSC 2305

Date: 20241218  
Docket: H220074  
Registry: Vancouver

Between:

**Jun Qi Liu**

Petitioner

And

**Shing Chi Choi, His Majesty the King in Right of the Province of British  
Columbia, Zhen Ni Fu, Amex Bank of Canada, and Capital One Bank (Canada  
Branch), Alex Tan and Sandy Chan and All Tenants or Occupiers of the  
Subject Lands and Premises**

Respondents

Before: The Honourable Justice Giltrow

## Reasons for Judgment

Counsel for the Petitioner:

X. Liu

Counsel for the Respondent, Shing Chi  
Choi:

W.M. Wong  
J.S. Kandola

No other Appearances:

Place and Date of Hearing:

Vancouver, B.C.  
September 19, 2024

Place and Date of Judgment:

Vancouver, B.C.  
December 18, 2024

[1] This is an application to set aside an order *nisi* in a foreclosure proceeding and to transfer the proceeding to the trial list.

[2] The order was granted *ex parte* against the Shing Chi (also known as Jackson) Choi, January 26, 2023.

[3] The law under which such an order may be set aside was summarized by Justice MacNaughton in *B2B Bank v. Sinnarajah*, 2021 BCSC 1475:

[40] There is no dispute about the applicable law on a reconsideration request. Pursuant to R. 22-1(2) of the *Supreme Court Civil Rules*, a chambers proceeding may proceed in the absence of a party if, considering the nature of the chambers proceeding, the court considers it will further the object of the *Rules* to do so.

[41] A decision to proceed may be reconsidered under R. 22-1(3) which provides:

Reconsideration of order

(3) If the court makes an order in circumstances referred to in subrule (2), the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

[42] In *Singh v. Plewes*, 2010 BCSC 1867, at para. 3, Justice Masuhara described the test for a reconsideration under R. 22-1(3) as being essentially the same as that for setting aside a default judgement as described in *Miracle Feeds v. D. & H. Enterprises Limited* (1979), 10 B.C.L.R. 58 (Co. Ct.).

[43] At paras. 4–6, Justice Masuhara said this about the test:

[4] The test has three components which must be met by an applicant to warrant reconsideration. They were articulated as follows in *Canada Mortgage and Housing Corp. v. Bhalla*, 2008 BCSC 1352 at para. 26:

(a) the applicant must not be guilty of any wilful default in respect of the non appearance;

(b) the application to set aside must have been made as soon as reasonably possible; and

(c) the applicant must show there is a meritorious defence to the action or at least a defence worthy of investigation.

[5] In considering the first part of the test, wilful delay or default; a party's non-attendance must be blameworthy. A failure may be purposeful, deliberate, or intentional but in the circumstances not blameworthy: *Anderson v. Toronto Dominion Bank* (1986), 70 B.C.L.R. 267 (C.A.).

[6] Even in the case of wilful delay or default, the judgment may still be set aside if it can be shown that a serious miscarriage of justice

would result if the application was not heard: *Lin v. Tang*, [1997] B.C.J. No. 1307 (Q.L.) (C.A.).

[44] The three elements of the test were confirmed in *Rangi v. Rangi*, 2007 BCCA 352 at para. 73.

**Wilful Default in Non-Appearance**

[4] Mr. Choi attests by affidavit that he was not served with the petition to enforce the mortgage that is the subject of these proceedings (the “Subject Mortgage”).

[5] This Court did grant the petitioner an order for alternative service for service of Mr. Choi on July 21, 2022. The order allowed service upon Mr. Choi by email to an @ymail email address (the “ymail Address”) and an @163.com email address (the “163.com Address”) as well as service upon Bernard Lau who had been counsel for Mr. Choi. The affidavit upon which the application for the order for substituted service was based attached as an exhibit an email and response that the petitioner attested demonstrated communication with Mr. Choi at these email addresses. This communication was in fact the demand for payment and acknowledgement of demand that forms the basis of the monetary amount that is alleged to be owed and secured pursuant to the Subject Mortgage.

[6] However, Mr. Choi attests that he does not have access to and does not hold the email accounts attached to either the ymail Address or the 163.com Address. In light of this evidence, the affidavit of service of the petition, which attests to having sent the petition materials to these email addresses, is not sufficient to demonstrate that Mr. Choi received the petition.

[7] The affidavit of service also attests that the petition was served on Mr. Lau, Mr. Choi’s former counsel. However, Mr. Choi attests that he did not receive notice or the documents regarding this proceeding from Mr. Lau. The only other evidence before the Court on this point is an email from Mr. Lau, who did receive the petition, in which he wrote to counsel for the petitioner saying that he had “contacted” Mr. Choi and “advised him to seek independent legal advice from another counsel since we no longer represent him in any matters.”

[8] I am on the whole of the evidence unable to satisfy myself that Mr. Choi was served with the petition.

[9] In any case, there is no evidence at all that Mr. Choi was served with the notice of hearing for the application seeking the order *nisi*, nor the order *nisi* itself, which allowed for a redemption period of six months.

[10] In the absence of evidence to the contrary I accept Mr. Choi's evidence that he was not served with the petition or the Notice of Hearing.

[11] Accordingly, I do not find Mr. Choi guilty of wilful default in his non-appearance in chambers on January 26, 2023, the date upon which the order *nisi* was granted *ex parte*.

**Application to Set Aside Made as soon as Reasonably Possible**

[12] As I have said, there is no evidence before me that Mr. Choi was served with the order *nisi* itself once it was issued. Mr. Choi attests that he did not become aware of the order *nisi* until July, 2023, when he received documents related to the proceeding from the Land Title Office that were left at his door.

[13] Mr. Choi did have active knowledge well before July 2023 of related foreclosure proceedings brought by the petitioner to enforce a mortgage the petitioner held against Mr. Choi's sister, Ms. Choi.

[14] Ms. Choi failed to appear in that related proceeding and Master Bilawich granted an order *nisi* on July 28, 2022. The evidence before me (and before the Court in the related proceeding) is that it was Mr. Choi who then retained legal counsel for his sister, and had knowledge of and was involved in those proceedings throughout. Those proceedings resulted in MacNaughton J. setting aside the order *nisi* against Ms. Choi and transferring the proceeding to the trial list in May 2023: *Liu v. Choi*, 2023 BCSC 866. The matter has not since been set for trial.

[15] There is some evidence that Mr. Choi might have become aware of the order *nisi* issued in this proceeding in the related proceedings, as MacNaughton J. wrote in May 2023:

[26] Mr. Liu is not at risk of losing his equity, or being unable to collect an order for costs if he is ultimately successful at trial. I also learned at the hearing that Mr. Liu has filed a foreclosure proceeding against property owned by Jackson Choi. The Mortgage appears to have been registered to secure the same debt owed by Jackson Choi to Mr. Liu. An order *nisi* has been obtained in that proceeding.

[16] If Mr. Choi were aware of MacNaughton J.'s statement made May 17, 2023, or the evidence upon which it was based, which would have been articulated in Court at the hearing May 12, 2023, that would make the date upon which he actually became aware of the order *nisi* about two months earlier than he has attested in the application before me. However, there is no direct evidence that Mr. Choi was aware of the order *nisi* against him in May 2023. Moreover, given the overall effluxion of time in this proceeding, I do not find that the difference of these three months weighs significantly in the evaluation of the reasonableness of the time in which Mr. Choi sought to bring the present application.

[17] Mr. Choi attests that he attempted to retain counsel to represent him in this proceeding beginning in July 2023:

- a) In July 2023 by first contacting the lawyer representing Mr. Choi's sister in another foreclosure proceeding brought against her by the petitioner. This lawyer was unable to represent Mr. Choi due to conflict.
- b) On August 18 2023 he contacted a second lawyer who was unable to represent Mr. Choi due to the lawyer's schedule.

[18] On August 21 2023 Mr. Choi attended the application for conduct of sale in this proceeding representing himself. The matter was adjourned to September 11, 2023.

[19] On August 31, 2023 Mr. Choi retained his present counsel, Mr. Wong.

[20] The September 11, 2023 application for conduct of sale was adjourned by Associate Judge Bilawich on the basis that Mr. Choi would be filing an application to set aside the order *nisi*. This application was filed September 25, 2023 to be heard in October, 2023.

[21] However, before the scheduled hearing of the application to set aside the order *nisi* in October 2023, the petitioner's lawyer withdrew. On October 26, 2023 the petitioner personally asked that the application be adjourned so that he could retain new counsel. By consent the parties agreed to reset the application to November 15, 2023. However, on November 14, 2023, the petitioner's new (and present) counsel requested an adjournment because she had only just come on the file and required time to prepare. The parties agreed to adjourn the application to January 17, 2024.

[22] I do not up to this point find Mr. Choi to be responsible for unreasonable delay in bringing forward the application.

[23] However, in January 2024 that changes. On January 5, 2024, Counsel for Mr. Choi withdrew due to an inability to obtain instructions. Mr. Choi filed an Intention to Act in Person. Counsel for the petitioner tried to contact Mr. Choi to determine whether Mr. Choi intended to proceed with the application January 17, 2024. No response was received, no materials were filed, and the matter was not brought on for hearing by Mr. Choi.

[24] Mr. Wong came back on the record as counsel for Mr. Choi in April 2024. However, no steps were then taken to bring this application on for hearing until the petitioner filed an amended notice of application for conduct of sale on May 14, 2024. At that point Mr. Choi filed a requisition setting the application to set aside the order *nisi* down for hearing, for May 30, 2024, by consent.

[25] I do attribute this 4-and-a-half-month delay to Mr. Choi.

[26] On May 30, 2024 Justice Shergill adjourned this application and directed the parties to reserve one day for the hearing of the matter. That one-day hearing came on before me September 19, 2024.

[27] On the whole of the evidence regarding the period between the granting of the order *nisi* on January 26, 2023 and the hearing of the present application on September 19, 2024, I am satisfied that Mr. Choi acted with reasonable diligence in bringing the application to set aside the order *nisi* once he had notice of it, even accounting for the delay for which he was responsible between January 17, and May 30, 2024.

### **Defence Worthy of Investigation and Transfer to Trial List**

[28] I will consider the third factor in the test to set aside the *ex parte* order *nisi* in conjunction with Mr. Choi's application to have this matter transferred to the trial list. While the two questions are distinct—a defence worthy of investigation need not necessarily be investigated by trial rather than petition—the pleadings and assertions of fact pertaining to these two questions are inherently inter-related.

[29] The legal principles that guide a determination as to whether an application for an order *nisi* raises *bona fide* triable issues and should be converted to the trial list were set out by Justice D. MacDonald in *Capital Now Inc. v. Munro*, 2023 BCSC 197:

[53] Pursuant to R. 21-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] a foreclosure proceeding must be started by petition and the Court has the power to summarily determine the matter.

[54] Order *nisi* hearings are regularly set before a master. The master has the jurisdiction to render a decision when there are no *bona fide* triable issues: *Western Arres Capital Inc. v. Currey*, 2011 BCSC 522 at para. 20. The petitioner in a foreclosure proceeding bears the onus of demonstrating the absence of a *bona fide* triable issue: *Griffin v. 0904713 B.C. Ltd.*, 2013 BCSC 273 at para. 34.

[55] As set out in *Griffin* at paras. 30-31 and *Yu Yue Construction & Development Ltd. v. 1098686 B.C. Ltd.*, 2022 BCSC 248 at para. 21, a *bona fide* triable issue arises when:

- (a) there is a true defence;

- (b) there is serious dispute as to facts or law which raises a reasonable doubt;
- (c) the dispute cannot be resolved on the evidence and submissions that are before the court; and
- (d) the dispute would affect the outcome of the proceeding.

[56] In *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701, Justice Ballance stated:

[48] The dominant principle is that the Court should exercise its discretion under the rule to convert a petition into trial where there is a *bona fide* triable issue that cannot be determined by reference to the documents, and would affect the outcome of the proceeding. A *bona fide* triable issue arises where on the evidence before the Court there is a dispute as to facts or law which raises a reasonable doubt or suggests there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith*, 1991 CanLII 3954 (BC CA), [1991] B.C.J. No. 484 (C.A.). The threshold is, appropriately, a relatively low one.

[49] The authorities indicate a tendency of the Court to convert a summary process to a full trial where serious and disputed questions of fact or law are raised. ...

[57] To forestall an order *nisi*, the *bona fide* triable issue must go to the root of the foreclosure action. This includes the validity of the mortgage, the ability of the mortgagee to claim under the mortgage, or the amount due and owing under the mortgage that is contested: *Fairmont Hot Springs Resort Ltd. v. Linwood Homes Ltd.*, 2013 BCSC 589 at para. 8. A self-serving affidavit that does not provide detailed facts or supporting evidence is not sufficient in itself to create a *bona fide* triable issue: *Yu Yue* at para. 31.

...

[84] If there is a *bona fide* triable issue, the Court has discretion to determine whether the petition should be converted into an action and referred to the trial list, or whether it can be resolved through alternative methods.

[85] The factors to consider in converting a petition to an action in British Columbia were set out in *Azam v. Andrews Custom Furniture Designs Inc.*, 2022 BCSC 1166 at para. 6., citing *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627 at para. 39. Justice Dardi summarized the principles to consider as follows:

- (a) the undesirability of multiple proceedings;
- (b) the desirability of avoiding unnecessary costs and delay;
- (c) whether the particular issues involved require an assessment of the credibility of witnesses;
- (d) the need for the Court to have a full grasp of all the evidence; and
- (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

[86] While all factors are important, the most significant factor is the interests of justice. This point was explained by Justice Skolrood, as he then was,

in *Taj Park Convention Centre Ltd. v. Sher-A-Punjab Community Centre Corporation*, 2022 BCSC 473 [*Taj Park*]:

[38] The interests of justice is undoubtedly the most important factor to consider. That assessment will be informed by the other factors identified by Justices Ballance and Dardi in *Boffo Developments* and *Terasen Gas* as well as by the objective underpinning the *Supreme Court Civil Rules* as a whole of securing a just, speedy and inexpensive determination of the proceeding on its merits: R. 1-3(1)

[87] When faced with credibility issues and other *bona fide* triable issues that make summary procedures inappropriate, this Court may consider the use of hybrid procedures without transferring the matter to trial. Such procedures may include limited discovery or cross-examination on affidavits to investigate the triable issue(s): *Cepuran v. Carlton*, 2022 BCCA 76 at para. 160.

[88] There are no hard and fast rules. It is up to the Court to determine on a case-by-case basis whether a petition proceeding is suitable for adopting a hybrid procedure or whether it should be converted to an action and referred to trial: *Cepuran* at paras. 162-165.

[89] When considering what course of action to take, the Court must be mindful of the object of the *Rules* as set out in R. 1-3: to secure the just, speedy, and inexpensive determination of every proceeding on its merits, in so far as can be achieved, in ways that are proportionate to the amounts involved, the importance of the issues, and the complexity of the proceeding: *Cepuran* at para. 166.

[30] As Justice Gomery explained in *The Bank of Nova Scotia v. Khoe*, 2021 BCSC 1153 starting at para. 14, at this stage in the proceeding, the respondent to the application for an order *nisi* need not prove that any of their defences will succeed. To avoid the order *nisi* and have the case referred to the trial list, it is sufficient for the respondent to show that there is a genuine or *bona fide* triable issue going to the foundation of the petitioner's claim. Again, those foundational issues include the validity of the mortgage and the amount due and owing under the mortgage.

[31] The burden of demonstrating the absence of a genuine triable issue lies on the petitioner. The bank can only succeed if the absence of a triable issue is "manifestly clear." Put another way, the evidentiary threshold in arguing for the existence of a triable issue is very low: *Griffin v. 0904713 B.C. Ltd.*, 2013 BCSC 273 at paras. 32–33; and *Khoe* at para. 15.

[32] In *Bank of Montreal v. Jamieson*, 2011 BCSC 1141 Justice Pearlman put it this way:

[39] I return to the guiding principle stated by McLachlin J., as she then was, in *Royal Bank of Canada v. Rizkalla*, that unless it is manifestly clear that the mortgagors are without a defence that deserves to be tried, their application to place the matter on the trial list should be granted.

[33] The burden is on the petitioner to establish the absence of a triable issue, and the threshold for determining a *bona fide* triable issue is very low. With that guidance in mind, I set out the relevant respective positions of the parties.

[34] The petitioner alleges:

- a) He has known Mr. Choi for over 20 years, and they were close friends until 2020.
- b) Mr. Choi worked as a salesperson for BMW and also operated a used car export business.
- c) Between 2016 and 2019, Mr. Choi repeatedly asked to borrow money from the petitioner for various personal reasons, including living expenses, his children's tuition, his father-in-law's medical expenses and operating expenses for his car exporting business.
- d) The petitioner attests that "as a good friend, I lent him approximately \$1,000,000." He further attests that he advised Mr. Choi that the loan was payable on demand.
- e) By January 2019, the petitioner attests he became concerned about repayment when the amount of the funds loaned reached about \$1,000,000.
- f) The petitioner attests that as of March 7, 2024, he had not received any payment for the money he loaned to Mr. Choi.
- g) The petitioner attests that out of concern for repayment of the funds he had loaned, in January, 2019, he asked Mr. Choi to pledge his house (the "McKay

- Drive Property”) as security for the approximately \$1,000,000 he had loaned him.
- h) The petitioner attests that he and Mr. Choi agreed that, due to there being insufficient equity in the McKay Drive Property, an additional mortgage would be registered against Mr. Choi’s sister’s home (the “Hazelbridge Way Property”). The petitioner eventually filed for default of that mortgage. However, as noted above, MacNaughton J. set aside the order *nisi* against Ms. Choi’s Hazelbridge Way Property, dismissed Mr. Liu’s application for an order for sale, and referred that matter to the trial list in May 2023.
- i) The petitioner attaches as exhibits to his affidavit the loan agreement between Mr. Choi and the petitioner, named as Jun Qi Liu in the agreement, dated July 9, 2019, and the second loan agreement between the same parties dated January 14, 2020 (the “2020 Loan Agreement”) as well as, *inter alia*, the Subject Mortgage, being a mortgage registered against the McKay Drive Property on March 17, 2020 pursuant to the 2020 Loan Agreement.
- j) The petitioner further attests that he and Mr. Choi met in May, 2020 to discuss repayment of the loan, and that Mr. Choi told the petitioner then that he would need to make a written demand for full repayment of the loan by giving 3 months’ notice as contemplated under the 2020 Loan Agreement. The petitioner attests that Mr. Choi gave him the ymail Address at that meeting; that the petitioner subsequently sent the demand to the ymail Address, and that Mr. Choi responded and acknowledged the demand for payment.
- k) This email communication, which, as noted, also formed the basis for the petitioner’s application for an order allowing alternative service, was attached as an exhibit to the petitioner’s affidavit responding to the within application to set aside the order *nisi*.

i. The demand states in part: “This email is a formal request that you pay back the loan of CAD \$500,000.00 in full within three months.

ii. The response states:

“To Jun Qi Liu,

I Jackson choi acknowledge receipt of your email.

I agree that the loan I took from you, in amount of CAD \$500,000.00 is due in three months from 1 June, 2020

Jackson choi” [*sic*]

l) By September, 2020 Mr. Choi had failed to repay \$500,000 or any part thereof.

m) In October, 2020, Mr. Choi told the petitioner he was going back to Hong Kong for medical reasons. The petitioner attests that he and Mr. Choi went together to a notary and Mr. Choi provided the petitioner with a power of attorney to sell the McKay Drive Property. A photograph of a power of attorney document of that date is attached as an exhibit to the petitioner’s affidavit. It lists sale of the McKay Drive Property as being a “condition or restriction” to which the general grant of power of attorney is subject. For the purpose of the question before me, I need not determine whether the power of attorney document granted the rights to sell the McKay Drive Property attested to by the petitioner.

n) After further events and alleged failure to pay, the petitioner eventually did, in April 2021, enter into a contract for purchase and sale with a third party for the McKay Drive Property, under the power of attorney.

o) However, on June 30, 2021 Mr. Choi’s lawyer advised the petitioner that Mr. Choi opposed the sale and revoked the power of attorney.

p) On December 23, 2021, the petitioner commenced the within foreclosure proceedings against Mr. Choi. I have reviewed the relevant procedural history of this proceeding earlier in these reasons.

[35] The order *nisi* issued January 26, 2023 is for \$1,030,958.90. On the face of the petition, this amount was based upon \$500,000 loaned to Mr. Choi, and interest at 40% annually commencing June 1, 2020. The relevant clauses of the 2020 Loan Agreement state:

2.1 The Loan is of no interest until the earlier of the date of demand in 4.7 or July 1, 2022 after which the interest is 40% per annum.

4.7 The Lender has the option to demand from the Borrower for full payment of the Loan by giving three (3) months' notice in writing to the Borrower.

11.1 Any notice required or permitted to be given by the Lender to the Borrower shall be given by e-mail to [gmail address], and upon the Borrower giving a reply to the Lender acknowledging receipt of the notice will be sufficient notice.

[36] The petition states the same facts alleged by the petitioner in response to the within application and that I have recounted above: that on June 1, 2020 the petitioner demanded in writing that Mr. Choi repay the \$500,000 loaned under the agreement within 3 months, and that on that same day, Mr. Choi acknowledged in writing that he must repay the petitioner \$500,000 within 3 months of June 1, 2020. The petitioner's affidavit in support of the petition attaches the email correspondence which the petitioner alleges is the demand and acknowledgement required under the 2020 Loan Agreement. However, neither the petition nor the affidavit in support of it which was before the Court in the application for the order *nisi* alleges or states that Mr. Choi had provided an alternate email address other than the gmail address listed in the 2020 Loan Agreement for the purposes of serving notice under the Agreement. They both are silent on that point.

[37] Mr. Choi attests that he does not have access to the emails by which the petitioner was granted rights of alternative service (the 163.com Address and the ymail Address). As noted, the alleged demand and acknowledgment presented as

evidence by the petitioner was sent to and from the ymail Address, not the gmail address provided for in the 2020 Loan Agreement.

[38] On the evidence before me, this is a point in dispute that goes to a fundamental issue, being the amount due under the loan agreement. If the demand was not in fact received and acknowledged by Mr. Choi, then the date upon which interest began to accrue pursuant to s. 4.7 of the Agreement would not be determined by that demand. As my review of the record of service of documents on Mr. Choi in this proceeding reveals, there are credible questions about what documents and correspondence Mr. Choi has and has not received from the petitioner throughout this proceeding. While I wish to make clear I am not accepting as fact Mr. Choi's assertions in this application, as there are very significant internal inconsistencies in his pleadings and affidavit evidence, I am of the view that Mr. Choi has raised a defence that warrants inquiry. Furthermore, given the petitioner's attestation that the alternate ymail Address for service of the demand under the Agreement was provided to him by Mr. Choi in person at a meeting in May 2020, and Mr. Choi's contrasting denial of any access to this email address or the 163.com Address, credibility is starkly in issue. In my view this defence is best addressed by way of trial, including cross-examination of both parties.

[39] Mr. Choi also raises a further defence to the order *nisi* that warrants inquiry. While the petitioner alleges that he loaned Mr. Choi approximately \$1,000,000 and has received none of that in repayment, Mr. Choi attests that the petitioner actually "advanced" him \$1,569,512 between 2016-2019 for "business purposes", but that Mr. Choi returned at least \$1,126,598 to the petitioner between 2018-2020. Some of these payments were made to the petitioner's company Dragon Heir Investments Ltd. While the petitioner acknowledges that Dragon Heir loaned and received money from Mr. Choi, the petitioner attests that these sums are outside the scope of the loan he is claiming under the Subject Mortgage.

[40] Despite acknowledging that he received money from the petitioner, in his notice of application Mr. Choi denies having received "\$500,000 in mortgage

proceeds from the petitioner” and that he “does not recall signing any documents in relation to the Mortgage on the Property.” As I understand Mr. Choi’s position based upon counsel’s submissions, Mr. Choi acknowledges receiving funds from the petitioner, but not that these were “mortgage proceeds.” Rather, he says, they were funds received “for business purposes not for any personal reasons and all the money that was advanced was repaid with profit.”

[41] Despite his pleading in his September 25, 2023 notice of application that he does not recall entering into the mortgage with the petitioner, Mr. Choi subsequently attested in his third affidavit, dated May 27, 2024:

25. Jacky Chan also known as Jun Qi Liu asked me to mortgage my property if we were to conduct further business, and that he would not advance further money to me if I did not. I did not agree. After I did not agree he threatened to have two vietnamese people harm my family and children.

26. After he made these threats, I complied with his demands and mortgaged my property located at [McKay Drive Property] under duress.

27. The Petitioner’s mortgage was obtained fraudulently and by use threats.  
[sic]

[42] Mr. Choi gives evidence of the threats he attests he suffered, citing three specific events in the summer of 2019.

[43] I also note that Mr. Choi initially attested he did not know who the petitioner was, but then attested he believes the petitioner is a person he has known as “Jacky Chan.” I note that the two signed loan agreements, including the 2020 Loan Agreement, are between Mr. Choi and the petitioner, named as Jun Qi Liu in the agreements, and that several of the exhibits Mr. Choi points to as evidence of his return of amounts forwarded to him are cheques made out from Mr. Choi to Jun Qi Liu (I note on the face of these exhibits it is not clear these cheques were provided to or deposited by the petitioner, however I need make no finding in relation to this for the purposes of this application.) It strains credulity that Mr. Choi did not at all relevant times know who Jun Qi Liu was. However, either way, this fact does not impact the questions before me on this application.

[44] While there are evident inconsistencies and credibility issues with the pleadings and evidence advanced by Mr. Choi, these do not, in themselves, allow me to over-ride my determination that Mr. Choi has raised defences worthy of investigation, and moreover, that these defences raise *bona fide* triable issues.

[45] It is common ground between the parties that the mortgage was entered into retroactively, that is, after the loans were made or funds advanced by the petitioner to Mr. Choi. Further, both parties acknowledge that funds beyond the \$500,000 secured by the mortgage were provided by the petitioner to Mr. Choi, although the total amounts are in dispute. Additionally, the petitioner alleges that no money of the approximately \$1,000,000 he attests he loaned Mr. Choi has been repaid. By contrast, Mr. Choi alleges he has “returned” a substantial sum: either all of the money advanced, or at least approximately \$1,126,000 of \$1,569,000 to the petitioner or the petitioner’s company.

[46] Given all of this, I am persuaded that there is an open question, or a defence worthy of investigation, relating to what funds were secured by the Subject Mortgage, and what, if any, portion of those funds has been repaid by Mr. Choi. This raises an issue going to the root of the foreclosure claim, namely, the amount due and owing under the mortgage. Given the complexity of the financial relationship between the parties, and the significant disparity between the parties’ affidavit evidence, I am of the view that this question is best determined by way of trial, with *viva voce* testimony and cross examination.

[47] A secondary issue relating to the validity of the mortgage, both in terms of the consideration received and Mr. Choi’s claims of duress, also goes to the root of the foreclosure claim. This issue is also best determined by way of trial.

[48] I would accordingly allow the application to set aside the order *nisi* and refer the matter to the trial list.

[49] Costs will be in the cause.

“Giltrow J.”