COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *JEKE Enterprises Ltd. v. Philip K. Matkin Professional Corp.*, 2014 BCCA 227

Date: 20140613
Docket: CA041433

Between:

JEKE ENTERPRISES LTD. (as representative of approximately 300 owners/leaseholders in Riverside Villas, Hillside Villas and Riverview Villas in Fairmont Hot Springs)

Appellant
(Owner)

And

Philip K. Matkin Professional Corporation

Respondent
(Petitioner)

And

Northmont Resort Properties Ltd.

Respondent
(Respondent)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated November 15, 2013 (*Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.*, 2013 BCSC 2071, Vancouver Docket S132760).

Counsel for the Appellant, JEKE Enterprises Ltd.: L.J. Alexander, L.R. LeBlanc

Counsel for the Respondent Northmont Resort Properties Ltd.: J.E. Virtue, C.V. Pearce

Place and Date of Hearing:	Vancouver, British Columbia May 12, 2014
Place and Date of Judgment:	Vancouver, British Columbia June 13, 2014

Written Reasons of the Court

Summary:

The appellants hold time shares in a resort owned by the respondent. In order to fund substantial renovations the respondent gave time share holders the option of paying either a renovation project fee or a cancellation fee. The appellants disputed the respondent's ability to impose these fees. Initially the parties sought to resolve the dispute by way of a special case (Rule 9-3) in the Supreme Court but the appellants ultimately argued that the issue was not appropriate for a special case. The chambers judge proceeded with the special case and found in the respondent's favour.

Held: appeal allowed; the question before the court was not appropriate for a special case. The underlying facts were in dispute and the question put to the court was based on hypothetical circumstances. The result was that the special case did not lead to a just, speedy or efficient determination of the issues.

Reasons for Judgment of the Court:

[1] The narrow issue in this appeal is whether the chambers judge erred in answering a special case under Rule 9-3 of the *Supreme Court Civil Rules* in circumstances where there was disagreement between the parties as to the underlying facts, and where the special case assumed that the contracts in dispute were valid and enforceable.

[2] Because we are of the view that the appeal must be allowed and the order from the special case must be set aside, we will review the background facts and reasons of the chambers judge to the limited extent necessary to explain our reasons for allowing the appeal.

BACKGROUND

[3] Between 1990 and 2009, Fairmont Resort Properties Ltd. ("Fairmont") constructed resort properties in Fairmont Hot Springs and sold time shares in these properties (the "Agreements"). In 2009 Fairmont became insolvent and defaulted on its loans. Pursuant to a foreclosure agreement, Fairmont's rights in the resort were transferred to the respondent Northmont Resort Properties Ltd. ("Northmont").

[4] The appellants in this case own a portion of the approximately 18,950 time shares in the resort property in the form of either leasehold interests or co-ownership agreements (collectively, the "Owners").

[5] Because of the nature of the interests in the property, legal title to the property is registered in the name of a trustee, Carthew Registry Services Ltd., which holds title as nominee, agent and bare trustee for the petitioner, Philip K. Matkin Professional Corporation ("Matkin"), which in turn holds its beneficial interest as nominee, agent and bare trustee for the benefit of present and future holders of Agreements and for Northmont to the extent of its residual interest in the resort property. In essence, Matkin keeps the register of the Owners' and Northmont's interests in the property.

[6] Fairmont never established or maintained a reserve fund to deal with repairs to the resort. When Northmont took over the resort it hired consultants who identified many areas of the resort requiring renovation. The estimated cost for the renovations is disputed, but is said to be between $41 million and $50 million.

[7] On April 16, 2013, Matkin, as trustee, applied to the Court for advice and direction pursuant to the *Trustee Act*, R.S.B.C. 1996, c. 464, s. 86. The relief claimed in the petition was limited. It reads:

> 4. The Respondent [Northmont] wishes to make certain unilateral amendments to the Agreements and to have the Petitioner [Philip Matkin Professional Corporation] make corresponding changes to the register it maintains of the Owners' interests and, on the basis of those changes, to transfer title to the Respondent of certain property currently part of the Resort.
>
> 5. The Petitioner seeks advice and direction from this Court in responding to the Respondent's request.

[8] Pursuant to an order dated April 18, 2013, the Owners were notified of the petition by letter. The letter was entitled "FREEDOM TO CHOOSE, REASON TO STAY". The letter provided two options to the Owners: pay their share of the fees associated with the renovations (the "Renovation Project Fee") and keep their time

share with the resort, or pay a cancellation fee (the "Cancellation Fee") to terminate their Agreement and leave the resort, avoiding future obligations.

[9] Case planning conferences were held with respect to Matkin's petition. At the first case planning conference on June 25, 2013, it was apparent the two main issues were the Renovation Project Fee and the Cancellation Fee. At the second case planning conference on July 12, 2013, the chambers judge ordered that the issues relating to the Renovation Project Fee and the Cancellation Fee be determined by way of a special case under Rule 9-3.

[10] At the third case planning conference on September 3, 2013, an issue was raised for the first time regarding the validity of the Agreements. Certain Owners disputed Northmont's entitlement to levy the Renovation Project Fee and further disputed the validity and enforceability of the Agreements. The statement of special case defined the dispute:

> 15. Some Vacation Interval Owners dispute the legality, validity and enforceability of the Cancellation Fee both under the Vacation Interval Agreements and at law; further dispute the contractual entitlement of Northmont to levy the Renovation Project Fee in whole or in part, pursuant to the Vacation Interval Agreements or otherwise; and further dispute the validity and enforceability of the Vacation Interval Agreements by Northmont against the Vacation Interval Owners.

[11] In an apparent effort to address the Owners' concerns, the chambers judge directed that the statement of special case include a term that the Court would proceed on the assumption that the Agreements are valid and enforceable. Paragraph 19 was added to the statement of special case:

> 19. The Parties agree that for the purposes of this Statement of Special Case, and without prejudice, the Court may assume that the Agreements are valid and enforceable contracts.

[12] At a judicial management conference on September 19, 2013, the form of special case was settled by the Court. Counsel for the Owners refused to sign the statement of special case because of the extensive disputed affidavit evidence that, by then, had clearly demonstrated a lack of consensus on the facts of the special

case. Nonetheless, the statement of special case was endorsed by the judge on the bench.

[13] The questions for determination were stated in the special case as follows:

> 1. Is Northmont entitled to charge or levy the Cancellation Fee?
> 2. Is Northmont entitled under the Vacation Interval Agreements to levy the Renovation Project Fee, in whole or in part?

[14] The statement of special case set out certain agreed relevant facts. However, it also included, as Part 3, an extensive list of "Evidence": six affidavits and seven items identified as "questioning" certain affiants on their affidavits.

[15] At the hearing of the special case in October 2013, the Owners took the preliminary position that proceeding with the special case was inappropriate as it was premised on a hypothetical (the assumption that the Agreements were valid and enforceable), it did not include the facts necessary to decide the case, and proceeding with the case would require the Court to answer the questions on the basis of contested evidence.

[16] The chambers judge addressed the Owners' preliminary position as to the propriety of proceeding by way of special case at paras. 53-55 of her reasons:

> [53] The owners recognize that the issues raised by the petition are narrow, and is not the proceeding in which they can raise issues relating to alleged breaches or enforceability of the vacation interval agreements. They contend that those issues should be determined in an action commenced by Northmont against an owner for non-payment of the renovation project fee, and in that event, an owner may claim set-off for negligence, or damages for breach of contract. Conceivably, this would require Northmont to commence hundreds – if not thousands – of separate actions against owners who do not pay the renovation project fee. That would take an enormous amount of time, expense, and involve many in unnecessary litigation. But time is running out, and money is running out. The object of the *Supreme Court Civil Rules* is proportionality: to secure the just, speedy, and inexpensive determination of every proceeding on its merits.
>
> [54] On October 8, 2013, the first day of the hearing of the special case, the Action Committee on Access to Justice in Civil and Family Matters, Ottawa, Canada released its report "Access To Civil & Family Justice, A Roadmap for Change". In the executive summary, the Honourable Thomas A. Cromwell begins by stating:

> **There is a serious access to justice problem** in Canada. The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve.
>
> [55] There are approximately 14,500 owners, and of these, roughly 755 were represented at the hearing of the special case and oppose either the renovation project fee, the cancellation fee, both, or simply want out of their agreements. As of June 20, 2013 Northmont had processed 3,019 cancellation agreements representing 15.1 percent of the 12,750 total annualized weeks of inventory, and 502 cancellation agreements had been received and were yet to be processed. Approximately 200 to 300 additional cancellation agreements remained outstanding pending the correction of deficiencies. As of June 20, 2012, renovation project fees from 2,805 owners or 23.5 percent of the invoiced owners had been processed.
>
> [Emphasis in original.]

[17] The chambers judge then went on to decide the two questions posed in the special case. She interpreted the Agreements, considered and weighed the tendered evidence, and ultimately concluded that Northmont is entitled to levy the Cancellation Fee and the Renovation Project Fee.

[18] On appeal, the Owners submit that it was inappropriate to proceed by way of special case for several reasons:

a) the questions posed in the special case rested on the hypothetical assumption that the Agreements in question were valid;

b) necessary facts were not included in the statement of special case and not all of the facts that were submitted were agreed upon by the parties; and

c) the parties did not sign the statement of special case as required by Rule 9-3(3)(c).

[19] Northmont submits the decision to proceed by way of special case is discretionary and entitled to deference. It submits that Rule 9-3 should be interpreted broadly and in a way that is consistent with the proportionality principle set out in Rule 1-3(2):

> Proportionality
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[20] Northmont further submits the "hypothetical" with which the Owners take issue was included in the special case at the Owners' insistence. Northmont says that even if the Owners are correct in asserting that there were insufficient agreed facts, or that the decision was based on a hypothetical, they have not demonstrated that the use of the special case process has resulted in a miscarriage of justice.

[21] Lastly, Northmont says the fact that the parties did not sign the statement of special case is a mere irregularity that has no impact on the fairness of the process.

[22] At the hearing of the appeal, the Owners applied to admit new evidence in the form of an affidavit to which is attached a draft Notice of Civil Claim in the Supreme Court directed to one of the Owners, Robert Alexander. The salient portions read:

> 15. On November 15th, 2013, [Madam] Justice Loo rendered her Decision (the "Decision") on matter of the Special Case and determining the following:
>
> (a) Owners, including Alexander, are responsible for all administrative, maintenance, repair and replacement Costs;
>
> (b) Northmont's responsibility in managing the resort only necessitates that it act reasonably;
>
> (c) The renovation plan for the Resort and Property, reflect a reasonable course of action on the part of Northmont and the Costs associated with the renovation, fall within the contractual obligations of owners such as Alexander;
>
> (d) That Northmont is entitled to levy a Renovation Project Fee.
>
> 16. Villa claims that Alexander is bound by the determination within the Special Case and the Judgment as rendered by [Madam] Justice Loo.

DECISION

[23] The special case procedure is set out in Rule 9-3 of the *Supreme Court Civil Rules*. It reads as follows:

> Statement of special case
>
> (1) The parties to a proceeding may concur in stating a question of law or fact, or partly of law and partly of fact, in the form of a special case for the opinion of the court.
>
> Court may order special case
>
> (2) The court may order a question or issue arising in a proceeding, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be stated in the form of a special case.
>
> Form of special case
>
> (3) A special case must
>
> (a) be divided into paragraphs numbered consecutively,
>
> (b) state concisely such facts and set out or refer to such documents as may be necessary to enable the court to decide the questions stated, and
>
> (c) be signed by the parties or their lawyers.
>
> Hearing of special case
>
> (4) On the hearing of a special case, the court and the parties may refer to any document mentioned in the special case, and the court may draw from the stated facts and documents any inference, whether of fact or law, that might have been drawn from them if proved at a trial or hearing.
>
> Order after hearing of special case
>
> (5) With the consent of the parties, on any question in a special case being answered, the court may grant specific relief or order judgment to be entered.

[24] In *British Columbia v. Abitibi-Consolidated*, 2005 BCSC 409, Bouck J. helpfully explained the role of the special case in the broader context of criminal and civil trials:

> [10] Regular criminal and civil trials involve a five-step sequence. First, the parties present the evidence. Second, the trier of fact determines the facts arising from that evidence. Third, the trier of fact applies the law to those facts. Fourth, the trier of fact applies the relevant standard of proof to the law and the facts. … Fifth, the trier returns a verdict that provides a resolution, a remedy, or both. … For example, if the plaintiff succeeds, the resolution is a finding of liability and frequently a remedy by way of damages. If the

> defendant succeeds, the resolution and the remedy result in a dismissal of the action.
>
> [11] Rule 33(1) [now Rule 9-3(1)] provides a shortcut to that procedure. It allows the parties to skip the first step of presenting evidence by agreeing to the facts. It then permits the court to provide a resolution and a remedy based on the law that applies to those facts. …

[25] The Owners and Northmont made extensive submissions on whether the chambers judge was entitled to draw inferences from or make findings of fact based on the evidence and documents referred to in the special case. Rule 9-3(4) allows the court to draw inferences of fact or law from *stated* facts and documents. This requirement, and the practical limitations of the special case rule, were usefully explained by Bouck J. in *Abitibi-Consolidated*:

> [14] Of course, the parties must agree to the facts set out in any mentioned document, otherwise, the document is just a written form of information. It is not evidence, because Rule 33 does not contemplate the presentation of sworn evidence. Nor is it fact that meets the requirement of a Special Case.
>
> [15] Like an ordinary trial, a Special Case judge may draw inferences from other proven facts. An inference is “a conclusion reached by considering other facts and deducing a logical sequence from them”, Black's Law Dictionary, 7th ed. page 781. Or, in the case of evidence, it is "in the legal sense, ... a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof, *Montreal Tramways Co. v. Leveille*, [1933] 4 D.L.R. 337 at 350 (S.C.C.).
>
> [16] Sub rules 33(2) and (5) [now Rule 9-3(2) and (5)] seem to contemplate those rare situations where not every fact is known, but there are sufficient facts that a Special Case judge may be able to decide a legal issue resolving the dispute. That is not what happened here because the parties did not get a Rule 33(2) order. Instead, they intended to agree to all the facts and the questions of law that arose from those facts under Rule 33(1).
>
> [17] Generally, the law does not anticipate that courts should provide gratuitous opinions on hypothetical facts involving legal issues arising during the course of litigation. The primary intention behind Rule 33(1) is to give the parties an opportunity to dispose of the whole dispute without going to trial where they agree on the facts but disagree on the law.
>
> [18] A Special Case judge cannot answer legal questions posed by the parties unless they supply the judge with an agreed statement of facts. Those facts and the questions asked must not be ambiguous. They must be clear enough for the Special Case judge to answer them: Rule 33(3)(b). The Special Case paragraphs on damages appear to be mostly statements of evidence in search of fact.

[26] In *William et al v. British Columbia et al,* 2004 BCSC 964, (*sub nom*. *Xeni Gwet'in First Nations v. British Columbia*) 30 B.C.L.R. (4th) 382), Vickers J. noted that the Rule "provides no mechanism for resolving disputes as to the facts. It is necessary to include every material fact in a stated case and a case should not proceed upon an insufficient or erroneous statement of facts" (at para. 12, citing *Reichl v. Rutherford-McRae Ltd.* (1964), 47 W.W.R. 227 (B.C.C.A.)).

[27] Mr. Justice Vickers relied on the Manitoba Court of Appeal decision in *Graham v. Canadian Premier Life Insurance Company* (1966), 57 W.W.R. 318. In that case, the Court noted that the facts on which the chambers judge's opinion was sought were not agreed to by the parties. They sought to proceed with the special case even though the opinion would only be valid in the event that certain facts were established by the plaintiff (at 319).

[28] On appeal, different counsel for the plaintiff argued that the special case ought not to have been submitted to the Court for its opinion as it dealt with a hypothetical issue. Justice Freedman agreed, stating (at 319-320):

> I have reached the conclusion that counsel's submission is well founded. It is the function of the court to act judicially and not in an advisory or consultative capacity. The occasions on which a special case may be stated for the opinion of the court under Q.B.R. 204 are limited to those where a question of law arises upon facts which are either agreed or not in issue. In the present case, however, the facts are distinctly in issue, and counsel for the defendant expressly reserved the right, in the event of an adverse decision on the special case, to contest those facts. As a result, the court was being invited to participate in what might well have turned out to be simply an academic exercise.
>
> There is abundant authority for the view just expressed. In *Sumner v. William Henderson & Sons Ltd.* [1963] 1 WLR 823, 107 Sol J 436, [1963] 2 All ER 712n, the court of appeal of England was considering an appeal from Phillimore, J. upon a special case. By one of the provisions of the special case the court was there asked: "for the purposes of this special case, to assume the truth of each of the allegations of the plaintiff and defendants set forth in paras. 5, 6, 7 and 8 of the special case." Sellers, L.J., stating the decision of the court, questioned the propriety of a special case which sought the opinion of the court on what seemed to be no more, or little more, than a consultative case on points of law. He quoted with approval the observation of Harman, L.J. in *Windsor Refrigerator Co. v. Branch Nominees Ltd.* [1961] Ch 375, [1961] 2 WLR 196, [1961] 1 All ER 277, thus, at p. 283: "It is highly

> undesirable that the court should be constrained to tie itself in so many knots, and in the end merely say: 'Well, if this was thus, then that was so.'"
>
> …
>
> Other decisions in support of the view that the court should not enter by anticipation into a consideration of what might be the effect in point of law of circumstances or facts which have not yet been ascertained, established, or agreed upon, are *Commonwealth of Australia v. Zachariassen* (1920) 36 TLR 655 (P.C.); *Glasgow Navigation Co. v. Iron Ore Co.* [1910] AC 293, 79 LJPC 83; *Bright v. Tyndall* (1876-7) 4 Ch D 189, 25 WR 109; *Stephenson, Blake & Co. v. Grant, Legros & Co.* (1917) 86 LJ Ch 439, 116 LT 268; *Re Bell Estate; Montgomery v. Marshall* (1955) 15 WWR 615, 63 Man R 236—the latter being a decision of this court.

[29] As we have noted, the Owners argue that the special case before the chambers judge improperly proceeded on a hypothetical assumption that the Agreements between Northmont and the Owners were valid and enforceable.

[30] Northmont responds by saying that the cases on "hypothetical outcomes" do not apply because they involve situations in which a party was willing to accept one outcome of a special case, but would contest the facts underlying the special case if an adverse outcome was reached. Yet that is precisely what the Owners in this case were reserving the right to do. The statement of special case said that the Owners disputed the validity of the Agreements but that they agreed that the Court may assume their validity for the purpose of the special case, without prejudice. This necessarily meant that the Owners were reserving the right to have this issue adjudicated at some future proceeding. If the chambers judge had decided in favour of the Owners (*i.e.* that the Agreements did not permit Northmont to impose a cancellation or renovation fee), then there would have been no need for the Owners to pursue the question of the validity of the Agreements.

[31] This is not to say that determining a hypothetical point of law will never be appropriate in a special case. There may be situations in which it would have a conclusive effect on litigation or would serve a useful purpose: see *Xeni Gwet'in First Nations v. British Columbia* at paras. 8-9. However, this is not one of those cases. The special case does not conclude the litigation since it is completely contingent on the validity of the underlying Agreements, which has yet to be determined.

[32] Northmont, as we have noted, further asserts that the Owners have not demonstrated that the use of this procedure has caused them prejudice. Northmont argues that in the context of the case planning conferences, in which the Owners initially agreed to the adopted procedure, this Court should be loath to disturb the order appealed from.

[33] In our opinion, Northmont's argument must fail.

[34] We first observe that it is entirely unclear to us how it came to pass that this entire process started as a petition in which the only relief sought by the petitioner, whose responsibilities appear to be limited to maintaining a register of owners, was for direction, on behalf of Northmont, on whether it could make unilateral amendments to the Agreements.

[35] That request ultimately transmogrified into an order that, as the new evidence on appeal demonstrates, purportedly decided that the Owners are responsible for all repair and replacement costs with no basis for deductions or set-off.

[36] The prejudice to the Owners is, in our view, obvious. Their obligations have been decided on the basis of a procedure in which there were no pleadings, no particulars, and no exchange of expert reports.

[37] Furthermore, the hearing of the special case offended the Rule; it proceeded in the absence of agreed facts. The Owners' refusal to sign the statement of agreed facts was not, as Northmont suggests, a "mere irregularity". The signature of all parties is a mandatory requirement of the Rule by which the parties signify their concurrence in stating the questions for the Court.

[38] This is so whether the special case proceeds in accordance with Rule 9-3(1), where the parties prepare and sign a statement of special case, or Rule 9-3(3), where the Court stipulates the question and directs the parties to prepare a special case. In circumstances in which the parties have been unable to agree on the wording of the questions the judge considers appropriate to be decided in the special case, the judge may set them out.

[39] For example, in *Newton Cleaners Ltd. v. Better Business Bureau of the Mainland of British Columbia*, [1981] B.C.J. No. 1041 (S.C.), the plaintiffs applied for an order that certain issues be stated in the form of a special case. The parties could not agree on the wording of the issues to be put before the Court. The Court found that there was an issue suitable for a special case and held:

> [8] After reviewing the pleadings, the affidavits filed by both parties and the arguments of counsel, I have come to the conclusion that there is an issue here than can be conveniently and suitably dealt with by stating a special case under Rule 33(2).
>
> [9] The suitability of determining questions under this Rule was considered by Fulton, J., of the Supreme Court of B.C. in Perimeter Transportation Ltd. v. Northwest Airporter Bus Service Ltd. 13 Carswell's Practice Cases 1 at p. 9:
>
> > "On the basis of the facts so far appearing, and the authorities cited to me: Smith v. Christie, (1920) 3 W.W.R. 581; affirmed (1920) 3 W.W.R. 585, 16 Alta. L.R. 53, 55 D.L.R. 68 (C.A.): Crichton v. Zelenitsky, 54 Man. R. 79, (1946) 2 W.W.R. 209, (1946) 3 D.L.R. 729 (C.A.), I agree that this is a proper question for trial by way of special case. It is true that the answer may not dispose of all the issues, but it will certainly dispose of a main issue, and the answers to most of the others - including the determination of whether or not Northwest has a valid contract - will depend thereon. And in any event I would accept the position that nowhere in our R. 33 is it specified that the answer to the preliminary question to be tried must dispose of all the issues: on the authority of Smith v. Christie, supra, the question need not be one the determination of which will end the action one way or the other. And in view of the clear wording of R. 33(2) it is no bar to the application that the question may involve an issue or issues partly of fact and partly of law."
>
> [10] <u>As the parties have been unable to agree on the wording [of] the questions, I will set them out.</u> In doing so, I am guided by the comments of the authors of The Conduct of Civil Litigation in B.C. (Fraser & Horn, Vol. 1, p. 603):
>
> > "Where the Court has ordered a special case to be drawn, the Judge will normally indicate to the parties what questions he desires to have submitted. The parties must then endeavour to agree on what facts are material and it is usual to include in the order that, failing agreement, the case will be settled by the Court."
>
> [Emphasis added.]

[40] We would add, however, that settling the terms of a special case should be reserved for circumstances in which it is clear that the case is suitable for determination by the special case procedure.

[41] In this case, the judge purported to resolve disputes as to the facts when the Rule provides no mechanism for doing so. The judge considered an abundance of sworn evidence when the Rule does not contemplate the presentation of sworn evidence. The statement of special case assumed the Agreements to be valid and enforceable, thus placing the opinion in hypothetical terms, contrary to the jurisprudence.

[42] In *Goncalves v. Guerra*, [1984] B.C.J. No. 1390 (C.A.), this Court upheld a chambers judge's decision not to proceed by way of special case and, at para. 7, adopted an older version of the following paragraph from *McLaughlin & Taylor: British Columbia Practice*, 3rd ed. (looseleaf) vol. 1 at 9-49:

> While Rule 9-3(1) gives the parties a right to set down a special case, the Court may decline to give the opinion sought if it is of the view the matter is not appropriate for hearing by way of special case. Generally courts are cautious about proceeding by way of special case or preliminary point of law in view of the obvious dangers of making decisions upon an insufficient or erroneous view of the facts.
>
> [Emphasis added.]

[43] In our opinion, the decision to proceed by way of special case in the circumstances of this case was fundamentally ill-conceived. Once it became apparent that the validity and enforceability of the Agreements was in issue, and that the respondents intended to have the case decided on the basis of disputed evidence, the chambers judge should have directed a trial on that issue in whatever manner was most efficient. There were various other alternatives open to the chambers judge. The special case was simply not the appropriate method. In saying this, we recognize that the judge was well-intentioned in that she considered this procedure to be the most efficient and cost-effective, consistent with the principle of proportionality set out in Rule 1-3.

[44] Northmont emphasized this aspect of the chambers judge's analysis and also relied on the principles recently expressed in *Hryniak v. Mauldin*, 2014 SCC 7. *Hryniak v. Mauldin* addresses the proper interpretation of Ontario's summary judgment rule, which was amended in 2010 ("Rule 20"). The Court's interpretation of Rule 20 is explicitly informed by the need to increase access to justice by ensuring that there are proportionate, timely and affordable alternatives to full trials. The amended Rule 20 gives Ontario judges increased fact-finding powers so that the summary judgment process has a more robust function than simply weeding out meritless claims. The Court was clear that the principles and values underlying Ontario's Rule 20 are of general application (at para. 35).

[45] The B.C. Supreme Court Civil Rules have for many years provided various alternatives to a full trial and the principle of proportionality set out in Rule 1-3 underlies all of these processes. However, the process of stating a special case serves a different function than the summary judgment or summary trial procedures under Rules 9-6 and 9-7. The summary trial specifically provides for the admission of affidavit material, reports, or evidence taken on an examination for discovery, and other methods that facilitate the judge's ability to make findings of fact from disputed evidence. As already mentioned, these mechanisms are absent from the special case process.

[46] In our opinion, the chambers judge's quest for efficiency overwhelmed her analysis and failed to give proper effect to the Rule and the rights of the time share Owners. This proceeding did not favour access to justice — it precluded it.

[47] The new evidence, which we would admit, demonstrates the injustice that has resulted from the manner in which the special case was stated and heard. The Owners, having registered their objections and having proceeded without prejudice, are now confronted with claims that seek to enforce the order without having had an opportunity to contest the enforceability of the underlying Agreements, or challenge, by evidence, the necessity for and quantum of the renovations to the resort.

[48] For all of the above reasons, we allow the appeal, and set aside the order of the chambers judge. The appellants are entitled to their costs of the appeal. We make no order as to costs in the Supreme Court, but would leave that to the judge hearing the merits of the claims.

"The Honourable Madam Justice Kirkpatrick"

"The Honourable Madam Justice D. Smith "

"The Honourable Madam Justice Garson"