

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jaycap Financial Ltd. v. Ferrell Living Inc.*,
2026 BCSC 1166

Date: 20260623
Docket: H2512811
Registry: Victoria

Between:

Jaycap Financial Ltd.

Petitioner

And

**Ferrell Living Inc., Ferrell Projects Limited
Partnership By Its General Partner Ferrell
Projects (GP) Inc., TLA Group of Holding Companies
Inc., Chris Lunney, Titan GMS GP Inc., Titan GMS
Limited Partnership, and BJK Holdings Ltd.**

Respondents

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Petitioner:

B.S. Khatra

Counsel for the Respondent, Chris Lunney:

C. Reedman
S. James

Place and Dates of Hearing:

Vancouver, B.C.
June 18, 2026

Place and Date of Judgment:

Victoria, B.C.
June 23, 2026

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Introduction

[1] The petitioner applies for judgment against the respondent Mr. Lunney based on determinations and declarations that:

- a) Certain joint & several full liability guarantee dated April 12, 2024 (“Guarantee”) granted by *inter alia* by the respondent, Mr. Lunney to the petitioner is a valid and enforceable agreement;
- b) Mr. Lunney has made default under the Guarantee and that all monies owing pursuant to the Guarantee are due and owing to the petitioner;

[2] The application arises in the context of commercial foreclosure proceedings with respect to vacant development lands in Victoria, BC.

[3] The following facts are not in dispute.

[4] The Respondent, Ferrell Living Inc. (the “Borrower”), holds legal title to property with the following legal description (the “Property”):

Legal Description: LOT B SECTION 40 VICTORIA LAND DISTRICT
PLAN VIP 402C

PID Number: 009-078-878

[5] The Property is subject to a security in favour of the petitioner to secure the liabilities of the Borrower to the petitioner under a loan agreement dated February 7, 2024, for a principal loan amount of \$1,280,000 (the “Loan Agreement”).

[6] On April 12, 2024, Mr. Lunney entered into a joint and several personal guarantee in favour of the petitioner to guarantee the obligations of the Borrower to the petitioner under the Loan Agreement (the “Guarantee”).

[7] On February 17, 2026, this Court granted an Order *nisi* against the balance of the petition respondents. The relief sought against Mr. Lunney was adjourned generally.

[8] On June 11, 2026, by consent, this Court again adjourned the hearing of the relief sought against Mr. Lunny to June 18, 2026, on terms.

[9] The directors of the Borrower and the co-guarantors under the Guarantee, Messrs. Bradley and Grant, are subject to personal bankruptcy proceedings.

[10] While the above facts are not in dispute, Mr. Lunney argues that he has raised a *bona fide* triable issue such that the matter should be referred to the trial list, and judgment not granted in summary fashion. In particular, he pleads the defence of *non est factum*.

Issues

[11] The issues for determination are:

- a) Whether Mr. Lunney has raised a *bona fide* triable issue?
- b) If so, whether that *bona fide* issue needs to be tried or whether it can be determined summarily?

Analysis

[12] 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.

[13] Order *nisi* hearings are regularly set before an associate judge. The associate judge 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.

[14] 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.

[15] A bald assertion that there is a defence is not generally sufficient to cause an inquiry to be made further. Rather, as noted in *Freshwest Equities Trading Corp. v. Dosanjh*, 2015 BCSC 952 [*Freshwest*]:

[37] A person alleging a *bona fide* defence must establish some evidentiary basis for that defence. The corollary to this is that bald assertions will rarely be sufficient to raise such a defence. Further, some assessment of that evidence is necessary in order for the court to determine whether or not a *bona fide* triable issue has been raised and whether or not it is bound to fail. In *Pacifica Mortgage Investment Corporation v. Laus Holdings Ltd.* 2010 BCSC 1904 at para. 17, aff'd 2013 BCCA 95, I stated:

[17] The cases suggest that some weighing of the evidence is necessary in order for the court to determine whether or not a *bona fide* triable issue has been raised. Depending upon the circumstances, a bold assertion may not be enough: see *Southeast Toyota Distributors Inc. v. Branch*, 1997 CanLII 2089 (BC SC), [1997] B.C.J. No. 1426 (S.C.) at paras. 60 to 63. At paras. 69 and 74 of *Branch*, the court found that when faced with issues concerning the interpretation of documents, the court was in a position to review the matter to determine whether there were any disputed facts or legal issues and whether a valid defence had been raised.

[38] There are numerous cases where the court was able to interpret documentation in order to assess whether a *bona fide* triable issue exists: *Gupta v. 0856716 B.C. Ltd.*, 2012 BCSC 1407 at para. 41. Such documentation has included ordinary commercial documentation such as loan documentation and security such as guarantees and mortgages. *Laus* involved a consideration of a mortgage and commitment letter.

[16] Historically, the Court of Appeal has held that unless it is “manifestly clear” that the mortgagors are without a defence to be tried the application to have the matter referred to the trial list ought to be made: *HGE Administrative Services Ltd. v. Perrick* [*HGE*], 2011 BCCA 308, at paras. 17–19.

[17] However, decisions that pre-date *Cepuran v. Carlton*, 2022 BCCA 76 [Cepuran] must be approached with some caution, including *HGE*.

[18] In *Capital Now Inc. v. Munro*, 2023 BCSC 197 [Capital Now], the court summarized the factors for referring a matter to the trial list post *Cepuran*, in a foreclosure proceeding, as follows:

[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.

[19] It is only if there is a *bona fide* triable issue that the factors are to be considered.

[20] As noted in *Gupta v. 0856716 Ltd.*, 2012 BCSC 1407 [*Gupta*], citing *Freshwest* at para. 36, “not every case that raises a triable issue must necessarily be placed on the trial list. The notion of a low threshold is to be tempered with the analysis as to whether there is a *bona fide* issue that needs to be tried.”

[21] In his amended response to petition, filed June 15, 2026, Mr. Lunney pleads, among other things:

11. At the time of signing the Respondent did not receive comprehensive legal advice explaining the nature, terms, or risks of the Lunney Guarantee before or at the time of signing.

12. Lunney had no direct communication with JayCap Financial Ltd. or with the legal counsel of Ferrell Living Inc. at any time prior to or at the time of signing the personal guarantee.

13. Further, terms of the transactional documents were misrepresented by a partner of Ferrell Living Inc. It was presented as a routine transaction and that it would be effectively bridge financing and low or no risk.

14. Lunney did not receive independent legal advice concerning this transaction notwithstanding that the documents were witnessed by a lawyer who witnessed the signatures of the partners of Ferrell Living Inc.

[22] The amended response to petition then pleads that the Guarantee is unconscionable and contrary to the *Interest Act*; R.S.C. 1985, c. I-15, however, neither of these defences was relied on at the hearing for summary judgment.

[23] Instead, Mr. Lunney relied only on his plea of the defence of *non est factum*. In this respect, the amended response to petition pleads:

21. Further, Lunney pleads the defence of *non-est factum*.

22. To succeed on a plea of non est factum, the party bears the burden of demonstrating that the document they signed was fundamentally different in nature from what they believed it to be, that they signed it as a result of a misrepresentation, and that they were not careless in doing so: *Marvco Colour Research Ltd v Harris*, 1982 Can LI 1 63 (SCC), [19821 2 SCR 77 4; *Bulut v Carter*, 2014 ONCA 424 at paras 23-24; see also the discussion in *Argo Ventures Inc. v Choi*, 2020 BCCA 17 at paras 10-17.

23. Lunney in his own evidence demonstrates that there (i) was a misrepresentation by his partner as a result of signing the loan documents and personal guarantee about his risk and liability, (ii) he was not careless and received no or ineffective legal advice concerning the purported guarantees.

24. To be clear, Lunney does not allege that the Petitioner is responsible for the misrepresentation, but that this was done by his former partner as an inducement to enter into the transaction documents. He was never made a shareholder of the company as promised but also appears to have borne the liability.

25. Given the circumstances, the issue of non est factum is a full defense to the personal guarantee. Alternatively, it constitutes a triable issue and that this matter should be referred to the trial list, or in the further alternative should be adjourned for cross-examinations on affidavits.

[24] As noted in *Freshwater* and set out above, some assessment of the evidence is necessary in order for the Court to determine whether or not a *bona fide* triable issue has been raised and whether or not it is bound to fail.

[25] In this case, as I will explain with reference to the evidence, I have concluded that the defence of *non est factum* is not a *bona fide* triable issue. That defence is bound to fail. It would not be in the interest of justice to refer this matter to the trial list or otherwise engage in a hybrid process. The cost and delay of such a process would be disproportionate to any possible benefit from it as the Court is able to dispense with the defence on the evidence already assembled.

[26] In his affidavit, Mr. Lunney deposes, in part:

3. It was my understanding that Ferrell Living Inc. ("FLI") required refinancing. As I was being onboarded as a shareholder of TLA Group of Holdings Companies ("TLA"), the parent company of FLI, Troy Grant advised me that I would be required to provide a personal guarantee in connection with the loan from JayCap. It was on that basis, and that basis alone, that I agreed to sign the personal guarantee.

4. I was told by Troy Grant that this was bridge financing and it would be required to get to the next stage of the development. It was presented to me

as a relatively routine transaction, and I embarrassingly was not familiar with loan documents or personal guarantees.

[27] Even if this evidence was all accepted, it is not capable of meeting the test for a defence of *non est factum*.

[28] Specifically, there is no evidence that the Guarantee was “fundamentally different in nature” from what Mr. Lunney believed it to be. He deposes that he believed it was a personal guarantee in connection with the loan from JayCap, and that is in fact what it was.

[29] There is also no evidence of a material misrepresentation. There is no evidence that:

- a) the purpose of the loan was other than to secure bridge financing; or
- b) that it was not required to get to the next stage of development.

[30] With respect to whether the Loan Agreement or the Guarantee was in fact a “relatively routine transaction”, regardless of whether that representation was made, the question is not material.

[31] I am also able to conclude, on the evidence before me, that if Mr. Lunney’s evidence is accepted, then he would be found to have been careless in signing the Guarantee. Mr. Lunney deposes that:

- a) He was unfamiliar with loan documents and personal guarantees;
- b) He was not privy to any legal advice received by TLA at the time;
- c) He was not included in any communications with legal counsel at the time;
- d) He relied on Troy Grant to communicate any relevant legal advice to him, which Mr. Grant did not do;
- e) He did not receive “comprehensive legal advice to explain the nature, terms or risk of the personal guarantee before signing”.

[32] Even if I accepted this evidence, there is no requirement in circumstances such as these for the Bank to advise or insist that Mr. Lunney obtain independent legal advice: *Royal Bank of Canada v G.S. Continuous Gutters Inc.*, 2022 BCSC 366, at paras. 116–121.

[33] The above analysis is premised on accepting Mr. Lunney’s evidence at face value. However, I am also satisfied that a summary assessment of the evidence before the Court undermines some of Mr. Lunney’s evidence. The mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding summarily or mandate a hybrid process. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily: *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, at para. 22. Here, I am satisfied the Court is able to achieve a just and fair result despite some conflicts in the evidence described below.

[34] Paragraph 3 does not say that Mr. Lunney was not made a shareholder, as the amended petition response pleads. Rather, it refers to onboarding Mr. Lunney as a shareholder. To the extent that paragraph 3 seeks to imply that Mr. Lunney was only being brought on as a shareholder, this is contradicted by the affidavit evidence of Mr. Lastiwka and also by Mr. Lunney’s own personal net worth statement in which he set out that he was the managing partner at TLA and had been with the company for two years.

[35] With respect to Mr. Lunney’s purported unfamiliarity with loan documents, Mr. Lunney’s own personal net worth statement shows that he currently owns three other properties with mortgages secured against them, a vehicle loan, credit cards, and a line of credit. While he may be unfamiliar with guarantees, there is no question that he has experience with loan documents.

[36] There is no question but that the petitioner altered its position in reliance on Mr. Lunney’s net worth statement.

[37] With respect to the lack of legal advice, appended to the Guarantee is a certificate of notary public (the “Certificate”), sworn by a lawyer, Mikle L. Carter, who certifies that he satisfied himself by examination of Mr. Lunney that Mr. Lunney was aware of the contents of the guarantee and understood it. The Certificate is signed on the same date by Mr. Lunney.

[38] More fundamentally, whether or not he received the legal advice, as the Certificate says, the documents shows that Mr. Lunney had an opportunity to receive legal advice and would have been alerted that the situation called for legal advice. His failure to do so in the circumstances was neglectful and careless.

[39] In all of these circumstances, I conclude Mr. Lunney has failed to raise a *bona fide* and it would not be interest of justice to refer this matter to the trial list or otherwise engage in a hybrid process. Such a process would simply delay matters and raise costs without any realistic prospect that another outcome would be achieved.

[40] The orders sought by the petitioner are granted and this Court declares that:

- a) Certain joint & several full liability guarantee dated April 12, 2024 granted by the respondent Chris Lunney to the petitioner is a valid and enforceable agreement.
- b) Mr. Lunney has made default under the Guarantee and that all monies owing pursuant to the Guarantee are due and owing to the petitioner.
- c) Judgment is granted against Mr. Lunney.

Costs

[41] The petitioner seeks its costs of this application on a solicitor and own client basis. There is a contractual basis for this request which is found in s. 418 of the Guarantee.

[42] This Court retains discretion to make a different determination as to costs, notwithstanding his contractual term: s. 20 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. Mr. Lunney argues the Court should exercise its discretion to limit costs to Scale B in this case.

[43] In *Blueshore Financial v 1134038 B.C. Ltd.*, 2023 BCSC 2304 this Court explained considerations that inform the exercise of that discretion:

[10] However, the mere existence of a covenant or term in the lending documents will not generally be sufficient to compel the court to depart from the “usual rule”, particularly in the case of a simple residential foreclosure. Rather, in exercising the discretion under s. 20 of the *LEA* the existence of a combination of the following factors, although not exhaustive, will likely guide the court’s consideration:

- a) The mortgage term or covenant as agreed to by the parties provides for such costs which, but for s. 20 of the *LEA*, they would be awarded: *Epoch Press Inc. v. Sewak*, 2011 BCSC 323, at para. 13, and *Wanson (Bristol) Development Ltd. V. Sahba*, 2017 BCSC 2140, and *0856464 B.C. Ltd. v. TimberWest Forest Corp*, 2015 BCSC 985, at para. 19.
- b) The sophistication of the parties and involvement of legal counsel in the preparation and execution of the lending documents;
- c) Whether the matter is a commercial matter where the use of the lender’s funds was intended to generate an opportunity to profit or earn income ;
- d) Whether, although being brought as a foreclosure under R. 21-7, other agreements are being enforced as part of the proceedings such as personal property security, including debenture security, under s. 55(6) of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (“*PPSA*”); or guarantees and indemnity agreements, each of which may have their own covenant or term, outside of the mortgage, which provides for true indemnity costs;
- e) Whether there have been delays in prosecuting the matter, including the need to obtain alternative service orders and requests for any forbearance by the mortgagor, such that the mortgagor has had an extended use of the borrowed funds post default; and
- f) The overall complexity of the proceedings including the number of parties, and extent of the security and collateral.

[44] These factors do not favour Mr. Lunney’s position.

- a) Section 4.18 of the *Guarantee* provides for full indemnity costs.

- b) Mr. Lunney is a sophisticated businessman. There is evidence that legal counsel was involved in the preparation and execution of the lending documents, although Mr. Lunney deposes that he did not receive legal advice.
- c) This is a commercial foreclosure proceeding where the lender's funds were intended to generate an opportunity to profit. Mr. Lunney gave evidence that he was being onboarded as a shareholder of TLA, the parent company of the Borrower.
- d) As set out above, the petitioners' efforts to obtain relief was twice adjourned at the request of Mr. Lunney.

[45] No argument was presented on the remaining factors, and I conclude they are all neutral in the assessment.

[46] In all of these circumstances, I order full indemnity costs of this application to the petitioner.

"Latimer J."