

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Schwitzer v. Little*,
2026 BCCA 285

Date: 20260622
Docket: CA51247

Between:

Jennifer Shannon Schwitzer

Appellant
(Plaintiff)

And

Jillian Irene Little and Little J Vacations Inc.

Respondents
(Defendants)

Before: The Honourable Mr. Justice Butler
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated
December 18, 2025 (*Schwitzer v. Little*, 2025 BCSC 2471,
Kelowna Docket S135085).

Oral Reasons for Judgment

The Appellant, appearing in person
(via videoconference):

J.S. Schwitzer

The Respondent, appearing in person and
on behalf of Little J Vacations Inc.
(via videoconference):

J.I. Little

Place and Date of Hearing:

Vancouver, British Columbia
June 19, 2026

Place and Date of Judgment:

Vancouver, British Columbia
June 22, 2026

Summary:

After missing an extended deadline to file transcripts in her appeal, the appellant retained counsel who argued it was in the interests of justice to grant a further extension of time for the appellant to prosecute a narrowed appeal. The extension was granted, the respondent's application to dismiss the appeal as abandoned was dismissed, and a stay of execution of the judgment below was set aside as the narrowed appeal did not claim an interest in the property it preserved. The appellant then discharged her counsel and indicated she would be resiling from the position counsel had taken on her behalf and would not fulfil her commitment to file an amended factum narrowing the scope of her appeal. In light of this, the Court initiated an application to determine whether its previous order, which remained unentered, should be reconsidered. Held: application to reconsider the order is dismissed. The appellant's attempt to reinstate proceedings on the broader grounds advanced in her earlier factum, while maintaining the benefits of the orders she obtained by committing to proceed on narrower grounds, amounts to an abuse of process. The appropriate remedy is to strike her earlier factum, with leave to file transcripts and an amended factum in accordance with the unentered order. Having found it would be an impermissible abuse of process for the appellant to proceed on her broader appeal, there is no material change that would justify reopening and reconsidering the unentered order.

[1] **BUTLER J.A.:** These reasons address two applications that were heard together. The first is an application, on the Court's motion, to consider whether my unentered order of May 7, 2026 (the "May 7 Order"), should be reconsidered in light of a change in circumstance. The second is Ms. Schwitzer's application for a partial stay of execution of the May 7 Order, pending my determination of the reconsideration application. After hearing the applications on June 19, I dismissed Ms. Schwitzer's stay application given that the May 7 Order is unentered, Ms. Little indicated she would be taking no steps to sell or encumber the Longacre property over the weekend, and I would be issuing my decision on the reconsideration application today.

Background

[2] This is an appeal from a 19-day trial over a failed business venture. The relevant background is set out in my oral decision of May 7, 2026. These reasons are intended to be read in conjunction with those reasons and will repeat only the most essential facts.

[3] At trial, Ms. Schwitzer claimed an interest in two properties that were acquired as part of the business venture and registered in the names of the respondents, Ms. Little and Little J Vacations Inc. One property was sold during the proceedings, and the proceeds of sale were ordered to be paid into court. The other continues to be held by the respondents. The trial judge dismissed Ms. Schwitzer's claims—including claims in contract based on an alleged partnership agreement and unjust enrichment—to an ownership interest in the properties.

[4] Ms. Schwitzer filed her notice of appeal on December 22, 2025, shortly after the judgment was pronounced. Early in the proceedings, Ms. Schwitzer obtained a stay of execution of the judgment below pending determination of her appeal (the "Stay"). The terms of the Stay prevent the proceeds of sale held in court from being released to Ms. Little and prohibit her from encumbering or selling the other property.

[5] On March 11, 2026, Ms. Schwitzer appeared before Justice Francis requesting a 60-day extension of time to file her appeal record and transcripts. Justice Francis summarized Ms. Schwitzer's application:

[12] On February 20, 2026, Ms. Schwitzer applied for an extension of time to file her appeal record and transcripts, which would be due that day, as well as an extension of time to file her factum. She provided evidence that she has been approved for pro bono legal assistance on her appeal, but that a lawyer has yet to be assigned to her case. She requests a 60-day extension to allow pro bono counsel to be assigned and properly prepare the appeal materials, although I note in oral submissions she suggested that amount of time should be longer. She also seeks costs on this application, on the basis that Ms. Little refused to consent to the extension.

[6] Justice Francis was satisfied that Ms. Schwitzer's delay in filing appeal materials was not intentional. However, she was concerned about delay given the impact of the Stay on Ms. Little. She found that it was in the interests of justice to grant a 30-day extension, rather than the 60-day extension Ms. Schwitzer requested:

[19] I am concerned about delay given the large sum of money that is presently tied up and inaccessible to the defendant. However, weighing all the factors, and the fact that the appellant anticipates retaining counsel who will be able to pursue the appeal on her behalf with diligence, it is in the interests of justice to grant a short extension of time. However, in my view,

60 days is not in keeping with the appellant's obligation to diligently pursue her appeal.

[20] I will make an order extending the time to file the appeal record and book of transcripts pursuant to Rules 23 and 24 of the *Court of Appeal Rules*, B.C. Reg 120/2022, for 30 days to March 23, 2026. I decline to order any further extensions of time.

[Emphasis added.]

[7] Ms. Schwitzer filed her appeal record by the deadline but failed to file transcripts. Indeed, she had not ordered any transcripts by the deadline. Ms. Schwitzer took the position that full transcripts should not be required because she could not afford to obtain these, given the lengthy trial. Ms. Little did not agree to the use of partial transcripts. Approximately three weeks after the deadline to file her transcripts had passed, Ms. Schwitzer applied to have the Registrar settle the contents of the transcripts required for her appeal. She also applied for a further extension of time to file the transcripts. Ms. Little cross applied for an order dismissing the appeal, which was later amended to include an alternative request for variation of the terms of the Stay.

[8] On April 15, 2026, without the assistance of counsel, Ms. Schwitzer filed her factum. The factum advances 11 grounds of appeal, alleging that the trial judge erred:

1. in law in treating the absence of a formal agreement as determinative of all the appellant's claims;
2. in law in treating an April 2022 agreement as a juristic reason defeating her claims in unjust enrichment and constructive trust;
3. in law in mischaracterizing and misapplying legal tests for "condition precedents" and the statutory test for a partnership;
4. in law in failing to analyze certain proprietary claims "on the substance of the pleadings and relief sought";

5. in law in failing to address certain claims grounded in proprietary estoppel, including failing to address certain arguments advanced in her closing submissions;
6. in fact in failing to give adequate reasons and by reciting but not meaningfully analyzing material evidence of ownership, equity allocation, sweat equity, shared business structure, and the treatment of properties as assets held by both parties;
7. in fact in making findings unsupported by the evidentiary record and failing to address “material contrary evidence”;
8. in law in failing to award statutory pre-judgment interest;
9. in principle in failing to conduct a proper assessment of *quantum meruit* by mischaracterizing the appellant’s labour evidence and failing to properly value the services provided;
10. in breaching procedural fairness and in fact in his defamation and credibility findings, including by relying on a “withdrawn Facebook defamation issue”; and
11. in awarding costs to the respondent.

[9] On April 24, 2026, Access Pro Bono counsel for Ms. Schwitzer came onto the record.

The May 7 Order

[10] The parties’ applications came before me on April 27. I heard the parties’ submissions on whether the extension should be granted, or alternatively, whether the appeal should be dismissed as abandoned, and on whether the terms of the Stay should be varied. Counsel for Ms. Schwitzer made extensive submissions about how the proceedings would change now that he was retained to assist Ms. Schwitzer. He explained that he expected to proceed on a narrowed appeal that

focused on Ms. Schwitzer's strongest grounds. In his submission, this focused appeal would require a smaller subset of the trial transcripts, which would reduce the cost of the transcripts and allow the appeal to proceed without further delay. I adjourned the determination of these applications to allow the extent of transcripts required to be settled by the Registrar.

[11] On April 29, 2026, in advance of the April 30 hearing before the Registrar, Ms. Schwitzer's counsel filed a letter with the Court advising that Ms. Schwitzer's appeal would be narrowed to challenge only the trial judge's conclusions on Ms. Little's defamation claim, Ms. Schwitzer's *quantum meruit* claim, and the failure to award pre-judgment interest to Ms. Schwitzer. It stated:

During a chambers application before the Honourable Justice Butler on April 27, 2026 I advised the Court that I anticipate filing an amended factum to refine and focus the Appellant's grounds of appeal. In order to assist Ms. Little and the Court tomorrow, I can now advise that Ms. Schwitzer will be proceeding **only** on the following grounds of appeal:

1. The trial judge made the following errors (which are reviewable legal errors or breaches of procedural fairness) in relation to the Respondent's defamation counterclaim:
 - a. The trial judge made adverse findings about the Appellant's credibility in relation to an allegation (the allegedly defamatory Facebook post) that the Respondent withdrew from her counterclaim . . .
 - b. The trial judge erred in concluding that the Respondent did not act or hold herself out as a mortgage broker (including by failing to give effect to the British Columbia Financial Services Authority letter) which improperly deprived the Appellant of the potential defences of truth, justification, and fair comment in relation to the Respondent's defamation counterclaim . . .
 - c. The trial judge erred in applying the law of agency and vicarious liability to the Respondent's defamation counterclaim, resulting in an improper attribution of liability to the Appellant . . .
 - d. Fresh evidence in relation to the Respondent's wrongful termination action against her employer will establish that the allegedly defamatory statements by Mr. Cluff (and attributed to the Appellant) did not "significantly cause or contribute" to the Respondent's termination from her employment and, to the contrary, that "factors unconnected to the [Appellant]" including performance and conduct issues were the sole or primary cause the Respondent's termination . . .

- e. The trial judge failed to consider the application of immunity or privilege to an allegedly defamatory statement in a complaint to a person's employer that accompanies or is contemporaneous with a regulatory complaint . . .
2. The trial judge erred by (a) awarding compensation at an unreasonable hourly rate and for an incorrect number of hours and (b) failing to consider the full scope of benefits and value the Respondent received from the Appellant's work, including increased property values and rents, both of which errors unjustifiably limited the fair hourly rate the trial judge applied and therefore the amount of the quantum meruit award he granted . . .
3. The trial judge failed to award pre-judgment interest to Ms. Schwitzer under the *Court Order Interest Act* and this Court should award pre-judgement interest to any modified damages award in the event of a successful appeal . . .

I enclose Ms. Schwitzer's current appeal factum, which I refer to in this letter. As I told Justice Butler in chambers on April 27, I anticipate seeking leave of the Court or the consent of the Respondent to file an Amended Factum under Rule 82 to narrow the scope of the appeal to the grounds set out above.

Finally, I note that the Respondent indicated to Justice Butler that she may be considering a cross-appeal. For the sake of clarity, Ms. Schwitzer reserves the right to make additional arguments and advance additional grounds, beyond the grounds set out above, in response to or arising from a cross-appeal by the Respondent. In relation to a potential cross-appeal, Ms. Schwitzer reserves the right to vary her position regarding the scope of the transcripts needed for the Court to decide the case.

[Emphasis in original.]

[12] At the April 30 hearing before the Registrar, the parties arrived at an agreement on the contents of the transcripts required for the appeal. They appeared before me on May 7 to make further submissions on how the narrowing of issues on appeal and the agreement on transcripts would affect the applications before me.

[13] I gave reasons for judgment granting Ms. Schwitzer an extension of time to file her transcripts and dismissing Ms. Little's application to dismiss the appeal. In making the order, I stated:

[15] I have concluded that it is in the interests of justice to grant an extension of time. I will explain how I have arrived at the conclusion with reference to the *Davies* factors.

[16] Despite her failure to meet filing deadlines, it is clear that Ms. Schwitzer has consistently held a *bona fide* intention to take the necessary steps to prosecute her appeal. She filed her appeal record, appeal book, and factum by the deadlines set by the Court, and has taken steps,

albeit with some delay, to resolve the overdue transcript issue. I am similarly satisfied that Ms. Little was aware at all times of Ms. Schwitzer's intention to proceed.

[17] These conclusions are significant. There is no question that the trial was hard fought, personal, and extremely important to the parties. Where a losing party forms the intent to appeal, commences an appeal on time, and takes steps to prosecute the appeal, this Court is reluctant to dismiss an appeal as abandoned where a deadline for filing is missed. The *Davies* factors are applied less stringently in such circumstances: *Alam v. Leung*, 2025 BCCA 13 (Chambers).

[18] Ms. Little submits that she will suffer considerable prejudice if the appeal is allowed to continue because of her financial situation and her inability to access the funds in court or deal with the Longacre property. However, that prejudice arises more from the fact of the appeal than from the delay that will be incurred if an additional extension of time is granted.

[19] Ms. Little also stresses that the first extension granted by Justice Francis was very brief and given with an exhortation to diligently pursue the appeal. Ms. Little submits I should find that a further extension is not in the interests of justice. However, I note that Ms. Schwitzer did retain counsel through Access Pro Bono, as she indicated, and has settled the contents of the transcripts. The time taken for these steps was not lengthy or unexpected. Accordingly, she has provided an adequate explanation for that delay and the need for an additional extension.

[20] Finally, I am satisfied on the basis of counsel's letter to the Registrar of April 29, 2026, that the grounds of appeal to be raised in Ms. Schwitzer's amended factum will be limited compared to those set out in the factum filed on April 15, 2026. That factum was prepared before counsel came on record. In it, Ms. Schwitzer challenged all of the findings of the trial judge including the dismissal of her claim for an ownership interest in the properties. The issues to be raised in the amended factum are focused on the defamation claim, errors alleged in considering the value of the *quantum meruit* award, and the judge's failure to award pre-judgment interest on Ms. Schwitzer's successful claims. I am satisfied that there is some merit in the circumscribed appeal.

[21] In conclusion, I am satisfied it is in the interest of justice to grant an extension of time to file the transcripts. I will also set a deadline for Ms. Schwitzer to file her amended factum.

[14] I went on to analyze the alternative relief sought by Ms. Little, finding that the narrowing of the scope of Ms. Schwitzer's appeal constituted a material change in circumstances which warranted varying the Stay. I found that there was no basis to continue the stay of execution preventing Ms. Little from dealing with the Longacre property and the proceeds of sale of the Breeze property as Ms. Schwitzer was

abandoning her dismissed claim for any ownership or beneficial interest in the properties:

[32] Without a claim for an equitable interest in the Longacre property, I see no basis for a stay of execution to prevent its sale or further encumbrance. Similarly, without a claim that she was entitled to such an interest in the Breeze property, that logic applies to the broader stay. Given the limited grounds of appeal, there would have been little reason to grant the appellant what would effectively be security for her appeal. Both parties appear to be in the same difficult financial positions. The substantial change to the substance of Ms. Schwitzer's grounds of appeal is material to the balance of convenience and would likely have altered the justice's decision on the appropriate terms for the stay of execution. Accordingly, I conclude there has been a material change in circumstances that makes the stay of execution preventing Ms. Little from taking any steps to encumber or sell the Longacre property unnecessary to protect Ms. Schwitzer's interests pending the appeal. Further, the broader stay of execution would have been inequitable. I conclude that the stay should be set aside.

[15] In summary, I ordered that: 1) Ms. Little's application to dismiss the appeal for failure to meet the transcript filing deadline was dismissed; 2) the time to file transcripts was extended to June 22, 2026; 3) the time for Ms. Schwitzer to file an amended factum was extended to 30 days from the filing of transcripts; and 4) the terms of the Stay were varied and the Stay set aside in its entirety.

Subsequent Developments

[16] Shortly after judgment was rendered, Ms. Little applied to have the Registrar settle the terms of the May 7 Order and Ms. Schwitzer filed an application to vary or cancel the order. Ms. Schwitzer's application to vary was set to be heard by a division on May 26, 2026.

[17] Ms. Schwitzer then discharged her counsel.

[18] On May 18, Ms. Schwitzer wrote to the Registrar indicating that she intended to proceed with her appeal relying on her April 15 factum. She indicated she was resiling from the position counsel had taken on her behalf and would not fulfil her commitment to file an amended factum narrowing the scope of her appeal. She sought case management orders resettling the transcripts required for her broader appeal and updating Ms. Little's deadline to file her responding factum.

[19] Given this change in circumstances, I directed the parties to appear before me in case management. The division set to hear Ms. Schwitzer's application to vary adjourned the hearing, on the grounds that the same subject—possible variation of the May 7 Order—would be addressed at case management. After hearing from the parties, I directed that the parties appear before me to consider whether the applications I had ruled on should be reopened to permit Ms. Schwitzer to withdraw the commitments made to the Court and if so, whether the May 7 Order should be varied.

Issues

[20] As I indicated to the parties in the memorandums sent on June 4 and June 8, these circumstances raise a number of issues:

1. Should Ms. Schwitzer be permitted to withdraw from the commitment made to the Court that she would proceed only on the revised grounds of appeal? Similarly, should Ms. Schwitzer be permitted to withdraw from the agreement reached regarding the contents of transcripts for the appeal?
2. Does Ms. Schwitzer's intention to rely on the April 15 factum amount to a new circumstance that requires reopening and reconsidering the May 7 Order? And if so, which of the three applications should be reconsidered?
3. Upon reconsideration, should the May 7 Order be varied in any way?

Issue 1: Is Ms. Schwitzer Permitted to Rely on her April 15 Factum?

[21] Ms. Schwitzer has advised the Court that she will no longer be filing an amended factum, as provided in the May 7 Order, and will instead proceed on the basis of the grounds of appeal set out in her April 15 factum. As a preliminary issue in determining whether to reconsider the May 7 Order, I must decide whether Ms. Schwitzer is permitted to do this. That involves considering whether her purported change of position amounts to an abuse of the Court's process.

[22] The doctrine of abuse of process engages the inherent power of the court to prevent misuse of its proceedings in a way that would be manifestly unfair to a party or would in some way bring the administration of justice into disrepute:

Saskatchewan (Environment) v. Métis Nation – Saskatchewan, 2025 SCC 4 at para. 33 [MN–S]. Abuse of process is a broad and flexible concept that applies in various contexts, including relitigation, problematic litigation tactics, inordinate delay causing serious prejudice, and oppressive treatment of an accused in criminal proceedings. This Court has repeatedly held that taking inconsistent positions in legal proceedings can constitute an abuse of process: *Deissner v. Boorsma*, 2023 BCCA 476 at para. 19. However, not every change in position will amount to an abuse of process. A court must examine the factual or legal inconsistency with regard to the context and circumstances of the case: *Pan Afric Holdings Ltd. v. Athabasca Holdings Ltd.*, 2018 BCCA 113 at para. 37.

[23] While abuse of process is often applied where a party takes inconsistent positions in different proceedings, there is no principled reason why it cannot be applied to prevent a party from taking inconsistent positions in the same proceeding. The question raised here is whether a party who has taken a position to obtain a benefit or advantage in litigation should be permitted to then take an inconsistent and incompatible position with a view to retaining an advantage they otherwise would not have obtained. In my view, such a litigation strategy is problematic and should not be permitted.

[24] The present situation raises two related abuse of process concerns. The first is whether Ms. Schwitzer's purpose in resiling from her position to file a new factum was to undermine the basis for setting aside the Stay, so that she can have the May 7 Order varied to reinstate the Stay. Of course, Ms. Schwitzer's application to vary my decision to set aside the Stay, on the basis that I erred in arriving at my ruling, is not itself an abuse of process. That is, so long as the positions Ms. Schwitzer takes before the division on review are not inconsistent with the positions she took at the hearing before me: *Deissner* at para. 19.

[25] The more relevant abuse of process concern is that Ms. Schwitzer is seeking to benefit from terms of the May 7 Order that she obtained on the basis of commitments made to the Court—about the substance of the appeal as well as procedural steps that would be taken to prosecute the appeal—that she no longer intends to abide by. In particular, she seeks to retain her ability to proceed with the appeal despite her failure to comply with Justice Francis’s order. Taking inconsistent positions in this way is unfair to Ms. Little and is the kind of problematic litigation tactic that the broad and flexible doctrine of abuse of process addresses: *MN–S* at para. 36; *Este v. Esteghamat-Ardakani*, 2018 BCCA 290 at paras. 92–93.

Positions of the Parties

[26] Ms. Schwitzer submits that reverting to her April 15 factum is not an abuse of process but rather a legitimate and practical response to the withdrawal of her counsel and her anticipation of Ms. Little filing a cross appeal. She says that the scope of an appeal cannot be amended by correspondence alone, only by following the procedures set out in the *Rules*. Since she did not follow a formal procedure to file an amended factum, she says she cannot be found to have resiled from or abandoned the grounds of appeal set out in her April 15 factum, and she should be permitted to proceed on the basis of the filed factum. In any event, she says that counsel expressly reserved her right to advance additional grounds of appeal in response to a cross appeal, which may yet be advanced by Ms. Little.

[27] Ms. Schwitzer concedes that resuming her broader grounds of appeal requires renegotiating the parties’ agreement that limits the transcripts required for her appeal. Despite Ms. Little’s earlier insistence that full transcripts would be required for the broader appeal, Ms. Schwitzer maintains that limited transcripts are sufficient. She says any prejudice or uncertainty arising from her change in position could be managed by directions from the Court resettling the transcript dispute and setting out a new schedule for the appeal.

[28] Ultimately, Ms. Schwitzer maintains that it is in the interests of justice to allow her to proceed on the grounds of appeal set out in the April 15 factum. She submits

that even if there is some prejudice to Ms. Little in her change of position, it would be disproportionate to dismiss her appeal, and unfair to require her to proceed on an amended factum that has not been prepared or filed.

[29] Ms. Little submits that Ms. Schwitzer should not be allowed to resile from the commitment made to the Court and revert to her April 15 factum. She says that the attempt to do so is consistent with Ms. Schwitzer's history of changing positions and abusing the court process. She disagrees with Ms. Schwitzer's assertion that she took no procedural steps to narrow her grounds of appeal. Ms. Little points out that Ms. Schwitzer fulfilled the Rule 82 requirements to obtain leave to amend her factum by securing Ms. Little's consent to this as part of the agreement to limit transcripts. This was confirmed by the Court in setting a deadline for filing the amended factum.

[30] Ms. Little submits that Ms. Schwitzer's commitment to limit her appeal and the scope of transcripts required was the basis upon which Ms. Schwitzer justified the delay in obtaining her transcripts. Ms. Little says Ms. Schwitzer's subsequent change of position exhibits a pattern of conduct, identified by the trial judge, of Ms. Schwitzer arguing that agreements she makes are not binding when it is not to her advantage to live up to them. Ms. Little says that Ms. Schwitzer's explanation for why she has changed her mind about the scope of her appeal does not stand up to scrutiny. She suggests that the timing of this decision—immediately following Ms. Schwitzer unsuccessfully resisting Ms. Little's application to have the Stay set aside—gives rise to the inference that Ms. Schwitzer is treating her commitments to the Court as conditional on these being to her advantage.

Analysis

[31] I conclude that Ms. Schwitzer cannot be permitted to withdraw from the commitment she made to the Court, reflected in the agreement to limit transcripts, to amend her factum to limit the grounds of appeal. It would be an abuse of the Court's process, and unfair to Ms. Little, to allow Ms. Schwitzer to retain the benefit of the May 7 Order and the transcript agreement without fulfilling the conditions on which the order was premised.

[32] At the hearings before me in April and May, Ms. Schwitzer was facing the possible dismissal of her appeal because of her failure to meet the deadline imposed by Justice Francis. In her reasons granting the extension of time, Justice Francis noted the impact the Stay was having on Ms. Little and granted a short extension emphasizing the need for Ms. Schwitzer to prosecute the appeal with diligence. When I was advised at the hearing on May 7 of the steps taken by Ms. Schwitzer with the assistance of counsel to limit the grounds of appeal and restrict the extent of the transcripts, I was satisfied that although she had missed the deadline for filing transcripts, Ms. Schwitzer was taking appropriate steps to pursue the appeal expeditiously. That included reducing the grounds of appeal to those with more merit. As articulated in the May 7 reasons, based on the steps Ms. Schwitzer had taken or was committed to taking, I found it was in the interests of justice to grant a further extension of time. I have little doubt that my decision would not have been the same had Ms. Schwitzer not committed to the restricted grounds of appeal as set out in counsel's letter of April 29, 2026, and the reduced transcripts.

[33] Ms. Schwitzer argues that I should not give undue weight to counsel's submissions in Court and his statement in correspondence about her intention to limit the grounds of appeal to be raised in her amended factum. She suggests that unless that commitment has been formalized in an order or the filing of an amended factum, there is no reason to treat it as binding on her. She fails to appreciate the extent to which the effective operation of the courts depends on judges' ability to rely on counsel. In *Park v. Palmer*, 2010 BCCA 8, Justice Chiasson stated:

[10] The judge stated she was entitled to rely on the representation of counsel that there had been a settlement. She stated: "[a]s a lawyer and officer of the court, this court can rely on what Ms. Kim tells the court. The same goes for Mr. Nugent, counsel for the defendants". I agree with that statement and add that the effective and efficient operation of the courts depends very much on the trust judges repose in counsel who appear before them.

[Emphasis added.]

[34] When a party makes a commitment to the court, as Ms. Schwitzer did through counsel, the court is entitled to rely on and enforce that commitment. In this case, as a result of the submissions of counsel, including his confirmation that “Ms. Schwitzer will be proceeding **only** on the ... grounds of appeal” set out in his correspondence, I granted orders: 1) dismissing Ms. Little’s application to dismiss the appeal; and 2) further extending time for Ms. Schwitzer to file transcripts in the abbreviated form agreed by the parties based on the reduced scope of the appeal. Permitting Ms. Schwitzer to withdraw from her commitments and yet retain the benefit of these orders would undermine the finality and fairness of the court process.

[35] Nor is it correct to say that Ms. Schwitzer should be permitted to modify the scope of her appeal because she needs to do so in order to fairly respond to a potential cross appeal. There is no cross appeal, and Ms. Little would need to obtain an extension of time, which she has not sought, in order to bring one. The potential for a cross appeal is not before the Court.

[36] In my view, Ms. Schwitzer’s attempt to reinstate her proceedings on the broader grounds advanced in her April 15 factum, while maintaining the benefits of the agreement and orders she obtained by committing to proceed on narrower grounds, amounts to an abuse of process. Ms. Schwitzer’s purported reasons for withdrawing from her commitment do not withstand scrutiny. I see no possible legitimate basis upon which she could now take the inconsistent and incompatible position that she will not be proceeding on the narrowed appeal, since she previously argued the narrowing of her appeal justified granting her the extension of time to continue prosecuting it. To allow Ms. Schwitzer to pursue proceedings that misuse the court procedure in this way would bring the administration of justice into disrepute: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37.

[37] Having found that proceeding on the April 15 factum would amount to an abuse of process, I must determine the appropriate remedy. I accept Ms. Schwitzer’s submission that it would be disproportionate to dismiss her appeal. While her submissions on this application demonstrate that she has seriously

misunderstood her rights and obligations, it would be unfair to dismiss her appeal without giving her the opportunity to pursue the appeal on the narrowed grounds of appeal to which she committed and on which the May 7 order was premised. It would be equally unfair to Ms. Little to allow Ms. Schwitzer to pursue the broader appeal relying on the extension of time that was granted on the basis of her “refined and focused” narrower one. Nor should she be allowed to relitigate the issues of the scope of transcripts required or the terms of the extension of time to file those transcripts.

[38] I conclude that the appropriate remedy is to strike the April 15 factum, with leave to file transcripts and an amended factum in accordance with the terms of the May 7 Order.

[39] Before concluding my comments on the remedy, I note that the May 7 Order required the transcripts to be filed by today’s date. At the hearing on Friday, Ms. Schwitzer indicated that she would be in a position to file transcripts if I so ordered. Accordingly, the orders I make today are based on the assumption that the transcripts have been filed as required by the May 7 Order.

Issue 2: Should the May 7 Order be Reconsidered?

[40] Having found that it would be an impermissible abuse of process for Ms. Schwitzer to rely on her April 15 factum, there can be no material change that would justify reopening and reconsidering the unentered May 7 Order.

[41] However, I consider it useful to explain how I would have approached the reconsideration application had I concluded that Ms. Schwitzer’s conduct did not rise to the level of abuse of process. Had I arrived at that conclusion, I would have found that her decision to proceed on her April 15 factum was a change in circumstance that required reconsidering parts of the May 7 Order.

[42] The court has the discretion, after the conclusion of a hearing and before entry of the order, to reopen the matter before the court: *Harrison v. Harrison*, 2007 BCCA 120 at para. 28. This discretion is broad but is to be exercised sparingly

with the overriding objective of preventing a miscarriage of justice. There are two primary considerations in deciding whether to reopen: 1) is it probable that a miscarriage of justice would occur absent reopening; and 2) would a rehearing probably change the result: *Grewal v. Grewal*, 2016 BCCA 237 at para. 71. A reopening is meant to remedy what might otherwise be a substantial injustice and should not be allowed where a party seeks only to reargue or recast their case: *Grewal* at para. 71.

Analysis

[43] Had Ms. Schwitzer been allowed to proceed on her April 15 factum, the application for an extension of time and cross application for an order dismissing the appeal would have had to be reconsidered.

[44] My finding that it was not in the interests of justice to dismiss Ms. Schwitzer's appeal was premised on the circumstances before the Court and the positions taken by the parties. Ms. Schwitzer had followed through with the retainer of counsel to assist her, which was part of her justification for needing the first extension of time. As I have noted, Ms. Schwitzer did not meet the 30-day deadline set by Justice Francis and arguably did not heed the warning that she needed to diligently pursue the appeal. However, given her retainer of counsel and the active steps taken to focus the appeal and limit the extent of the transcripts, I found it was in the interests of justice to grant a further extension.

[45] Had Ms. Schwitzer not taken those steps prior to May 7, it would have been difficult to find that she was committed to the diligent pursuit of the appeal and I would have been unable to conclude that it was in the interests of justice to grant a further extension. As I explained, the steps she took with the benefit of counsel to narrow the appeal and settle the transcripts bolstered the merits of the appeal, moved it forward, and mitigated possible concerns that Ms. Schwitzer's conduct failed to evidence a *bona fide* intention to prosecute her appeal.

[46] Ms. Schwitzer's subsequent decision to abandon the commitments made through counsel to the Court clearly undercuts the foundation upon which the extension of time was granted. A miscarriage of justice would thus result if she could resile from her commitments, but the May 7 Order granting the further extension of time was allowed to stand.

[47] Accordingly, had I reconsidered the applications, I would have found that Ms. Schwitzer had not taken adequate steps to pursue the appeal with diligence and that the interests of justice required dismissing Ms. Schwitzer's appeal as abandoned for failure to comply with the order of Justice Francis requiring her to file transcripts by March 23. Her actions in attempting to resile from her earlier position would call into question the *bona fides* of her stated intention to prosecute her appeal, and raise the prospect that she was intentionally delaying the proceedings in order to prevent Ms. Little from obtaining the fruits of the trial judgment. Both the delay in bringing the appeal to hearing, and the number of interlocutory hearings Ms. Little has been required to attend to address that delay, have been prejudicial to Ms. Little. In light of this, I would have found that it was not in the interests of justice to grant Ms. Schwitzer a further extension of time to file her transcripts and would have dismissed the appeal as abandoned.

Disposition

[48] Ms. Schwitzer's April 15 factum is struck.

[49] The application to reopen and reconsider the May 7 Order is dismissed. The terms of the May 7 Order stand as pronounced in my reasons of May 7, 2026.

[50] The Registry is directed to enter the May 7 Order. The requirement for Ms. Schwitzer's and Ms. Little's signatures on the order is dispensed with.

[51] In accordance with the May 7 Order, Ms. Schwitzer must file an amended factum within 30 days of today's date. The grounds of appeal to be raised in the amended factum are limited to those matters set out in counsel's letter to the Court of April 29, 2026. I have directed the Registrar to review the amended factum once it

is filed to consider whether the grounds of appeal raised are restricted as ordered. If the Registrar has any concern in that regard, I have directed him to refer the parties to me.

[52] If Ms. Schwitzer fails to file the amended factum within 30 days, Ms. Little is at liberty to apply to dismiss the appeal as abandoned.

[53] Ms. Schwitzer's application for a stay of the May 7 Order pending the determination of this application is dismissed.

[54] The Registry is directed to draft and enter this order. The requirement for Ms. Schwitzer's and Ms. Little's signatures on this order is dispensed with.

[Submissions by parties re: costs]

[55] **BUTLER J.A.:** I have received submissions from the parties in response to my inquiry about costs and whether special costs should be ordered because I have found that Ms. Schwitzer's litigation conduct amounted to an abuse of process. Ms. Schwitzer argues that the steps she took were taken in good faith as a self-represented litigant. She believed there was a proper basis for the positions that she took, including for changing her position before the Court. Ms. Schwitzer also notes that in light of her impecuniosity, the Court made a no fee order. Accordingly, she says the Court should be cautious about making any order on costs for these applications.

[56] I have, however, concluded that Ms. Schwitzer's conduct amounts to an abuse of this Court's process. A finding of an abuse of process in and of itself can satisfy the test for reprehensible conduct, and I conclude that Ms. Schwitzer's litigation conduct satisfies the test. However, the award that I make will only be in relation to this application and the case management conference made in advance of this application.

[57] I conclude that Ms. Little is entitled to costs for the preparation for and attendance at the case management conference and the hearing of these applications. I also conclude that it is appropriate in the circumstances of this case that costs be awarded as special costs. These costs shall be assessed by the Registrar and payable forthwith in any event of the cause. I leave the costs order made in the May 7 Order undisturbed.

“The Honourable Mr. Justice Butler”