

COURT OF APPEAL FOR ONTARIO

CITATION: Chand Morningside Plaza Inc. v. Healthy Lifestyle Medical Group
Inc., 2026 ONCA 558

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Roberts, Coroza and Rahman JJ.A.

BETWEEN

Chand Morningside Plaza Inc.,
and Joshi Group of Companies Ltd.

Plaintiffs (Appellants)

and

Healthy Lifestyle Medical Group Inc., Rochak Badhwar,
Gore Doctors Medical Inc., Ashok Badhwar*, Usha
Badhwar*, Aash Karia, Bindaas Capital Inc. and
Marvin Talsky

Defendants (Respondents*)

Jonathan Rosenstein, for the appellants

Larry Levine, for the respondents

Heard: January 20, 2026

On appeal from the judgment of Justice Markus Koehnen of the Superior Court of
Justice, dated December 30, 2024, with reasons reported at 2024 ONSC 7285.

L.B. Roberts J.A.:

Overview

[1] This appeal involves the question of the appropriate procedure to be followed for pleadings amendments raised by the trial judge following a trial.¹ Here, the trial judge, on his own initiative, effectively amended the respondents' amended fresh as amended statement of defence by relying on unpleaded defences to defeat the appellants' action without allowing the appellants to meaningfully respond.

[2] There is no question that r. 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, permits tenable amendments at any stage of an action, absent non-compensable prejudice to the opposing party. In an appropriate case, a court may also, on its own initiative, raise the question of whether an amendment should be made to a pleading: *O'Bryne v. Farmers' Mutual Insurance Company (Lindsay)*, 2014 ONCA 543, 121 O.R. (3d) 387, at para. 23. The overarching question for the court in considering whether an amendment should be made is whether trial fairness will be compromised by prejudice to the opposing party that cannot be fairly addressed and compensated.

[3] The appellants appeal the dismissal of their collection action against the respondents, Ashok and Usha Badhwar ("the Badhwars"). They seek payment of the amounts that remain owing under a guarantee and a mortgage that the

¹ The appellants originally sought to appeal the costs decision but clarified in oral argument that they only seek their costs from trial in the event they are successful in the appeal on the merits.

Badhwars signed to assist their son, Rochak Badhwar, in the purchase of five commercial condominium units from the appellants.

[4] As part of the purchase price of the units, the Badhwars' son gave a vendor take-back mortgage to the appellants. To assist their son, the Badhwars signed a guarantee, promissory note and mortgage on their home as collateral security for the vendor take-back mortgage.

[5] The vendor take-back mortgage went into default. The Badhwars' son made an assignment into bankruptcy. The units were sold under the first and second mortgages. The appellants sought payment from the Badhwars of the deficiency owing under the vendor take-back mortgage.

[6] The trial judge dismissed the action on the grounds that the Badhwars had received inadequate independent legal advice from their lawyer (the "ILA lawyer") with respect to the guarantee, promissory note and mortgage documentation that they signed and, alternatively, that they did not receive a demand for payment under the guarantee that they had signed. The appellants maintain that these defences, which the trial judge allowed to defeat their claim, were not pleaded or raised during the trial and that they did not have a meaningful opportunity to respond to them.

[7] This appeal highlights the difficulty in trial management when one or more of the parties are not represented by counsel and issues giving rise to non-pleaded

but potentially relevant defences come to light and are raised by the trial judge following the trial.

[8] In the present case, the trial judge managed a very challenging trial where the self-represented Badhwars – unsophisticated parties whose English language skills are very limited – initially declined to participate and then were unable to adequately respond to complicated issues or advance relevant defences. The trial judge’s efforts to assist the Badhwars were commendable. The new issues he raised following the trial and addressed in his reasons were legitimate and significant. Indeed, the outcome of the action essentially turned on them. The difficulty is that the appellants did not have a meaningful opportunity to respond to them.

[9] Trial management decisions are ordinarily entitled to significant appellate deference: *Rassouli-Rashti v. Tayefi*, 2023 ONCA 315, at para. 19. It happens that issues may arise after the trial is completed and that many of them can be appropriately and fairly dealt with by providing notice to the parties and inviting written submissions. However, in this particular case, it was an error for the trial judge to address these issues without adequately giving notice of them to the parties and by only requesting written submissions.

[10] Specifically, while the trial judge sent an email to the parties asking for further written responses to questions, the trial judge’s email and questions did not

adequately convey to the parties that the trial judge was considering broad, new issues that were not raised at trial by the respondents. Nor that they gave rise to the potential for defence amendments that may have required an amended reply from the appellants, as well as the presentation of additional evidence.

[11] Like the defence amendment made mid-trial to permit the respondents to rely on their assertion of undue influence, these other potential defence amendments should have been dealt with in court as part of the trial. The appellants would then have had the opportunity to make detailed, oral submissions in court and, at the very least, to respond formally to the proposed defence amendments. If the amendments were permitted, the appellants should have been permitted to address the amendment of their reply, if desired. It may also have been appropriate to canvass reopening the trial to ascertain whether the parties wished to call further evidence and make additional submissions in court to respond to the new defences that the trial judge applied following the trial. An adjournment of the trial may also have been warranted to ensure trial fairness.

[12] As a result, I would allow the appeal and remit the action to the Superior Court for a new trial before a different judge. It is unnecessary to address the appellants' other grounds of appeal. Accordingly, these reasons are restricted to explaining why I would allow the appeal based on the ground of procedural unfairness.

Background

[13] I set out only the background facts relevant to the procedural unfairness ground of appeal, on which this appeal turns. To provide the necessary context for this ground of appeal, I set out in some detail the manner in which defences and other allegations were raised by the Badhwars prior to and during the trial, their admissions and how the pleadings were amended. As I will explain, at no time were the issues ultimately raised by the trial judge raised during the trial.

i. The statement of defence

[14] The statement of defence was amended several times before trial while the Badhwars were represented by counsel, with the final version – an amended fresh as amended statement of defence² – dated September 17, 2019.

[15] The Badhwars' amended fresh as amended statement of defence contains the following admissions: they signed the guarantee, promissory note and mortgage documentation, and they knew they were guaranteeing their son's obligations. They pled, however, that they did not understand their house was at risk.

[16] The Badhwars asked in their amended fresh as amended statement of defence to set aside the guarantee, promissory note and mortgage, relying on the

² As is set out in more detail below, this is the version of the pleading that appears to have been prepared by the Badhwars' former counsel in relation to a motion to amend the pleading that the Badhwars did not pursue. In this version, the Badhwars pleaded the new defence of undue influence respecting Ms. Badhwar, which the trial judge allowed in the course of the trial.

pleaded defence of *non est factum*. They additionally asserted that the independent legal advice that they had received with respect to those documents was inadequate, that they received no benefit for signing those documents, and that the appellants suffered no damages. They did not plead that the appellants knew about the alleged inadequacy of the independent legal advice they received nor that there was any deficiency in the demand for payment under the guarantee, promissory note or mortgage.

[17] There is no indication in the record of any request for further amendment to the defence before trial.

ii. The trial

[18] By the time the trial started, the Badhwars were no longer represented by counsel. Following the appellants' opening submissions, the Badhwars left the courtroom, were not present during the evidence of the appellants' principal and did not cross-examine him.

[19] Following a nearly two-month long adjournment, the Badhwars returned to the courtroom, and the trial judge allowed their son and daughter-in-law to assist them with their testimony and make submissions on their behalf. The following arguments were raised during the son's opening submissions on behalf of his parents:

- The appellants' principal, Mr. Joshi, misrepresented the purchase price of the condominium units, charged extra to cover development costs on the closing of the purchase and insisted that the son take a vendor take-back mortgage to purchase the units.
- Contrary to his representations, Mr. Joshi did not give the Badhwars' son the exclusive right to practice as a chiropractor but allowed competing businesses to come into the plaza, which caused the son's business to suffer.
- The appellants did not make any effort to enter into an arrangement for payments from the son and his parents for the deficiency owing under the vendor take-back mortgage and just started an action.
- The ILA lawyer was not independent, and the Badhwars did not receive proper independent legal advice: the documents were presented to them for signing at their son's solicitor's office where they were told to sign them without any explanation. They were not aware they were granting a mortgage to the appellants. They understood that the appellants would pursue recovery against their son and that if the appellants were unable to recover from their son, they would be personally liable, but their home would not be at risk.
- The Badhwars received no consideration or benefit for signing.

- The appellants failed to demonstrate any real damages, having recouped the “full principal sum paid”, despite selling the units for less than market value. The appellants’ claims were for interest, utilities and legal costs. No documentation was provided for many of the costs outlined nor did the appellants send a demand of payment prior to commencing the action.

[20] Though, as noted, the Badhwars admitted to signing the guarantee, mortgage and promissory note, they both testified that when they met with the ILA lawyer to sign certain documents, they received no advice about them but were just told where to sign them.

[21] Additionally, the certificate of independent legal advice, signed by the Badhwars and dated October 4, 2010, was made an exhibit at trial. It certified the following:

- The ILA lawyer was consulted by the Badhwars with respect to “the nature and effect” of the mortgage, which was registered on their property in the amount of \$607,607.71, and of the guarantee.
- He was not acting for the lenders but independently for the Badhwars.
- He “plainly and fully described” to the Badhwars “the nature, effect and liability” of executing the mortgage.

- He was satisfied that the Badhwars were executing the mortgage, guarantee and related documentation “voluntarily and without any fear, threat, undue influence, duress or compulsion of, from or by any person including, without limitation, Joshi Group of Companies Ltd.”
- The Badhwars confirmed that: they consulted with the ILA lawyer as their solicitor in and for their interests only in connection with the mortgage; they were “fully advised of the nature, effect and liability” of executing the mortgage and the guarantee; they “fully understood” the advice provided to them; and they executed the mortgage, guarantee “and all related documentation freely and without any fear, threat, undue influence, duress or compulsion of, from or by any person including, without limitation, Joshi Group of Companies Ltd.”

[22] While no one called the ILA lawyer as a witness at trial, he was cross-examined on an affidavit filed for an earlier motion by the then lawyer for the Badhwars on his provision of independent legal advice and on the certificate on September 15, 2016. The transcript from his cross-examination was accepted into evidence, though the trial judge noted he had “serious doubts about whether it [met] the requirements of necessity and reliability.” The ILA lawyer’s evidence about his advice can be summarized as follows:

- He met with the Badhwars on October 4, 2010 and reviewed with them the certificate of independent legal advice, the promissory note, mortgage and guarantee. He “[f]aintly” remembered meeting with the Badhwars but testified that he read the documents to the Badhwars in English and then explained them in Punjabi and that they understood and signed the documents.
- The lawyer acting for the Badhwars’ son recommended him to the Badhwars, set up the meeting and provided the form of the certificate.
- The Badhwars told him to leave his invoice with their son’s lawyer, which he did, and he received payment from the office of the son’s lawyer.

[23] The closing submissions made by their son on behalf of the Badhwars mirrored the opening submissions that he had made and additionally raised the defence of undue influence with respect to Usha Badhwar. In sum, he argued what he described as the “three pivotal points” of his parents’ defence. First, there was an absence of proper independent legal advice, and his parents did not understand what they were signing, particularly his mother who just did what his father told her to do. Second, the Badhwars received no personal benefit from signing the documents. Third, the appellants suffered no real damages because the entire

debt had been satisfied as a consequence of the sale of the units under power of sale.

[24] The son framed his references to the appellants' failure to first make a demand for payment before commencing their lawsuit as issues of damages and good faith. He argued that the appellants could not prove their damages and never made a demand for payment from him or his parents: "You couldn't just send me one letter, saying 'Rochak, we sold the units. This is what's outstanding. What do you want to do?' before you throw a lawsuit at 80-year-olds. How does that show any kind of good faith." The son claimed that they were always willing to pay any outstanding amounts that were proven but that the claimed expenses under the mortgage were "fabricated".

[25] In reply, appellants' counsel fairly advised the court that Usha Badhwar pleaded undue influence in the unissued amended fresh as amended statement of defence. While the amendment had apparently been drafted by former counsel, it was never formally taken out, and the Badhwars failed to pursue this amendment. Appellants' counsel opposed the amendment, but he conceded that it occasioned no non-compensable prejudice. The trial judge amended the fresh as amended statement of defence to include the undue influence defence. No other amendments or defences were raised or requested during the trial.

iii. Post-trial questions and submissions

[26] On December 29, 2024, following the conclusion of the trial but prior to the release of his reasons for judgment, the trial judge wrote to the parties and asked for further written submissions, including asking for submissions on *0867740 B.C. Ltd. v. Quails View Farm Inc.*, 2014 BCCA 252, 62 B.C.L.R. (5th) 232, and *Bank of Nova Scotia v. Williamson*, 2009 ONCA 754, 97 O.R. (3d) 561, as follows:

As I have been working through things and have been drafting my reasons, a number of questions have arisen in my mind for [counsel for the appellants]. Those are set out below:

1. The defendants said a number of times in opening, in evidence and in closing argument that no demand was made on the guarantee. They also handed up an article about guarantees. The article cites [0867740 and *Williamson*] for the proposition that an action on a guarantee is a nullity unless it is preceded by a demand for payment. May I have your response to this.
2. The certificate of independent legal advice does not refer to the promissory note in any way. That suggests no advice was given on the promissory note. I appreciate [the ILA lawyer] says in his cross-examination that he gave advice on the promissory note. What should I make of the apparent contradiction between the certificate and [the ILA lawyer]'s evidence?
3. Although the certificate of independent legal advice refers to the guarantee, it does

not indicate in the operative 4th paragraph that any advice was actually given about the guarantee. I appreciate [the ILA lawyer] says in his cross-examination that he gave advice on the guarantee. What should I make of the apparent contradiction between the certificate and [the ILA lawyer]'s evidence?

Can you let me know when you will be in a position to respond to these questions. That will help me block off time immediately after the anticipated response date so I can address the matter in a timely way.

[27] On the same day, the appellants' counsel responded with very brief written submissions. They asserted that the action was not rendered a nullity by an absence of a demand and distinguished the cases cited by the trial judge on the basis that the Badhwars were primary debtors under the guarantee. They also submitted that there was no conflict between the certificate of independent legal advice and the evidence given by the ILA lawyer on his cross-examination about the advice he gave to the Badhwars. The appellants offered to provide any further submissions or assistance as required.

[28] The record does not disclose that the Badhwars provided submissions on these issues nor that the trial judge asked for further submissions from the parties.

iv. The trial judgment

[29] In his reasons for judgment, the trial judge concluded that the defence of *non est factum* was made out, finding that: 1) the Badhwars were unsophisticated individuals who spoke very little English; and 2) the Badhwars' son had

misrepresented the nature of the documents that they signed for his benefit. He also found that Usha Badhwar faced actual undue influence from her husband and presumed undue influence from her son.

[30] Further, although the trial judge stated that the ILA lawyer “may well have given advice of a nature that fully meets the requirements of independent legal advice”, the trial judge nevertheless was “not satisfied that the [Badhwars] received independent legal advice of the sort the court expects” and found that the appellants “knew or ought to have known that there were serious issues about the scope, nature and quality of the independent legal advice” that the Badhwars received. The trial judge determined that the deficiencies of the independent legal advice should have been apparent to the appellants on the face of the certificate of independent legal advice.

[31] Specifically, the trial judge closely scrutinized the wording of the certificate of independent legal advice and highlighted “two glaring defects in the certificate that ought to have been apparent to the creditor”: 1) there was no reference to the promissory note in the certificate of independent legal advice nor any suggestion that the Badhwars were given independent legal advice about it; and 2) although the certificate refers to the guarantee and indicates the Badhwars certified that they fully understood it, it does not indicate that any advice was given about it.

[32] The trial judge found that there were significant inconsistencies between the certificate and the ILA lawyer's testimony, in particular, that he testified reviewing and giving advice to the Badhwars about all the documents that they signed, although the certificate did not note this about the promissory note and guarantee.

[33] As a result, the trial judge determined that the appellants "did not take the steps that the law requires to prevent them from being subject to the equitable defences that [the Badhwars] have raised" and therefore could not rely on the certificate of independent legal advice. He ordered that the mortgage be removed from title and set aside the guarantee and promissory note.

[34] The trial judge also dismissed the appellants' action on the grounds that the Badhwars were "accommodation sureties" entitled to a formal demand for repayment under the guarantee and that the appellants had failed to make a formal demand for repayment.

v. Post-judgment submissions and refusal to reopen the trial

[35] Following the release of his reasons for judgment, the appellants sought to reopen the trial in order to file a letter dated October 7, 2011, which they submitted served as a demand letter from their lawyers for payment under the mortgage from the Badhwars. The trial judge refused to reopen the trial and to consider the letter. In his ruling, he concluded that it would not have affected the outcome of the trial; that it could have been obtained before trial; and that considerations of finality,

apparent cogency of the evidence, delay, fairness and prejudice mitigated against it.³

Analysis

[36] This appeal turns on the question of procedural unfairness. I accept the appellants' submissions that the trial judge dismissed the action on the strength of two defences that were not pleaded or raised by the Badhwars and to which the appellants were denied the opportunity to respond in a meaningful way.

i. Governing principles

[37] The overarching consideration here is trial fairness. The parties are entitled to know the issues that are joined in the proceeding. They marshal their evidence and litigation strategy in accordance with the pleadings. If new issues arise, the parties are entitled to respond to them. Depending on the timing, the proposed amendments may be too prejudicial to the opposing party.

[38] As this court reiterated in *Holmes v. Hatch Ltd.*, 2017 ONCA 880, at para. 7: "The law assumes that the parties' pleadings properly delineate all relevant claims in dispute and define the issues." The court went on to set out the operative principle, as outlined by this court in *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (C.A.). The court in *Rodaro*, at para. 60, explains:

³ See *Chand Morningside Plaza Inc. v. Healthy Lifestyle Medical Group Inc.*, 2024 ONSC 1541.

It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in *460635 Ontario Limited v. 1002953 Ontario Inc.*, [1999] O.J. No. 4071 at para. 9 (C.A.) (QL):

... The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. ...

[39] Rule 26.01 permits tenable pleading amendments to be made at any time, including following a trial, “unless prejudice would result that could not be compensated for by costs or an adjournment.” The mandatory language of r. 26.01 – that leave to amend a pleading “shall” be granted – is tempered by the court’s discretion to prevent non-compensable prejudice.

[40] The court’s discretion to make such amendments is not unfettered and must be exercised in accordance with the principles of procedural fairness. The moving party must show there is no prejudice that cannot be compensated for by costs or an adjournment: *Avedian v. Enbridge Gas Distribution Inc.*, 2023 ONCA 289, at para. 6. Given this standard, it will be rare that amendments following trial will be permitted because of the strong likelihood of prejudice to the opposing party. Indeed, where there is inordinate delay in seeking amendments, prejudice will be presumed unless there is sufficient proof to the contrary to rebut this presumption

of prejudice: *Family Delicatessen Ltd. v. London (City)*, 2006 CanLII 5135 (Ont. C.A.), at para. 6; 1588444 *Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42, 135 O.R. (3d) 681, at paras. 25, 36-37.

[41] The limit on the court's discretion arising from the presumption of prejudice arises from the unfairness that such late amendments will cause because of the way that parties have chosen to manage the litigation, including decisions regarding pleadings, settlement, evidence and submissions: see e.g., *Milosevic (Litigation Guardian of) v. Etheridge* (1991), 3 C.P.C. (3d) 69 (Ont. Gen. Div.), at para. 6; *Kings Gate Developments Inc. v. Colangelo* (1994), 17 O.R. (3d) 841 (C.A.), at pp. 843-44; and *Family Delicatessen Ltd.*, at para. 7.

[42] At the very least, if the court is considering new defences, an opportunity should be given to the opposing party to oppose the amendment and, if the amendment is permitted, to reopen the trial to call further evidence and make additional submissions. To prevent an unreasonable use of the amendment rule, where late amendments are permitted, the court should consider orders that will prevent trial unfairness, such as an adjournment of the trial to permit further production and examination for discovery, as well as ordering costs: *Kings Gate Developments Inc.*, at pp. 844-45.

ii. Principles applied

[43] It was open to the trial judge to raise the possibility of the new defences related to the inadequacy of the independent legal advice received by the Badhwars and the requirement of a demand for payment prior to the commencement of an action. Trial unfairness did not result as a consequence of the trial judge assisting the Badhwars in this way.

[44] Trial unfairness resulted because the appellants were not given adequate notice of the potential new defences and, consequently, not provided with an opportunity to respond to these new issues in a meaningful way. This included an opportunity to oppose very late-stage amendments to the already amended fresh as amended statement of defence that were made following the completion of the trial and, if the amendments were allowed, to amend their pleadings to address them. These amendments raised complicated issues that should have been addressed in open court.

[45] The new defence related to the appellants' actual or constructive knowledge of the inadequacy of the independent legal advice arose out of – but was materially different than – the question of the appellants' knowledge, actual or constructive, concerning the pleaded defences of *non est factum*, duress, undue influence or unconscionability in the signing of guarantees, promissory notes or mortgages.

[46] It is well established that where a lender has actual or constructive knowledge of issues supporting the defence of undue influence in the signing of

guarantees, promissory notes or mortgages, in order to protect against a claim that the instruments relied upon are vitiated, the lender must take reasonable steps to try to ensure that the persons signing the instruments understand the transaction and are entering into it freely: *Bank of Montreal v. Duguid* (2000), 47 O.R. (3d) 737 (C.A.), at para. 12, leave to appeal granted but appeal discontinued, [2000] S.C.C.A. No. 298. A lender may accomplish this by suggesting that the signers seek and obtain independent legal advice and a full explanation of the transaction: *CIBC Mortgage Corp. v. Rowatt* (2002), 61 O.R. (3d) 737 (C.A.), at para. 16, leave to appeal refused, [2002] S.C.C.A. No. 526; *Bank of Montreal*, at paras. 14-15; and *JGB Collateral v. Rochon*, 2020 ONCA 464, 151 O.R. (3d) 601, at para. 11. This is equally true in instances where a lender has actual or constructive knowledge of issues supporting the defences of *non est factum*, duress and unconscionability.

[47] However, any deficiencies in the independent legal advice are a matter between the lawyer who gives the advice and the clients who receive it, unless the lender knows or ought reasonably to have known of them. The lender is entitled to rely on a certificate of independent legal advice from a lawyer licensed to practice law in the jurisdiction, so long as the lender did not have any knowledge, direct or otherwise, that there is an issue of the authenticity or propriety of the independence of the legal advice: *Royal Bank of Canada v. Biddell et al*, 2015 ONSC 6535,

61 R.P.R. (5th) 62, at para. 75; *Bertolo v. Bank of Montreal* (1986), 57 O.R. (2d) 577 (C.A.), at para. 7.

[48] The difficulty here is that the new defence, as framed by the trial judge, was not raised in submissions nor in the evidence at trial.

[49] As I have earlier noted, with respect to the adequacy of the independent legal advice, the Badhwars pleaded and argued at trial that the independent legal advice was inadequate because they did not receive any but were simply told to sign the documents without any explanation. They did not plead or allege at trial that the appellants knew or should have known that the advice was inadequate.

[50] Further, the Badhwars did not assert any of the “glaring defects” or other deficiencies that the trial judge identified as invalidating the certificate of independent legal advice. Nor did they assert the inconsistencies that the trial judge found to exist between the wording of the certificate and the evidence given by the ILA lawyer about the independent legal advice given to the Badhwars. They simply testified that the certificate was not explained to them.

[51] It is significant that the trial judge recognized that the ILA lawyer was not asked any of the questions that he raised in his reasons, “nor were the contradictions between his evidence and the certificate put to him.” The ILA lawyer had no existing professional relationship with the appellants or their lawyer. He testified in his cross-examination that he was not practising with the lawyer of

Badhwars' son when he provided the independent legal advice and signed the certificate. This evidence was also supported by the wording of the certificate of independent legal advice.

[52] Moreover, it was confirmed during oral argument on the appeal that the appellants' principal who testified in support of the action was not cross-examined at trial. As a result, he was not cross-examined on and allowed to respond to any of the deficiencies that the trial judge found flawed the certificate of independent legal advice nor on his knowledge of any such deficiencies.

[53] During opening and closing submissions, while the trial judge asked about the ILA lawyer's Punjabi linguistic abilities, no mention was made by the Badhwars or the trial judge of any issue with respect to the information contained in the certificate that the trial judge later relied upon.

[54] Accordingly, while the trial judge's efforts to assist the Badhwars were laudable, it was an error for the trial judge to apply the new defence without giving the appellants notice he might do so and by not affording the appellants a meaningful opportunity to respond. Before amending the pleading, the trial judge was required to hear an amendment motion and, if the amendment were allowed, permit the appellants to respond.

[55] With respect to the second new defence that the trial judge allowed, in footnote 26 of his reasons, the trial judge acknowledged that the demand defence “was not raised in the statement of defence” but that:

It was raised in the [Badhwars'] opening argument, evidence and closing argument together with an article explaining this principle and citing the two cases referred to in this footnote. The [appellants] did not object, or seek to call reply evidence or ask for an adjournment to prepare further submissions. I raised the issue in an email to the parties during my deliberations. [Appellants'] counsel responded with submissions but raised no objection to the issue being considered.

[56] Respectfully, the trial judge's approach was mistaken. The Badhwars did not plead or raise the defence at trial that the Badhwars were accommodation sureties nor that the appellants were required to make a formal demand for payment before they could start their action and that their action was therefore invalid. Again, no evidence was led on this issue nor was it raised during opening or closing submissions by the Badhwars or the trial judge. As explained above, the Badhwars' argument about demand for payment related to the issues of damages and good faith. It was never framed as a condition precedent to the appellants' commencing their action. Nor did the Badhwars expressly refer to the article or the cases to which the trial judge made reference in his reasons.

[57] As noted by the trial judge, the demand issue was a defence. To consider it, he was required to allow an amendment to the statement of defence. Before he

could amend the statement of defence, he had to obtain the consent of the appellants or decide the issue after argument. He did neither.

[58] Further, the demand issue raised by the trial judge on his own initiative is a complicated issue to which the appellants should have been permitted to respond by calling further evidence and making fuller submissions. Applying *Williamson* and *0867740*, the trial judge found that the Badhwars were “accommodation sureties” (whose obligations did not crystallize until the main debtor defaulted: *0867740*, at para. 60), who were entitled to a demand for payment before the appellants could commence an action against them.

[59] The appellants have raised serious issues that they should have been permitted to meaningfully address: 1) *Williamson* has no application to the present case. The appellants assert that it concerned a guarantee with a condition precedent that was absent from the guarantee in the present case. Moreover, *Williamson* only addressed when the limitation period starts to run in relation to a demand guarantee; 2) *0867740* does not clearly stand for the proposition that a demand for payment independent of an action must be made and only addresses the circumstances of prematurity where the guarantor’s liability has not yet crystallized because the main debtor has not yet gone into default; 3) in accordance with the plain language of the guarantee and mortgage, the Badhwars were principal debtors and not “accommodation sureties”, to whom no demand was required before an action could be commenced; and 4) in any event, the

appellants say that they did make a formal demand for payment from the Badhwars before commencing their action, as evidenced by their counsel's October 7, 2011 letter to the Badhwars. They should have been permitted to rely on that letter as evidence that they did make a formal demand for payment.

[60] The trial judge in the present case amended, on his own initiative, the statement of defence to include the defences and the particulars of the defences that he relied upon to dismiss the action. Neither these defences nor their particulars were apparent from the issues framed in the pleadings, raised at trial or from the evidence. They were nuanced, complicated and open to debate. As a result, the trial judge should have heard submissions on whether to allow the amendments and, if so, on what terms to avoid the presumption of prejudice to the appellants that arose by the delay of raising and allowing the late amendments.

[61] The appellants were unaware of the full scope of the issues being canvassed by the trial judge, the case they had to meet and the importance that the issues played in his reasons for judgment. They were not given an opportunity to object to the trial judge's consideration of the new defences nor to present further evidence and make further submissions in court about the issues that principally underpinned the trial judge's dismissal of their action. This was procedurally unfair and resulted in a miscarriage of justice.

[62] The appellants urge us to allow their claim and grant judgment. As the record is not sufficient to do so, I would remit the action to be re-tried before a different judge.

Disposition

[63] I would allow the appeal and set aside the dismissal of the action and the costs awarded to the Badhwars. I would remit the action to the Superior Court before a different judge, for a new trial on all issues, including damages.

[64] As the amended fresh as amended statement of defence stands at present, the amendment granted by the trial judge during closing submissions to include the defence of undue influence is valid but the amended fresh as amended statement of defence should be formally filed with the court office to reflect this amendment.

[65] If the Badhwars wish to amend the defence pleading further to include the defences related to inadequate independent legal advice and pre-trial demand for payment that the trial judge raised, they will have to do so on a properly brought motion well before the start of the next trial. The parties are advised to seek case management to deal with these and any other steps that are required to ready this matter for the new trial.

[66] If the parties cannot agree on the disposition of the costs of the appeal and the trial costs below, I would allow them to deliver brief written submissions of no more than two pages, plus a costs outline, within 14 days of the release of these reasons.

Released: July 31, 2026 “L.B.R.”

“L.B. Roberts J.A.”

“I agree. S. Coroza J.A.”

“I agree. M. Rahman J.A.”