COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Main Street Arts 2 Development Limited Partnership v Altin Capital Limited,* 2026 BCCA 443

Date: 20261030
Docket: CA51578

Between:

Main Street Arts 2 Development Limited Partnership, Main Street Arts 2 Investments Inc., Port Capital Development (1940 Main) Inc., Port Capital Development Inc., Port Capital Group Inc., Macario Teodoro Consunjii Reyes a.k.a. Macario Tobi Reyes

Appellants
(Respondents)

And

Altin Capital Limited

Respondent
(Petitioner)

Before: The Honourable Justice Fleming
The Honourable Mr. Justice Riley
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated May 6, 2026 (*Altin Capital Limited v Main Street Arts 2 Development Limited Partnership*, 2026 BCSC 830, Vancouver Docket H210089).

Oral Reasons for Judgment

Counsel for the Appellants:	R. Clark, KC
Counsel for the Respondent:	A.H. Sabur Y. Gao
Place and Date of Hearing:	Vancouver, British Columbia October 27, 2026
Place and Date of Judgment:	Vancouver, British Columbia October 30, 2026

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Summary:

The appellants, Main Street Arts 2 Development Limited Partnership ("Main Street") and others, appeal from a chambers judge's dismissal of an application to set aside a substitution order granted in a foreclosure petition. Main Street had been served with the foreclosure petition, but did not file a petition response, and was therefore not a "party of record" entitled to notice of the application for the substitution order. Nonetheless, Main Street applied to set aside the substitution order, arguing that respondent's counsel breached the duty of full, frank, and fair disclosure by failing to advise the court that it was not permissible to obtain a substitution order in respect of the in personam portion of a foreclosure proceeding after final judgment on the debt. The chambers judge held that because Main Street was not a party of record, the substitution order application was not ex parte, so the duty of full, frank, and fair disclosure did not apply. He concluded that he had no jurisdiction under the Supreme Court Civil Rules to set aside the substitution order. On appeal, Main Street argues that the chambers judge erred holding that the duty of full, frank, and fair disclosure did not apply, and that he had no jurisdiction beyond the remedial powers provided for in the Rules.

HELD: Appeal dismissed. The judge was correct in holding that the substitution order application was not ex parte, such that the duty of full, frank, and fair disclosure did not apply. While the judge overlooked the inherent jurisdiction to revisit an entered order based on a miscarriage of justice, no basis was shown for invoking that jurisdiction here because the legal flaw in the substitution order did not affect the ongoing in rem portion of the foreclosure proceedings, such that there was no lasting prejudice to Main Street in the circumstances of this case.

RILEY J.A.:

Introduction

[1] The appellants, Main Street Arts 2 Development Limited Partnership ("Main Street") and others, appeal the decision of a judge of the Supreme Court of British Columbia, in chambers, declining to set aside an order substituting the respondent Altin Capital Limited ("Altin") for the original petitioner, BCMP Mortgage Investment Corporation ("BCMP"), in a foreclosure proceeding. While Main Street was a party to the foreclosure petition, it had not filed a petition response, was therefore not a "party of record", and thus not entitled to notice of the substitution order application. Despite this, Main Street sought to set aside the substitution order on the basis that the judge who granted it was not informed of the law prohibiting assignment of the *in personam* portion of a foreclosure proceeding after an order *nisi* has been granted. The chambers judge found that, despite this conceded legal deficiency, he could not

entertain the application to set aside the substitution order because Main Street was not a "party of record", and the court had no other jurisdiction to revisit an entered order.

[2] On appeal, Main Street argues that the chambers judge erred in law in finding that he lacked jurisdiction. Main Street's principal submission is that there was jurisdiction to set aside the order based on Altin's breach of the duty of full, frank, and fair disclosure in an *ex parte* application. For reasons explained in greater detail below, I would not give effect to that submission. The application was not *ex parte*, because Altin had no obligation to give notice of the substitution order application to Main Street, who was not a party of record. While the judge was in error in stating the Court had no inherent jurisdiction to set aside the substitution order, this would not have been an appropriate case for the exercise of that jurisdiction, because there has never been any suggestion that allowing the order to stand would amount to a miscarriage of justice.

Factual Background

[3] The appellant, Main Street, is the owner of three adjacent parcels of property with a civic address of 1940 Main Street, Vancouver.

[4] All but two of the other appellants are closely-related parties who were guarantors in respect of the mortgage which is the subject of these proceedings. The final two appellants were, at least at the time of the petition, tenants of Main Street.

[5] On 9 November 2017, Main Street granted a first mortgage to BCMP in the principal amount of $15,750,000.

[6] On 6 June 2019, Main Street granted a second mortgage in favour of Altin.

[7] By 2020, Main Street was in default on its mortgage to BCMP. On 11 August 2020, Main Street signed a forbearance agreement with BCMP, under which some payments were made, and Main Street agreed that it in the event of a further default

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leading to foreclosure proceedings, it would consent to an order *nisi* with a one-day redemption period and would cooperate to achieve a timely sale of the properties.

[8] On 16 February 2021, BCMP filed a foreclosure petition against Main Street. All interested parties were named as respondents. Altin filed a petition response, opposing the one-day redemption period and the order granting conduct of sale to BCMP. Main Street did not file a response, although its counsel was involved in discussions regarding the relief sought, and attended the hearing for the order *nisi*.

[9] On 13 April 2021, BCMP obtained an order *nisi*, granting judgment against Main Street for a debt totalling $17,291,680.77, plus interest of 18% per annum, resulting in a daily interest charge of $8,447.25. The redemption period for the first mortgage was set at 90 days. Altin, who was by that time owed some $7,050,000 on the second mortgage, was granted exclusive conduct of sale for 90 days.

[10] Altin thereafter made efforts to market the properties but was unable to secure a sale. The redemption period and Altin's conduct of sale order expired on 12 July 2021.

[11] On 21 August 2021, BCMP applied for and obtained exclusive conduct of sale.

[12] In December 2021, a third lender, MIB Enterprises Ltd. ("MIB"), advanced further funds to Main Street, subsequently registered a third mortgage against the properties, and later still filed a petition response in relation to the BCMP foreclosure proceedings.

[13] By written agreement dated 20 January 2022, BCMP assigned its interest in the first mortgage, the corresponding security, and the foreclosure petition to Altin. The assignment agreement included a term by which Altin was to promptly give notice of the assignment to all parties to the foreclosure proceedings, and to promptly make an application for an order substituting Altin as the petitioner, in the place of BCMP. Altin did not do so.

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[14] On 10 July 2025, Altin applied for a substitution order. As required under r 8-1(7) of the *Supreme Court Civil Rules*, BC Reg 168/2009 [*Rules*], Altin served all parties of record. Altin did not serve Main Street, because it was not a party of record. The presiding judge granted the order, which provided that Altin was: (1) substituted as the petitioner in the foreclosure proceedings, with the style of cause amended accordingly, (2) at liberty to amend the petition accordingly, (3) not required to file an amended petition or pleadings, and (4) not required to serve the amended pleadings on any parties to the proceedings.

[15] On 31 July 2025, Altin served the substitution order on Main Street.

[16] On 2 September 2025, Altin applied for order absolute. Counsel for Main Street appeared in response to the application, arguing that it should not be granted because the substitution order was obtained without notice and legally flawed. Altin's application was adjourned because there was not enough time to hear it.

[17] Altin's application for order absolute came on for hearing before the chambers judge on 7 January 2026. The hearing commenced that day and was set to continue on 6 February 2026.

[18] In the meantime, on 29 January 2026, Main Street filed an application to set aside the substitution order, returnable 6 February 2026.

[19] The hearing of the two applications continued on 6 February, 26 March, and 27 March 2026.

[20] The chambers judge gave reasons for judgment, indexed as *Altin Capital Limited v Main Street Arts 2 Development Limited Partnership*, 2026 BCSC 830, on 6 May 2026. The judge first addressed Main Street's late-filed application to set aside the substitution order. He concluded that he had no authority to entertain it under r 22-1(3), because Main Street was not a party of record to the foreclosure proceedings. The judge also said he had no inherent jurisdiction to set aside the substitution order, which had already been entered. In the judge's view, the only way

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for Main Street to revisit the substitution order would be (i) to appeal it, or (ii) to convince Altin to apply to vary it.

[21] The judge adjourned Altin's application for order absolute, to allow time for the parties to "address" the substitution order. He acknowledged ongoing prejudice to Altin and urged Main Street to "act with haste if they intend to bring an appeal". The judge also seized himself of any further steps in the foreclosure proceedings.

Discussion

[22] The crux of the chambers judge's reasoning in dismissing Altin's application to vary the substitution order was as follows:

> [30] In my view, Mr. Justice Macaulay's reasoning in *Matthes* [*Matthes v Manufacturers Life Insurance Company*, 2008 BCSC 6] applies here. The Main Street Arts respondents did not file petition responses and were therefore not parties of record. Accordingly, Altin was not required to serve them with the Substitution Order Notice of Application. The July 10, 2025 hearing that led to the Substitution Order was not *ex parte*.
>
> [31] I agree with Altin that none of the circumstances covered by Rules 3-8(11), 8-5(8), or 22-1(3) apply. Main Street Arts essentially submits that the court has inherent jurisdiction to vary or set aside an order resulting from material non-disclosure. I do not agree with this submission. In my view, once that order was entered, the court was *functus* and only has the power to vary the judgment in the limited circumstances set out in the *Rules*.

[23] Main Street says there were two errors in this reasoning.

[24] First, Main Street says the chambers judge's conclusion that his authority to revisit the substitution order was restricted to the remedial routes available under the *Rules* overlooked the Court's inherent jurisdiction to revisit an entered order. This inherent jurisdiction includes, says Main Street, the authority to revisit an *ex parte* order granted on the basis of fraud or material non-disclosure.

[25] Second, Main Street says the chambers judge erred in holding that the substitution order was not granted *ex parte*. Main Street submits that because the application for the substitution order proceeded without notice to adverse parties, it was *ex parte*, such that counsel for Altin had a duty to make full, frank, and fair disclosure. In this case, that included an obligation to advise the presiding judge

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that: (i) a substitution order cannot be made in a foreclosure proceeding after an order *nisi* has been granted, (ii) Altin had not complied with the requirement to give notice of the assignment of a debt under s 36 of the *Law and Equity Act*, RSBC 1996, c 253, and (iii) Altin was in breach of various terms of the assignment agreement, including terms requiring it to promptly notify Main Street of the assignment, and promptly apply for a substitution order on notice to the other parties in the foreclosure proceeding. In Main Street's submission, these points were material to the substitution order, such that the chambers judge had jurisdiction to set it aside based on counsel's failure to meet his duty of full, frank, and fair disclosure during the *ex parte* proceedings.

[26] I will deal with Main Street's arguments in reverse order.

Issue 1: Whether the Chambers Judge Erred in Concluding Altin's Application for a Substitution Order was Not Made *Ex Parte*

[27] It is trite law that in the context of an *ex parte* application, counsel has a duty to make full, frank, and fair disclosure of all material facts bearing on the application. A party who appears in court and speaks to an order without notice to other parties who are entitled to be heard on the matter or whose interests are otherwise affected has a duty of utmost good faith to disclose all material points, whether for or against the granting of the order: *British Columbia (Director of Civil Forfeiture) v Qin*, 2019 BCCA 345 at para 29 (Chambers) [*Qin*], citing *Kriegman v Dill*, 2018 BCCA 86 [*Kriegman*], and *Gulf Islands Navigation Limited v Seafarers International Union of North America (Canadian District)*, 1959 CanLII 291 (BC SC), 18 DLR (2d) 216, aff'd 1959 CanLII 272 (BC CA), 28 WWR (ns) 517. Further, while some older cases restrict the duty to material facts, more recent authority recognizes that the duty extends to "any points of fact or law known to [the moving party] which favour the other side": *Qin* at para 30, citing *USA v Friedland*, [1996] OJ No 4399 (Ont Gen Div) at para 27; *Kriegman* at para 40.

[28] However, the lynchpin of the chambers judge's decision in this case is his conclusion that the substitution order application was not brought on an *ex parte*

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basis. If that conclusion was correct, then (i) Altin's counsel was not obliged in law to make disclosure of points that might be raised by parties adverse in interest, and (ii) the chambers judge would not have had jurisdiction to revisit the order based on an alleged failure to comply with such a duty.

[29] The chambers judge reasoned that the application was not *ex parte* because Altin had no obligation under the *Rules* to give notice to Main Street, who had not filed a response to petition and was therefore not a party of record. The chambers judge drew support for this conclusion from *Matthes v Manufacturers Life Insurance Company*, 2008 BCSC 6 at paras 43-44, holding that an application brought without notice to a party who is not a party of record is not, for that reason alone, an *ex parte* proceeding.

[30] Main Street does not quarrel with the notion that, because it did not file a petition response, it was not a party of record, and therefore not entitled to formal notice of the substitution order application. This is consistent with the reasoning in *Main Acquisitions Consultants Inc. v Prior Properties Inc.*, 2022 BCCA 102 at para 31. However, Main Street's submission is that this is not dispositive of the question of whether the substitution order application was *ex parte*.

[31] Main Street says that while the *Rules* set out the circumstances in which one party must give formal notice to other parties, this is not dispositive because counsel's duty of full, frank, and fair disclosure is owed to the court, not the opposing parties. Further, the *Rules* cannot define the circumstances in which the duty arises, or when an order may be revisited based on a breach of the duty as part of the court's inherent jurisdiction to regulate its own process.

[32] It is important to distinguish between counsel's ethical obligations and responsibilities to the court, and the legal duties that apply in the context of an *ex parte* application. Certainly, counsel has an ethical obligation of candour, and an affirmative duty not to knowingly mislead the court: *Irvine v Canada (Restrictive Trade Practices Commission)*, 1987 CanLII 81, [1987] 1 SCR 181 at para 46; *J.P. v British Columbia (Children and Family Development)*, 2018 BCCA 325 at para 22.

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This duty exists regardless of the particular forum or manner of appearing before the court. But this case is concerned with the superadded legal duty arising where counsel speaks to an *ex parte* application. The central question for determination is what triggers that duty.

[33] The purpose of the duty of full, frank and fair disclosure is to safeguard the integrity of the administration of justice in a legal system that is fundamentally adversarial in nature. It is not necessarily helpful to ask whether the duty is owed to the court or to the opposing parties. In some sense, it is a duty owed to both. The duty arises where one party appears before the court in circumstances where parties adverse in interest have not been given the opportunity to appear and make their positions known.

[34] For current purposes, the key qualifier is that the duty arises where an adverse party has not been given the opportunity to be heard. While the *Rules* may not be dispositive of the question of when such a duty arises, they provide essential guidance in answering that question. Rule 8-1(7) provides that a party bringing an application must give notice of the application to all parties of record, and to any other person, other than a party, whose interests may be affected by the order sought. This rule is drafted in such as way as to ensure that all parties adverse in interest are given an opportunity to participate in the proceedings.

[35] In this case, Main Street was a party to the petition proceeding but did not file a petition response. Main Street was given the opportunity to participate in the process and to receive notice of any applications brought in the proceedings and chose not to avail itself of that opportunity. In these circumstances, it cannot be said that the chambers judge erred in law in finding that the proceedings were not *ex parte* in nature. Put another way, this was not a circumstance in which Altin had a duty to make full, frank and fair disclosure of anything Main Street might conceivably have said in opposition to the order, because Main Street had declined its opportunity to be heard.

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[36] Finally, Main Street relies on *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 25 [*Ruby*], where Justice Arbour stated, "[*e*]*x parte*, in a legal sense, means a proceeding, or a procedural step, that is taken or granted at the instance of and for the benefit of one party only, without notice to or argument by any adverse party". Main Street says the current circumstance is caught by that definition.

[37] The working definition adopted in *Ruby* is a useful starting point. It was certainly apt in the circumstances in which it was invoked. However, I do not think it can be taken as universal. Applied literally, this definition would cover any situation in which an opposing party was given notice of a proceeding and chose not to participate. That would be inconsistent with the purpose of the duty of full, frank and fair disclosure as I have just described it.

[38] My conclusion is that the chambers judge did not err in finding that the substitution order was not granted *ex parte*. The chambers judge was therefore correct in holding that he had no jurisdiction to reconsider the order on the basis of a breach of the duty of full, frank and fair disclosure.

[39] I should not leave this point without observing that this entire unfortunate series of events was both foreseeable and avoidable. Altin's counsel would have appreciated that even though Main Street had not filed a petition response, its counsel had appeared at the hearing of the earlier application for an order *nisi*. Moreover, counsel was in email communication with counsel for Main Street a matter of days after the substitution order was obtained. It is hard to understand why Altin's counsel would not have given Main Street's counsel some form of notice, however informal, of the substitution order application. If notice were given, it is likely that the overbreadth of the substitution order would have be discovered, and all of the subsequent debate about validity and effect of the order, and the resulting complexity, delay, and expense, could have been avoided.

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Issue 2: Whether the Chambers Judge Erred in Holding that his Authority to Vary the Substitution Order was Limited to Circumstances Set Out in the *Rules*

[40] I return to Main Street's first submission, that the chambers judge was wrong in holding that his authority to vary the substitution order was limited to the circumstances set out in the *Rules*. In short, I agree with Main Street that, read literally, the final sentence of para 31 of the reasons — stating that once the substitution order was entered, "the court was *functus* and only has the power to vary the judgment in the limited circumstances set out in the *Rules*" — is not correct.

[41] It is true that once an order is entered, the court is *functus*, and the avenues for revisiting the order are extremely limited: *Harrison v Harrison*, 2007 BCCA 120 at para 29. There is good reason for this, given the importance of the principle of finality: *Canadian Broadcasting Corp. v Manitoba*, 2021 SCC 33 at paras 32-35. However, even where the *Rules* do not provide a basis for reconsideration, the court retains the inherent jurisdiction to revisit an order where it is shown that allowing it to stand would be a miscarriage of justice: *Nichol v Nichol*, 2015 BCCA 278 at para 28, citing *R & J Siever Holdings Ltd. v Moldenhauer*, 2008 BCCA 59 at para 14.

[42] Reading the chambers judge's reasons as a whole, the error may be more apparent than real. But even if the judge erred, I agree with Altin that the error would be of no moment in this case. Main Street never sought to set aside the substitution order on the basis of a miscarriage of justice, and in any event, there could be no suggestion that allowing the order to stand would give rise to a miscarriage of justice.

[43] The chambers judge was certainly of the view that Main Street could have applied for an extension of time to appeal the substitution order upon becoming aware of it, or even after the chambers judge ruled that he had no jurisdiction to set it aside. I agree. I acknowledge Main Street's submission that there was no guarantee an extension of time to appeal would be granted. However, if Main Street's complaint was that the substitution order worked an injustice because it was legally flawed, the most direct route to correct the legal flaw would have been to

seek to appeal the substitution order itself, and there was certainly a viable argument that Main Street could not be faulted for failing to do so until the order came to its attention.

[44] I will briefly explain why there is no case for saying the alleged flaws in the substitution order would result in any manifest injustice.

[45] Main Street argues the substitution order was not properly granted for a number of reasons. Chief among these is the submission that it is not legally permissible to grant an order substituting a new party in the place of the petitioner once an order *nisi* has been granted, because an order *nisi* includes final judgment on the *in personam* portion of the claim, and once final judgment has been entered, the proceedings are at an end.

[46] For its part, Altin concedes the substitution order should not have applied to the *in personam* portion of the claim. However, Altin's counsel is quick to point out that this would not necessarily invalidate the entire order. Counsel relies on *Classic Mortgage Corporation v 0768723 B.C. Ltd.*, 2017 BCSC 439 [*Classic Mortgage*], in which Justice Warren, as she then was, explained that foreclosure actions are a "special class of case", in that while the order *nisi* represents a final judgment on the *in personam* portion of the proceedings, the *in rem* portion continues, such that a party subsequently acquiring an interest in the mortgage or debt may be permissibly substituted as the petitioner for that portion of the claim. Altin adds that the flaw in the substitution order will have no practical effect, because if Altin is successful in obtaining an order absolute, the personal covenants and guarantees on the mortgage will be extinguished, making the *in personam* portion of the order *nisi* of no further consequence.

[47] I agree with Altin's position on the scope of the legal flaw in the substitution order, and its limited practical impact. The reasoning in *Classic Mortgage* is consistent with Justice Esson's observation in *Royal Bank of Can. v Harewood Estates Ltd.*, 1986 CanLII 826 (BC CA) at para 14 (Chambers), that mortgages are a "special class of case", in that while an order *nisi* is a final judgment, it "contemplates

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further proceedings extending over a period of time" such that a party subsequently acquiring an interest may be added to the proceedings.

[48] Main Street also alleges that the substitution order is flawed or was improperly obtained for a number of other reasons, relating to the alleged invalidity of the underlying assignment, non-compliance with the *Law and Equity Act* provisions dealing with assignment of debts, and breaches of the assignment agreement. Counsel points out that the assignment agreement required Altin to promptly notify Main Street of its existence and promptly bring a substitution application on notice to the other parties to the foreclosure proceedings. Counsel says none of that happened, and counsel for Altin breached his duty to the court in failing to advise the judge who heard the substitution application of these failings.

[49] I do not consider it necessary to address these alleged deficiencies in any detail. As explained above, the substitution order application was not an *ex parte* proceeding, so Altin's counsel had no duty to advise the court of arguments that might have been advanced by Main Street if it had chosen to participate. In any event, Main Street's complaints all relate to the terms of the assignment agreement between Altin and BCMP, the two parties to the substitution agreement. None of the alleged breaches by Altin of its contractual obligations to BCMP are matters that would undermine the validity of the assignment itself.

[50] Finally, Main Street suggests that the substitution order had the effect of depriving it of the ability to apply for dismissal of the BCMP's petition for want of prosecution. I see no merit in this submission, since, regardless of the substitution order, Main Street had the ability to file a petition response and then apply for dismissal for want of prosecution at any time. The substitution order had no bearing on its right to do so. I find it hard to conceive how Main Street's failure to bring an application to dismiss the petition for want of prosecution at any point from when the order *nisi* was granted on 13 April 2021 up to and including when the substitution order was granted on 10 July 2025 could give rise to a miscarriage of justice attributable to the alleged flaw in the substitution order.

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[51] I have gone on at some length to make it as clear as possible that, although there is a legal flaw in the substitution order that has gone unremedied, there could be no viable suggestion that this flaw has occasioned any injustice to Main Street.

Disposition

[52] I would dismiss the appeal.

[53] **FLEMING J.A.**: I agree.

[54] **GOMERY J.A.**: I agree.

[55] **FLEMING J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Riley"

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