

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *CCR Resort Ltd. v. Jaff Family Resort
Holdings Ltd.*,
2026 BCSC 1340

Date: 20260717
Docket: S140310
Registry: Kelowna

Between:

CCR Resort Ltd.

Plaintiff
(Defendant by way of Counterclaim)

And

Jaff Family Resort Holdings Ltd.

Defendant
(Plaintiff by way of Counterclaim)

And

Barry Siebenga and Crazy Creek Developments Ltd.

Third Parties

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiff:

W. McMillan

Counsel for the Defendant:

D.W. Draht

No other appearances

Place and Date of Hearing:

Kelowna, B.C.
April 21 – 23, 2026

Place and Date of Judgment:

Kelowna, B.C.
July 17, 2026

Table of Contents

INTRODUCTION	3
THE EASEMENTS	6
LITIGATION HISTORY.....	11
THE CCR SUMMARY TRIAL APPLICATION.....	13
SUITABILITY FOR SUMMARY DETERMINATION: THE LAW.....	14
THE PARTIES' POSITIONS REGARDING SUITABILITY FOR SUMMARY DETERMINATION	20
CCR's Position	20
Jaff's Position	21
Suitability for Summary Determination: Analysis	22
COSTS	24

Introduction

[1] This action primarily concerns a dispute over the interpretation of an easement, at the literal center of which is a suspension bridge (the “Suspension Bridge”) over a waterway named “Crazy Creek”. Somewhat uniquely, the driving force of the easement dispute is not a disagreement about access generally. It is a disagreement about whether access by certain individuals to and over the easement area can be restricted based upon payment of a fee.

[2] The plaintiff, CCR Resort Ltd. (“CCR”), and defendant, Jaff Family Resort Holdings Ltd. (“Jaff”), are the current owners of adjacent lands located near Malakwa, British Columbia.

[3] Malakwa is a small community situated approximately 40 kilometers west of Revelstoke and approximately 40 kilometers east of Salmon Arm. Malakwa’s recorded population for Census Canada purposes is less than 1,000 individuals.

[4] CCR owns the real property located at 6162 Trans-Canada Highway, Malakwa, British Columbia (the “CCR Lands”). CCR acquired this property in 2021.

[5] Jaff owns the real property located at 6207 Trans-Canada Highway, Malakwa, British Columbia (the “Jaff Lands”). Jaff acquired this property in 2020.

[6] The CCR Lands and Jaff Lands were previously both owned by Crescent Ridge Holdings Ltd. (“Crescent Ridge”). The primary operating mind of Crescent Ridge was Victor (Vic) Bates. Vic Bates’ wife, Alice Bates, was also a shareholder. Common ownership of the CCR Lands and Jaff Lands ended in 2012 when the CCR Lands were transferred to CrazyCreek Resort Ltd. Shortly thereafter, Crescent Ridge became Crazy Creek Developments Ltd. (“CCD”) following a corporate re-organization. CCD is a named third party in this proceeding. Vic Bates passed away in 2013. The significance of these facts shall become apparent in due course.

[7] CCR presently owns and operates a business known as “Crazy Creek Hot Pools Resort” on the CCR Lands (the “Resort”). The Resort operations include, *inter*

alia, a hotel, camping areas, serviced RV sites, and heated swimming pools. It is primarily a tourism-based business. The Resort operated offering similar (albeit not identical) amenities prior to CCR acquiring ownership of the CCR lands.

[8] The principals of CCR are Mr. Devon Siebenga and Mr. Jason Siebenga. The personally named third party in this action, Barry Siebenga, is their father. The corporate third party is CCD, which is now owned and controlled by Alice Bates (the, as noted, widow of Vic Bates). The significance of these facts will also become apparent in due course.

[9] The primary structure constructed exclusively on the Jaff Lands is a large building with a residential suite and gift shop, which includes an expansive patio area. Jaff also operates primarily a tourism-based business which is centered upon providing access to tourists to view Crazy Creek and its surrounding features from the Suspension Bridge and the viewing platforms built for this purpose. Again, the business operations on the Jaff Lands were similar (albeit not identical) prior to Jaff acquiring ownership of the Jaff Lands.

[10] The sole director and shareholder of Jaff when it acquired the Jaff Lands in 2020 and again at present time is Mr. Rawezh Taaeb. Commencing in or about March 2023, the day-to-day business operations conducted on Jaff Lands were done through a numbered company controlled by unrelated third parties, Ms. A.B. Miller and Mr. P. Piccinin. Jaff resumed control of the operations under Mr. Taaeb's direction in October 2025 after a default on payment obligations. An issue has arisen, which is relevant to any damages claim in this proceeding, as to the records (or lack thereof) maintained during the time that Ms. Miller and Mr. Piccinin were in control of the business operations on the Jaff Lands.

[11] Returning to the geography relevant to this dispute, the majority of the CCR Lands are located southwest of the Trans-Canada Highway whereas most of the Jaff Lands are located northeast of the Trans-Canada Highway.

[12] Crazy Creek runs through both the CCR Lands and the Jaff Lands. The Suspension Bridge, constructed in or about 2004, spans Crazy Creek. The driving mind behind the construction of the Suspension Bridge was Vic Bates who, as noted, was the operating mind of Crescent Ridge which then owned both properties. One side of the Suspension Bridge is on the CCR Lands, and the other side is on the Jaff Lands. Near to the Suspension Bridge is the Crazy Creek waterfall which is recognized by all parties as a popular natural attraction, especially to tourists.

[13] The Crazy Creek waterfall and the immediate surrounding area is, however, steep and potentially dangerous. The evidentiary record refers to the unfortunate death of one individual who, since the acquisition of the CCR Lands and the Jaff Lands by the respective parties, accessed this terrain without authorization before the Suspension Bridge was open for the tourist season. My general sense from the materials is that is not the first such tragedy associated with this portion of Crazy Creek, but merely the one that has occurred in the time frame material to this litigation.

[14] As I will return to, the Jaff Lands benefit from an easement over a portion of the CCR Lands that is connected to the Jaff Lands by way of the Suspension Bridge. This portion of the lands is referred to in the record as “CCR North” or the “CCR North Lands”. On CCR North, there are hiking trails, boardwalks and viewing platforms overlooking Crazy Creek.

[15] Until 2004, the only access point to the Suspension Bridge was through the Jaff Lands. In 2011, a pedestrian overpass (the “Overpass”) was constructed over the Trans Canada Highway. The Overpass, constructed under the direction of Vic Bates (and apparently at his expense) primarily for safety reasons, permits pedestrian access from the CCR Lands to CCR North and the Suspension Bridge. A ticket booth was created on the trail from the CCR North Lands to the Suspension Bridge after the Overpass was completed.

[16] To provide some necessary context, a visitor crossing the Suspension Bridge onto the Jaff Lands enters the patio of the gift shop in the structure located on the

Jaff Lands almost immediately after stepping off the Suspension Bridge. In contrast, a visitor crossing the Suspension Bridge onto CCR North will walk on a trail through the forest. It is a walk of some reasonable distance before a visitor reaches the Resort.

[17] For further context, I accept that almost all visitors go from one end of the Suspension Bridge to the other and that most visitors to the Suspension Bridge view the Crazy Creek waterfalls from the viewing platforms built for this express purpose. This means that, in most instances, visitors from CCR North will access the viewing platform on the Jaff Lands and visitors from the Jaff Lands will access the viewing platform on CCR North.

The Easements

[18] There are two easements registered on title to the CCR Lands with Jaff being the “dominant tenement” and CCR being the “servient tenement”.

[19] The easements were registered almost simultaneously on December 20, 2011. This was the same year that the Overpass was constructed. The timing does not appear entirely coincidental.

[20] At the time the easements were drafted and registered, Crescent Ridge was both the grantor and the grantee, as it owned both the CCR Lands and the Jaff Lands. Vic Bates signed the easement on behalf of both companies. The two easements are:

- a) the “Parking Easement” registered as instrument number CA2323058 in the Kamloops Land Title Office; and
- b) the “Bridge Easement” or, alternatively, the “Improvement Easement” registered as instrument number CA2323060 in the Kamloops Land Title Office.

Unless context dictates otherwise, any reference to the “Easement” in these reasons for judgment is a reference to the Bridge Easement/Improvement Easement.

[21] The Parking Easement permits the owner of the Jaff Lands to construct and maintain amongst other things, a parking lot for the mutual benefit of the Jaff Lands and the CCR Lands. The easement area covered by the Parking Easement area is located on the CCR Lands to the south of the Trans-Canada Highway. This allows eastbound traffic on the Trans Canada Highway to make a right turn off the highway and then safely cross using the Overpass (instead of having to make a potentially dangerous left hand turn across moving traffic travelling at potentially high speed). There is no current controversy over the Parking Easement, although Jaff does rely on some of the wording in the Parking Easement in support of its proposed interpretation of the Bridge Easement.

[22] The Bridge Easement permits the owner of the Jaff Lands to, among other things, use the designated easement area located on the CCR lands for the purposes of access to the Suspension Bridge. The Bridge Easement specifically reads, in its entirety, as follows:

Easement over that part shown on Plan EPP16137

Person entitled to interest: Registered owner of: Parcel Identifier: 016-672-291

The West 1/2 of Legal Subdivision 15 of the North East 1/4 of Section 28 Township 23 Range 5 W6M KDYD (the "Dominant Tenement")

EASEMENT AGREEMENT

WHEREAS:

A. The Transferor is the registered owner in fee-simple of that certain parcel or tract of land and premises situate in the Vernon Assessment Area, Province of British Columbia, more particularly described in Section 2 of the Form E Schedule to this Form C General Instrument (the "Servient Tenement").

B. The Transferee Is the registered owner in fee-simple of that certain parcel or tract of land and premises situate in the Vernon Assessment Area, Province of British Columbia, more particularly described In the Form E Schedule to this Form C General Instrument (the "Dominant Tenement").

C. The Transferee intends to construct certain improvements on the Dominant Tenement including, but not limited to, commercial buildings, tourist attractions, including suspension bridge and boardwalk, parking areas, water, storm sewer, sanitary sewer, electrical, natural gas, telephone and cable services, together with all pipelines, conduits, valves, fittings, regulators, wires, connections and all similar equipment used in connection therewith, signage, walkways and roadways (hereinafter called the "Improvements") which will encroach on the Servient Tenement.

D. The Transferor has agreed, at the request of the Transferee, to grant to the Transferee an easement, over the portion of the Servient Tenement hereinafter described, in order to permit the encroachment of the Improvements on the Servient Tenement.

NOW THEREFORE this Agreement witnesseth that In consideration of the premises and In consideration of the payment of ONE DOLLAR (\$1.00) of lawful money of Canada, now paid by the Transferee to the Transferor and for other good and valuable consideration (the receipt and sufficiency of which Is hereby acknowledged), the parties hereto hereby covenant and agree as follows:

1. The Transferor grants unto the Transferee an Easement, In perpetuity, for the benefit of the Dominant Tenement, and to be appurtenant to and for the use and enjoyment of the Dominant Tenement, upon all that portion of the Servient Tenement shown outlined with heavy line and entitled "Easement ", as shown on an Explanatory Plan of Easement prepared by Brian D. Sansom, B.C.L.S., and completed on the 1st day of November, 2011, now Plan EPP16137, (hereinafter called the "Easement Area"), and thereon by the Transferee, and the owner and occupiers for the time being of the Dominant Tenement, and their respective agents, servants, workers, contractors, licensees, invitees and all other persons by their authority:

- (a) to permit the encroachment of the Improvements on the Easement Area and without restricting the generality of the foregoing, to enter on the Easement Area to inspect, maintain, alter, repair, reconstruct, remove or replace the Improvements and to perform any work Incidental thereto;
- (b) to enter upon and to pass and repass, both with and without vehicles, machinery and equipment, by day or by night, free, clear and uninterrupted, for the purpose of pedestrian and vehicular access, Including ingress and egress, on, over and through the Easement Area and without restricting the generality of the foregoing, to enter on the Easement Area to construct, maintain, alter, replace, reconstruct, Inspect and repair a roadway for the purposes set out herein;
- (c) to utilize the Easement Area for vehicle parking and to construct a vehicle parking area and to pass and repass as hereinbefore provided for those purposes;
- (d) to enter on, both with and without vehicles, implements, machinery and equipment, and to dig, drill, excavate, lay down, construct, operate, maintain, Inspect, alter, service, repair, remove, replace and reconstruct one or more systems of works for the provision of services to the Dominant Tenement including, without restricting the generality of the foregoing, water, storm sewer, sanitary sewer, electrical, natural gas, telephone and cable services, together with all pipelines, conduits, valves, fittings, regulators, wires, connections and all similar equipment used in connection therewith (herein called the "Works") or perform any work incidental thereto including, without limiting the generality of the foregoing, the right to make any excavation; PROVIDED that the Transferee shall, as soon as practical thereafter, fill in any excavation so made and shall restore the surface of the ground and any affected Improvements as nearly as may be possible to the level and condition before such work was done;
- (e) to make, place, erect, construct, maintain, repair and replace signage, decoration, lettering and advertising on, over and upon the Easement Area;

(f) to keep the Easement Area clear of any obstruction which might interfere with or endanger the use of the Easement Area by the Transferee for the purposes herein set out.

2. The Transferor covenants and agrees with the Transferee not to make, place, erect, construct, or maintain on the Easement Area any building, structure, foundation or obstruction whatsoever, nor plant any growth nor place any soil or debris or other obstruction which might interfere with access to any part of the Easement Area.
3. The Transferor further covenants and agrees with the Transferee not to otherwise do or knowingly permit to be done any act or thing which might interfere with the use by the Transferee of the Easement Area for the purposes herein stated.
4. The Transferee covenants and agrees with the Transferor to pay all property taxes on the value of the Improvements and the Works and to indemnify the Transferor for any increase in the property tax assessment for the Servient Tenement which is attributable to the value of the Improvements and the Works in the Easement Area.
5. The Transferee further covenants and agrees to obtain and to maintain in full force and effect thereafter, suitable liability insurance coverage with respect to the location and use of the Improvements and the Works in the Easement Area and to indemnify the Transferor for any loss or damage (whether in respect to property or person) suffered by the Transferor out of the use by the Transferee, or any person or persons authorized by the Transferee, of the Easement Area.
6. The Transferee further covenants and agrees with the Transferor as follows:
 - (a) that the Transferee will install suitable markings, signage and barriers which will define the parking area and traffic corridor in the Easement Area;
 - (b) that the Transferee will, at its sole cost, operate and maintain the Improvements and the Works and will do so in a safe and proper manner and, in the event that the Transferor is required to operate or maintain the Improvements or the Works, indemnify the Transferor for the cost of doing so;
 - (c) that the Transferee will, as soon as practicable thereafter, fill in any excavation made in the Easement Area and will restore the surface of the ground and any affected improvements as nearly as may be practicable to the level and condition before such work was done; and
 - (d) that the Transferor may use the Easement Area for its own purposes and enjoyment in conjunction with the rights herein granted to the Transferee.
7. The Transferor and the Transferee agree with one another that:
 - (a) no interest in fee-simple to the Servient Tenement shall pass to or be vested in the Transferee under or by virtue of this Easement Agreement and the Transferor may fully use and enjoy the Servient Tenement, subject only to the rights and restrictions herein set out for the benefit of the Transferee;
 - (b) the rights, privileges and obligations herein set forth are and shall be of the same force and effect to all intents and purposes as covenants running with title to the Dominant Tenement and Servient Tenement and shall enure to the benefit of and be binding upon not only the Transferor and the Transferee, but also their respective successors, assigns, successors in title, servants, agents and licensees; and

(c) wherever the expression "Transferor" and "Transferee" are used herein, the same shall be construed as meaning the plural, masculine, feminine or body corporate or politic, where the context or the parties so require.

[23] There is no reciprocal or substantially reciprocal easement in which CCR holds rights under an easement (or easements) over a portion of the Jaff Lands. The Bridge Easement is specifically limited to conferring Jaff rights over the specified portion of the CCR Lands.

[24] Importantly, as may be apparent, neither CCR nor Jaff (who operate entirely at arm's length) were involved in the creation or registration of the Bridge Easement. At the time the Bridge Easement was registered, there was relatedness in ownership through the Bates family. Despite the relatedness, there is some evidence before me from an individual with some personal knowledge who is not a party to this litigation, Ms. A. Stremick, that the Suspension Bridge business (operated from the Jaff Lands) was treated separate and distinct from the Resort business (operated from the CCR Lands) even while Vic Bates was the controlling mind of both.

[25] This appears to have continued after Vic Bates' passing when Barry Siebenga was involved in the operation of both businesses based upon certain limited financial disclosure which is in evidence – specifically the 2018 and 2019 financial statements for CCD which list the Suspension Bridge (along with the boardwalk and viewing platforms) as corporate assets whereas the CrazyCreek Resort Ltd. financial records for the same period do not list the Suspension Bridge as an asset of that company.

[26] Finally, it is not disputed that Jaff is the entity that has maintained liability insurance on the Suspension Bridge, walking trails and boardwalks, including those on CCR North, since purchasing the Jaff Lands in accordance with paragraph 5 of the Bridge Easement.

Litigation History

[27] Between the time that CCR purchased the CCR Lands and the spring of 2024, there were in place a series of arrangements in which tickets for access to the Suspension Bridge (and surrounding improvements) were sold by Jaff (or on behalf of Jaff) and CCR received a portion of ticket revenue for those customers who were also customers of CCR/the Resort. There were issues that arose and things did not necessarily always go smoothly, but there were ultimately generally arrangements in place that saw the Suspension Bridge open to the fee-paying public regardless of whether those members of the public originated from the Jaff Lands or the CCR Lands.

[28] By the spring of 2024, the relationship between CCR and Jaff concerning the Suspension Bridge had broken down. The position of Jaff since that time has been that CCR's owners and employees have full access to the Suspension Bridge and the North CCR Lands but that CCR customers must purchase a ticket from Jaff to access the Suspension Bridge and CCR North lands. Jaff maintains that if the Bridge Easement allows CCR to sell tickets to the Suspension Bridge this forms an identical business to the one operated by Jaff which will undermine its business model and potentially jeopardize Jaff's ability to pay for the ongoing cost of insurance and maintenance for the Suspension Bridge.

[29] As a result of this disagreement between the parties, CCR commenced this action on May 6, 2024.

[30] Jaff filed a response to civil claim and a counterclaim on June 5, 2024, followed shortly thereafter by a third-party notice naming CCD and Barry Siebenga as parties to the litigation.

[31] On July 8, 2024, CCR filed a notice of application seeking an interlocutory injunction seeking to prevent Jaff from obstructing, limiting or interfering with access to the CCR Lands by CCR's owners, agents, servants and guests (emphasis added). The injunction application was dismissed by Justice A. Ross in reasons for judgment released on September 6, 2024 and indexed at 2024 BCSC 1658. In

refusing to grant the injunction, Justice A. Ross noted that “the issue for the trial judge will be the breadth and proper interpretation” of the Easement: see para. 59.

[32] Justice A. Ross also found that CCR was not suffering from “irreparable harm”, noting that the loss, if proven at trial, “will be easily calculable” based on the evidence of [Jaff] that they have a “special card-reader indicating the total revenue for the ticket booth on CCR North”: see para. 74.

[33] The current evidence before the Court is that data from this card reader is lost, perhaps irretrievably, because of Jaff’s internal arrangements during the material time when the operations were under the control of Ms. Miller and Mr. Piccinin. This becomes relevant in my subsequent discussion as to suitability for summary determination as the CCR Summary Trial Application (as defined below) does not seek damages, though the damages’ claim remains a live issue in the action generally.

[34] On December 6, 2024, the third parties, who were then represented by the same counsel, brought an application to summarily dismiss the claims against them in the proceeding. In addition to opposing the application, Jaff filed a cross-application seeking to adjourn or dismiss the third parties’ application.

[35] The cross-application was heard by Justice Hoffman on March 5, 2026. Justice Hoffman subsequently granted the relief sought and dismissed the summary trial application on the basis that it would not assist in the efficient resolution of the litigation to try the third party claims separately from the main action: see 2025 BCSC 1145 at para. 55.

[36] On March 6, 2025, the same day that Justice Hoffman released her oral reasons for judgment, CCR filed an amended notice of civil claim (“ANOCC”). The ANOCC seeks the following relief:

1. General damages;
2. Special damages;
- 2A. In the alternative, judgment for mesne profits;

3. ~~Punitive damages;~~
4. ~~An interim, interlocutory, and~~ A permanent injunction restraining the Defendant Jaff, their by its servants or agents or otherwise, from obstructing, blocking, or interfering in any manner with access to the CCR Lands and including the Improvement Easement area by CCR or its invitees, including customers and guests. ~~continuing a nuisance, and from trespassing upon the CCR Lands.~~
- 4A. A permanent injunction restraining Jaff, by its servants or agents or otherwise, from selling tickets on CCR Lands.
5. ~~Special costs, or in the alternative, c~~ Costs;
6. Interest pursuant to the *Court Order Interest Act*, RSBC 1996, c. 79.

[37] On March 28, 2025, Jaff filed an amended response to civil claim. Jaff opposes all the relief sought in the ANOCC.

[38] On April 2, 2025, the plaintiff filed a notice of trial setting the matter down for a 10-day trial commencing on the assize list in Kelowna during the week of February 2, 2026.

[39] On July 30, 2025, Ms. Bates, on behalf of CCD, filed a notice of intention to act in person. The address for delivery is a residential address located in Grand Prairie, Alberta.

[40] At the trial management conference conducted on December 15, 2025, the first trial date was adjourned by Associate Judge Schwartz. No one appeared on behalf of CCD at the trial management conference. Mr. Chorneyko appeared as counsel of record for Barry Siebenga.

[41] On February 3, 2026, a new notice of trial was filed by CCR scheduling this action for a 14-day trial on the assize list in Kelowna commencing during the week of January 4, 2027.

The CCR Summary Trial Application

[42] On March 17, 2026, CCR filed a notice of a notice of application seeking the following relief pursuant to R. 9-7 of the *Supreme Court Civil Rules* [SCCR] (“CCR Summary Trial Application”):

1. A declaration that the Easement does not permit the owner of the dominant tenement to obstruct, block, or interfere in any manner with access to the CCR Lands including the Improvement Easement area by CCR or its invitees, including customers and guests.
2. A permanent injunction restraining the defendant, by its servants or agents or otherwise, from obstructing, blocking, or interfering in any manner with access to the CCR Lands including the Improvement Easement area by CCR or its invitees, including customers and guests.
3. A permanent injunction restraining the defendant, by its servants or agents or otherwise, from selling tickets on CCR Lands for access to CCR Lands.

...

[43] The CCR Summary Trial Application does not, as alluded to above, seek to address all the issues in the litigation. It is limited to the relief set out at para. 42. That said, as noted, the injunctive relief sought by CCR is permanent injunctive relief.

[44] In addition to opposing all the relief sought on its merits, Jaff takes preliminary issue with the suitability of this action for summary determination at this time. This is, accordingly, a threshold issue which I must address.

Suitability for Summary Determination: The Law

[45] Rule 9-7 of the *SCCR*, the summary trial rule, permits a party to an action, to which a response to civil claim has been filed, to apply to the court for judgment under the rule, either on an issue or generally: see R. 9-7(2).

[46] Of some significance, R. 9-7(5) provides that in responding to a summary trial application, a party may tender evidence in a variety of forms, including: affidavits; answers to interrogatories; examination for discovery transcripts; admissions; and expert reports.

[47] The specific scope of a summary trial application is set out in R. 9-7(15) of the *SCCR* as follows:

- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless

- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.

[48] In a decision I authored very recently, *Mayer v. Woolley*, 2026 BCSC 803, the issue of suitability for summary determination was squarely before the court and I reviewed certain of the relevant case authorities considering R. 9-7. As a starting point, I am going to adopt that summary of the law herein beginning at para. 53:

[53] In the seminal decision of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the Court of Appeal confirmed at p. 211 that the court under this rule “tries the issues raised by the pleadings on affidavits”, that “a triable issue or arguable defence will not always defeat a summary trial application”, and that “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law” provided that the judge does not find “it is unjust to do so”.

[54] Processes like the summary trial rule are to be interpreted broadly, favoring proportionality and fair access to the affordable, timely and just adjudication of all claims. The purpose of the summary trial is to expedite the resolution of cases in which disputed questions of fact can be decided on the basis of affidavit, unless it would be unjust to do so: see *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 5-6 and *Arbutus Investment Management Ltd. v. Russell*, 2022 BCSC 72 at paras. 40-50, aff’d 2023 BCCA 9 [*Arbutus*].

[55] In deciding whether it will see unjust to grant judgment on a summary trial, the non-exhaustive list of factors the court can consider include: (i) the amount involved; (ii) the complexity of the matter; (iii) its urgency; (iv) any prejudice likely to arise by reason of delay; (v) the cost of taking the case forward to a conventional trial in relation to the amount involved; (vi) the course of the proceedings; (vii) the risk of wasted time and effort; and (viii) whether credibility is a crucial factor: see *Arbutus* at paras. 40-50 and *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 31-32 [*Gichuru*].

[56] Importantly, a summary trial is a trial. Accordingly, all parties to an action must come to a summary trial hearing prepared to prove their claim, or defence, as judgment may be granted in favour of any party, regardless of which party has brought the application, unless the judge concludes that they are unable to find the facts necessary to decide the issues or are of the view that it would be unjust to decide the issues in this manner: see *Gichuru* at para. 32. This requirement was underscored by Madam Justice Newbury

in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34 (referring to the former R. 18A which is now R. 9-7):

[34] It is trite law that where an application for summary determination under Rule 18A is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process. Where the application is brought by a plaintiff, the defendant may not simply insist on a full trial in hopes that with the benefit of viva voce evidence, 'something might turn up': see *Hamilton v. Sutherland* (1992) 68 B.C.L.R. (2d) 115, [1992] 5 W.W.R. 151 (B.C.C.A.) at paras. 66-7. The same is true of a plaintiff where the defence has brought the R.18A motion.

[57] While there may be a dispute on credibility, this does not necessarily mean the matter cannot be dealt with by summary trial. As recently stated by Justice Schultes in *Kushty Consulting Ltd. v. Wissman*, 2025 BCSC 336 at paras. 5-6:

[5] With respect to finding the necessary facts, a summary trial almost invariably involves a resolution of credibility issues: *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, at para. 22. In appropriate circumstances it is perfectly acceptable for a summary trial judge to make credibility findings on affidavit evidence alone: *Amacon Alaska Development Partnership v. ARC Digital Canada Corp.*, 2023 BCCA 34, at para. 40, citing *Orangeville Raceway Ltd. v. Wood Gundy Inc.*, [1995] 6 B.C.L.R. (3d) 391 (C.A.). The court in *ARC* cited as an example its previous decision in *Newhouse v. Garland*, 2022 BCCA 276, in which a negative inference about credibility was drawn from the implausibility and vagueness of the affidavit evidence, and the finding with respect to credibility was supported by circumstantial evidence.

[6] More frequently, a court is able to render judgment despite the conflict in the affidavits because there is other objective evidence, such as documents generated by the parties, or correspondence between them, which allows the conflict to be resolved: for example, *ARC*, at para. 42; *Orangeville*, at para. 43.

[58] ...

[59] Ultimately, R. 9-7 makes the presiding judge a gatekeeper. As described in *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 89, it is an important role:

[89] The Rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or indeed often the vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so. As noted by Justice Southin in her typically forthright language in *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138 [*Bacchus*]:

[28] . . . the judge before whom a proceeding of this kind comes must not think of himself or herself as a puppet in the hands of the litigants.

[49] An additional relevant and binding authority referred to in submissions by counsel for CCR which I did not mention in *Mayer* is the appellate decision in *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83. *Ferrer* is not inconsistent with any of the foregoing summary of the law but helpfully addresses, in detail, the issue of suitability for summary determination of a single issue in the context of the broader litigation.

[50] Writing for the Court in *Ferrer*, Justice Groberman stated as follows starting at para. 23:

[23] On its face, the Rule appears to allow parties considerable freedom to bring particular issues on for summary determination apart from the balance of the litigation. Courts have, however, shown considerable reluctance to opine on particular issues independently of other issues in the litigation.

[24] In *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138, Southin J.A., for the Court, said this about the summary trial rule (then Rule 18A):

[6] This is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.

[7] When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case - what I have often characterized as "litigating in slices" - it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".

[25] In *Coast Foundation v. Currie*, 2003 BCSC 1781, at paras. 13–18, the court considered the circumstances in which summary determination of a discrete issue will be appropriate; this Court cited the decision with approval in *Kaler v. Kaler*, 2013 BCCA 57 at para. 24.

[26] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada added its voice to the observation that the summary trial procedure should be accepted as a means of improving access to justice where it provides a fair and just process that is proportionate to the matters being litigated:

[27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for

adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure

[27] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, the court considered a large number of authorities (most of which emanated from the British Columbia Supreme Court) on when it is appropriate to hive off an issue in litigation for summary trial. It distilled from the cases a list of factors to be considered:

[110] In summary, the authorities in BC, including *Hryniak*, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:

- a) whether the court can find the facts necessary to decide the issues of fact or law;
- b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
 - i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
 - (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
 - (2) the potential for multiple appeals; and
 - (3) the novelty of the issues to be determined;
 - ii. the amount involved;
 - iii. the complexity of the matter;
 - iv. its urgency;
 - v. any prejudice likely to arise by reason of delay; and
 - vi. the cost of a conventional trial in relation to the amount involved.

[28] This list is a good indication of the factors that are typically of concern when a court is asked to deal with a single issue on a summary trial. I would not, however, suggest that all of these factors will be relevant in every case, and I would discourage a checklist approach to the question.

[29] There is a different line of cases, commencing with *Chun v. Smit*, 2011 BCSC 412, that adopts the test for severance of trial proceedings under Rule 12–5 as the test for the suitability of individual issues for summary determination under Rule 9–7. The test for severance of issues for trial under Rule 12–5 had, in a number of earlier cases, been described as being whether there are “extraordinary, exceptional, or compelling reasons for severance”.

[30] It is not clear to me that the considerations used to determine whether individual issues are suitable for summary determination under Rule 9–7 need to be identical to those that are used, under Rule 12–5, to determine whether a conventional trial should be bifurcated. Often, the two situations will present quite different contexts, in terms of the efficiency of trial management and the allocation of judicial and litigant resources.

[31] We are concerned, on this appeal, only with the considerations to be applied under Rule 9–7, and nothing that I say should be taken as reflecting on the proper tests or practices under Rule 12–5.

[32] In my view, the “extraordinary, exceptional or compelling reasons” test, at least when applied under Rule 9–7, is a curious one. It is not clear why we should describe the concept using three near-synonyms in a disjunctive test. Nor does the test give us a clear picture of what it is about the reasons for severance that makes them “extraordinary”, “exceptional,” or “compelling”.

[33] The case law under Rule 9–7 and its predecessor, Rule 18A, makes it clear that, absent good reason, courts should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation. If that is all that is meant by the use of the phrase “extraordinary, exceptional or compelling reasons”, then it is not objectionable, though I am not convinced that the phrase itself provides much in the way of guidance.

[34] In terms of what constitutes a good reason to decide an individual issue separately in a summary trial, it seems to me that the analytical approach represented by *Currie* and by *Greater Vancouver Water District* is more helpful in setting out the considerations that apply. Using that approach, I am not convinced the trial judge erred in ruling that the Limitation Clause issue was suitable for summary disposition.

[35] The Limitation Clause issue is a relatively straightforward one. It does not involve novel issues, and no unfairness results from determining it in advance of the other issues at trial. Further, disposition of the Limitation Clause issue will greatly assist the parties in determining what resources should reasonably be devoted to the trial.

[36] While the judge did not specifically mention it, I would observe that one of the most important considerations in determining whether a single issue should be separated out and determined in a

summary trial is the question of whether it is intertwined with other issues. In this case, there is very little connection between the Limitation Clause and other issues in the litigation.

[37] The judge stated that she did “not view the summary trial application as litigating in slices”. The appellants say that she was wrong in that regard. As I see it, the expression “litigating in slices” is simply a way of describing the disposition of litigation in a sequence of hearings. In that sense, the current proceedings could be described as “litigating in slices”, but the description is of no moment. Courts are wary of attempts to split up litigation into independent hearings, but in appropriate cases, they will permit that to occur.

The Parties’ Positions Regarding Suitability for Summary Determination

CCR’s Position

[51] CCR maintains that the CCR Summary Trial Application is suitable for summary determination.

[52] CCR’s position in this regard is set out as follows in its written argument:

Interpretation of an easement is often deemed suitable for summary trial. This is a reflection of the fact that the facts giving rise to the dispute after granting of the easement are not relevant to its interpretation: see *Robinson v. Pipito*, 2014 BCCA 200 at para. 54.

There is no dispute about the evidence relevant to the interpretation of the easement. The parties have conducted examinations for discovery. The cost of taking this matter to a conventional trial (scheduled for 14 days) is disproportionate. Indeed, the trial length is, in large part, a result of the third party claim (which involves issues of who said what to whom when the principal of Jaff purchased the Jaff Lands). The plaintiff has no interest in the third party claim: see *Buchner v. Longenecker*, 2025 BCSC 804 at paras. 12 - 20

The third party claim is an additional reason that summary trial is suitable. The third party claim is in misrepresentation as against the vendor of the Jaff Lands. The third party claim disappears if the defendant is successful as against the plaintiff. If the plaintiff’s claim and the third party claim are heard together, the evidence for the third party claim will overwhelm the evidence relevant to interpretation of the easement which, as discussed below, is rather limited.

The plaintiff does not seek damages at this hearing. The unavailability of evidence to quantify damages is not within the control of the plaintiff. That issue can safely be severed and dealt with later should the plaintiff succeed on this application.

The issue of damages should not serve to stall the determination of the parties’ rights, which is an ongoing issue affecting the operation of the plaintiff’s business.

Indeed, the inability of the defendant to provide ticket sales and revenue data militate toward prompt resolution of the parties' rights under the easement.

Aside from damages, which continue to accrue until resolution of the easement interpretation, all other possible issues are in the nature of alleged historical wrongs.

Resolution of the interpretation of the easement will:

- a. clarify the issues, if any, that remain; and
- b. potentially obviate the third party claim entirely.

Upon resolution of the easement interpretation, the parties will have a clear understanding of their rights and will be able to conduct themselves in accordance with those rights. The remaining issues can then be dealt with by way of negotiation or at trial in January 2027. Undoubtedly, the length of that trial, if necessary, will be shortened by a determination of this summary trial on its merits.

Jaff's Position

[53] Jaff submits that the CCR Summary Trial Application is premature and ought to be adjourned.

[54] Factually, Jaff relies on the following chronology of events, some of which I have already set forth in my summary of the litigation, in support of its position:

1. The authorized signatory on the Easements is Victor Bates. Victor Bates died in 2013 but was survived by his spouse Alice Bates who remains the sole principal of the third party, CCD.
2. At the initial stages of this matter, CCD and Barry Siebenga were represented by Mr. Rodney Chomeyko and CCD has filed pleadings and provided a list of documents in this matter. Among other things the Response to Third Party Notice asserts at paragraph 4 of Division 3 of Part 1: "This Third Party Claim was commenced by the Defendants with the intention of causing inconvenience and financial harm to the Third Parties and thereby cause harm to the principals of the Plaintiff"
3. CCD, as noted, brought an application for summary trial but the application was dismissed on March 6, 2025.
4. On July 15, 2026, Mr. Chomeyko confirmed Ms. Bates' availability for an October 7, 2025 examination for discovery but on July 25, 2025 a Notice of Intention to Act in Person was filed for CCD and signed by Alice Bates.
5. On August 26, 2025, Alice Bates was ordered, pursuant to a case planning order, to attend Examinations for Discovery on October 7, 2025 but she did not attend.
6. Ms. Bates was then scheduled for a January 30, 2026 examination for discovery which she again did not attend.
7. While CCR asserts, as replicated above, *that the parties have conducted examinations for discovery, that is incorrect*. CCD, the entity responsible for creating the Easements, has not undergone examinations for discovery.

8. The list of documents provided by CCD in this matter contains no documents that pre-date 2018.
9. On March 6, 2026, counsel for Jaff sent a letter seeking production of the solicitors file of Elizabeth Sadorsky, the solicitor that registered the Easements. CCR's counsel did not provide consent and no other responses were received.
10. On March 17, 2026, in the absence of any disclosure concerning the events surrounding tire creation of the Easements from CCD and two unattended examination for discovery dates, Jaff filed an application for production of the solicitor's file of Elizabeth Sadorsky. On March 24, 2026, CCR filed an Application Response contesting disclosure raising, among other things, a defense of privilege.
11. CCR's Summary Trial Application relies on three affidavits that focus on events that post-date 2020 and contain limited information about the circumstances in which the Easements were created.

[55] The document production application filed by Jaff has not yet been heard by this court. It has been reset, by consent, for early August.

[56] It is Jaff's position that CCD very likely has in its possession or control relevant information regarding the surrounding circumstances for the creation of the Bridge Easement and the Parking Easement, but that this information has not been disclosed yet. According to Jaff's written submissions:

. . . the risk in proceeding with the summary trial without fulsome disclosure from CCD is that evidence might not be available today, and a final determination made without that evidence, only to find that when Jaff pursues CCD that additional evidence then comes available to exculpate CCD when it would have been of assistance to Jaff in its dispute with CCR. In this way, non-disclosure will be used as a sword against Jaff. This is particularly troubling given the Response to Third Party Notice concedes that the third parties are not arms-length from CCR.

Suitability for Summary Determination: Analysis

[57] Upon consideration of R. 9-7, the relevant caselaw and the submissions of the parties, I have ultimately concluded that the matter is not suitable for summary determination at this time and that it would be unjust to grant the relief sought by the plaintiffs in the CCR Summary Trial Application.

[58] In this regard, while it is true that the interpretation of an easement is often deemed suitable for summary trial, this is not, in my view, a straightforward easement dispute.

[59] As a starting point, I accept that easements are to be interpreted as contractual documents, which necessitates using the “modern approach” to contractual interpretation: see *Armstrong v. District of North Saanich*, 20204 BCSC 1844, aff’d on appeal in 2025 BCCA 277 at para. 32 and *The Owners, Strata Plan VR1364 v. The Owners, Strata Plan VR 2027*, 2025 BCSC 2555 at para. 49.

[60] The “modern approach” to contractual interpretation was, of course, affirmed by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. The “modern approach” has at its core the goal of discovering the objective intent of the parties at the time the contract was made. The interpretative process involves reading the agreement in question “as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract”: see paras. 47 and 50.

[61] *Sattva* expressly recognizes that contracts are not made in a vacuum and that in the case of a commercial contract, the court should “know the commercial purpose of the contract”: see para. 47 citing Lord Wilberforce in *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 at p. 574.

[62] The failure to consider surrounding circumstances is a reviewable error on appeal: see *British Columbia (Minister of Technology Innovation and Citizens’ Services v. Columbus Real Estate Inc.*, 2016 BCCA 283 [*Columbus*] at para. 51.

[63] Furthermore, the surrounding circumstances are relevant regardless of whether there is ambiguity in the contract: see *Columbus* at para. 42 citing *Directcash Management Inc. v. Seven Oaks Inn Partnership*, 2014 SKCA 106 at para. 13.

[64] In this case, there is very limited evidence before the court about surrounding circumstances at present beyond that Vic Bates signed both the Bridge Easement and the Parking Easement and that his signature on both was witnessed by the same solicitor who, it seems to be accepted, was the individual primarily tasked with

drafting the easements. There is also some hearsay evidence about certain statements Vic Bates made prior to his passing about the intended separation of the two businesses but there are identifiable concerns about the reliability of that evidence.

[65] Further, Jaff's argument that the simple, plain language interpretation of the Bridge Easement that CCR relies upon in seeking the relief sought in the CCR Summary Trial Application (primarily in reliance upon the principles set forth by Justice Brundrett [as he was then] in *Smith v. Balen*, 2018 BCSC 918) could lead to an absurdity has merit.

[66] Based on the foregoing, I have genuine reservations as to whether this matter will ever be suitable for summary determination. However, Jaff does not actually take the position that the CCR Summary Trial Application should be dismissed outright (which would by virtue of R. 9-7(16), preclude the CCR from applying again without leave of the court). Rather, Jaff's position is that the CCR Summary Trial Application should be adjourned.

[67] In all the circumstances and upon consideration of the able submissions of both counsel, I accede to the position advanced by Jaff and make an order that the CCR Summary Trial Application is adjourned pursuant to R. 9-7(11)(a).

[68] In accordance with R. 9-7(14), I am not seized of this action. If the CCR Summary Trial Application is reset for hearing in due course, it shall simply be done in accordance with the SCCR. Counsel will need to work out as between themselves a deadline for the delivery of any additional affidavit evidence that might be tendered following the hearing of Jaff's document production application and the examination for discovery of Ms. Alice Bates, should that ever actually occur.

Costs

[69] Costs, pursuant to the SCCR, are awardable at the discretion of the presiding justice. Subject to said judicial discretion, the general principle is that costs are awarded to the successful party: see R. 14-1(9). "Success", as it is defined for the

purposes of costs, means substantial success. This is the same for trials, summary trials and petitions.

[70] In *Tisalona v. Easton*, 2017 BCCA 272, the Court of Appeal stated the law regarding costs as follows:

[71] Rule 14-1(9) . . . grants unqualified discretion to depart from the *prima facie* rule that the successful litigant should be awarded its costs.

[72] This discretion must of course be exercised judicially, not arbitrarily or capriciously. An error in principle in an order departing from the usual rule will justify intervention by the Court of Appeal: see *Brito (Guardian ad litem of) v. Woolley*, 2007 BCCA 1. Subject to such an error, the discretion is very broad.

[71] Having persuaded this Court that it would be unjust to grant the relief sought in the CCR Summary Trial Application at this time and on the current evidentiary record such that I made the above order adjourning said Application, Jaff was substantially successful and is presumptively entitled to its costs.

[72] Considering the fact, however, that I adjourned the CCR Summary Trial Application as opposed to dismissing it, I am satisfied that the appropriate order is that Jaff is entitled to its costs simply as costs in the cause. Those costs shall be assessed, if necessary, on Scale B.

“Hardwick J.”