NOVA SCOTIA COURT OF APPEAL

Citation: *Elfreda Freeman Alter Ego Trust (2015) v. Payne*, 2019 NSCA 28

Date: 20190410
Docket: CA 478953
Registry: Halifax

Between:

Elfreda Freeman, in her capacity as Trustee of the Elfreda Freeman Alter Ego Trust (2015)

Appellant

v.

Elizabeth Payne, Janet Wile and Ponhook Lodge Limited

Respondents

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	November 28, 2018, in Halifax, Nova Scotia
Subject:	Motion to convert. *Civil Procedure Rule* 6.
Summary:	The respondents' right-of-way (ROW) runs through the appellant's property. The appellant rerouted a section of the ROW and blocked the respondents' access to the original section. The respondents filed an application seeking to restore their original access. The appellant unsuccessfully brought a motion to convert the proceeding to an action, claiming a substantive and *prima facie* right to a civil jury trial. The appellant seeks leave to appeal and if granted asks this Court to convert the proceedings below to an action.
Issues:	Did the motion judge err by dismissing the motion to convert?
Result:	Leave granted but appeal dismissed. Finding no error in principle, no erroneous finding of fact, and no patent injustice there is no basis for this Court to interfere with the order of the motions judge. Costs awarded of $2,000 inclusive of disbursements.

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Appellant

v.

Elizabeth Payne, Janet Wile and Ponhook Lodge Limited

Respondents

Judges:	Beveridge, Van den Eynden and Derrick, JJ.A.
Appeal Heard:	November 28, 2018, in Halifax, Nova Scotia
Held:	Leave granted and appeal dismissed, per reasons for judgment of Van den Eynden, J.A.; Beveridge and Derrick, JJ.A. concurring
Counsel:	Roderick Rogers, Q.C. and Sarah Walsh, for the appellant Andrew Christofi, for the respondent

Reasons for judgment:

Overview

[1] The respondents have a right-of-way (ROW) which runs through the appellant's property. The appellant rerouted a section of the ROW and blocked the respondents' access to the original section.

[2] The respondents brought an application to restore their access to the original track of the ROW. The dispute was not complex and seemed well-suited for an application. However, the appellant brought an interlocutory motion seeking to convert the proceeding to an action, claiming a substantive and *prima facie* right to a civil jury trial.

[3] The motion to convert was heard and dismissed by the Honourable Justice D. Timothy Gabriel (2018 NSSC 160). The appellant seeks leave to appeal and if granted asks this Court to convert the proceedings below to an action.

[4] I would grant leave but dismiss the appeal with costs. My reasons follow.

Background

[5] The respondents are dominant tenement holders of a deeded ROW for access to and from their respective properties to the public highway known as Ponhook Lodge Road. The ROW is referred to as the Laurie Wamboldt Road and is the only road capable of accessing their respective properties.

[6] The appellant is the servient tenement holder with respect to the portion of the ROW which crosses its property. In 1977, Laura Wamboldt conveyed property to Harry C. Freeman. The late Mr. Freeman was the spouse of the appellant trustee, Elfreda Freeman. The Trust is the current owner.

[7] In the deed to Mr. Freeman, Laura Wamboldt reserved a private ROW for herself (and now others, including the respondents) to access property which lies beyond the appellant's property. The specific location of the ROW was not defined in the deed; rather, the ROW was described as follows:

> The grantor reserves a right of way up to thirty feet wide (30) to be used to service her, her heirs and assigns and her families' lots situated on the so-called Ephraim Hunt lot, crown grant no. 9284.

[8] The respondents say Laurie Wamboldt Road (the ROW) was in use for decades, and was clearly visible and well-defined on the ground. It has been upgraded and maintained from time-to-time during its existence.

[9] In or around September of 2016, the appellant blocked the ROW which traversed its property. The blocking was achieved through the placement of large equipment and the stringing of cable. Signs were posted redirecting traffic to an alternative route the appellant had constructed. The respondents said all this was done without their knowledge and consent or acquiescence.

[10] The respondents further said this rerouted section of the historic Laurie Wamboldt Road is hazardous because of its steep gradients, sharp u-turn near a lake, impaired visibility, and circumnavigation of a large building. In contrast, the respondents said the original section of the ROW over the appellant's property had good visibility, and was fairly straight and level with only a slight increase in grade.

[11] The appellant said the ROW was rerouted because of safety reasons for members of the Freeman family who reside on the property. Apparently, the original ROW passed through the appellant's property near a home.

[12] The respondents demanded their right to use the original ROW. They were unsuccessful in their efforts to regain access and thus filed a Notice of Application in Court. The respondents claimed that the relocation of their ROW was unlawful and substantially interfered with their rights. They asked the court below to restore their rights.

[13] The appellant filed a motion to convert the proceeding from an application to an action and indicated an intent to have the issues decided by a jury. As an aside, when appellant counsel was asked by the motion judge and the panel of this Court to identify authority for the proposition that a servient tenement can unilaterally alter a ROW even for safety reasons, he was unable to do so. Nevertheless, the appellant saw the determination of any safety issues and their bearing on ROW relocation to be matters for a jury.

[14] One witness for each side of the contested conversion motion filed an affidavit and was cross-examined. When the Notice of Application in Court was filed by the respondents pursuant to *Civil Procedure Rule* 5, their counsel, Andrew Christofi (also counsel on appeal), filed an affidavit. As required by this *Rule*, the Notice of Application must include a motion for directions (5.07(2)) and be

supported by an affidavit, which may be an affidavit of counsel, addressing the list or requirements in 5.07(4). This includes *Rule* 5.07(4)(g) which provides that if the application concerns alleged rights that could be eroded over time, "an explanation of the rights, how they may be eroded, and the consequences for the applicant" must be provided.

[15] There is a paragraph in Mr. Christofi's affidavit respecting the erosion of rights which the appellant relies heavily upon in this appeal. I will address this in more detail in my analysis.

[16] Justice Gabriel dismissed the motion and provided detailed reasons for doing so. I will return to his reasons later. The order dismissing the motion was issued in July 2018. The appellants appealed to this Court.

Leave

[17] Leave is required because the matter is interlocutory. To be granted leave, the appellant must raise an "arguable issue". That is an issue which could result in the appeal being allowed (see *Lavy v. Hong*, 2018 NSCA 28 at para. 24; and *Burton Canada Company v. Coady*, 2013 NSCA 95 at para. 18).

[18] I am satisfied that an arguable issue has been raised and would grant leave.

Issue

[19] The Notice of Appeal identified three grounds of appeal which the appellant reworked into two; however, counsel proceeded to argue them somewhat differently than listed. I would reframe the issues as one: *Did the motion judge err by dismissing the motion to convert?*

Standard of Review

[20] This interlocutory motion to convert is governed by *Rule* 6 and involves the exercise of judicial discretion. We would only intervene if satisfied the judge applied wrong principles of law, made clearly erroneous findings of fact, or if failure to intervene would give rise to a patent injustice (see *Hong, supra* at para. 27; and *Minkoff v. Poole* (1991), 101 N.S.R. (2d) 143 (C.A.) at para. 10).

Analysis

Did the motion judge err by dismissing the motion to convert?

[21] The appellant said the judge made several missteps along his decision-making path which lead to reversible error. The appellant argues that in the exercise of his discretion:

(1) The judge incorrectly found there was a presumption in favour of an application. This error resulted from his incorrect determination that the respondents' substantive rights would be eroded in the time it takes to bring an action to trial.
(2) The judge incorrectly found there was no presumption in favour of an action. Rolled into this error is the additional complaint that the judge provided no cogent reasons to deny the appellant's substantive right to a jury trial.
(3) The judge erred in the balancing of factors under *Rule* 6.02(5) and (6).

[22] I will deal with each complaint in turn. Before doing so it is helpful to set out the provisions of *Rule* 6 and what was required of the judge when deciding whether to grant a motion to convert. This *Rule* provides:

> **Choice of proceeding**
>
> 6.01 A person may choose to start an action or an application as the person is satisfied would be appropriate, unless legislation under which the proceeding is started requires only one kind of proceeding.
>
> **Converting action or application**
>
> 6.02 (1) A judge may order that a proceeding started as an action be converted to an application or that a proceeding started as an application be converted to an action.
>
> (2) A party who proposes that a claim be determined by an action, rather than an application, has the burden of satisfying the judge that an application should be converted to an action, or an action should not be converted to an application.
>
> (3) An application is presumed to be preferable to an action if either of the following is established:
>
> > (a) substantive rights asserted by a party will be eroded in the time it will take to bring an action to trial, the party expeditiously brought a proceeding asserting these rights, and the erosion will be significantly lessened if the dispute is resolved by application;

(b) the court is requested to hold several hearings in one proceeding, such as with some proceedings for corporate reorganization.

(4) An action is presumed to be preferable to an application, if the presumption in favour of an application does not apply and either of the following is established:

(a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;

(b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.

(5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

(a) the parties can quickly ascertain who their important witnesses will be;

(b) the parties can be ready to be heard in months, rather than years;

(c) the hearing is of predictable length and content;

(d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross-examination.

(6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

Evidence for converting an application

6.03 (1) A party who makes a motion to convert an application to an action must, by affidavit, provide all of the following:

(a) a description of the evidence the party would seek to introduce;

(b) the party's position on all issues raised by the application;

(c) disclosure of all further issues the party would raise by way of either a notice of contest, if the proceeding remains an application, or a statement of defence, if the proceeding is converted to an action.

(2) Despite Rule 6.03(1), a party who wishes to withhold disclosure of evidence the party will produce only to impeach a witness need not describe the evidence, or the investigations to be undertaken to obtain the evidence.

[23] The *Civil Procedure Rules* also mandate that applications must be heard or tried by a judge without a jury:

52.02. Jury election

(1) For the purpose of Section 34 of the *Judicature Act*, the provisions in that Section respecting jury trials and procedure are modified by this Rule 52.02.

> (2) An application, and an action to which Part 12 - Actions Under $100,000 applies, must be heard or tried by a judge without a jury […]

[24] The motion judge clearly identified the proper questions to be asked and answered. He said:

> [17] The only issue to be determined is whether the matter should be converted from an application to an action pursuant to *Civil Procedure Rule* 6. In order to answer this question, I will have to consider:
>
> 1. Whether the Respondent has complied with *Civil Procedure Rule* 6.03; and
> 2. The requirements of *Civil Procedure Rule* 6.02 itself.

[25] The judge determined that the appellant had met the preliminary requirements of *Rule* 6.03. It is unnecessary to review his reasons for this finding because they are not in issue in this appeal. Having met this threshold, the judge proceeded to consider the merits of the motion in accordance with the requirements of *Rule* 6.02.

[26] *Rule* 6.02 is straightforward. There is no dispute over what the *Rule* requires. It mandates a judge to assess whether any of the presumptions are in play and to consider other enumerated factors. It is a stepped process that works like this:

- First, assess whether any of the presumptions in favour of an application are applicable under *Rule* 6.02(3);
- Second, if no presumptions apply in favour of an application, assess whether any presumptions in favour of an action apply under *Rule* 6.02(4);
- Third, regardless of whether there is a presumption in favour of an application or an action or neither, determine the extent to which each of the (non-exhaustive) list of factors favouring an application are present under *Rule* 6.02(5) and determine the relative cost and delay as between an action and an application under *Rule* 6.02(6).

[27] Everything is then "placed in the deliberation hopper" for consideration by the judge (see *Nova Scotia v. Roué*, 2013 NSCA 94 at para. 31).

[28] As further noted in *Roué*, *supra* at para. 47, the role of the motion judge under *Rule* 6.02 is "to achieve a balance that shortens time and lessens cost, while

ensuring that the proceeding at hand maintains the essential attributes of a fair fact-finding process".

No erosion of rights/No presumption in favour of an application

[29] I return to the appellant's first complaint that the judge was wrong to find a presumption in favour of an application because there was no erosion of the respondents' rights.

[30] To trigger the presumption under *Rule* 6.02(3)(a) the judge had to be satisfied of these three things: (1) the respondents' substantive rights will erode in the time it will take to bring an action to trial; (2) they expeditiously brought their application to assert their rights; and (3) the erosion will be significantly lessened if the dispute is resolved by application.

[31] The judge was satisfied these requirements were met. He reasoned as follows:

> [45] First off, *Civil Procedure Rule* 6.02(3)(a) establishes a presumption that an application is preferable to an action in the event that "substantive rights asserted by a party will be eroded over time". This is because (generally speaking) an application may be more quickly accommodated by the courts than an action.
>
> [46] After all (to state the obvious), an application in court involves the provision by the deponents of their "direct evidence" in affidavit rather than *viva voce* form. Since deponents are generally limited to cross-examination upon that affidavit evidence, the entire process generally consumes less court time. Hence, it will usually be quicker to get into court for a hearing on the merits of the matter.
>
> [47] The Applicants (in oral argument before this court) assert that they are, indeed, possessed of eroding substantive rights. They contend that the newly created (or "adjusted") route over the Freeman properties is much more dangerous than its predecessor, particularly in the winter. They argue (in effect) that the more winters which pass before the matter is heard, the greater the danger to which they will be exposed when accessing their properties. Moreover, their ability to use and enjoy their properties is significantly eroded with the spectre of litigation hanging over everyone's heads.
>
> […]
>
> [51] … Here, the parties concede that the properties north of the Freeman properties, are, for the most part, used seasonally. Most of the use occurs during summer.
>
> [52] That said, even seasonal users will find it necessary to visit their properties during the off season from time to time. More to the point (at what Justice Moir

> called the "abstract level") is the lingering strain and upset that permeates such properties and their owners in the wake of an issue like this. On the basis of Mr. Freeman's affidavit, the contagion appears to have interfered with the parties' enjoyment of the ownership of their properties on a year round basis, notwithstanding that the physical use thereof, for the most part, is seasonal.
>
> [53] Such an impediment will likely be exacerbated, rather than lessened, by the fact that, in this case, it is not the usual right of way issues (i.e. location and use) that are driving this litigation. No dispute has been raised as to where that portion of the right of way which traverses the Freeman properties was located, or with respect to its manner of use prior to the blockade. Rather, at the heart of this dispute is an allegation of interference with a vested proprietary right. This concern is only strengthened when its corollary is considered; namely, the allegation that the only expedient with which the Applicants have been left is to travel over an alternative route which they consider to be much less safe than the route to which they are entitled. (emphasis in original)
>
> [54] I find this consideration to be one which triggers a presumption in favour of an application within the meaning of *Civil Procedure Rule* 6.02(3)(a). …

[32] In an effort to establish reversible error, the appellant refers to and relies upon the following paragraph in the affidavit filed by the respondents' counsel together with the Notice of Application in Court:

> 10. Based on my review of this matter, this matter does not concern rights that may be eroded over time.

[33] The appellant notes that the affidavit was part of the evidentiary record before the judge and complains that he did not mention it in his decision and asserts there was no evidence presented by the respondents to otherwise contradict counsel's statement.

[34] The affidavit was required by notice in court application *Rule* 5.07 (4). That provision provides:

> (4) The motion for directions must be supported by an affidavit, which may be an affidavit of counsel, addressing all of the following:
>
> (a) whether there are any persons who are not parties but who may have an interest in the matters raised by the application;
>
> (b) whether the list of possible witnesses in the notice of application is complete;
>
> (c) the extent to which the applicant has disclosed documents and electronic information to the respondents and, if disclosure is not complete, the applicant's plan for completing disclosure;

> (d) whether the applicant anticipates discovering any witness;
>
> (e) if the application will involve a series of hearings, an estimate of the number of hearings and when each could occur;
>
> (f) if the application concerns events that are unfolding, a description of the events and the expected course of the events;
>
> **(g) if the application concerns alleged rights that could be eroded over time, an explanation of the rights, how they may be eroded, and the consequences for the applicant;**
>
> (h) all information known to the applicant that could significantly affect the estimate of time needed to prepare for the hearing and the length of the hearing itself.
>
> [Emphasis added]

[35] It is important to note that counsel's affidavit was executed before any motion to convert was even raised. Furthermore, during oral submissions before the motions judge, counsel attempted to clarify the unintended consequences of his words:

> **THE COURT:** Do you agree -- Mr. Rogers pointed out that you had indicated in your documents that there would be no erosion of the rights of the ---
>
> **MR. CHRISTOFI:** Yeah, I don't believe that it's the proper word to describe how -- their rights will be affected by the passage of time.
>
> **THE COURT:** You're arguing that it's contemplated in -- there is prejudice, which is basically ---
>
> **MR. CHRISTOFI:** Absolutely. The safety issues are well laid out in Mr. Wamboldt's affidavit. I don't think anyone is suggesting that we have to wait for an accident to figure out this case. …
>
> **MR. CHRISTOFI:** I think the point is that, yes, the applicants will be prejudiced for each winter that they're forced to drive up and down an unsafe, icy, slippery road, on an incline, around a blind turn, near a lake. We're ready to proceed, if there's no experts, in weeks. And I'll get to the expert portion of it.
>
> So, I'm not standing here telling you that sub(b) is engaged here, the presumption, but the significant impact and prejudice to the applicants is a factor that weighs heavily in favour of proceeding by application. I think what's contemplated by erosion ---
>
> **THE COURT:** Are you saying -- you're not saying that sub(3) is engaged?
>
> **MR. CHRISTOFI:** Sub(3), sub(b).
>
> **THE COURT:** I see, okay.

> **MR. CHRISTOFI:** Yeah. So, I think what's contemplated by that rule is an irreparable erosion of rights.
>
> **THE COURT:** Oh, okay, so you're dealing with sub(a).
>
> **MR. CHRISTOFI:** My apologies.
>
> **THE COURT:** Sorry, I was a little confused in terms of --
>
> **MR. CHRISTOFI:** Oh, my apologies, yes, sub(a). …

[36] Mr. Christofi's submissions to the judge were confusing. A point which Mr. Christofi acknowledged on appeal. Although Mr. Christofi suggested to the judge that the presumption under 6.03(2)(a) was not in play, at the same time, he focused on the material interference with the respondents' rights and their related safety concerns. Counsel seemed to think that "prejudice" was a better term than "erosion"; however, it is clear the judge was tuned into the substance of what was being said versus the form.

[37] Also, the judge had the benefit of the affidavits from the appellant and respondent witness and their cross-examination evidence. In the affidavit of Lawrence Wamboldt, an employee of the corporate respondent, the risks and negative impact of the interruption of the respondents' rights are explained. His evidence was reinforced, not shaken on cross-examination. Mr. Wamboldt said in his affidavit:

> 16. At no time before September 2016 was this portion of the road, or <u>any</u> portion of the road, altered so as to re-route the road down a steep hill, taking a sharp turn at the bottom of the hill near a lake, and then back up a steep hill to re-join the existing road. (emphasis in original)
>
> […]
>
> 18. As far back as I can remember (in the early 1990s), Laurie Wamboldt Road followed a single path over the Freeman Properties. The path of this road was more or less straight, with good visibility, and fairly level, with only a slight increase in grade while travelling in a northwest direction. The road retained this path and shape until sometime in 2016.
>
> […]
>
> 21. The new road which circumnavigates the Freemans' garage is not safe and is inconvenient. The new road makes a sharp U-shaped turn around their garage. While traveling around the bend, I find it alarming not knowing if I will meet opposing traffic on the bend. The garage, which is quite large, and the retaining wall at the base of the garage, completely obstruct the view of oncoming traffic. Additionally, the new road is not level. It dips

> downward and then back upward within a short distance while traveling around the bend. Because the bend must be traveled very slowly (due to its sharpness and lack of visibility of traffic ahead), it is difficult to ascend the incline, at times in the winter, with my rear-wheel-drive mode. Lastly, the portion of the road whose tangent line runs parallel to the old road (the furthest portion of the new road from the old road), is next to a very steep drop-off at the edge of Little Ponhook Lake. This poses a significant safety risk in event of slippery or winter conditions, or when meeting oncoming traffic in any conditions.

[38] To support their safety concerns, the respondents also presented video evidence of the rerouted section of the ROW.

[39] I reject the appellant's assertion of error. There was evidence before the judge which was sufficient to support his finding that substantive rights were being eroded. The respondents had a vested proprietary right to use their ROW. The appellant says the respondents' substantive rights have not evaporated—although blocked from using the original ROW, it still "exists" and can be restored by a court. And further, the respondents were provided with a viable alternate route in the interim. This argument ignores both the substantive right of the dominant tenement holders to exercise their lawful right to use their ROW and the apparent safety concerns they identified and which the judge accepted. The respondents had a substantive right that was diminished in a material way by the unilateral actions of the appellant servient tenement. This was not a minor alteration of a ROW; rather, a wholesale change in course. The diminishment continues by the ongoing interruption of the respondents' right to use their ROW. I see no error in the judge's conclusion that substantive rights were being eroded.

[40] Finding an erosion of a substantive right is not the end of the exercise. For the presumption in favour of an application to apply, the erosion must be significantly lessened if the dispute is resolved by application. The judge must ask and answer this question: Will delay in proceeding by action further the erosion of the parties' substantive rights and will proceeding by application significantly lessen the impact of that delay?

[41] The judge asked and answered these questions. The judge found the delay in proceeding by action would further erode the respondents' substantive rights and proceeding by application would significantly lessen the impact of that delay. On this record, the evidence supports his finding. It was the judge's call to make and reflects a proper exercise of his discretion.

[42] There is one further requirement under 6.02(3)(a), that is the need for the respondents to have expeditiously brought an application to assert their rights. The application was filed on March 13, 2018 and the ROW was rerouted in approximately September 2016. The appellant points out that the judge did not expressly address the "expeditiously" requirement in his reasons. However, there is nothing in the record that indicates the appellant argued that the application was not brought in an expeditious manner. Rather, the gist of the appellant's submissions invited the conclusion that given the time gap this was not a time-sensitive matter with eroding rights. I decline to so conclude, as did the motion judge.

[43] Turning to the specific "expeditiously" requirement, I note both parties acknowledge that the record before the judge confirmed that in the interim period there were communications between the parties' respective counsel. Parties should endeavour to resolve disputes without having to first resort to litigation. It is obvious from the record that the dispute was not resolved in the intervening period and the only remaining option for the appellants to restore their ROW was to apply to the court for relief.

[44] While it is true that the judge did not specifically address this requirement, he was aware of it as he referenced the full provisions of *Rule* 6.02(3)(a) in his decision and it is implicit in his reasons that he was satisfied that all the requirements were met.

[45] There is no basis for this Court to interfere in this first step of the judge's analysis. I see no error in principle, no palpable and overriding errors of fact, and no patent injustice.

No presumption in favour of an action

[46] The appellant's next complaint is that the judge incorrectly found there was no presumption in favour of an action under *Rule* 6.02(4). Rolled into this asserted error is the related complaint that the judge provided no cogent reasons to deny the appellant's substantive right to a jury trial.

[47] Because I found no error in the judge's analysis of the first step (whether the presumption in favour of an application was triggered) there is no need to address these complaints. That is because a presumption in favour of an application precludes a presumption in favour of an action. *Rule* 6.02(4) says so. For convenience it provides:

> (4) An action is presumed to be preferable to an application, **if the presumption in favour of an application does not apply** and either of the following is established:
>
> > (a) a party has, and wishes to exercise, a right to trial by jury and it is unreasonable to deprive the party of that right;
> >
> > (b) it is unreasonable to require a party to disclose information about witnesses early in the proceeding, such as information about a witness that may be withheld if the witness is to be called only to impeach credibility.
> >
> > [Emphasis added]

[48] The judge clearly recognized this when he said:

> [54] I find this consideration to be one which triggers a presumption in favour of an application within the meaning of *Civil Procedure Rule* 60.02(3)(a) [*sic*]. Because of this finding, as Campbell J. pointed out in *Hong v. Lavy, supra*, at para. 37:
>
> > ... there is no requirement to advance to the next step of considering whether any of the factors that favour the presumption of proceeding by an action apply. The presumption in favour of an action is addressed only if the presumption in favour of application does not apply. Here, the presumption in favour of an application applies...
>
> [55] However, in the event that I have erred in my application of *Civil Procedure Rule* 6.02(3)(a), I will consider the balance of the Rule.

[49] Although not required, the judge went on to consider whether any of the presumptions in *Rule* 6.02(4) favour proceeding by way of an action. He did so in the event he erred in his analysis of *Rule* 6.02(3)(a). He found the presumption in favour of an action was not triggered. His analysis is set out in paras. 57 to 66 of his decision.

[50] As noted, I need not address this complaint. That said, I have considered it carefully and would have rejected it for having no merit.

Did the judge err in the balancing of factors under Rule 6.02(5) and (6)?

[51] Presumptions in *Rule* 6 are rebuttable. After finding a presumption in favour of an application the judge then did as he was required—he considered *Rule* 6.02(5) and (6). As noted, they require these considerations:

> (5) On a motion to convert a proceeding, factors in favour of an application include each of the following:

> (a) the parties can quickly ascertain who their important witnesses will be;
>
> (b) the parties can be ready to be heard in months, rather than years;
>
> (c) the hearing is of predictable length and content;
>
> (d) the evidence is such that credibility can satisfactorily be assessed by considering the whole of the evidence to be presented at the hearing, including affidavit evidence, permitted direct testimony, and cross examination.
>
> (6) The relative cost and delay of an action or an application are circumstances to be considered by a judge who determines a motion to convert a proceeding.

[52] The appellant's allegation of error in the balancing of these factors hinges on the success of the appellant's first two complaints. The appellant's factum put it this way:

> Given the first two issues above, namely that the motion judge erred in finding that the presumption in Rule 6.02(3)(a) was engaged, and the motion judge's error in finding that the presumption in Rule 6.03(4) was not engaged, the subsequent analysis was erroneously coloured by these findings.
>
> Any balancing employed by the motion judge must be viewed as being influenced by what the Appellant submits were reviewable errors in relation to the presumptions under Rule 6.02(3)(a) and 6.02(4)(a).

[53] As I rejected the appellant's first two complaints for the reasons above, the appellant's basis for challenging the judge's balancing of factors is fatally undercut. Although that alone is enough to dispense with this third and final assertion of error, I will go further and summarily say that the judge undertook an analysis of all the relevant factors and provided clear reasons why he did not see them as displacing or rebutting the presumption in favour of an application. Nowhere in his analysis does the judge rely upon his earlier presumption findings. He conducted a separate and detailed analysis which is found at paras. 67 to 93 of his reported decision and need not be repeated.

[54] It is sufficient to refer to Justice Gabriel's concluding reasons which followed his analysis of the *Rule* 6.02(5) and (6) factors:

> [94] I summarize my analysis of the *Civil Procedure Rule* 6.02(5) factors by concluding that the anticipated length of the proceeding is slightly in excess of the norm for an application, hence, favours an action.
>
> [95] The fact that the parties may quickly ascertain who their important witnesses will be, that the legal issues are relatively uncomplicated, the much greater

> expense to the parties if an action is pursued in these circumstances, and the fact that the matter can be ready to be heard in months, rather than years, all favour an application. So does the fact that an application in court is well suited to the assessment of the credibility issues (if any) that may present themselves in this case.
>
> [96] It is not simply a matter of counting the above, observing that the factors in favour of an application outnumber those favouring an action, and declaring the former the winner. In every case, each individual factor will vary in the amount of weight which must be assigned to it. Having considered the above factors in some detail, I conclude that the factors present here favouring an application are much weightier, cumulatively and individually, than those favouring an action.
>
> [97] The Respondent's motion to convert this matter to an action is therefore dismissed.

[55] The claim that the judge's alleged errors in the presumption analysis leaked into his analysis of the relevant factors is unfounded. In this last step of the process under *Rule* 6 the judge again exercised his discretion judiciously. There is no basis to interfere with his determinations.

Conclusion

[56] I see no error in principle that could impact the result, no erroneous findings of fact, and no patent injustice that would cause me to disturb the judge's dismissal of the motion to convert. I would grant leave to appeal, but dismiss the appeal.

Costs

[57] The respondents requested costs in the amount of $2,000.00, and I would so order, inclusive of disbursements.

Van den Eynden, J.A.

Concurred in:

Beveridge, J.A.
Derrick, J.A.