COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sellathurai v. Bremjit,*
2023 BCCA 268

Date: 20230616
Docket: CA48566

Between:

Vignarajah Sellathurai

Appellant
(Defendant)

And

Tharmalingam Bremjit

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Fitch
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated September 1, 2022, as varied by an order dated, December 13, 2022 (*Bremjit v. Sellathurai*, 2022 BCSC 1542, Vancouver Docket S206994).

Oral Reasons for Judgment

Counsel for the Appellant:	R. Soni
Counsel for the Respondent:	P.J. Roberts, K.C.
Place and Date of Hearing:	Vancouver, British Columbia June 16, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 16, 2023

Summary:

Appeal from an order granting the respondent judgment on a $600,000 debt claim. The key issue at trial was whether money advanced by the respondent to the appellant was properly characterized as a loan or an equity investment in a property redevelopment project. The judge accepted the respondent's evidence that the money advanced was a loan. The appellant submits that the trial judge erred in law by failing to provide sufficient reasons in support of his credibility findings, relying on inappropriate considerations in making those findings, and failing to consider all of the evidence that informed resolution of the key issue.

Held: Appeal dismissed. Properly characterized, the grounds of appeal take aim at the judge's findings of fact and credibility and do not flow from error in principle. Those factual findings have not been shown to be the product of palpable and overriding error and must be accorded deference.

FITCH J.A.:

I. Introduction

[1] This is an appeal from an order granting the respondent judgment on a debt claim in the amount of $600,000 plus interest. The result followed a six-day trial in the Supreme Court.

[2] The appellant was self-represented. The respondent was represented by counsel. Both parties testified.

[3] The central issue at trial concerned the characterization of monetary advances made by the respondent, Mr. Bremjit, to the appellant, Mr. Sellathurai, in connection with a residential property redevelopment project. The respondent's position was that the monies advanced were a loan, documented by a Loan Agreement and corresponding Promissory Note. The appellant's position was that the monies advanced constituted an equity investment by the respondent in the project. The project turned out to be unprofitable. The appellant disputed his obligation to repay monies advanced by the respondent. The trial judge resolved the central issue in the respondent's favour.

[4] On appeal, the appellant submits, among other things, that the trial judge erred: by failing to provide sufficient reasons for his conclusion that the respondent was more credible than the appellant; by failing to consider the totality of the

circumstances surrounding the execution of the Loan Agreement in assessing the credibility of the parties; in assessing the credibility of a key witness, Mr. Chandradas, whose evidence tended to support the respondent's version of events; and, by drawing unsupported inferences from Mr. Chandradas' testimony.

[5] Although framed by the appellant as questions of law, I am of the view that, properly characterized, the grounds of appeal take aim at the judge's findings of fact and credibility. I cannot credit the appellant's contention that the judge's credibility findings flow from, and are tainted by, error in principle. In the absence of palpable and overriding error—and, in my view, none has been shown—the judge's findings of fact are entitled to deference. For this reason, I would dismiss the appeal.

II. Background

[6] Although the business relationship between the parties is more involved than is reflected in these reasons, I will set out only so much of the background as is required to dispose of the appeal.

[7] The appellant has considerable experience in the acquisition and redevelopment of property. The respondent—a resident of Washington state who was interested in investment opportunities in the Vancouver area—was introduced to the appellant by Mr. Chandradas, a mutual friend.

[8] Beginning in March 2018, the respondent advanced a total of $600,000 to the appellant towards the redevelopment of a property located on West 16th Avenue in Vancouver.

[9] On April 26, 2018, the parties attended at the law office of Conor Zokol, the appellant's solicitor, to document the transaction. Mr. Zokol testified that there was some initial discussion about creating a bare trust agreement. After Mr. Zokol advised that such an agreement would likely trigger application of the foreign buyer's tax to the respondent, the parties agreed to document the $600,000 advance by way of a Loan Agreement and Promissory Note. Mr. Zokol's handwritten notes of that meeting reflect that the parties "agreed to a personal loan instead" in the amount of

$600,000 at 9% interest. The loan was to have a two-year term and the monies advanced were to be repaid at the end of the term.

[10] Mr. Zokol confirmed these instructions in an email sent to the appellant the same day. In an email sent by the appellant to Mr. Zokol on April 29, 2018, the appellant confirmed that the advance was to be treated as a personal loan from the respondent.

[11] Mr. Zokol prepared the Loan Agreement and Promissory Note and sent drafts of both to the appellant, copying the respondent. Mr. Zokol made some changes to the documents at the appellant's instruction. On May 17, 2018, the revised documents were signed by the parties in Mr. Zokol's presence.

[12] As noted, the Loan Agreement was evidenced by a Promissory Note, signed by the appellant, which set out the $600,000 principal amount, the 9% interest rate, and the due date of repayment as May 17, 2020.

[13] The respondent testified that he asked Mr. Zokol about putting his name on title, but was dissuaded from doing so because it would trigger the foreign buyer's tax. The respondent testified that the advance was a loan and was documented as such.

[14] The appellant acknowledged that he signed the Loan Agreement and Promissory Note, but testified they were sham documents signed by the parties so that the respondent could avoid payment of the foreign buyer's tax—a result that would be triggered if the respondent's ownership interest in the property were documented. The appellant testified that the respondent was, in fact, a 50% equity partner in the redevelopment of the W. 16th Ave. property, and that the monies advanced represented the respondent's investment in the project. According to the appellant, the parties agreed to share in the profits arising from the project, but also to share the risk that the redevelopment project would result in a financial loss.

[15] The redeveloped W. 16th Ave. property eventually sold at a considerable loss.

[16] In April 2020, the respondent demanded repayment of the loan plus accrued interest. The appellant refused. Mr. Chandradas attempted to act as an informal arbiter of the dispute, but the $600,000 remained unpaid. The respondent filed his notice of civil claim on July 15, 2020.

[17] Mr. Chandradas testified that he overheard the appellant assure the respondent that the funds advanced were “guaranteed” and “200% safe”. Mr. Chandradas also testified that he was shocked when he was told by the respondent of the appellant’s position that the parties should share equally in the loss from the sale of the W. 16th Ave. property. He was shocked because the monies advanced by the respondent were “guaranteed”. He also testified that the appellant admitted to him that he had given guarantees to the respondent. Indeed, the appellant assured Mr. Chandradas that he would repay the respondent, but that he needed more time to do so.

III. Findings of Fact and Credibility

[18] The judge concluded that the evidence of the respondent was, on balance, more credible than that given by the appellant.

[19] At the same time, he noted that the respondent’s evidence did not “hang together particularly well” on certain points. For example, the respondent testified that he had previously invested money on a redevelopment project undertaken by the appellant which was not profitable. For this reason, the respondent said that he was unwilling to invest money with the appellant in the W. 16th Ave. project. As the judge noted, while the respondent’s account sounded plausible, the timing was off because the respondent had advanced money towards the W. 16th Ave. property before learning that the other redevelopment project had sold at a loss.

[20] In assessing the respondent’s credibility, the trial judge also considered the testimony of tradespeople and realtors called by the appellant at trial concerning

Mr. Bremjit's conduct in relation to the W. 16th Ave. property and the extent to which it supported the appellant's claim that he was an investor in the project:

> [23] There was also considerable evidence from multiple witnesses called by Mr. Sellathurai, which I accept, about Mr. Bremjit's conduct in relation to the W. 16th Property project. Multiple tradespeople testified that Mr. Bremjit visited the site often, sometimes without Mr. Sellathurai, and said he was either an owner of the property or Mr. Sellathurai's partner. Both realtors gave evidence about speaking with Mr. Bremjit about the potential listing. In addition, Mr. Bremjit prepared a spreadsheet, which he sent to Mr. Sellathurai, setting out potential profit scenarios from the sale of the property. In sum, that evidence shows that Mr. Bremjit was certainly behaving like an owner of the W. 16th Property—one who was invested in it to a greater extent than would be expected of an arm's length money lender.

[21] Despite noting deficiencies in and concerns about the respondent's testimony, the trial judge accepted his account. He found that Mr. Chandradas' testimony tended to support the respondent's version of events. The judge said this:

> [24] Nonetheless, I am satisfied that Mr. Bremjit sought and obtained assurances from Mr. Sellathurai at the time he advanced the initial $600,000 for the W. 16th Property project. I accept his evidence about the guarantees made by Mr. Sellathurai. Mr. Chandradas, who was in my view an objective witness, said Mr. Sellathurai made such assurances to Mr. Bremjit, in his presence. Mr. Chandradas gave other evidence that tends to support Mr. Bremjit's interpretation of the transactions and refute that of Mr. Sellathurai.
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> [25] Mr. Chandradas, as noted, was a mutual friend of the parties, in fact the person who introduced them to one another. He appeared as a witness in both trial briefs. Ultimately, he was called by the defendant. He did not seem to be favouring either party in his testimony, but rather attempting to remain neutral, and simply giving honest answers to the questions asked by both parties.

[22] The judge rejected the appellant's version of events for the following reasons:

> [27] I do not accept Mr. Sellathurai's evidence that the agreement between him and Mr. Bremjit was that they would each own 50% of the W. 16th Property project, and share equally in the profits. Rather, I accept Mr. Bremjit's evidence that he was only willing to invest $600,000 with Mr. Sellathurai as a loan, with a guaranteed return at a specified interest rate. I also accept his evidence that on two occasions, first during a conversation between the two men, and later at Mr. Zokol's office, Mr. Sellathurai offered interest at eight or nine percent. I do not accept that Mr. Zokol insisted on inclusion of interest in the agreement.
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> [28] The two documents prepared by Mr. Zokol, and executed at his office on May 17, 2018 memorialize exactly what the parties agreed to at the time

> Mr. Bremji advanced the funds to Mr. Sellathurai. I reject the suggestion that they were somehow "sham" documents, designed to evade taxes. Clearly, Mr. Sellathurai, who retained Mr. Zokol, explored the concept of a bare trust during the initial office meeting. However, that idea was quickly abandoned, after Mr. Zokol explained the potential tax implications. That then led to the creation of the loan agreement and corresponding promissory note.
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> [29] Mr. Sellathurai agreed that he knew what he was signing when he executed those documents. Although he said that Mr. Zokol acted for both parties, it is clear from all the evidence that Mr. Zokol only acted for Mr. Sellathurai. In my view, Mr. Sellathurai must have known that fact at the time. He clearly engaged the services of a lawyer to memorialize the investment of Mr. Bremjit, and to structure it in such a way that Mr. Bremjit had comfort his money would be repaid, with interest at a prescribed rate. That was the legal effect of the two documents prepared by Mr. Zokol, and it must have been the intended effect of both Mr. Sellathurai and Mr. Bremjit.
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> [30] In summary, the $600,000 that passed from Mr. Bremjit to Mr. Sellathurai in 2018 was a loan, which Mr. Sellathurai agreed to repay with interest of 9%. The loan became payable on May 17, 2020. Since that date, Mr. Sellathurai has been in default of the loan. Both the May 17 Loan Agreement and promissory note executed May 17, 2018 are legally enforceable instruments, which create obligations on the part of Mr. Sellathurai.
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> …
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> [37] … there is no reason not to give effect to the clear terms of the agreement. Mr. Bremjit has demanded payment, and Mr. Sellathurai has refused. He is thus in default of that loan agreement.

IV. Grounds of Appeal

[23] The appellant alleges that the trial judge erred in law by:

1) Failing to provide sufficient reasons for his conclusion that the respondent was more credible than the appellant;
2) Using the absence of credibility detractors, such as Mr. Chandradas' lack of motive to lie, to elevate the credibility of Mr. Chandradas' testimony over other witnesses, such as the tradespeople;
3) Relying on his favourable assessment of Mr. Chandradas' demeanour; and
4) Failing to consider the surrounding circumstances and conditions before and after the execution of the Loan Agreement, when resolving issues pertaining to the credibility of the parties.

[24] In addition, the appellant asserts that the judge committed a palpable and overriding error in fact by concluding that Mr. Chandradas' testimony conclusively confirmed the respondent's version of events.

V. Analysis

Governing Principles

[25] There are a few foundational principles that frame consideration of the grounds of appeal.

[26] First, the standard of review for findings of fact and mixed fact and law—absent an extricable question of law—is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 10,19, 26–28. Findings pertaining to the credibility of witnesses are reviewed on the same standard: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 388, 1991 CanLII 69 (SCC); *Khela v. Clarke*, 2022 BCCA 71 at para. 6.

[27] Second, where a trial judge demonstrates they are alive to inconsistencies in the evidence of a witness, but concludes nonetheless that the witness is credible, "there is no basis for interference by the appellate court in the absence of palpable and overriding error": *F.H. v. McDougall*, 2008 SCC 53 at para. 70. Relatedly, where a trial judge refers to inconsistencies and deals expressly with a number of them, it must be assumed that the judge took them into account: *McDougall* at para. 71.

[28] Third, a judge is not obliged to identify and discuss every piece of evidence in making a finding of fact or credibility, nor are they obliged to identify and resolve every inconsistency in the evidence. Rather, the judge must show that they grappled with the substance of the evidence and the live issues in the case: *R. v. R.E.M.*, 2008 SCC 51 at para. 64; *M. McIsaac Family Holdings Ltd. v. Tolam Holdings Ltd.,* 2020 BCCA 371 at para. 106. The failure of a trial judge to address critical evidence on a disputed issue at trial may constitute a palpable and overriding error, but only if it gives rise to a reasoned belief that the judge forgot, ignored, or misconceived the

evidence: *M. McIsaac Family Holdings Ltd.* at para. 109; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 125.

[29] Fourth, with respect to the sufficiency of reasons, the Court in *R. v. G.F.,* 2021 SCC 20 emphasized the importance of a "functional and contextual reading" of reasons alleged to be insufficient:

> [69] … Appellate courts must not finely parse the trial judge's reasons in a search for error: *Chung*, at paras. 13 and 33. Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review.

[30] Put simply, the function of reasons is to facilitate meaningful appellate review, and to justify and explain the result. Where, as here, a case turns largely on determinations of credibility, the sufficiency of reasons should be considered in light of the deference afforded to a trial judge's credibility findings: *R. v. Dinardo*, 2008 SCC 24 at para. 26.

[31] Fifth, a judge does not err in law in performing a credibility assessment by considering whether a witness had a motive to lie. The absence of a motive to lie is a non-conclusive, common-sense factor that triers of fact—judges or juries—may consider: *R. v. Gerrard*, 2022 SCC 13 at para. 4.

[32] Sixth, a judge does not err in law by considering the demeanour of a witness. While judges and juries must be cautious about putting undue weight on the extent to which the demeanour of a witness informs their assessment of credibility and reliability, judging is a human exercise, informed by human experience and the perception of whether a witness can be counted on to give credible and reliable testimony: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 at 537, 1997 CanLII 324 (SCC); *R. v. Gagnon,* 2006 SCC 17 at para. 20. That said, judges must be mindful of the fact that credibility and reliability are best gauged by considering whether evidence of a witness is consistent with independent evidence and in harmony with the preponderance of probabilities having regard to the evidence as a whole: *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).

[33] With these principles in mind, I turn now to consideration of the grounds of appeal.

[34] As noted earlier, it is my view that the grounds of appeal take aim at the judge's findings of fact and credibility. Respectfully, I am of the view that the appellant has failed to identify an extricable question of law in any of the grounds of appeal. The more deferential standard of palpable and overriding error therefore applies. As I am not persuaded that the appellant has demonstrated palpable and overriding error in the reasons for judgment, the appeal must fail.

Sufficiency of Reasons on Credibility

[35] Reading the reasons from a functional perspective, I am of the view that the trial judge provided both factually and legally sufficient reasons for his determination that the respondent's evidence was more credible than that given by the appellant. The trial judge grappled with the inconsistencies in the respondent's testimony (at para. 22) and considered the testimony of the tradespeople and realtors that the respondent behaved as if he were an owner of the W. 16th Ave. property (at para. 23). Having done so, the judge nonetheless accepted the respondent's evidence that the $600,000 advance was a loan, not an equity investment.

[36] I have no difficulty determining how or why the judge arrived at the conclusion he did. As he noted, the respondent's evidence was supported by the evidence of Mr. Zokol, the communications between the appellant and Mr. Zokol confirming that the advance was to be treated as a personal loan, the Loan Agreement and Promissory Note, the evidence of Mr. Chandradas and, to some extent, the evidence of the appellant himself—an experienced businessman—who acknowledged that he understood the nature of the documents he signed. Against this background, the judge rejected the position of the appellant that the Loan Agreement and Promissory Note were "sham" documents designed to evade taxes. While the appellant disputes the conclusion the trial judge reached, he must know from the reasons for judgment how and why the judge decided the case as he did.

[37] The judge did not, as the appellant suggests, ignore the evidence of the tradespeople and realtors. Indeed, he accepted their evidence. But it did not necessarily flow from the acceptance of that evidence that the respondent was an equity investor in the project. It is not difficult to imagine why the respondent, having made a sizable and unsecured loan to the appellant, would take a keen interest in the success of the project. Put differently, that the respondent may have acted in some ways as if he had an equity interest in the property did not, as the appellant suggests, conclusively establish that the advance was not a loan.

[38] In the result, I would not give effect to this ground of appeal.

Failing to Consider Evidence in Resolving Credibility Issues

[39] While the judge did not expressly address every piece of evidence that could conceivably detract from his assessment of the respondent's credibility—and here the appellant places particular emphasis on evidence that the respondent made inquiries about the appellant's repayment plans before the loan was due—he was not obliged to do so: *R.E.M.* at para. 64. There is no basis for the appellant's contention that the judge was not alive to this evidence when he made his credibility findings. The evidence did not, in any event, serve to "conclusively" undermine the respondent's version of events.

Reliance on Demeanour and Absence of Motive to Fabricate Issues

[40] To the extent that the judge can be said to have relied on Mr. Chandradas' lack of motive to lie in assessing his credibility—and on this point he said only that Mr. Chandradas was a mutual friend of the parties and an objective witness who did not seem to be favouring either of them in his evidence—the judge made no error. The judge certainly did not, as the appellant suggests, rely on Mr. Chandradas' neutrality and seemingly honest demeanour to conclude that his evidence must, therefore, be true. Rather, "demeanour" was one factor that informed the trial judge's credibility assessment. The case did not, in any event, turn on the judge's assessment of the credibility of Mr. Chandradas. The judge relied on Mr. Chandradas' evidence simply because it tended to confirm the respondent's

account which was, in turn, confirmed by independent evidence. I see no merit in this ground of appeal.

Drawing Unavailable Inferences from Mr. Chandradas' Evidence

[41] The appellant submits that the trial judge committed a palpable and overriding error by concluding that Mr. Chandradas' testimony "conclusively" confirmed the respondent's version of events. Respectfully, the judge did no such thing.

[42] The judge found that Mr. Chandradas' testimony "…tends to support Mr. Bremjit's interpretation of the transactions and refute that of Mr. Sellathurai": at para. 24. In no way did he use Mr. Chandradas' testimony to "conclusively [confirm]" the respondent's version of events.

[43] As detailed above, the judge relied on a number of considerations to determine that, on balance, the respondent's version of events was more credible than that of the appellant. Given the applicable standard of review, I see no merit to this ground.

VI. Conclusion

[44] For the foregoing reasons, I would dismiss the appeal.

[45] **GRIFFIN J.A.**: I agree.

[46] **HORSMAN J.A.**: I agree.

[47] **FITCH J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Fitch"