COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Yung v. Matheson,*
2023 BCCA 447

Date: 20231201
Dockets: CA48721; CA48723

Docket: CA48721

Between:

Julia Yung

Appellant
(Defendant)

And

Deacon Lee Matheson

Respondent
(Plaintiff)

- and -

Docket: CA48723

Between:

Julia Yung and Deacon Lee Matheson

Appellants
(Defendants)

And

Gwen Lynn Lowney

Respondent
(Plaintiff)

Before: The Honourable Justice MacKenzie
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia,
dated November 2, 2022 (*Lowney v. Yung*, 2022 BCSC 1918,
Vancouver Dockets M179831 and M179865).

Counsel for the Appellant, Julia Yung: R.C. Brun, K.C.
J.J.L. Brun

Counsel for the Respondents, Deacon Lee Matheson and Gwen Lynn Lowney:	J.D. Whyte
Place and Date of Hearing:	Vancouver, British Columbia November 10, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 1, 2023

Written Reasons by:
The Honourable Justice MacKenzie

Concurred in by:
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

Summary:

The respondents, Mr. Matheson and Ms. Lowney, were injured in a car accident for which the appellant admitted liability. The appellant appeals Mr. Matheson's award for loss of future earning capacity arising from his lost ability to do the physical labour required for his home renovation sole proprietorship business. She also appeals the respondents' award for loss of opportunity to earn income from the sale of their property in Edgemont, North Vancouver, arising from their lost ability to complete renovations on the property.

Held: Appeal dismissed. Regarding the first award, the appellant proposes a new contingency that she did not raise at trial: the possibility that Mr. Matheson could replace his Sole Proprietorship income with income earned through his real estate investment and development ventures. Her argument is based on speculation and does not establish error. In addition, she misconstrues the burden of proof regarding contingencies by claiming that the respondent failed to establish that he could not replace his lost income. As to the second award, the appellant invites this Court to reweigh the evidence before the trial judge, which is not this Court's role. She raises new arguments as to contingencies not made to the trial judge. The appellant has failed to identify an error that would take the award outside the range of reasonable compensation.

Reasons for Judgment of the Honourable Justice MacKenzie:

Introduction

[1] The respondents, Mr. Matheson and Ms. Lowney, were injured in a car accident on November 27, 2015, for which the appellant, Ms. Yung, admitted liability. The respondents' claims were tried together, and they were awarded various damages.

[2] Ms. Yung now appeals two awards of damages:

1) Mr. Matheson's award of $478,129 for loss of future earning capacity arising from his lost ability to do the physical labour required for his home renovation business (the "Sole Proprietorship"); and

2) Mr. Matheson's and Ms. Lowney's award for loss of opportunity to earn income of $400,000 total ($200,000 each) from the sale of their property in Edgemont, North Vancouver (the "Edgemont Property"), arising from their lost ability to complete renovations on the property.

She does not challenge the awards for non-pecuniary damages, special damages, cost of future care, Ms. Lowney's future income loss, or past loss of opportunity as to another property of the respondents, the "Sunshine Coast Property".

[3] The appellant concedes the judge correctly articulated the law regarding the assessment of the loss of earning capacity. But she argues the judge failed to correctly apply the law to the circumstances of this case. In particular, she contends the judge failed to consider and give effect to negative contingencies that would have reduced the awards.

[4] As to the first award, Ms. Yung says the judge erred by failing to account for Mr. Matheson's residual capacity to replace income lost from the Sole Proprietorship with income from his less physically demanding occupation of supervising and managing his real estate development investments. As to the Edgemont Property award, Ms. Yung submits the judge erred in not considering a contingency deduction of 25% to account for various factors related to the premature sale of this property. Ms. Yung asks this Court to set aside and reassess these two awards.

[5] In my view, what Ms. Yung characterizes as alleged errors of law reviewable on a correctness standard are instead alleged errors of mixed fact and law, reviewable on the deferential standard of palpable and overriding error. As the Supreme Court of Canada has cautioned, "[t]he motivations for counsel to strategically frame a mixed question as a legal question … are transparent" (*Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 21, at para. 45). Doing so is often an effort to obtain a review on a stricter, less deferential standard. Despite the appellant's characterizations, I consider the issues on appeal are reviewable on the standard of palpable and overriding error.

[6] On appeal, the appellant argued a theory of her case that she failed to put before the trial judge. She is inviting this Court to make different findings of fact, sift through the transcript for evidence to support her argument, but without identifying relevant passages, and to re-do the trial based on a different theory of the case and

on facts unsupported by the evidence. In short, the appellant asks us to reweigh and reinterpret the evidence, which is not our function.

[7] Moreover, the appellant's submissions appear to misconstrue where the onus lies in establishing a real and substantial possibility with respect to contingencies. The burden to establish a contingency to reduce an award is on the party asserting it. However, the appellant submitted that it was for the plaintiff to adduce evidence to rebut a contingency. This is not the law.

[8] Ultimately, I discern no error in the judge's conclusions. They were based on an application of the correct legal frameworks to the facts open to her on a reasonable interpretation of the evidence. I would dismiss the appeal.

Background

[9] The respondents were a married couple at the time of the accident but are no longer. At the time of trial, Mr. Matheson was 52 years old, and Ms. Lowney was 45. Throughout their marriage, they worked together in purchasing, renovating and selling residential properties. Mr. Matheson was the sole shareholder of a company called DNGM Investment Holdings Ltd. ("DNGM") through which he undertook real estate ventures. Mr. Matheson also operated a Sole Proprietorship for his construction and renovation work.

[10] Mr. Matheson is a skilled tradesman. Before the accident, Mr. Matheson was actively involved in a joint venture through DNGM, which did not involve physical labour. He and Ms. Lowney were also in the process of renovating their home, the Edgemont Property. The materials had been purchased for the last part of this renovation, and the couple planned to sell the property once the renovation was complete.

[11] The couple was also in the process of redeveloping their Sunshine Coast Property. Moreover, Mr. Matheson was still working through his Sole Proprietorship at the time of the accident. Apart from his joint venture work, all of this work involved

Mr. Matheson engaging in physical labour. Before the accident, he planned to continue all these aspects of his work for the rest of his career.

[12] At the time of trial, seven years after the accident, Mr. Matheson still suffered pain in the right side of his neck and face, and numbness in his arms from the injuries sustained in the accident. The judge noted his injuries seemed to have improved but not resolved. Mr. Matheson testified that physical exertion triggered pain; he could no longer do his home renovation work.

[13] The evidence of Dr. Hawkeswood, a physiatrist and expert witness at trial, was that Mr. Matheson has a low probability of complete recovery and will likely experience ongoing chronic pain. Dr. Sun, a neurosurgeon, opined that Mr. Matheson's soft tissue injury and mechanical back pain are likely to be permanent. Robert Gander, an expert in occupational theory, functional capacity examinations, work capacity evaluation, and cost of future care analyses said Mr. Matheson is unable to meet the physical demands of the renovation work that he did previously.

[14] On the evidence as a whole, the judge concluded that Mr. Matheson's injuries commenced shortly after and were caused by the accident.

[15] At trial, Mr. Matheson submitted that his injuries left him unable to do the physical work required for renovating the Edgemont Property, the Sunshine Coast Property, and his work through the Sole Proprietorship. He had three claims regarding income earning activities: "a claim for past loss of opportunity related to the Edgemont Property, a claim for past loss of opportunity related to the Sunshine Coast Property, and a past and future loss of income earning capacity claim related to the [S]ole [P]roprietorship" (at para. 85).

[16] Before addressing the two grounds of appeal, it is important to set out the significant concern that governed the judge's findings of credibility and fact, and which is central to the disposition of the appeal. This concern was that the appellant failed to comply with the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.). The judge

noted that the appellant conducted extremely brief cross-examination of each respondent and did not challenge either on their subjective pain complaints, pre-existing conditions, or on a number of inconsistencies between their trial evidence and clinical records, yet the appellant's case relied heavily on the respondents' credibility. Specifically, the appellant asked the court to find the respondents not credible about the extent of their injuries, their current impairments, or their future prospects.

[17] *Browne v. Dunn* held that a party who intends to challenge the credibility of a witness should generally give them an opportunity to address or explain the point upon which their credibility is attacked. The judge stated that "it is in the interests of justice, particularly the truth-seeking function of the court, for the confrontation principle to be observed when a witness is to be challenged on his or her credibility" (at para. 6).

[18] The judge observed that "the defendant failed to confront the plaintiffs on the vast majority of issues about which the defendant now asks the court to find the plaintiffs not credible" (at para. 7). This left the court unable to properly assess credibility on those points, since the respondents were not given a chance to explain inconsistencies between their evidence and evidence of other witnesses (at para. 7). She held that "it would be manifestly unfair to the plaintiffs, and prejudicial to the fact-finding process, if [she] were to accede to the defendant's arguments with respect to the plaintiffs' credibility that are grounded in evidence … that [was] not put to the plaintiffs" (at para. 8). On that basis, the judge declined to impugn the credibility of any party based on inconsistent evidence that was not put to them on cross-examination (at para. 11).

Standard of Review

[19] A trial judge's assessment of damages is generally entitled to deference, as described by the majority in *Reilly v. Lynn*, 2003 BCCA 49, leave to appeal ref'd, [2004] 1 SCR xiii:

> [99] We cannot alter a damage award simply because, on the evidence, we would come to a conclusion different from that of the trial judge. However, we may vary a damage award if we conclude that the trial judge in assessing the damage award applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or if the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. …
>
> [Emphasis added.]

[20] *Reilly* at para. 100 also noted that regarding an award for loss of earning capacity, a trial judge must engage in the difficult and uncertain exercise of "'gaz[ing] more deeply into the crystal ball'" and asking, "'[w]hat sort of a career would the accident victim have had? What were his prospects and potential prior to the accident?'" Given the uncertainty of this exercise, "the applicable standard of review … must be approached with some care, in order to ensure that what is alleged to be an error in principle is not actually a question of factual determination" (*Steinlauf v. Deol*, 2022 BCCA 96, at para. 51).

[21] Further, *Bains v. Cheema*, 2022 BCCA 430, cautioned that "appellate courts must not finely parse a trial judge's reasons in search of error", and that "it is the appellant's burden to demonstrate error" (at para. 40).

[22] Overall, analysis of future events and the applicable contingencies is an inherently uncertain enterprise. An appellate court must bear this difficulty in mind, deferring to the trial judge's decision unless there is a clear error in their reasons.

Legal Framework

[23] I will next briefly set out the relevant legal principles. As stated, the assessment of the loss of both past and future earning capacity involves considering hypothetical events. A plaintiff need not prove these hypothetical events on a balance of probabilities; rather, "a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation" (*Grewal v. Naumann*, 2017 BCCA 158, at para. 48, per Goepel J.A. in dissent, but not on this point). If such a possibility is established, then the court must determine the quantum of damages by assessing the likelihood of the hypothetical

event (*Grewal,* at para. 48). In assessing future loss of income earning capacity in particular, the court undertakes "a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened" (*Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, at para. 32).

[24] I turn to address the issues on appeal.

Loss of Future Earning Capacity: Loss of the Sole Proprietorship

[25] The appellant challenges the damages award for Mr. Matheson's loss of future earning capacity regarding the loss of his Sole Proprietorship, contending that the judge erred by failing to consider whether Mr. Matheson could replace any lost Sole Proprietorship income with other sources of income. As explained below, I would not accede to this ground of appeal.

The Reasons for Judgment

[26] In her reasons at para. 113, the judge quoted the three-part test in *Rab v. Prescott*, 2021 BCCA 345, for assessing damages for loss of future earning capacity:

> [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

[27] The judge then applied the *Rab* test to the present case. On the first step, she held it was clear that Mr. Matheson's chronic pain had led to a loss of capacity to do his physical renovating work; further, this loss of capacity was long-term and not likely to resolve (at para. 114).

[28] As to the second step, the judge held there was a real and substantial possibility that Mr. Matheson's loss of capacity would cause pecuniary loss, as he was no longer capable of earning income as a home renovator, or through his Sole Proprietorship (at para. 115).

[29] On step three, in assessing the value of the loss, the judge noted that Sergiy Pivnenko, an economist who testified as an expert at trial, used the National Occupational Classification ("NOC") figures to estimate Mr. Matheson's future earnings loss as it pertains to the Sole Proprietorship (at para. 118). She concluded overall that "Mr. Pivnenko's calculation, using the NOC figures and informed by Mr. Matheson's actual average past income, modified by contingencies for labour market participation, unemployment, and part-time factors, provides a reasonably accurate assessment of Mr. Matheson's likely future without-Accident income" (at para. 123).

The Appellant's Position

[30] On appeal, the appellant argues the judge erred in assessing Mr. Matheson's loss of future earning capacity because Mr. Matheson had the proven residual earning capacity to earn equal or greater income in the future from less physical occupations. In her analysis of the third step of the *Rab* test, the judge did not consider whether Mr. Matheson could replace any renovating income from his Sole Proprietorship with other sources of income. Moreover, the calculations assume a loss based on Mr. Matheson working full-time as a renovator, when in fact this was only a portion of his working time. The appellant generally contends that the award must account for "the likely greater income Mr. Matheson will earn in pursuing his development ventures in the future". Therefore, "only a modest award for loss of capacity — if any — is justified".

[31] In her reply factum (at para. 10), the appellant also frames her argument on this point as a failure to mitigate, contending that Mr. Matheson has a duty to mitigate his damages by seeking other employment within his residual capacity. I

would not characterize this issue as one of failure to mitigate but rather as one of a negative contingency for residual earning capacity.

Discussion

[32] This Court has accepted that "contingencies are 'so bound up with an appreciation of the evidence that the trial judge's view must be given deference', and should not be interfered with, barring an 'obvious error'" (*Joyce v. Dorvault*, 2008 BCCA 151, at para. 15). The bar for appellate review on this ground of appeal is therefore very strict.

[33] In my view, the appellant has failed to demonstrate a reviewable error on this ground of appeal. The judge was alive to the need to account for contingencies in this award. The evidence already accounted for general contingencies, and at trial, the appellant did not adduce evidence of other contingencies. On appeal, the appellant proposes a new contingency that she did not raise at trial: the possibility that Mr. Matheson could replace his Sole Proprietorship income with income earned through his real estate investment and development ventures. The appellant's argument is based on speculation and does not establish error. In addition, it misconstrues the burden of proof regarding contingencies.

[34] First, on a more minor point, the respondent points out that the appellant's argument is based on misconceptions of the evidence. As explained at paras. 120–121 of her reasons, the judge did not assess the loss as if Mr. Matheson operated the Sole Proprietorship full-time. It is true that Mr. Pivnenko projected the future loss based on full-time industry averages, but he compared these averages to Mr. Matheson's earnings and found them to be similar.

[35] General contingencies are those likely to be common to all of us as part of the normal human experience; they include possible events such as promotions or sickness. Specific contingencies, on the other hand, are peculiar to a particular person, and could be based on their particular skills or work record, for instance (*Dornan v. Silva*, 2021 BCCA 228).

[36] When a party relies on a specific contingency, "that party must be able to point to evidence which supports an allowance for that contingency" and "the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility" (*Dornan*, at para. 92; see also *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400, at para. 98).

[37] Moreover, the burden of showing that the contingency is a real and substantial possibility falls on the party asserting that contingency (*Lo v. Vos*, 2021 BCCA 421, at paras. 38–9). The appellant appears to reverse the burden of proof in arguing Mr. Matheson failed to adduce evidence at trial that he could not replace his lost Sole Proprietorship income with income from his real estate development investments. Moreover, although the appellant claims she is attempting to have this Court overturn the judge's failure to correctly apply the third step of *Rab*, the appellant in fact invites us to overturn findings of fact to which we must defer absent a palpable and overriding error.

[38] Here, the appellant fails to meet her onus of pointing to evidence that establishes a realistic possibility. She identifies no reviewable error. There is no evidence to support the proposition that Mr. Matheson could replace with real estate investment income, the income he has lost through the Sole Proprietorship. This proposition is based on speculation. There is no evidence that more time spent on researching development opportunities would lead to more investment income.

[39] The evidence at trial was that Mr. Matheson was living on his savings. There is no specific evidence of his real estate investment income at all. Moreover, this is a new argument raised on appeal, which is presumptively not open to parties on appeal (*Mariner Towers Ltd. Partnership v. Imani-Raoshanagh*, 2011 BCCA 261, at para. 27). On this ground of appeal, the appellant urges this Court to reweigh the evidence, raises new arguments, and seeks a "re-do" of the trial.

[40] In support of her argument on this ground of appeal, the appellant emphasizes Mr. Matheson's Costa Rica property development, insisting this was an example of a project that would produce future income that could replace the lost

income from the Sole Proprietorship. I find this speculative. There is no evidence that after ten years of owning the property, it was producing any profit, or that it would do so in the future. On the contrary, the evidence of Mr. Matheson's partner was that the property would "hopefully in time pay for itself" (T., p. 180, lines 28–30). The property clearly was not turning a profit.

[41] Thus, I would not accede to this ground of appeal.

Past Loss of Opportunity to Earn Income: Edgemont Property

[42] The appellant also challenges the damages award for the past loss of opportunity to earn income on the Edgemont Property, arguing that the award does not account for necessary deductions. For the following reasons, I would not accede to this ground of appeal.

The Reasons for Judgment

[43] The judge began her analysis of this issue by setting out the relevant evidence regarding this loss. Mr. Matheson and Ms. Lowney decided to sell the Edgemont Property shortly after the accident because the market had peaked, their son was moving out, and Mr. Matheson needed funding for his joint venture DNGM work. The judge said:

> [87] As a result of the injuries he suffered in the Accident, Mr. Matheson was unable to perform the heavy physical labour required to finish the renovations on the front suite of the Edgemont Property. All the materials had been purchased, including flooring, toilets, and plumbing fixtures, but work was required to install those components prior to the house being complete.
>
> [Emphasis added.]

[44] The judge found the couple was unable to hire competent subcontractors to do the renovation work for them. Mr. Matheson said that but for the accident, he would have sold the property after completing the renovations. The respondents sold it for $2,000,000 in March 2016. Mitchell Rabiner, a residential property appraiser, opined that the fair market value of the Edgemont Property as of March 13, 2016, if the renovations had been completed, was $2,400,000.

[45] The judge then turned to the appellant's argument on the respondents' loss of opportunity claim, some of which is repeated on appeal. The appellant submitted the Court should not accept that Mr. Matheson could not hire trades because he was well-connected and ought to have been able to find trades; that the respondents sold the property because they needed funds, not because of their injuries; that it was "safe to assume" they would have had to hire skilled trades people to finish the renovation; and less expensive materials could have been used for the renovation so as to decrease the differential between the actual sale price and the market value of the property if renovated. The judge noted that none of these points were put to either respondent on cross-examination (at para. 90).

[46] The judge rejected the above propositions as speculative and without an evidentiary basis. She accepted the evidence of the respondents that but for the accident, they would have finished the renovations. She assessed the loss as the difference between the actual sale price of the Edgemont Property and what it would have sold for had they finished the renovations. The judge accepted Mr. Rabiner's opinion that $2,400,000 was a reasonably accurate assessment of the latter figure. The actual gross sale price was $2,000,000. She held that the $400,000 difference between these two figures was the respondents' loss.

The Appellant's Position

[47] On appeal, the appellant argues the judge erred in assessing the damages for past loss of opportunity to earn income on the Edgemont Property by failing to account for several contingency deductions for product not yet purchased, product returned, labour costs, or real estate commissions.

[48] The appellant contends the respondents' evidence established that they could have hired a contractor to do the renovation work; they made a strategic decision to sell before completing the renovations due to the market spike; skilled trades people would have been required regardless; and that some, but not all, materials had been purchased. The appellant maintains that the judge erred in failing to take these

factors into account in the valuation of the loss. Deductions or allowances must be made for these factors.

Discussion

[49] As explained, the standard of review is deferential. *Housen v. Nikolaisen*, 2002 SCC 33, makes clear that "where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error" (at para. 36). On the palpable and overriding standard, the appellate court's role "'is not to re-do the work of the trial judge by allowing parties to reargue the case but to correct errors'" (*Roeske v. Roeske*, 2023 BCCA 358, at para. 26). This standard recognizes that it is "'not the role of appellate courts to second-guess the weight to be assigned to ... evidence ... [nor] to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion'" (*Roeske*, at para. 26). An appeal in these circumstances is not a 'second kick at the can' in which the appellant can repeat arguments made below and re-litigate the trial judge's factual findings; "'[s]uch an approach is not consonant with the strict standard of review this Court must apply'" (*Roeske*, at para. 27).

[50] The judge's interpretation of the evidence on this award was open to her and is owed deference. At trial, the appellant could have cross-examined upon, or called evidence about, the cost of materials returned, or yet to be purchased to establish an appropriate deduction from the damages award. She failed to do so. The appellant now invites this Court to reweigh the evidence before the trial judge, which is not this Court's role. The appellant raises new arguments as to contingencies not made to the trial judge. It is not surprising the judge did not address these. The appellant does not identify a reviewable error in the judge's reasons to warrant this Court's intervention.

[51] First, as to the 1.5% real estate commission, this amount is modest and would not have made a material difference to the award. Next, the argument that the respondents would have had to hire trades to finish the renovation is mere

speculation. The appellant's counsel at trial stated merely that it was "safe to assume" that trades would still need to be hired, (T., p. 665, lines 13–16) but there was no evidence in this regard. The trial judge found this submission speculative (at paras. 90–1). She stated that due to his injuries, "Mr. Matheson was unable to perform the heavy physical labour required to finish the renovations" (at para. 87), implying that Mr. Matheson would have done the trades work himself but for his injuries. This was a finding of fact clearly anchored in the evidence.

[52] Regarding materials returned or yet to be purchased, counsel did not assist by directing us to passages of the transcript to support their argument as to the deduction of specific contingencies for these costs. It is for the appellant to clearly identify error in the judge's findings of fact and she has failed to do so. The appellants did not raise these contingency issues at trial.

[53] At trial, the appellant raised the issue of flooring that was returned, but not as a basis for a deduction (T., p. 662, lines 36–39). In terms of materials yet to be purchased, the judge did make an overstatement in saying that all the materials were already purchased, as this was not the evidence. Mr. Matheson testified in chief that there remained for purchase a fireplace, kitchen cabinets and counter tops, and matching paint (T., p. 66, lines 29–37). Again, the appellant failed to cross-examine on this evidence to elicit the cost of these items for a specific deduction. Thus, without speculating, the judge would have been unable to assess the value of this contingency in any event. I do not consider this error material to the outcome. If characterized as a misapprehension of evidence, it is not material; if framed as a factual error, it is not palpable and overriding. As with the modest extra real estate commission, these unpurchased items can be rolled into or considered as part of Mr. Rabiner's "assessment" of the loss on the sale of the Edgemont Property.

[54] Overall, it must be remembered that Mr. Rabiner's appraisal was an "assessment". The amount could have been greater or lesser. Damages in many cases, this being one of them, are not a precise mathematical exercise or computation; "'on appeal any missteps that may have occurred in arriving at an

award are unimportant if the figure falls within the range of reasonable compensation'" (*Uhrovic v. Masjhuri*, 2008 BCCA 462, at para. 31). In my opinion, the appellant has failed to identify an error that would take the award outside the range of reasonable compensation.

[55] Moreover, it was open to the judge to apply the rule in *Browne v. Dunn* and find the respondents' credibility was not undermined based on matters the appellant failed to raise in cross-examination. As the judge said, the court is not well-positioned to have credibility impeached on inconsistencies that the respondents were never given the opportunity to explain. Further, assessments of credibility are owed a high standard of deference, given that "[a] trial judge has an 'overwhelming advantage' in making credibility assessments" (*Khela v. Clarke*, 2022 BCCA 71, at para. 6).

[56] The appellant says the rule in *Browne v. Dunn* does not apply when the inconsistencies lie within the respondents' own evidence at trial, as the appellant says occurred here. The appellant also implies that she sought to challenge only the respondents' reliability, rather than their credibility, so the rule in *Browne v. Dunn* was not engaged. These arguments are not persuasive as is apparent from the judge's reasons.

[57] The rule in *Browne v. Dunn* was indeed engaged at trial because the appellant clearly challenged the respondents' credibility, not just their reliability (for example, see T., p. 646, lines 34–37). Overall, given the highly deferential standard of review applicable to credibility findings, there is no basis for this Court to interfere with the findings of the judge. Issues of credibility and reliability fall particularly within the domain of the trial judge.

[58] I would therefore not give effect to this ground of appeal.

Disposition

[59] In the result, I would dismiss the appeal.

"The Honourable Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Justice Skolrood"