

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cheema v. Toor*,
2024 BCSC 130

Date: 20240129
Docket: S218241
Registry: New Westminster

Between:

Ishwant Singh Cheema and Navjyot Kaur Cheema

Plaintiffs

And

**Devinder Singh Toor, Sukhbir Kaur Toor, Simrandeep Singh Toor,
Ayyaz Shums and A 2 Z Mortgages Inc.**

Defendants

Before: The Honourable Justice Girn

Reasons for Judgment

Counsel for the Plaintiff:

R. Davidson

Counsel for the Defendants, Ayyaz Shums
and A 2 Z Mortgages Inc.:

R. Alam
S. Saran, Articled Student

No other appearances:

Written submissions from the Plaintiff:

June 9 and
July 14, 2023

Written submissions from the Defendants:

July 14, 2023

Place and Dates of Trial:

New Westminster, B.C.
June 5-8 and 11, 2023
July 11, 2023

Place and Date of Judgment:

New Westminster, B.C.
January 29, 2024

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INTRODUCTION

[1] The heart of this action involves alleged misrepresentations in the context of private lending facilitated by a mortgage broker.

[2] On September 1, 2017, the plaintiffs, Ishwant Singh Cheema and Navjyot Kaur Cheema (the “Cheemas”) loaned \$100,000 to the defendants, Devinder Singh Toor, Sukhbir Kaur Toor, and Simrandeep Singh Toor (the “Toors”) so that they could purchase a residential property. The loan was to be for a period of one year with an interest rate of 12% per annum. The Toors repaid some of the loan but payments ceased as of August 2019.

[3] The loan was facilitated by the defendant, Ayyaz Shums (“Mr. Shums”).

[4] As adapted from their closing submissions, the Cheemas allege that the defendants collectively made the following fraudulent misrepresentations which induced the Cheemas to agree to loan sums of money to the Toors:

- a) The Toors were purchasing a home in Surrey for \$1.456 million and paid a deposit of \$65,000.
- b) The Toors had a down payment of \$356,000.
- c) The Toors had a combined monthly income of \$16,000 and they worked, respectively, as a truck driver, a cook and an airport worker.

[5] As well, the Cheemas allege that Mr. Shums also made the following fraudulent misrepresentations:

- a) The Toors owned a home that they were selling and they would be moving into a bigger home.
- b) Mr. Shums had already conducted credit checks and found that the Toors had good credit and proof of income.

[6] While the Cheemas named A 2 Z in their Notice of Civil Claim as a defendant, at no point in the Notice of Civil Claim nor in their submissions did they explain the basis for A 2 Z's potential liability. Accordingly, in all of the circumstances, I find that the Cheemas have failed to establish a basis for the corporate defendant's liability.

[7] Although the Toors filed a response to the civil claim, they did not appear at the trial to defend themselves.

[8] Mr. Shums denies any misrepresentations. Mr. Shums submits that he merely introduced the Toors to the Cheemas but did not broker the loan in his capacity as a mortgage broker, nor was he paid to facilitate the loan.

[9] The issue to be decided is whether the defendants, the Toors and Mr. Shums, fraudulently misrepresented material facts such that the Cheemas were induced to loan money to the Toors which led them to suffer damages. In the alternative, the Cheemas argue, even if Mr. Shums did not fraudulently misrepresent material facts, that he negligently misrepresented those facts such that the Cheemas reasonably relied on them, resulting in damages. Given my findings below on the primary issue of fraudulent misrepresentation, the alternative issue is unnecessary.

[10] Accordingly, the primary dispute is factual; that is, whether or not misrepresentations were made.

BACKGROUND

[11] The Cheemas are a married couple with three children. They immigrated from India in 2007.

[12] Mr. Cheema is a licensed practical nurse and Mrs. Cheema is an elementary school teacher. They have worked hard in building a comfortable life in Canada for their family.

[13] A 2 Z is a company incorporated pursuant to the laws of British Columbia. Up until 2022, it was in the business of brokering mortgages through financial institutions as well as private lenders.

[14] At the relevant time, Mr. Shums was a licenced mortgage broker and real estate agent and the sole director of A 2 Z, which he founded in 2007.

[15] Mr. Shums ceased to be a director of A 2 Z in January 2018 and also relinquished his mortgage broker licence at that time. Since then he has worked exclusively as a real estate agent.

[16] From 2018 to 2022, Mr. Shums' wife, Mrs. Asma Shums, was the sole director of A 2 Z. In 2022, the business closed its doors.

[17] Mr. Cheema met Mr. Shums in 2016 through Mr. Cheema's brother, who had also acted as a private lender through A 2 Z's mortgage brokering. The Cheemas were also interested in private lending given the high rate of return involved in these types of loans.

[18] In total, the Cheemas were involved in three loans with Mr. Shums. There is no dispute that Mr. Shums, through A 2 Z, brokered the first two loans. On each of these first two occasions, the loans were repaid and the Cheemas received a healthy return on their investment.

[19] The loan at issue on this trial is the third loan. There is much dispute factually in terms of this loan. Mr. Cheema and Mr. Shums testified in this trial. There is substantial conflict in many areas. As such, assessing their credibility and reliability is central to this case.

[20] I will now summarize the evidence of Mr. Cheema and Mr. Shums, followed by a brief summary of the evidence of Mrs. Shums, which I find not to be controversial.

Ishwant Singh Cheema

[21] As I noted, Mr. Cheema is a licenced practical nurse. Prior to immigrating to Canada, Mr. Cheema worked in the Indian Army. Mr. Cheema testified that prior to meeting Mr. Shums, he had no previous experience or training in the business or financial sector.

[22] At their first meeting sometime in 2016 at the offices of A 2 Z, Mr. Shums advised that he was an experienced licenced mortgage broker and through his company A 2 Z he had arranged hundreds of loans for clients who were buying homes or refinancing, and that he was always looking for private lenders like Mr. Cheema who wished to get a higher return on their investments at 12% per annum. Mr. Shums does not dispute this was discussed.

[23] Mr. Cheema testified that Mr. Shums asked him if he had any experience in lending, to which he replied he did not. Mr. Shums also does not dispute this. Mr. Cheema advised Mr. Shums that he would be using funds from his home equity line of credit for the lending.

[24] Mr. Shums advised him that the loans would be short term and a safe investment because Mr. Shums did background checks on all of his borrowers, including credit checks and making sure they had the ability to pay.

[25] Mr. Cheema was assured that an added protection to the lender is that the loan would be secured by way of a second mortgage on the borrower's property and the lender would receive post-dated cheques.

[26] Mr. Cheema was reassured by Mr. Shums that all he had to do was to provide the money and the rest would be taken care of by Mr. Shums. However, ultimately the lender had the final say, and had to exercise their own judgment on whether or not to lend the money.

[27] Mr. Cheema understood that the borrower was to pay the broker's fee as well as any legal fees for the registration of the second mortgage. However, Mr. Cheema was not advised as to what Mr. Shums received as his fee, and he did not ask as he felt it was inappropriate to inquire. Mr. Shums gave Mr. Cheema his business card on which it was prominently displayed that Mr. Shums was a senior mortgage broker with A 2 Z.

[28] After speaking with his wife, Mr. Cheema called Mr. Shums the next day and told him they were interested in participating in the private lending mortgages

through A 2 Z. Mr. Shums advised that he would call Mr. Cheema when he had a client looking for a loan.

[29] For the first loan, Mr. Cheema received a call from Mr. Shums a few days after their first meeting and advised that he had a client who wanted to borrow \$90,000. Mr. Shums advised that the borrower had good credit with no issues on their first mortgage. The borrower required a short-term loan in order to purchase a hotel, the rate of return would be 12% per annum and the borrower would provide 12 post-dated cheques for the interest only payments.

[30] Mr. Shums provided the name of a notary who would handle the paperwork for the parties to sign and for the registration of the second mortgage in favor of the Cheemas. As discussed, the Cheemas attended at the notary's office with a bank draft to be deposited to the notary's trust account. In addition to a lender disclosure statement certified by Mr. Shums and signed by both the borrower and the Cheemas, the Cheemas received a document addressed to the notary outlining the terms of the loan and the Cheemas' acknowledgement that the borrower's first mortgage was in good standing.

[31] This first loan was promptly paid back by the borrowers earlier than the term of the loan. The second mortgage was cancelled on the borrower's property and the Cheemas received back their principal and 12% return on their investment.

[32] Mr. Shums brought a second opportunity for the Cheemas. This time the loan was for \$65,000. The terms were identical to the first loan on the length of the loan and the rate of return. The Cheemas attended the same notary's office and provided a bank draft and received the same paperwork as in the first loan.

[33] Once again, a second mortgage was registered on the borrower's property in favor of the Cheemas. Although the borrowers did have one NSF cheque, they promptly paid the fee as stipulated in the loan agreement and continued to pay the monthly interest payments. The loan was extended but the Cheemas ultimately

received the principal back along with the rate of return as agreed upon. With the exception of the one NSF cheque, the Cheemas had no issues with this loan.

[34] Mr. Shums does not dispute that he acted as a mortgage broker when he arranged these first two loans. There is also no dispute that the notary who finalized the paperwork for the Cheemas was referred by Mr. Shums.

[35] Shortly after the first loan was paid off, Mr. Cheema testified that Mr. Shums telephoned him and said he had another second mortgage loan if the Cheemas were interested in loaning the money. Mr. Shums told him that the borrowers (which turned out to be the Toors) were well known to him and that they needed to borrow \$100,000 to buy a house because they had been approved for a mortgage that was lower than what they needed to purchase the home.

[36] Mr. Cheema testified that Mr. Shums told him the Toors had a \$356,000 down payment of which they had already paid a deposit of \$65,000, which they were at risk of losing if they could not arrange the full purchase price. According to Mr. Shums, the Toors were in the process of selling a warehouse in India that would bring them the additional \$100,000. Once the warehouse was sold they would be in a position to pay back the loan to the Cheemas. The loan would be registered as a second mortgage against the property they intended to purchase.

[37] According to Mr. Cheema, Mr. Shums had already completed the background checks including a credit check with the credit bureau, and confirmed that the Toors were gainfully employed as a trucker and as a cook, that their adult son was employed at the airport with a federal security clearance, and that the three Toors had a combined monthly income of \$16,000.

[38] Mr. Cheema testified that Mr. Shums told him that he knew the Toors and had helped them with loans previously.

[39] In cross-examination, Mr. Cheema said the verification of the Toors' finances and employment was provided orally in the same manner as the first two loans. Mr. Cheema explained this information was being provided by Mr. Shums: a

professional with whom he already worked and trusted. As such, he had no concerns regarding the Toors' ability to pay back the loan.

[40] Mr. Cheema testified that on August 25, 2017, he received an email from Mr. Shums. This email from Mr. Shums was tendered into evidence. It reads:

Hi Ishwant,

The above clients have purchased a property for \$1.45mn they have a mtg approved by G&F Financial for \$1mn they have \$356K down payment they need \$100K attached.

[Emphasis added]

[41] Attached to this email was a commitment letter dated July 28, 2017 from Gulf and Fraser Fisherman's Credit Union ("G & F Credit Union") to the Toors for a mortgage for \$1 million for the property they intended to purchase. I note that only two of the three pages of this commitment letter were attached to the email.

[42] As well, a residential appraisal report for the said property was also attached to the email, which showed a property appraisal at \$1,460,000.

[43] Mr. Cheema testified that he discussed the potential loan with his wife. Given that Mr. Shums had verified everything and the two previous loans were completed without any issues, they decided that it was a safe investment.

[44] The Cheemas withdrew the money for the third loan from their home equity line of credit.

[45] On August 30, 2017, Mr. Cheema received a second email from Mr. Shums with further instructions:

Pls prepare draft of \$100K in the name of clients: Devinder S. Toor/Sukhbir K Toor/Simrandeep S Toor

Pls drop off the draft in the office of Sweeny Sarao Notary Public
400, 8148, 128 St, Surrey, BC V3W 1R1 604-5959

[Emphasis added]

[46] Mr. Cheema testified that he believed Mr. Shums was acting in his capacity as a mortgage broker. In both emails, Mr. Shums signs off as “Ayyaz, Senior Mortgage Consultant - A 2 Z Mortgages”.

[47] Mr. Shums told him that the registration of the second mortgage in favour of the Cheemas would take approximately 6 weeks, given that the borrowers were selling their existing home and purchasing a new one. This was different than what had occurred in the first two loans, where the borrowers already had a property for the second mortgage to be registered against immediately.

[48] Mr. Cheema testified that this did not raise any concerns for him. Mr. Cheema trusted Mr. Shums in his role as an experienced mortgage broker and was led to believe that verifications had already been done by Mr. Shums.

[49] On September 1, 2017, the Cheemas attended the notary, Ms. Sarao’s office. Mr. Shums was not present. Mr. Cheema testified that Mr. Shums telephoned that he would not be able to attend because he was stuck in a meeting.

[50] At Ms. Sarao’s office, the Cheemas received a certificate of independent legal advice signed by the Toors. Attached to the certificate was a completed and signed Land Title Act Form B containing the second mortgage in favour of the Cheemas that was likely to be registered with the Land Title Office once the sale completed. As well, a promissory note signed by the Toors was attached which set out the terms of the loan including its duration (September 28, 2017 to August 28, 2018) along with twelve post-dated cheques made out to the Cheemas in the amount of \$1,000 per month for the interest only payments.

[51] A document titled “Order to Pay” was signed by the Toors addressed to the Cheemas stating:

We the undersigned hereby confirm that we are borrowing \$100,000 from the lenders to purchase the subject property, and in the event the purchase of the property does not complete on or before September 15, 2017 then will return the \$100,000 back to the lender.

[52] After meeting with Ms. Sarao, Mr. Cheema saw the Toors in the office as well.

[53] Upon receiving these documents and the post-dated cheques, the Cheemas handed over the bank draft for the \$100,000 to the Toors. The Cheemas expected that the purchase would complete that day because Mr. Shums had told them so.

[54] The next day, Mr. Cheema received a telephone call from Mr. Shums advising the sale had not completed as planned but was extended to September 15. Mr. Cheema testified that he had no concerns because Mr. Shums assured him that it was simply a procedural delay. However, by September 15, the sale had not completed and Mr. Shums told Mr. Cheema that the completion date had been extended to the end of September.

[55] Mr. Shums assured Mr. Cheema that the delay was not a financial one. A contract of purchase and sale addendum dated September 12, 2017 was provided to the Cheemas confirming the extension to September 30.

[56] Once again, the Cheemas were not concerned, especially since the first post-dated cheque dated September 28, 2017 was processed and deposited into the Cheemas bank account.

[57] Unfortunately, the loan agreement did not proceed as planned. Around the end of September, Mr. Shums telephoned Mr. Cheema and advised that the Toors were not going ahead with the completion of the sale of the property.

[58] Mr. Cheema testified that Mr. Shums told him he was working on getting the Cheemas' money back from the Toors. Mr. Shums arranged a meeting at Ms. Sarao's office with the Toors and Cheemas sometime in October 2017.

[59] At this meeting, Mr. Toor advised that their daughter took their money and left for India. He advised Mr. Cheema that they were still in the process of selling their warehouse so that they could pay back the loan. Mr. Toor provided an additional post-dated cheque dated November 29, 2017 for \$100,000.

[60] Mr. Shums assured Mr. Cheema that he knew the Toors and should not be concerned about his money.

[61] The next post-dated cheque, dated October 28, 2017, bounced.

[62] The Cheemas subsequently learned at another meeting that the Toors had deposited the loan money on September 1 and then had a series of bank drafts made out totalling over \$90,000, along with credit card payments and cash withdrawals on the same day. Mr. Cheema testified that he was very upset to learn that the Toors had spent the money on items not related to the original purpose.

[63] Mr. Cheema asked Mr. Shums for documentation relating to the verifications he had done of the Toors' financial background. Mr. Cheema testified that Mr. Shums claimed that he lost them when he moved offices.

[64] After the October post-dated cheque bounced, Mr. Shums arranged to have the Toors provide cash payments to the Cheemas. Mr. Cheema collected these from the offices of A 2 Z.

[65] However, the November post-dated cheques for the principal and interest bounced as did all of the other post-dated cheques thereafter.

[66] Mr. Cheema subsequently learned that the Toors did not in fact own a home but rather were renting a home in Surrey. Mr. Shums had taken Mr. Cheema to the home but no one was there.

[67] Another meeting organized by Mr. Shums occurred in January 2018. At this meeting Mr. Toor provided Mr. Cheema a cheque for \$10,000. Mr. Cheema testified that Mr. Shums made representations that he had arranged to get the money paid back.

[68] Mr. Cheema says that Mr. Shums was always the point of contact for him to get the money back from Mr. Toor and was involved throughout. Both Mr. Shums and Mr. Toor assured Mr. Cheema that the money would be returned to him.

[69] To date, the Toors have paid \$12,000 in interest payments and \$16,000 towards the principal. The payments were staggered from September 2017 to August 2019. The Toors have not paid any money since then.

[70] Mr. Cheema says that \$84,000 is still owing, plus the interest he has had to pay on this amount on the home equity line of credit.

[71] In cross-examination, it was put to Mr. Cheema that all investments come with risks. Mr. Cheema responded that he did not believe there was a risk in loaning the money to the Toors because of the reassurances he received from Mr. Shums. He believed that Mr. Shums had done all of the due diligence including credit checks and income verification, and that the Toors were previously known to Mr. Shums.

[72] It was suggested that given the different nature of the third loan, Mr. Cheema ought to have sought legal advice before loaning the money to the Toors.

Mr. Cheema replied that he did not think he needed to because he relied on Mr. Shums' professional advice.

Ayyaz Shums

[73] Mr. Shums received his licences in 2005 to work as both a real estate agent and mortgage broker after successfully completing the required courses at the University of British Columbia.

[74] As I have noted earlier, Mr. Shums worked as a mortgage broker at A 2 Z, which he founded in 2007. He was a director at A 2 Z from its inception until January 2018. After that, his wife, Mrs. Asma Shums became the sole director of A 2 Z until it closed in 2022. During his time as a mortgage broker, Mr. Shums brokered over 300 mortgages.

[75] Mr. Shums explained that he received referrals from realtors and accountants, and through advertisements in local newspapers. When brokering any kind of mortgage, his initial step was to obtain the borrower's history including their financial information and bank statements. That information was then verified, including through a credit check. This step also applied to private lending.

[76] In private lending, Mr. Shums testified that the terms of the loan are agreed between lender and broker and he then discusses the terms with the borrower. If the

borrower agrees then the documents are signed but if they do not agree, the deal does not proceed.

[77] Mr. Shums testified that he had no influence on the terms of the loans, but rather the lender decides at what rate they wish to lend their money. Mr. Shums stated that the interest rate on the first two loans was set by Mr. Cheema.

[78] Once the borrower agrees, both parties sign a commitment letter that is drafted by Mr. Shums. He reiterated that the terms of the loan are determined by the lender. The commitment letter sets out the rate of interest, duration of the loan, charges for late payments and NSF cheques, and brokerage fees.

[79] There is no dispute that Mr. Shums drafted a commitment letter for the first two loans. Mr. Shums testified that Mr. Cheema provided the terms for the loans. I note that this point was not put to Mr. Cheema in cross-examination.

[80] A lender disclosure statement is also typically prepared by the mortgage broker. This sets out what terms and conditions the lender has agreed to. Mr. Shums stated that commitment letters and lender disclosure statements were prepared for the first two loans, which were tendered at trial. However, none were prepared for the third loan with the Toors.

[81] Once the commitment letter is signed, documents are then sent to the lender's notary, who drafts and registers the second mortgage in the lender's name. Mr. Shums stated that the mortgage broker is not responsible for this step of the process. However, it was not disputed that Mr. Shums sent the Cheemas to a notary of his choosing.

[82] Mr. Shums also testified that once the borrower and lender agree to the terms, documents are provided to the lender including the credit check, income documents, mortgage documents and the commitment letter.

[83] Mr. Shums received a 2 to 3% commission which is negotiated between the borrower and mortgage broker.

[84] In regards to the third loan, Mr. Shums testified that Mr. Toor simply walked into his office looking to obtain a mortgage. Mr. Shums told him that he was no longer involved in mortgage brokering and then referred him to a few banks. Mr. Shums claims that he did not have any previous dealings with the Toors.

[85] I note that at the time, Mr. Shums was the sole director of A 2 Z, which is in the business of brokering mortgages. It is puzzling as to why Mr. Shums would send Mr. Toor away rather than try to broker the mortgage through his company. Surely, even if Mr. Shums was no longer himself doing mortgage brokering, there must have been other brokers at A 2 Z who could have assisted Mr. Toor in obtaining a mortgage.

[86] Mr. Shums stated that a few weeks later, Mr. Toor attended A 2 Z's office again seeking assistance and stated that the Toors required \$100,000 to \$125,000 to complete the property purchase.

[87] Initially, Mr. Shums denied receiving any information from the Toors but admitted that he told them he would speak to the lender. However, when pressed in cross-examination, Mr. Shums acknowledged that he received the following information from Mr. Toor orally:

- a) that the Toors had been approved for a \$1 million mortgage;
- b) that the Toors had a combined monthly income of \$16,000; and
- c) that the Toors had a \$356,000 down payment.

[88] He contends that although he received this information from Mr. Toor, he did not verify any of it, including any credit checks, because he was not acting as a mortgage broker.

[89] Mr. Shums denies having helped Mr. Toor obtain the mortgage from G & F Credit Union. He points to the fact that the residential appraisal report lists another brokerage and broker who obtained the appraisal. I note that this report is dated July 31, 2017.

[90] When it was put to him that Mr. Toor stated in his examination for discovery that Mr. Shums helped to get the first mortgage approved, Mr. Shums denied this. He says that Mr. Toor asked for names of banks, which he provided.

[91] Mr. Shums told Mr. Toor that he would speak to his lender and if the lender agreed, the two of them could sort out the terms and conditions of the loan themselves. Since Mr. Toor did not have a scanner, he asked Mr. Shums to scan the commitment letter from G & F Credit Union and email it to Mr. Cheema.

[92] Mr. Shums confirmed that he sent the August 25 email to Mr. Cheema. I note the email also included the appraisal, which Mr. Shums failed to mention having included it in the email.

[93] To support his position that he did not broker the loan, Mr. Shums points to the fact that there is no commitment letter or lender disclosure statement for this loan. Mr. Shums says that he advised the Cheemas to do their own due diligence, review the documents and then decide whether to loan money to the Toors.

[94] Mr. Shums acknowledged that he did not tell the Cheemas that he was no longer doing mortgage brokering even though he was still licenced and was the sole director of A 2 Z.

[95] Mr. Shums' version of what occurred on September 1, 2017 differs from Mr. Cheema's version. Mr. Shums says that he told the Cheemas and Toors to attend the notary's office where he would introduce the parties. According to Mr. Shums, he chose Ms. Sarao to handle the paperwork because the Toors' English skills were lacking and Ms. Sarao spoke the same language as them.

[96] Mr. Shums says he arrived at Ms. Sarao's office around 3:30 to 4:00 pm. Mr. Cheema stated that he arrived at 6:00 pm. Mr. Shums testified that when he arrived, the Toors and Cheemas were already in Ms. Sarao's office.

[97] Mr. Shums told them that they should decide amongst themselves the terms and conditions of the loan and that Ms. Sarao would assist them in signing the paperwork. Mr. Shums says he then walked out and had no involvement after that.

[98] Although he was a mortgage broker operating his own brokerage, Mr. Shums insists that he did not broker the loan. However, when pressed in cross-examination on whether he ever advised the Cheemas that he was not acting as a mortgage broker on the Toors' loan, in writing or orally, Mr. Shums once again responded that he was not the broker and that was why he directed them to meet in person and have Ms. Sarao work out the details of the loan.

[99] Mr. Shums' account of how he learned about the Toors' inability to complete the sale of house is also different. Mr. Shums testified that Mr. Cheema told him this information. Mr. Cheema says the opposite.

[100] Mr. Shums testified that he told Mr. Cheema to get his money back.

[101] Mr. Shums also testified that when Mr. Cheema was unable to reach the Toors, Mr. Shums would call Mr. Toor several times a day to help the Cheemas get their money back. He says he did this out of good faith.

[102] Mr. Shums said that whenever Mr. Shums met with Mr. Toor, Mr. Toor made up a lot of stories on how he would repay the Cheemas. Mr. Shums said he eventually told Mr. Cheema to hire a lawyer to get his money back.

[103] In cross-examination, Mr. Shums acknowledged that he met with Mr. Toor and Mr. Cheema a number of times to help Mr. Cheema get his money back. In fact, a few meetings were even held at the offices of A 2 Z. Mr. Shums also accepted cash payments from Mr. Toor to give to Mr. Cheema. Mr. Shums reiterated that he did this in good faith, and not because he had brokered the loan or was worried about being sued by the Cheemas.

[104] In cross-examination, Mr. Shums denied that the reason he ceased to be a director of A 2 Z in January 2018 was due to his concern that the Toors' loan was becoming a problem and he could be liable.

Aasma Shums

[105] Mrs. Aasma Shums is Mr. Shums' wife. She appeared as a representative of the defendant, A 2 Z. Mrs. Shums confirmed that A 2 Z is no longer operational.

[106] Mrs. Shums confirmed that when A 2 Z was first served with the Notice of Civil Claim in September 2019, she looked for the relevant documents. She testified to locating documents relating to the first two loans but that there was no file on the Toors' loan or mortgage.

ANALYSIS

Credibility and Reliability

[107] There are two main witnesses in this trial and I must assess their evidence to determine whether they are credible (i.e., their truthfulness and honesty) and reliable (i.e., their evidence's accuracy).

[108] My assessment of the evidence requires consideration of a number of factors. These were helpfully summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the

probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[109] I also find the comments of Justice Ballance in *Erickson v. Sibble*, 2012 BCSC 1880, to be instructive:

[8] It is accepted as a general rule that judicial assessment of credibility starts on the footing that the witness is telling the truth: see *Halteren v. Wilhelm*, 2000 BCCA 2. However, truthfulness and reliability are not always one and the same. A witness may sincerely believe that she is telling the truth, but lack the sufficient memory, perspective, cognitive ability or narrative capacity to give reliable testimony. Alternatively, a witness “may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours the desired outcome”: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. And there is always the possibility that a witness may simply choose to lie for whatever reason.

[110] Finally, I can believe some, all, or none of the evidence of a witness and that credibility determinations “may not be purely intellectual and may involve factors that are difficult to verbalize”: *R. v. R. E.M.*, 2008 SCC 51 at para. 49. I must not make credibility findings based on emotion, stereotypes, guesswork, or other impermissible reasoning. Credibility and reliability must be grounded in reason and made as objectively as possible.

[111] Having regard to all of his evidence, I find Mr. Cheema was a very honest, careful and balanced witness. I am of the view that Mr. Cheema’s evidence better aligns with the documentary evidence. I found him to be courteous, and in cross-examination he was not argumentative or evasive, nor did I find him to give contradictory evidence.

[112] Moreover, the evidence of Mr. Cheema was plausible. This is in keeping with the comment noted from *Bradshaw* that the plausibility of the account is a crucial component in assessing credibility.

[113] In contrast, I find that Mr. Shums was not a credible witness. There were some important facts that he chose not to address in direct examination. When confronted with this evidence in cross-examination, he often shifted to his fall-back

answer that he did not broker the Toors' loan as if that would absolve him from any liability.

[114] As well, his responses on cross-examination were frequently argumentative and non-responsive. Rather than answering the question put to him, Mr. Shums would respond with a question to counsel for the Cheemas. As well, Mr. Shums was reluctant to make even modest concessions.

[115] His repeated position that he was not a broker on the loan is simply not believable nor does it have an air of reality. Most importantly, I find his version of the events inherently improbable, as I will explain.

[116] I also find him not to be a reliable witness. For example, when it was put to Mr. Shums that the Toors' loan was only the Cheemas' third loan, Mr. Shums responded that he did not know. He said that, because he had so many clients and lenders at the time, he did not keep track of how many loans each lender participated in. This is despite that Mr. Shums did on average 30 deals per year.

[117] I find that the evidence of Mr. Shums is neither credible nor reliable. His evidence was self-serving and argumentative. He did not appear to make an honest attempt to recall the events; rather, he fabricated portions of his evidence in an effort to bolster his case.

Fraudulent Misrepresentation

[118] In my view, the essential issue is one of fraudulent misrepresentation. That is, whether the defendants, Mr. Shums and the Toors, made material fraudulent representations to the Cheemas that were relied on when they entered into a contract to loan the Toors \$100,000.

[119] In the alternative, the Cheemas also submit that, even if the Court finds that the defendants did not make fraudulent misrepresentations, they can still be found to have made negligent misrepresentations. As noted above, given my findings on the first issue, I will not address the alternative grounds.

Legal Principles

[120] The elements of the test for fraudulent misrepresentation are well-established: *Wang v. Shao*, 2019 BCCA 130 at para. 24, leave to appeal to SCC ref'd, 38704 (14 November 2019). As summarized in *Van Beek v. Dodd*, 2010 BCSC 1639 at para. 42, the plaintiff must establish five elements:

1. the defendant made a representation of fact to the plaintiff(s);
2. the representation was false in fact;
3. the defendant knew that the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
4. the defendant intended for the plaintiffs to act on the representation; and
5. the plaintiffs were induced to enter into the contract in reliance upon the false representation and thereby suffered a detriment.

See also *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25.

[121] Given the seriousness of an allegation of fraud, the quality of the evidence required of the plaintiff to prove the elements must be commensurate to the seriousness of the allegation: *1104318 BC Ltd. v. Dr. Paul Wittenberg, Inc.*, 2023 BCSC 1520 at para. 122, citing *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70 at paras. 162–163. That said, there is no heightened standard of proof nor any difference in the level of scrutiny applied by the court—the burden of proof on the plaintiff remains that on a balance of probabilities: *Angel Acres* at para. 162, citing *F.H. v. McDougall*, 2008 SCC 53.

[122] Other considerations relevant to proving fraudulent misrepresentation were outlined by Justice Verhoeven in *Satnam Education Foundation v. MB Dream Construction & Supplies Ltd.*, 2020 BCSC 1089:

[30] The false representation must be one of fact. However, a statement of future intention is a statement of fact: *Punto e Pasta Manufacturing Inc. v. Henderson Development (Canada) Ltd.*, 2009 BCSC 37, at para. 146.

...

[31] A fraudulent misrepresentation of fact can be made orally, or in writing, or by conduct intended to induce the representee to believe the existence of a non-existent fact: *Sanghera [v. Danger Figure Centre (Burnaby) Ltd. (c.o.b. Orient Retreat)]*, 2007 BCSC 1308] at para. 10.

[32] In *Sanghera*, Garson J. provided the following concise summary:

15 In summary, the applicable legal principles provide that an oral fraudulent misrepresentation can be used to nullify a written contract even if the written contract contains a clause stipulating that no terms other than those in the written contract are to be considered. When a fraudulent representation is made to induce the other party to enter the contract, the contract cannot then be used as protection for the fraudulent party. Moreover, although parol evidence is generally not admissible to contradict the terms of a written contract, in the case of fraudulent misrepresentations parol evidence is not used to determine the terms of the contract, rather, it is used to determine the intentions of the parties and why they entered into the contract. This deals with the validity of the contract as a whole. An oral statement as to future intentions may also be found to be a fraudulent misrepresentation if the defendant is proven to have falsely stated his future intention.

[33] The representee must demonstrate that the false representation induced it to enter into the contract. However, the representation need not be the only factor or even the most important factor that led to the making of the contract. It is sufficient if the representation is only one of several factors contributing to the decision to enter into the contract: *Battrum v. MacKenzie*, 2010 BCSC 1285 [*Battrum*], at paras. 24-25.

[34] Half-truths may be the same as lies. An incomplete statement can be as misleading as a false one: *Battrum*, at para. 10, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canadian Law Book Inc., 1999).

Did the Defendants Make Fraudulent Misrepresentations to the Plaintiffs?

[123] On a review of all of the evidence, I have no hesitation in finding on a balance of probabilities that Mr. Shums and the Toors made material fraudulent misrepresentations to the Cheemas:

- a) Mr. Shums and the Toors made representations to the Cheemas about the Toors' financial situation.
- b) Those representations of the Toors' finances were in fact false.

- c) Mr. Shums and the Toors knew those representations were false when they were made or else they made the representations recklessly, not knowing if they were true or false.
- d) Mr. Shums and the Toors intended the Cheemas to act on the representations by entering into a contract to loan money to the Toors.
- e) The Cheemas did in fact rely on this information in entering into the contract to loan the money in question to the Toors, and suffered a detriment as a result.

[124] There is no dispute that Mr. Shums was a licenced mortgage broker at the relevant time and that he was the mortgage broker on the first two loans that the Cheemas entered into with borrowers brought to the Cheemas by him.

[125] I am satisfied that the Toors were known to Mr. Shums previously. Mr. Toor's evidence is that he had known Mr. Shums for five to six years. This is consistent with Mr. Cheema's evidence, which I accept, that Mr. Shums told Mr. Cheema that he knew the Toors. I do not accept Mr. Shums' evidence that Mr. Toor simply walked into A 2 Z offices to ask for a loan and, rather than helping Mr. Toor obtain a mortgage through A 2 Z, Mr. Shums provided names of banks to Mr. Toor.

[126] Mr. Shums brokered the loan between the Toors and Cheemas. I do not accept Mr. Shums' evidence that he was not acting as a mortgage broker. The evidence simply does not support this. Mr. Toor's evidence is that Mr. Shums not only brokered the loan with the Cheemas but also arranged the first mortgage with G & F Credit Union.

[127] In the two emails in August 2017, Mr. Shums referred to the Toors as the "clients" and signs off on these emails as "Ayyaz, Senior Mortgage Consultant -A 2 Z Mortgages." As well, nowhere in emails nor orally does Mr. Shums ever advise Mr. Cheema that he is not acting as a mortgage broker on the loan.

[128] In regards to the meeting at Ms. Sarao's office on the evening of September 1, 2017, I prefer the evidence of Mr. Cheema that Mr. Shums was not in attendance. It is not plausible that he simply introduced the parties, told them to determine the terms and conditions of the loan with Ms. Sarao and then left. Firstly, the certificate of independent legal advice would have been signed before the Toors attended Ms. Sarao's office. This certificate includes a promissory note setting out the terms and conditions of the loan. Given that Mr. Cheema stated that he attended Ms. Sarao's office at 6:00 pm, it simply cannot be that the terms and conditions were settled in her office and that the Toors then sought independent legal advice. Accordingly, I find that Mr. Shums provided all of the information to Ms. Sarao prior to the Cheemas attending her office that evening.

[129] Mr. Shums argues that he could not have brokered the loan because no commitment letter was issued. In my view, the absence of a commitment letter does not support Mr. Shums' position. A commitment letter is simply an intention to proceed with a loan. It is not an actual mortgage document or a contract.

[130] It is notable that Mr. Shums could have but chose not to call Ms. Sarao. She could have confirmed much of Mr. Shums' assertions without breaching solicitor client privilege.

[131] Mr. Shums' repeated claim that he did not broker the loan is also implausible given the steps he took after the Toors defaulted on the loan. I accept Mr. Cheema's evidence that it was Mr. Shums who repeatedly updated Mr. Cheema on the delay in the closing of the property sale. Mr. Shums' assurances to the Cheemas that the delay was not financial was a falsity and I find that he knew that. If Mr. Shums did not in fact broker the loan, he did not need to assure the Cheemas that there were no problems with the closing. I do not accept Mr. Shums evidence that it was Mr. Cheema who told him that the Toors failed to complete the sale of the property.

[132] Furthermore, I reject Mr. Shums' evidence that he continued to assist Mr. Cheema to get his money back from the Toors only in good faith. Mr. Shums arranged meetings and also accepted cash payments from Mr. Toor to give to

Mr. Cheema. These are not actions of someone who is simply doing this in good faith. In my view, this speaks of someone who was more involved than what Mr. Shums asserts; someone who had brokered the loan from the outset and was trying to right the wrong.

[133] In regards to what was communicated by Mr. Shums, the preponderance of evidence, including documentary evidence, supports that the Cheemas were advised by Mr. Shums that the Toors had a first mortgage approved for \$1 million, that the Toors had a \$356,000 down payment and that their combined monthly income was \$16,000.

[134] These details and the background information on the Toors provided by Mr. Shums were very detailed. I have no hesitation in accepting that Mr. Shums did in fact provide this information both by email and orally over the telephone to Mr. Cheema. This is not boiler plate information such that Mr. Cheema could have made this up.

[135] In my view, it is reasonable to infer that Mr. Shums knew that this representation was false when it was made to the Cheemas, or that Mr. Shums otherwise made the false representation recklessly, not knowing if it was true or false. Either way, it was a fraudulent misrepresentation.

[136] The Cheemas were also led to believe that Mr. Shums in his capacity as a mortgage broker conducted the usual verifications regarding credit check and income verification as he had done in the two previous loans. They were induced to act on the basis that this information was correct.

[137] Of course, this information turned out to be false. Mr. Toor acknowledged in his examination for discovery that he only had \$15,000 as a down payment and that the rest was secured through financing from the bank, the loan from the Cheemas and the remaining amount would come from a third mortgage from the seller of the property.

[138] In the context of a fraudulent misrepresentation, half truths may be the same as lies. The Cheemas were provided with incomplete information from Mr. Shums and the Toors in regards to the down payment and the third mortgage. This, in my view, was intended to mislead the Cheemas. Had the Cheemas been provided with the full picture of the financial position of the Toors, they likely would not have gone through with the loan. I find that Mr. Shums did not provide all of the information to the Cheemas because he knew that the Cheemas would likely not go ahead with the loan if they knew all of the facts.

[139] Mr. Shums argues that he only relayed the information that Mr. Toor provided him and told the Cheemas to do their own due diligence. He acknowledged that he was stating facts as relayed from Toors as if true. However, at no point does Mr. Shums ever tell the Cheemas, “this is what the Toors have said, I have not done any verifications”. Once again, Mr. Shums fall back response is that he didn’t think he needed to because he was not working in his capacity as a mortgage broker. He takes no responsibility on his end and I reject his explanation.

[140] I also find it implausible that the Cheemas were told to do their own due diligence given they had no access to the credit bureaus as Mr. Shums does and were not provided with employment details of the Toors other than cursory information. This simply makes no sense given that Mr. Shums is experienced and had the tools available to him in order to do the required due diligence. I reject Mr. Shums’ argument that the Cheemas were savvy investors and should have and could have done their own due diligence. I find that they were not.

[141] Given my finding that the defendants are liable for fraudulent misrepresentation, it is unnecessary for me to consider the plaintiffs’ alternative argument that the defendants are liable for negligent misrepresentation.

Contributory Negligence

[142] Mr. Shums argues that because the loan to the Toors was different than the two previous loans brokered by him, the Cheemas should have made further inquiries as a person acting reasonably would have done so. Mr. Shums once again

falls back on his argument that he was not acting as a broker on the Toors' loan and, because of that, the Cheemas ought to have made further inquiries including by verifying the Toors' financial information that was relayed to them by Mr. Shums. As I have found that Mr. Shums did in fact broker the loan and that he told the Cheemas that he himself had completed the financial verification, this argument must fail.

[143] It must be remembered that while in the case of a negligent misrepresentation a plaintiff may be contributorily negligent because of a failure to investigate where it would have clearly been prudent, it "is not a defence to fraudulent misrepresentation": *Chow v. Pang*, 2021 BCSC 1599 at para. 42; *Neidermayer v. Gillies*, 2012 BCSC 143 at para. 54; *Froese v. Sharif*, 2020 BCSC 1914 at para. 162.

[144] I agree with the Cheemas' submission that Mr. Shums cannot argue that, "while I misled you, actively or recklessly, you are partially at fault for believing me".

[145] Accordingly, I am unable to conclude that the Cheemas were contributorily negligent.

Damages

[146] In *Satnam Education Foundation v. MB Dream Construction & Supplies Ltd.*, 2020 BCSC 1089, Justice Verhoeven stated:

[100] In *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, the Supreme Court contrasted the measure of damage in contract and tort:

39 The measure of damages in contract and for the tort of negligent misrepresentation are:

Contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.

Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made.

[101] The measure of damages in a case of fraudulent misrepresentation is the amount of money required to put the plaintiff in the position that it would have occupied had the statement not been made: *Battrum*, at para. 31; *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd.*, [1982] 2 W.W.R. 385, 33 B.C.L.R. 291, at para. 17.

[147] The Cheemas submit that the Toors are liable to pay interest at the rate under the promissory note and mortgage that they signed, being 24% if the loan was not paid back within the one-year period as agreed upon. The principal owing is \$84,000. Interest from August 31, 2018 to July 11, 2023 totals \$98,038.36. The total judgment in favour of the Cheemas against the Toors is therefore \$182,038.36.

[148] As there is no evidence to the contrary, I order the Toors pay the Cheemas \$182,038.36 in damages.

[149] Additionally, Mr. Cheema testified that the source of the money loaned to the Toors was from their home equity line of credit and that they continued to pay interest on that line of credit. Mr. Cheema says the amount of interest paid from August 31, 2018 to July 11, 2023 is \$14,849.88. Mr. Shums does not dispute this number.

[150] The Cheemas argue that Mr. Shums is liable to pay the principal along with the interest that the Cheemas have paid as noted above. This amount totals \$98,849.88.

[151] Mr. Shums argues that the Cheemas should only be entitled to damages from Mr. Shums in the amount of \$14,849.88, and that it is unreasonable for Mr. Shums to pay the \$84,000 which he did not borrow.

[152] In my view, an award as suggested by the Cheemas does not put them in the same position they would have been in had the misrepresentations not been made. Rather, such an award would enrich them. I agree with Mr. Shums that he would be put in a worse position, in a situation where he gained absolutely no benefit.

[153] Accordingly, I order that Mr. Shums pay \$14,849.88, which is the interest paid by the Cheemas on their line of credit from the date of default to trial.

CONCLUSION

[154] In summary, I conclude that:

- a) The Toors and Mr. Shums misrepresented the financial details of the Toors.
- b) These representations of intention were false in fact.
- c) The Toors and Mr. Shums knew the representations were false or else were reckless in not knowing whether the representations were true or false.
- d) The Toors and Mr. Shums intended that the representations be acted upon, more specifically by inducing the Cheemas to enter the contract to loan the Toors \$100,000.
- e) The Cheemas were in fact induced to enter the loan with the Toors in reliance upon these statements.
- f) The Cheemas suffered damage caused by their reliance on the statements.
- g) The Cheemas were not contributorily negligent as it is not a defence to my finding of fraudulent misrepresentation.
- h) The Cheemas are entitled to damages for the defendants' fraudulent misrepresentations that induced them enter the loan.

[155] To reiterate, as a result of their fraudulent misrepresentations, I order that the Toors pay the Cheemas \$182,038.36 in damages, and that Mr. Shums pay the Cheemas \$14,849.88 in damages.

Costs

[156] Lastly, I find that the Cheemas are clearly the successful party, and I therefore order that they are entitled to their costs at Scale B.

[157] Should any issue arise from this judgment in respect of which clarification is required, the parties have leave to speak to it at a date and time convenient to counsel and the Court within 30 days of these reasons.

“Girn J.”