

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1052387 B.C. Ltd. v. Forjay Management Ltd.*,
2024 BCCA 81

Date: 20240306
Docket: CA49315

Between:

1052387 B.C. Ltd.

Appellant
(Respondent)

And

Forjay Management Ltd.

Respondent
(Petitioner)

And

Reliable Mortgages Investment Corp.

Respondent
(Respondent)

Before: The Honourable Chief Justice Marchand
The Honourable Justice Griffin
The Honourable Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated August 9, 2023 (*Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2023 BCSC 1368, Vancouver Docket H170498).

Counsel for the Appellant:

C.E. Hunter, K.C.
J.E. Roos

Counsel for the Respondents:

G. Nesbitt
T. Posyniak

Place and Date of Hearing:

Vancouver, British Columbia
January 19, 2024

Place and Date of Judgment:

Vancouver, British Columbia
March 6, 2024

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Voith

Summary:

The appellant challenges the chambers judge's finding that its mortgage and property transfer were fraudulent, after a show cause hearing pursuant to s. 9 of the Fraudulent Preference Act. The appellant says that the trial judge erred in finding that the respondents had standing as judgment creditors at the time of the impugned transactions and erred in finding the matter was suitable for summary determination. Held: Appeal dismissed. The appellant expressly resiled from its position on standing in the underlying proceedings, and it is not in the interests of justice to consider that argument on appeal. The chambers judge did not err in exercising her discretion to proceed by way of summary trial.

Reasons for Judgment of the Honourable Justice Griffin:**Introduction**

[1] This appeal raises questions regarding the interpretation of the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164 [*FPA*], considered in the context of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 [*FCA*].

[2] The appeal arises from a successful “show cause” hearing under s. 9(1)(a) and (2) of the *FPA* brought by the respondents, Forjay Management Ltd. and Reliable Mortgages Investment Corp. (for ease of reference I will refer to the respondents together as “Forjay”). Justice Fitzpatrick found that the appellant, 1052387 B.C. Ltd. (“105”), mortgaged and transferred a commercial strata property to delay, defeat and hinder Forjay’s recovery of costs owing pursuant to a judgment.

[3] The appellant submits that while s. 1 of the *FCA* creates certain remedies for “creditors and others” who allege a fraudulent conveyance, s. 9(1)(a) of the *FPA* has a narrower scope and provides for a summary process for determining fraudulent conveyance claims of a “judgment creditor” only.

[4] The appellant says that the chambers judge erred in applying the process under s. 9(1)(a) and (2) of the *FPA* to determine the fraudulent conveyance claims brought by Forjay, because the transactions occurred before Forjay was a judgment creditor. The chambers judge’s reasons are indexed at 2023 BCSC 1368 (the “Reasons”).

Relevant Legislation

[5] Forjay's application was brought pursuant to s. 9(1)(a) of the *FPA*. Sections 9 and 10 of the *FPA* provide:

9 (1) If

(a) a judgment creditor alleges that the debtor or person who has to pay has made a conveyance or other disposition of any of that person's land, which conveyance or other disposition is void, as being made to defeat, hinder, delay, prejudice or defraud creditors, or

(b) a creditor or assignee for the benefit of creditors alleges that a disposition is void under sections 2 to 6,

it is not necessary to institute an action to set aside the disposition.

(2) In the circumstances described in subsection (1), an application may be made to the Supreme Court by the judgment or other creditor or assignee or person entitled to the money, calling on the judgment debtor or person who is to pay, and the person to whom the conveyance or other disposition has been made or who has acquired any interest under it, to show cause

(a) why the land, or a competent part of it, should not be sold to realize the amount payable under the judgment, or

(b) why the disposition or payment should not be set aside and the property returned or otherwise dealt with as the court may direct.

(3) In an application under this section, a judgment creditor may claim to be entitled to register the judgment against

(a) the land in respect of which the application is made, or

(b) the judgment debtor's or another person's interest in the land.

10 (1) On an application under section 9, the proceedings may be brought either in a summary way or by the trial of an issue, or by inquiry before an officer of the court, or by an action or otherwise, as the court believes necessary or convenient, for the purpose of ascertaining the truth of the matters in question, and whether the land, or the debtor or other person's interest in it, is liable for the satisfaction of the judgment.

(2) On application by a judgment creditor under section 9, the court may order that the judgment creditor is entitled to register the judgment against

(a) the land in respect of which the application is made, or

(b) the judgment debtor's or another person's interest in the land.

[Emphasis added.]

[6] The *FCA* sets out when a conveyance or disposition of property may be void. Section 1 provides:

1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies

- (a) a disposition of property, by writing or otherwise,
- (b) a bond,
- (c) a proceeding, or
- (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

[Emphasis added.]

[7] Defences to a claim that a property transaction is fraudulent are set out in s. 2 of the *FCA*:

2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

[8] It is accepted that the *FPA* and *FCA* are part of a legislative scheme serving related purposes, and the two statutes must be read harmoniously, consistent with the presumptions of coherence and consistent expression: Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto, Ontario: LexisNexis, 2022) at 407; *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2016 BCCA 432 at para. 60.

[9] Despite their related purposes, the *FPA* and *FCA* have differences.

[10] There are sections of the *FPA* that address an insolvent debtor who takes actions to give some of the person's creditors a preference over other creditors, such as ss. 2–5. In *C.I.B.C. v. Boukalis*, 34 DLR (4th) 481, 1987 CanLII 2694 (B.C.C.A.) [*Boukalis*] this Court noted that the sections of the *FPA* prohibiting fraudulent preferences only protect persons who were “creditors” at the time of the preference, not persons who may become creditors. In contrast, the *FCA* protects

“creditors and others” and therefore includes persons who may become creditors: *Boukalis* at paras. 8–10.

Background

[11] The underlying proceeding commenced as a foreclosure proceeding in relation to a property development in Langley, BC, known as Murrayville House (the “Development”). The property was owned by 0981478 B.C. Ltd. (“098”). Forjay held first and second mortgages against the Development.

[12] A numbered company, 625536 B.C. Ltd., (“625”) held a third-ranking mortgage on the Development. Mohinder Gosal is a director of 625, as is his wife Harbhajan Kaur Gosal who is also the sole shareholder. Mr. Gosal is the controlling mind of 625.

[13] Mr. Gosal is also the director, the sole shareholder and the controlling mind of the appellant.

[14] The property which is the subject of the alleged fraudulent conveyance is a commercial strata unit that was owned by 625 located in Surrey, BC (the “Property”). This was 625’s only asset and 625 later mortgaged it in favour of the appellant and transferred it to the appellant in October 2021 (the “Property Transactions”).

Foreclosure Proceedings Involving 625

[15] In 2017, before the Property Transactions occurred, the Development failed and foreclosure proceedings ensued. Forjay’s foreclosure proceeding was commenced in August 2017. 625 disputed the mortgage ranking and amounts owed to Forjay in a number of applications and appeals.

[16] There were many stages to the foreclosure litigation and many judgments that went against 625. The chambers judge was familiar with the proceeding, having decided many of the Supreme Court applications. As noted by the chambers judge, by April 24, 2020, she had dismissed 625’s two main arguments on a summary trial

application and indicated that the parties were at liberty to speak to the matter of costs: Reasons at para. 23.

[17] The chambers judge found that it would have been apparent to 625 that it would not recover anything under its mortgage when the Supreme Court of Canada denied 625 leave to appeal in the foreclosure proceedings on October 1, 2020: Reasons at paras. 99–100.

[18] In March 2021, Forjay obtained a costs award against 625 for \$1,000 arising from 625’s failed application for leave to appeal to the Supreme Court of Canada (Forjay’s “SCC Costs Judgment”). Forjay registered this judgment against the Property owned by 625.

Notice of Special Costs Application

[19] In June 2021, after the end of the substantive parts of the foreclosure proceeding, Forjay’s counsel notified 625’s counsel, Jeremy Shragge, that it was considering bringing an application to seek “a significant amount of costs” from 625.

[20] On September 22, 2021, Forjay’s counsel sent Mr. Shragge unfiled copies of a special costs application being brought against 625, seeking special costs of \$513,137.22 (the “Special Costs Application”). Mr. Shragge advised he would not be speaking to the matter and that 625 would be retaining new counsel.

[21] On October 6, 2021, Forjay’s counsel advised Mr. Shragge that the Special Costs Application had been filed and was scheduled before the judge on November 12, 2021.

[22] Mr. Shragge sent correspondence to Mr. Gosal, advising him of the Special Costs Application, by fax on September 23, 2021; and by fax and courier to 625’s registered and records office on October 7, 2021, which was the same address as Mr. Gosal’s residence. Mr. Shragge also forwarded to 625 a notice of intention to withdraw as its counsel on October 7, 2021.

[23] On October 18, 2021, Mr. Shragge sent by courier to Mr. Gosal's attention at the Property, copies of Forjay's Special Costs Application materials.

[24] On the s. 9 application, Mr. Gosal denied receiving actual notice of the Special Costs Application prior to the Property Transactions.

The Alleged Fraudulent Property Transactions October 2021

[25] The subject of Forjay's application invoking the procedure under s. 9 of the *FPA* were the actions taken by 625 with the Property after it says Mr. Gosal knew that 625 faced a large special costs claim by Forjay.

[26] The Property Transactions occurred in late October 2021: first, 625 granted a mortgage to 105 on October 22, 2021; second, 625 transferred the Property to 105 on October 29, 2021. Again, Mr. Gosal is the principal of both 625 and 105.

[27] If the Property Transactions in October 2021 were valid, they would have the effect of defeating any ability of Forjay to collect on its intended special costs award against 625, and would allow the appellant to retain the Property free from Forjay's claims.

The August 2022 Special Costs Judgment

[28] On August 4, 2022, the judge granted special costs against 625 in favour of Forjay. It was then that Forjay discovered the Property Transactions between 625 and the appellant. On August 15, the special costs were fixed at \$270,488.76 (the "Special Costs Judgment").

Show Cause Application Under the *FPA*

[29] On December 5, 2022, Forjay brought an application pursuant to s. 9 of the *FPA*, against 625 and the appellant, seeking that they show cause why the Property should not be sold to satisfy the Special Costs Judgment, on the basis that the Property Transactions were fraudulent dispositions within the meaning of the *FPA* and *FCA* and of no force and effect as they affect Forjay.

[30] No formal response was filed by 625. However, the appellant filed a response and opposed the application.

[31] The argument advanced by the appellant in response was that the Property Transactions were legitimate transactions that arose because the appellant had loaned money to 625 in order to fund 625 in the foreclosure proceedings. The loan was alleged to be in excess of \$1.1 million.

[32] Mr. Gosal alleged that there was a loan agreement between the appellant and 625 entered into on May 1, 2017. Mr. Gosal produced a photograph of the purported written loan agreement, but could not produce the actual document which he said he believed was shredded in 2021. He claimed it was typed by a person named Rita who used to work at a banquet hall he operated, and he dictated the agreement to her but he could not remember her surname. Mr. Gosal purportedly signed the loan document on behalf of both the appellant and 625.

[33] Mr. Gosal filed evidence of his accountant to support his version of events regarding the alleged loan.

[34] The judge approached her analysis of whether the Property Transactions were fraudulent on a traditional framework under the *FCA*. She first considered whether Forjay established a *prima facie* case of 625 having fraudulent intent under s. 1 of the *FCA*; and then she considered whether the appellant had established any defence under s. 2 of the *FCA*, considering notice or knowledge of 625's fraudulent intent, good faith, and consideration.

[35] In considering the first issue, whether Forjay established a *prima facie* case of fraudulent intent by 625, the judge analyzed whether there were "badges of fraud" which could lead to an inference of intent. In doing so, the judge reviewed Mr. Gosal's evidence in considerable detail.

[36] The key indicator of fraud was the timing of the Property Transactions, which occurred soon after notice of the Special Costs Application materials were provided to 625's counsel of record.

[37] Among other things, the judge also found the logic of Mr. Gosal's version of events inconsistent with the fact that the Property Transactions occurred in October 2021, and noted that Mr. Gosal had not provided any reasonable explanation as to why they occurred then. After reviewing the evidence, the judge observed at para. 100 of the Reasons:

The clear inference is that the Transactions were in furtherance of putting the Property beyond Forjay's reach in the event that Forjay was successful in obtaining a costs award.

[38] As mentioned above, Mr. Gosal denied knowing of the impending Special Costs Application when the Property Transactions occurred, despite the fact that Mr. Shragge was still 625's counsel of record when Mr. Shragge received notice, and despite Mr. Shragge's correspondence indicating he had sent the materials by fax and courier to the Property and to the registered and records office of 625.

[39] Mr. Gosal stated in his affidavit evidence that he had terminated Mr. Shragge's engagement as counsel for 625 some time before September 2021. Mr. Gosal claimed his office at the Property was out of fax paper, he rarely went to the office, did not sign any courier slip or receive a courier package there, and for all these reasons he did not receive the Special Costs Application materials prior to the Property Transactions.

[40] As noted by the judge, Mr. Gosal's evidence did not address or respond to the evidence that the Special Costs Application materials had been couriered to 625's registered and records office, which was also Mr. Gosal's residence, on October 7, 2021: Reasons at para. 118. The judge found that Mr. Gosal's evidence was not credible, and that the "clear inference" was that he did receive the communications from Mr. Shragge prior to the Property Transactions: para. 119.

[41] The judge concluded that pursuant to s. 1 of the *FCA*, Forjay had established a *prima facie* case that 625 had fraudulent intent to transfer the Property to delay, defeat and hinder any execution proceedings that might have been taken by Forjay if its costs application was successful: Reasons at para. 103.

[42] The judge next considered whether the appellant had established any defence under s. 2 of the *FCA*, that is, that the Property Transactions were in good faith, for good consideration, and that it had no notice of 625's fraudulent intent.

[43] The judge found that Mr. Gosal's denial that he received notice of Forjay's Special Costs Application was internally inconsistent, inconsistent with other evidence of notice, and not credible: Reasons at paras. 113, 124. The judge held:

[128] I reluctantly conclude that Mr. Gosal is deliberately attempting to mislead the Court on the issue of notice. I also conclude that his denials of having receiving any notice were initially in aid of evading service of the application materials. However, this quickly evolved into his convoluted story toward alleging that he had not received any notice, in an attempt to take steps to complete the Transactions before he acknowledged that notice.

[129] My findings as to Mr. Gosal's credibility on the notice issue stands as a further "badge of fraud" that supports the conclusion that 625 had fraudulent intent to defeat Forjay's potential costs award. It further supports the conclusion that Mr. Gosal, in his capacity as 105's controlling mind, was well aware of such fraudulent intentions. Accordingly, this finding necessarily leads to the conclusion that Mr. Gosal and 105 are unable to advance any s. 2 defence under the *FCA*.

[44] The judge also carefully reviewed Mr. Gosal's evidence, and that of his accountant, regarding the existence of the alleged loan agreement. The judge noted many internal inconsistencies, including with respect to the financial details, the alleged consideration and the wording of the alleged loan agreement itself, which appeared to refer in past tense to past advances yet was purportedly dated before the advances were made, among other things.

[45] The judge found:

[143] I find as a fact that the clear inference that arises is that Mr. Gosal created and executed the Loan Agreement in response to this show cause hearing in late 2022 while preparing his defence of this application, and for the purpose of asserting that it supported that the Transactions were done in good faith and for valuable consideration.

[144] In that regard, Mr. Gosal's efforts to mislead the Court in that respect stand as a further "badge of fraud" in attempting to conceal his fraudulent intention behind the Transactions.

[46] The judge concluded that the appellant had failed to establish a “good faith” defence under s. 2 of the *FCA*: Reasons at para. 151.

[47] The judge also found that the appellant did not pay adequate or “good” consideration for the Transactions, and thus it was unable to mount a defence under s. 2 of the *FCA*: Reasons at para. 165.

[48] In the result, the judge held that the appellant had not rebutted the presumption of fraud and granted the order sought by Forjay: Reasons at paras. 173–174.

[49] The judge granted orders declaring as fraudulent, the mortgage and transfer of the Property granted by 625 to the appellant on October 22 and October 28, 2021 respectively. The judge ordered that the Property be sold to realize an amount payable under the Special Costs Judgment to Forjay: Reasons at para. 177.

Grounds of Appeal

[50] There are two grounds of appeal. The appellant submits the chambers judge erred in finding that:

- a) Forjay had the standing required to invoke s. 9(1)(a) of the *FPA* despite not being judgment creditors at the time of the Property Transactions; and
- b) The matter was suitable for summary determination under s. 9 of the *FPA*.

Alleged Error in Invoking Section 9 of *FPA*

[51] First, the appellant submits that the judge erred in finding that Forjay could invoke s. 9(2) of the *FPA*, as it was not a “judgment creditor” within the meaning of s. 9(1)(a).

[52] The issue of whether Forjay had standing under the *FPA* is a matter of statutory interpretation and a question of law reviewable on a correctness standard: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 47, 50.

[53] The appellant says that a party relying on s. 9(1)(a), as Forjay was here, must prove that it was a “judgment creditor” at the time of the impugned transactions, in relation to the judgment it is seeking to enforce by way of the show cause procedure. However, the Property Transactions occurred before Forjay had obtained the Special Costs Judgment. Thus, it was not open to Forjay to rely on s. 9 of the *FPA* to bring a show cause application.

[54] The appellant says that while some transactions captured as fraudulent conveyances under s. 1 of the *FCA* can be brought within s. 9 of the *FPA*, this is only so where the fraudulent conveyance is to “defeat, hinder, delay, prejudice or defraud creditors”, on a plain reading of the section. Section 9 is thus narrower than s. 1 of the *FCA*, which applies to “creditors and others” and may capture potential creditors. The appellant says the judge’s findings that the Property Transactions might have been a conveyance designed to defeat the appellant as a potential creditor might have been captured by s. 1 of the *FCA*, but this is not enough to fit within the procedure set out in s. 9 of the *FPA*.

[55] Forjay says it was not necessary that it be a judgment creditor at the time of the Property Transactions, only that it be a judgment creditor at the time of the application under s. 9. Forjay had obtained the Special Costs Judgment by the time it brought the application under s. 9.

[56] It seems to me that there is some strength to the appellant’s arguments regarding errors made in the judge’s application of s. 9(1)(a) of the *FPA* in these circumstances.

[57] As the appellant points out, the purpose and language of the *FPA* is different than the purpose and language of the *FCA*, as noted by this Court in *Boukalis* at para. 11. The appellant is correct that the judge did not grapple with these differences.

[58] The judge did not consider whether a finding of a fraudulent conveyance under the framework of the *FCA*, in relation to transactions that occurred when

Forjay was not yet a judgment creditor for the judgment it was seeking to enforce, could nonetheless translate to an order using the procedure provided by s. 9 of the *FPA* which is limited to a “judgment creditor”.

[59] However, the analysis does not end there. Forjay says that these are new issues on appeal.

[60] The appellant’s prior counsel alluded to these issues in argument filed in response to the s. 9 application and began to raise them during the application below, but after some discussion, expressly resiled from pressing them.

[61] When these issues were first raised in the court below, Forjay pointed out that it was a judgment creditor at the time of the Property Transactions, in that it held the SCC Costs Judgment for \$1,000 only. A review of the manner in which the arguments unfolded in the court below suggests this may have persuaded the appellant to abandon its argument. The judge was expressly told she did not need to address the issue. The judge refers to the fact of Forjay being a judgment creditor in respect of the SCC Costs Judgment at para. 28 of the Reasons.

[62] It appears to me that the judge was led astray by counsel in the court below. The fact that Forjay was a judgment creditor generally at the time of the Property Transactions, for \$1,000 only, does not answer the statutory interpretation issues now raised on this appeal.

[63] The statutory interpretation issues are important. The question before us is whether the situation is an exceptional one in which the discretion to entertain the statutory interpretation issues on appeal is warranted, having regard to all the circumstances: see *R. v. J.F.*, 2022 SCC 17 at para. 41. The Court’s discretion to allow leave to raise new issues on appeal that were not raised in the court below must be exercised sparingly and is “guided by balancing the interests of justice as they affect all the parties”: *R. v. Vidulich* (1989), 37 B.C.L.R. (2d) 391 at 398–399, 1989 CanLII 231 (C.A.).

[64] Further, this Court is even more reluctant to exercise its discretion to hear argument where a party expressly resiled from the issue. In *Argo Ventures Inc. v. Choi*, 2020 BCCA 17, Abrioux J.A. wrote:

[31] A distinction is to be made between raising a new issue on appeal and resiling from a position deliberately taken in the tribunal of first instance: *VIH Aviation Group Ltd. v. CHC Helicopter LLC*, 2012 BCCA 125 at para. 44. Generally, this court has not permitted a party that has chosen a particular position in the trial court to abandon that position on appeal: *Sahlin v. The Nature Trust of British Columbia, Inc.*, 2011 BCCA 157 at para. 38. Furthermore, taking inconsistent positions in legal proceedings can constitute an abuse of process: *Fortinet Technologies (Canada) ULC v. Bell Canada*, 2018 BCCA 277 at para. 23.

[65] On the one hand, I accept that these statutory interpretation issues are questions of law that can be determined by this Court on the record before us. They were also canvassed in the parties' factums. This weighs in favour of allowing the appellant to advance these issues on appeal.

[66] On the other hand, after the appellant expressly resiled from raising the standing issue, what occurred in the court below was simply the application of a summary procedure to the central factual dispute that had to be resolved between the parties in one way or the other, namely, the dispute over whether or not the mortgage and transfer of the Property were fraudulent conveyances. Section 9 of the *FPA* merely provided a summary procedure. If s. 9 of the *FPA* was not available to Forjay, there are other procedures, including summary trial procedures under the *Supreme Court Civil Rules*, that Forjay could employ to seek to set aside those transactions under the *FCA* and to then execute on the Special Costs Judgment.

[67] The appellant's counsel candidly agrees there are other procedural paths that could have led to the same destination, namely, asking a judge to determine the central factual dispute of whether the Property Transactions were fraudulent conveyances, including the merits of any defence raised, pursuant to ss. 1 and 2 of the *FCA*.

[68] In my view, if we were to conclude on the basis of the statutory interpretation issue abandoned in the court below, that the judge erred in relying on s. 9 of the

FPA, it would simply mean the parties would be put to the cost of bringing duplicative proceedings under another process, and eventually a trial court judge would have to determine the same factual dispute that was before this judge. This would be a waste of legal and judicial resources.

[69] Given the unique circumstances I have reviewed, I conclude that it is not in the interests of justice to consider the appellant's new argument on appeal that s. 9 of the *FPA* was not available to Forjay to enforce the Special Costs Judgment. In declining to consider this issue, I simply add that the judgment below should not be regarded as a reliable precedent and does not determine the issue of whether a party must be a judgment creditor, in relation to the judgment it later seeks to enforce, at the time of the impugned transactions in order to employ the procedure under s. 9(1)(a) and (2) of the *FPA*.

Suitability of Summary Trial Procedure

[70] The second ground of appeal is that the judge erred in finding that the matter was suitable for summary determination under ss. 9 and 10 of the *FPA*, because there were credibility issues that could only be resolved by oral testimony of witnesses in a traditional trial.

[71] The chambers judge's decision to proceed by way of summary trial was a discretionary decision. The Court will not interfere with such a decision in the absence of an error in principle, unless the discretion was not exercised judicially: *Arbutus Investment Management Ltd. v. Russell*, 2023 BCCA 9 at para. 20.

[72] The judge appreciated that she had the discretion to refer the matter to trial: Reasons at para. 79. The judge directed her mind to the suitability of deciding the matter summarily. She approached this issue by analogy to the approach of the court to considering whether an application for summary trial can be resolved on the merits pursuant to R. 9-7(15): Reasons at para. 84. In my view that was a helpful analogy.

[73] Both parties initially supported resolution of the issues by way of summary application. The appellant's position subsequently changed, but conditionally. The appellant objected to the summary application but only if the judge was going to resolve credibility issues against the appellant's principal, Mr. Gosal.

[74] The appellant complains that the matter was not suitable for summary trial as there were "head-on conflicts" in the evidence regarding the loan agreement. The appellant submits that the chambers judge unfairly rejected Mr. Gosal's evidence of the loan agreement when his own accountant's evidence corroborated his evidence and there were further witnesses that may have been called to fill in gaps in the evidence to assist in resolving credibility issues.

[75] The judge had before her considerable evidence which challenged Mr. Gosal's evidence. The judge found that Mr. Gosal's evidence that he did not know of Forjay's Special Costs Application when the Property Transactions occurred was not credible, given the whole of the evidence. The unravelling of this central strand to his case seriously undermined his credibility on other matters as well but the judge found additional reasons on the record to reject his version of events.

[76] The mere existence of credibility issues did not mandate that the judge refer the matter to trial: *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270, at para. 22. The judge was satisfied that on the entire record she could find the necessary facts to discern the truth, and that it would not be unjust to proceed summarily: Reasons at para. 84.

[77] The appellant also submits that the chambers judge unfairly accepted late filed affidavits by Forjay. However, Forjay asserts that the late filed affidavits were in response to arguments that the appellant raised belatedly. Forjay further argues that it was not unfair for the judge to proceed because the appellant had the opportunity to cross-examine one of the witnesses on the affidavits and elected not to do so. In my view, the late production of the affidavits did not put the appellant at a procedural disadvantage.

[78] A review of the entire record leads to the conclusion that there was evidentiary support for the judge’s findings. The process provided ample opportunity for the appellant to prove the three elements of a defence under s. 2 of the *FCA*, namely, that the transfer was made for good consideration; in good faith; and to a transferee who had no notice or knowledge of the fraud. It cannot be said that the judge made an error in principle in finding against the appellant.

[79] I therefore do not accede to this ground of appeal.

Disposition

[80] I would dismiss the appeal.

“The Honourable Justice Griffin”

I agree:

“The Honourable Chief Justice Marchand”

I agree:

“The Honourable Mr. Justice Voith”