COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Broer v. Multiguide GmbH,*
2023 BCCA 134

Date: 20230324
Dockets: CA48355; CA48360

Docket: CA48355

Between:

Rudolf Broer and Marc Rummeny

Appellants
(Defendants)

And

Multiguide GmbH

Respondent
(Plaintiff)

And

Multiguide Technologies Inc. and RTB Safe Traffic, Inc.

Respondents
(Defendants)

- and -

Docket: CA48360

Between:

Multiguide Technologies Inc. and RTB Safe Traffic, Inc.

Appellants
(Defendants)

And

Multiguide GmbH

Respondent
(Plaintiff)

And

Rudolf Broer and Marc Rummeny

Respondents
(Defendants)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Dickson
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated May 19, 2022 (*Multiguide GmbH v. Broer*, 2022 BCSC 852, Vancouver Docket S1510213).

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Place and Date of Hearing:	Vancouver, British Columbia March 3, 2023
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, British Columbia March 3, 2023
Place and Date of Written Reasons:	Vancouver, British Columbia March 24, 2023

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Justice Dickson
The Honourable Madam Justice Horsman

Summary:

These appeals stems from the trial judge's order characterizing an advance of €100,000 from a shareholder to a company as a shareholder loan and not an equity investment. The appellants assert the trial judge erred by considering circumstances beyond the time the advance was made, and by finding financial statements drafted subsequent to the advance determinative of the true character of the funds. Held: Appeal dismissed. The trial judge did not err in considering the parties' subsequent conduct and events occurring after the time of the advance. Her reasons disclose a careful consideration of all the relevant circumstances and she did not find the financial statements, in isolation, to be determinative of the issue.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Overview

[1] Following the hearing of these appeals, the appeals were dismissed with reasons to follow and the cross appeals were withdrawn. These are the reasons for dismissing the appeals.

[2] Following a 12-day trial, the plaintiff (respondent), Multiguide GmbH ("Multiguide"), was granted judgment for €100,000 against the defendants (appellants), Multiguide Technologies Inc. ("MTI"), RTB Safe Traffic, Inc. ("RTB Canada"), Rudolf Broer and Marc Rummeny, jointly and severally.

[3] The appellants submit the judge erred in principle in finding that €100,000 advanced by Multiguide to MTI was a shareholder loan rather than an equity contribution.

[4] Multiguide has brought cross appeals, to be heard only in the event the appellants are successful on the appeals, in which it seeks relief in the amount of €100,000 under the oppression remedy or as damages for conspiracy, and/or punitive damages of $100,000.

[5] Justice Marchand, in his refusal of the stay application brought by the appellants MTI and RTB Canada (2022 BCCA 298), summarized the parties to the litigation and their roles as follows:

> [5] As I understand it, the key players in this litigation are:
>
> a) Multiguide – a German company ….
>
> b) Roland Kraus – the sole shareholder of Multiguide.
>
> c) RTB GmbH & Co. KG ("RTB Germany") – a limited partnership between Mr. Broer and RTB Rehabilitations Technik Broer Beteiligungs GmbH ("RTB Technik").
>
> d) Mr. Broer – the sole limited partner of RTB Germany and the sole shareholder of RTB Technik ….
>
> e) MTI – a British Columbia company incorporated to carry out the parking meter business in North America ….
>
> f) RTB Canada – a British Columbia company incorporated to manage and carry out MTI's business in Canada ….
>
> g) Mr. Rummeny – an employee of RTB Germany, a[nd] director of MTI ….

[6] An additional individual relevant to these appeals is Robert Ziola, who was an initial shareholder of MTI with expertise in North American markets.

Background

[7] In 2013, Mr. Broer and Mr. Kraus acquired a pay-and-display parking metre ("PDM") business in Germany. In November 2014, they formed MTI to sell and service PDMs in North America.

[8] The original shareholders of MTI, each owning an equal 1/3 interest, were Multiguide, RTB Germany, and Mr. Ziola through a numbered holding company. Multiguide's initial shareholders were RTB Germany (owning 25% of the issued shares) and Mr. Kraus (owning the remaining 75%). The original directors of MTI were Mr. Broer (on behalf of RTB Germany), Mr. Kraus (on behalf of Multiguide), and Mr. Ziola.

[9] In December 2014, Multiguide and RTB Germany each advanced €100,000 in capital to MTI. The subject of these appeals is whether the trial judge committed a

reversible error in finding Multiguide's advance was a shareholder loan rather than an equity investment.

[10] In early 2015, the business relationship between Mr. Broer and Mr. Kraus soured. In mid-March 2015, Mr. Broer requested Mr. Kraus cause Multiguide to make payments on all amounts due and owing to RTB Germany from Multiguide. Pursuant to German law, the request placed Mr. Kraus in the position of having to go to court to declare an inability to pay the invoices (likely causing Multiguide to go into bankruptcy), or face personal liability for the company's debts. At this point, their relationship broke down and Mr. Broer and Mr. Kraus ceased effective communication.

[11] In May 2015, the parties negotiated a settlement agreement to separate the business of Multiguide from RTB Germany. Mr. Kraus became the sole shareholder of Multiguide as of May 4, 2015. He resigned as director, president and CEO of MTI as of August 2, 2015. The settlement agreement did not specifically deal with MTI, or otherwise determine how to separate their Canadian business interests, but it did include that "a provision for MTI shall be made at a shareholders' meeting of MTI".

[12] On August 26, 2015, Multiguide sent MTI demand letters requesting payment for unpaid invoices due and owing to Multiguide in the amount €172,778.10, which MTI disputed (the "Disputed Invoices").

[13] In October 2015, RTB Technik bought Mr. Ziola's shares in MTI for $20,000. As a result, RTB Germany and RTB Technik together held 2/3 of MTI's shares, and Multiguide held the remaining 1/3 as of October 2015. MTI's directors were Mr. Broer and Mr. Rummeny, who was appointed by Mr. Broer.

[14] On December 8, 2015, Multiguide sent a formal demand for repayment of its claimed shareholder loan in the amount of €100,000. The following day, Multiguide filed a notice of civil claim against MTI seeking repayment of the €100,000 and the Disputed Invoices.

[15] In January 2016, RTB Canada—wholly owned by RTB Germany—was incorporated in British Columbia. Mr. Broer and Mr. Rummeny, as directors of MTI, transferred all of MTI's assets to RTB Canada without notice to or consultation with Multiguide. The related written contract (called the Master Services Agreement or "MSA") was executed in 2018. In 2019, a special meeting of MTI shareholders was held and a special resolution passed to ratify the MSA. Multiguide dissented and maintained that the special resolution was invalid.

[16] Multiguide's notice of civil claim was consolidated with a second action seeking declarations that MTI had failed to comply with the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]. The notice of civil claim was amended to add claims related to oppression and conspiracy.

Trial Judgment

[17] The judge found no concerns with the credibility and reliability of Mr. Kraus and Mr. Rummeny. However, she found that Mr. Broer's evidence raised concerns about both his credibility and reliability:

> [48] Mr. Broer, by his own admission, did not have a detailed understanding of MTI's day to day business dealings. While I accept Mr. Broer's explanation that he was "not an integral part of the daily business", I found his evidence at various times to be unresponsive, vague, and contradicted by the evidence of others. While I do not reject all of his evidence, where there is a conflict between his evidence and that of either Mr. Kraus or Mr. Rummeny, I prefer their evidence: see *McPhail v. Ross*, 2019 BCSC 21 at para. 101.

[18] The judge noted that determining the legal characterization of an advance of funds by a shareholder is a question of fact to be determined by reference to all of the surrounding circumstances: *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation*, 2007 BCSC 286 [*Glacier Creek*] at para. 59.

[19] She found that the underlying facts were not in dispute; Mr. Kraus and Mr. Broer both initially understood their €100,000 contributions to be equity:

> [72] … I accept that at the time the initial contributions were made to MTI, both Mr. Kraus and Mr. Broer believed they were making equity contributions to MTI, based on their experience in Germany. I find they both initially failed to obtain professional advice, nor turn their minds to, whether the initial contributions would, or should, be treated differently in Canada.

[20] The judge observed that shortly after making the initial contribution, no later than March 2015, Mr. Kraus realized that the nature of the initial advances needed to be clarified. The judge described the draft shareholder agreements that circulated between the parties between late 2014 and early 2015 as an attempt to clarify the nature of the initial advances, but accepted that no shareholder agreement was ever executed: at para. 73.

[21] With respect to the advancement of the €100,000, the judge found:

> [74] Notwithstanding there does not appear to have been a substantive discussion of the legal character of the initial contributions at the April 22, 2015 shareholder meeting, the MTI financial statements for 2014 were signed by both Mr. Kraus and Mr. Broer, and clearly characterized the initial contributions as "Loan from shareholders". The 2014 financial statements clearly identify the initial contributions as shareholder loans, and that these financial statements were finalized in April 2015, at a time well before any dispute arose as to the classification of the funds. I find the 2014 financial statements recorded the clear agreement of the shareholders that the initial contributions were properly characterized as shareholder loans. I also note this occurred at a time when Mr. Broer and Mr. Kraus were in significant conflict, and in the process of separating their German business interests, so I do not find it believable that Mr. Broer merely signed whatever was put in front of him.
>
> [75] Likewise, the 2015 and 2016 MTI financial statements, signed by Mr. Broer and Mr. Rummeny, recorded the same. This is compelling evidence that even when Mr. Broer could have corrected the characterization of the initial contributions, he did not take any steps to do so. In all of the circumstances, I find the execution of the financial statements to be determinative, and I find the initial contribution of €100,000 to be a shareholder loan. I do not accept the defendants' argument that this was a "recharacterization" of the initial contribution; rather, I find it was a clarification of the true legal character of the initial contribution after receiving professional advice. Similarly, I do not accept the defendants' argument that Mr. Broer's requests for a capital increase in July 2015 (as set out in paras. [92] - [93]) are determinative in these circumstances because that was the language he

> was used to in Germany, his dominant country of business activities. His use of language he was familiar with is not conclusive.
>
> [76] Upon a consideration of all of the evidence, I find the evidence is clear that the parties quickly reached the agreement that the contribution of €100,000 by Multiguide to MTI was a shareholder loan (the "Shareholder Loan"). Given my finding, there is no need to consider nor determine the various categories of financial contributions that are possible when funding a company.
>
> [Emphasis added.]

Positions of the Parties

[22] The parties do not dispute that the judge was correct in noting that whether an advancement of funds by a shareholder to a company is a loan or an investment of capital is a question of fact to be determined by reference to all of the surrounding circumstances. The parties disagree on what "surrounding circumstances" the judge was entitled to consider and, more generally, about the timeframe that should inform a court's analysis when considering how to properly characterize an advancement of funds.

[23] The appellants contend the trial judge erred in principle by considering circumstances beyond the time of the advance, and by finding that the company's financial statements, in the absence of other evidence, were determinative of the true nature of the advance.

[24] They rely on *Ghassemvand v. Premium Weatherstripping Inc.*, 2017 BCCA 309 [*Ghassemvand*], as authority for the proposition that the trial judge was required to determine the nature of the advance by reference to all the circumstances at the time of the advance, in December 2014. The appellants say the evidence at trial was unequivocal that Multiguide and RTB Germany's mutual intention at this time was to each make an equity contribution of €100,000. This, they say, ought to have been determinative, and any lack of clarity arose only *after* the funds had been advanced by the shareholders and received by MTI as equity. The appellants submit the trial judge allowed evidence of the parties' conduct subsequent to December 2014 to overwhelm evidence of their unambiguous shared intention at the time of the advance, contrary to *Wade v. Duck,* 2018 BCCA 176

[*Wade*] and *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 [*Shewchuk*]. The appellants contend in the absence of a written contract, evidence of the parties' agreement must be drawn from the testimony of witnesses regarding what happened at the time of the advance and the contemporaneous documents.

Standard of Review

[25] Whether an advance to a corporation is a loan or capital contribution is a question of fact, or mixed law and fact, and as such is "reviewable on the standard of 'palpable and overriding error' unless it is clear that the lower court made an extricable error of law, such as an error with respect to the legal 'test' or standard to be applied": *Ghassemvand* at paras. 31, 35.

[26] If the inferences drawn by the trial judge are reasonably supported by the evidence, a reviewing court cannot reweigh the evidence by substituting for it an equally, or even more, persuasive inference of its own: *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at para. 74, cited in *Ghassemvand* at para. 32.

[27] I note that the parties disagree on the proper classification of the issue on appeal. The appellants say the judge made an extricable error of law reviewable on a standard of correctness. I do not have to address that issue as, in my view, it makes no difference in this case.

Discussion

[28] It is helpful to set out the evidence of the timeline relevant to the €100,000 contribution.

[29] On December 9, 2014, Mr. Kraus arranged a wire transfer from Multiguide to MTI, identifying the transfer as "Initial equity capital Multiguide GmbH". This contribution was initially reported in Multiguide's ledger as "Participation in Stock Corporations". That same day, Mr. Kraus wrote an email to RTB Germany's corporate controller with the subject line: "Equity contribution for MTI".

[30] Both Mr. Broer and Mr. Kraus gave evidence, and the trial judge accepted, that they initially understood that their respective €100,000 contribution was equity, as German law required a minimum equity contribution to start a company: at para. 50. In contrast, Mr. Ziola, who was from British Columbia, gave evidence he understood the advances were shareholder loans and would be paid back from the profits of the business: at para. 59.

[31] Mr. Kraus testified that as of March 2015 it was unclear how the funds were characterized. On March 3, 2015, MTI's external accountant sought clarification from MTI on whether he should consider the advances from Multiguide and RTB Germany as loans or capital when preparing MTI's financial statements. Mr. Kraus responded: "I thought this was an equity input, but according to our lawyer this may be a loan. I think this is something we need to clarify in our shareholder meeting in April. Can this wait until then??": at para. 54. MTI's external accountant responded that same day writing: "No worries, I will treat this amount as loan as for Dec. 31, 2014 financial statement, and we can rectified thereafter. And I will show as loan to respective loan acct of Multiguide and RTB": at para. 54. On March 20, 2015, Mr. Kraus sent the directors of MTI the 2014 financial statements. These draft financial statements recorded "Loan from Shareholders $238,318.17" under Liabilities and Capital as at December 31, 2014: at para. 55.

[32] On April 22, 2015, the annual general meeting for MTI was held in Vancouver, BC. The AGM was attended by Mr. Kraus, Mr. Ziola and Mr. Rummeny, who attended on Mr. Broer's behalf. On the agenda, the shareholders were to approve and sign the financial statement for 2014, and discuss and finalize the shareholders agreement. At trial, the parties disagreed whether there was a discussion at the AGM relating to the characterization on the 2014 financial statements of the initial contribution as a shareholder loan: at para. 58.

[33] On April 24, 2015, Mr. Kraus sent an email to Multiguide's accountant confirming the €100,000 contribution was a shareholder loan, and requesting he take that into account when preparing Multiguide's 2014 financial statements.

[34] The judge found that the evidence was clear that Mr. Broer and Mr. Kraus both signed the 2014 MTI financial statements which characterized the initial start-up capital as “Loan from shareholders.” The judge found Mr. Broer and Mr. Rummeny both signed the MTI 2015 and 2016 financial statements which continued to characterize the advances as shareholder loans: at paras. 61–62.

[35] On July 2 and 10, 2015, Mr. Broer wrote to Mr. Ziola requesting additional capital contributions to MTI. The July 2, 2015 demand was addressed to Mr. Ziola solely and read as follows:

> Dear Mr. Ziola,
>
> After inspecting the “financial statement” and after further examination of the current financial situation of MTI, I would like to tell you the following:
>
> To guarantee a continued existence of MTI, I am asking you for a capital increase of 140,000.00$, same as all other shareholders have done previously.
>
> This action is urgent required to pay outstanding invoices and to provide MTI a professional administration that you have not delivered.
>
> If you will not agree with the capital increase, I find myself constrained to think of RTB providing PDM deliveries and services to MTI in the future,
>
> Yours sincerely,
>
> Rudolf Broer

[36] Mr. Ziola did not agree to the request, but made alternative suggestions to improve MTI’s financial circumstance. On July 10, 2015, Mr. Broer wrote to Mr. Ziola and Mr. Kraus to again request additional capital: at para. 93.

[37] In August 2015, Mr. Kraus resigned as director, president and CEO of MTI.

[38] Following up on an inquiry from Mr. Broer, MTI’s financial controller wrote, in an email dated November 6, 2015, that MTI’s only shareholder loan was the €200,000 advance from Mr. Broer and Mr. Kraus.

[39] On December 8, 2015, Multiguide made a formal demand for repayment of its shareholder loan.

[40] As stated above, there is no dispute that whether an advancement of funds by a shareholder to a company is a loan or an investment of capital is a question of fact to be determined by reference to all of the surrounding circumstances: *Glacier Creek* at para. 59. This proposition was confirmed in *Ghassemvand*, the leading authority from this Court on the proper characterization of an advance of capital as equity or shareholder loan.

[41] In *Ghassemvand*, the plaintiff respondent was one of the founding shareholders of a company to which he had advanced funds at the company's inception. An external accountant had advised that the advances should be treated as loans for tax purposes. The plaintiff and all other shareholders agreed, and for four years the company's financial records and other documents reflected the advances as shareholder loans payable on demand. At the time the company was founded, the shareholders had executed a shoddily drafted shareholder agreement which provided, in part, that shareholders would not be required to make loans to the company. The external accountant had never seen the shareholder agreement, but upon seeing it, concluded based on that provision that the advances could only have been equity investments. The accountant proceeded to revise the company's records accordingly.

[42] The trial judge agreed with the accountant's opinion that any shareholder loan had to be supported by a shareholder agreement, and ruled that notwithstanding the references to demand loans in the company's records, the plaintiff's cash advances must have been equity contributions. On appeal, the majority of this Court found the trial judge had erred in law by finding the shareholders' agreement was definitive of the true character of the loans and could operate to retroactively re-characterize the funds. Instead, the judge ought to have considered all of the surrounding circumstances to determine the substance of the advances.

[43] The appellants submit *Ghassemvand* refined the test set out in *Glacier Creek* by confining the court's consideration to only those circumstances at the time of the

advance. In particular, they refer to the following portion of Justice Newbury's reasons:

> [35] Obviously, the central issue before the Court was whether the plaintiff (and, one supposes, the other shareholders) made his advances to PW totalling $180,000 as loans or as capital contributions. Although there are few authorities on the point, the law seems to be clear that this 'characterization' is primarily a question of fact, or perhaps mixed fact and law (insofar as Sattva applies), to be determined by reference to all the circumstances at the time of the advance.
>
> [Emphasis added.]

[44] In my view, *Ghassemvand* did not restrict the test in the manner the appellants claim. Neither the rest of the analysis in *Ghassemvand*, nor other leading authorities on the question, offer support for such a narrowed and time-constrained analysis. Indeed, the overriding rationale for considering "the surrounding circumstances" as articulated in *Ghassemvand* is the requirement to consider the substance of the transaction over the form. As Justice Newbury explained:

> [51] Subsequent cases have re-affirmed that the characterization of advances as loans or as capital contributions requires that the "substance of the transaction" be examined and that all the surrounding circumstances – not only the words used in documenting the transaction – be considered: see, e.g., *Re U.S. Steel Canada Inc*. 2016 ONSC 569 at paras. 167–8; *Re Tudor Sales Ltd.* 2017 BCSC 119 at paras. 34–40; *Ascent One Properties Ltd. v. Liao* 2017 BCSC 1017 at para. 227.

[45] This approach is consistent with other Canadian jurisdictions. In *Elefant v. Genwood Industries Ltd.*, 2018 QCCS 4590, the court summarized the law as follows:

> [7] In characterizing a claim as either debt or equity, Canadian courts generally take a contextual, intention-based approach that favours a determination of a claim's substance rather than its form. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, Mr. Justice Iacobucci stated that the correct approach is to determine the "substance" or "true nature" of the transaction under review.
>
> [8] More recently, in *U.S. Steel Canada Inc., Re,* the Ontario Superior Court held that where a transaction occurs between related, or non-arm's length parties, "there can be no certainty that the language of the agreements reflects the underlying substantive reality of the transaction".
>
> [Footnotes omitted.]

[46] In *U.S. Steel Canada Inc., Re*, 2016 ONSC 569, also cited with approval in *Ghassemvand* and *Tudor Sales Ltd., (Re),* 2017 BCSC 119, the court described the task of the court in determining the character of an advance of funds as follows:

> [168] In other words, the task of a court is to determine whether the transaction in substance constituted a contribution to capital notwithstanding the expressed intentions of the parties that the transaction be treated as a loan. It is therefore not appropriate to limit the inquiry into the intentions of the parties to a review of the form of the transaction documentation. Such an exercise reduces to a "rubber stamping" of the determination of a single party to the transaction, i.e., the sole shareholder, and it does not address the substance of the transaction as it was actually implemented. In such circumstances, the determination of whether a particular claim is to be treated as debt or equity must address not just the expressed intentions of the parties as reflected in the transaction documentation but also the manner in which the transaction was implemented and the economic reality of the surrounding circumstances.
>
> [Emphasis added.]

[47] How a court discerns the true substance of a transaction will be a fact-specific inquiry. Depending on the facts of any given case, this may well require the court to consider circumstances beyond those immediately occurring at the time of the advance.

[48] The appellants do not go so far as to say the parties formed any kind of written agreement at the time of the advance, but say the parties' shared intention at that time was unambiguous and therefore consideration of subsequent events was unnecessary and improper.

[49] Generally, evidence of surrounding circumstances will not be permitted to overwhelm the words of an agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57. In *Wade*, this Court offered clarification on how courts are to consider evidence of subsequent conduct, in particular:

> [28] ... evidence of subsequent conduct should only be admitted if the contract is found to be ambiguous after one has considered its text and the factual matrix surrounding the creation of the contract: *Re Canadian National Railways and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 252, aff'd [1979] 2 S.C.R. 668 [*Canadian National Railways*]. In that case, Mr. Justice Lambert,

writing for the majority of this Court, explained the circumstances permitting the use of subsequent conduct (at 262):

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction.

[50] *Wade* cited *Shewchuk* as further confirmation that, "[e]vidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and factual matrix": *Wade* at para. 31.

[51] In this case, the appellants seek to limit the judge's consideration to the events occurring on or about December 9, 2014, when Multiguide advanced the €100,000 to MTI. The judge described this period of time as follows:

> [51] The contemporaneous documents are consistent with a shared understanding that this initial contribution was on account of equity. On December 9, 2014, Mr. Kraus made arrangements for a wire transfer from Multiguide to MTI and identified the transfer as for "initial equity capital Multiguide GmbH". This contribution was initially reported in Multiguide's ledger as "Participation in stock corporations".
>
> [52] On the same day Mr. Kraus wrote to Anja Hagen (RTB Germany's corporate controller), and copied Mr. Broer, with the subject line "Equity contribution for MTI" as follows:
>
> > Hi Anja,
> >
> > May I ask you to make the EUR 100,000 equity contribution into our joint company Multiguide Technologies Inc. on behalf of RTB GmbH & Co. KG? I have paid my share [my part] today. It is therefore no longer necessary that your payment is made in December, you are also welcome to wait until the new year. You can find the banking details on my payment slip (see attachment).
> >
> > I think the start in Canada is going well so far. However, I expect that we'll need to make another equity contribution in early summer (hopefully for the last time then).

> Best regards,
>
> Roland

RTB Germany likewise advanced an initial €100,000 contribution.

[52] As I have noted above, the judge found, at para. 72:

> … I accept that at the time the initial contributions were made to MTI, both Mr. Kraus and Mr. Broer believed they were making equity contributions to MTI, based on their experience in Germany. I find they both initially failed to obtain professional advice, nor turn their minds to, whether the initial contributions would, or should, be treated differently in Canada.

[53] In my view, there is no merit to the appellants' argument that the judge erred by considering the "surrounding circumstances" beyond this period of time. From a contractual interpretation standpoint, in the absence of any written agreement formalizing the parties' intentions, it was appropriate for the judge to consider the parties' subsequent negotiations. This Court in *De Cotiis v. Viam Holdings Ltd.*, 2010 BCCA 368, explained the flexibility a court has in considering evidence of surrounding circumstances, including post-contractual circumstances, when interpreting oral agreements:

> [21] … As G.H.L. Fridman notes in *The Law of Contracts in Canada* (5th ed., 2006) "[i]n the case of a completely oral contract there is greater flexibility in the nature of the evidence that is admissible to prove the contents of the contract and the meaning of the language used by the parties." (At 440.) This flexibility follows intuitively from the recognition that oral contracts must often be construed without the key interpretive tool used to understand written contracts — the words of the agreement.

[54] In *Korker Diversified Holdings Inc. v. Savingsplus Internet Inc.*, 2008 BCSC 136, to which the respondent referred the judge at trial, the court quoted Fridman's same text at para. 35:

> … If there is no single document to which reference can be made in order to decide if a contract exists between the parties, but a series of negotiations, then everything that occurs between the parties relevant to the alleged contract must be considered by the court which is faced with the problem of deciding the issue. From what they have said, done, or written, in combination if necessary, there must be established a bargain or an agreement…

[55] In my view, any agreement about the characterization of the advance, as between the parties, at the time the funds were advanced in December 2014, was sufficiently ambiguous to justify the judge's consideration of the parties' subsequent conduct.

[56] The appellants assert that, on the facts found by the trial judge, any lack of clarity arose only *after* the funds had been advanced by the shareholders and received by MTI as equity. This argument mischaracterizes the judge's findings for a number of reasons.

[57] First, the judge made findings on the understanding Mr. Broer and Mr. Kraus shared at the time of the advance, but did not address the other relevant party, namely Mr. Ziola, whose understanding of the nature of the contribution at the time it was advanced is relevant to whether the relevant parties were *ad idem* on the proper characterization of the loan. Indeed, Mr. Ziola's evidence challenges the notion that all relevant parties were in agreement. Though the judge did not expressly mention Mr. Ziola's understanding at the time of the advance, she did refer to his evidence as part of her chronology, at para. 59, signaling her awareness that Mr. Ziola's understanding from November 2014 through April 2015 was that the advances were made as shareholder loans:

> Mr. Ziola testified that at the AGM he was asked if he would contribute additional funds, and he reminded the parties that the shareholder loans would be paid back, but that he was not going to personally contribute anything further. ...

[58] Second, the judge found that Mr. Kraus and Mr. Broer, at the time of the advance, initially understood the contribution to have been an equity contribution, as appeared to be required by German corporate law. The judge does not find that the contribution *was* therefore an equity contribution as of December 9, 2014. It is not the case that the judge determined the parties had agreed that the capital advanced was equity, and then subsequently re-characterized the advance. Indeed, the judge states this in her reasons:

> [75] … I do not accept the defendants' argument that this was a "recharacterization" of the initial contribution; rather, I find it was a clarification

> of the true legal character of the initial contribution after receiving professional advice. ...

[59] The absence of a re-characterization of the funds distinguishes this case from *Ghassemvand*. There, the parties had collectively conducted themselves for four years as though certain advances were shareholder loans before agreeing to a retroactive reclassification of those advances as capital contributions. Unlike *Ghassemvand*, there was no initial classification necessitating formal documentation of reclassification. The judge determined that it was merely a period of uncertainty. This finding was eminently reasonable on the facts of this case and the evidence before her.

[60] Beyond contractual interpretation, finding Mr. Kraus and Mr. Broer's understanding at the time of the advance determinative of the issue would be a failure to consider "all of the circumstances" per *Ghassemvand*. Below, the appellants argued that the description of loans on the books of the company may be entitled to little weight having regard to the whole of the evidence, and that the manner in which the transaction is described is not conclusive. The judge considered this submission, and referred to the guidelines distilled from the jurisprudence in *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, which she summarized as follows:

> [71] … neither the "intention of the parties" (as between non-arm's length parties) nor the formal characterization is conclusive as to the true nature of the transaction; the manner in which the transaction was implemented, and the surrounding economic circumstances, must be examined to determine the true nature of the transaction; and whether the parties had a subjective intent to repay principle or interest on the alleged loan and whether that expectation was reasonable. ...

[61] The appellants' claim hinges on the judge's findings concerning the parties' understanding of the advance on December 9, 2014. The authorities expressly caution against finding such evidence determinative. On the appellants' own submissions at trial, it would have been an error for the judge to have found the understanding of the parties on that date conclusive.

[62] The appellants submit the judge erred by finding the financial statements were determinative. The judge was alive to the clear line of authority from this Court urging courts not to find the words used in documenting the transaction determinative: *Ghassemvand* at para. 51. She did not examine the characterization of the funds in the 2014, 2015 and 2016 financial statements in isolation from other evidence. Her reasons disclose a careful consideration of the parties' interactions, and factors beyond just the financial statements. Her conclusion was clearly informed by her findings concerning issues with Mr. Broer's credibility and reliability. She considered the entire spectrum of interactions occurring between December 2014 and the date at which the respondent Multiguide requested payment of the outstanding €100,000. Indeed, the judge's conclusions reflect she considered all of the circumstances and all of the evidence in reaching her conclusion that the contribution of €100,000 by Multiguide to MTI was a shareholder loan.

Disposition

[63] It is my view the judge did not err in finding that €100,000 advanced by Multiguide to MTI was a shareholder loan and not an equity contribution.

[64] I would dismiss the appeals.

[65] It is not necessary to address the cross appeals and the cross appeals are withdrawn.

[66] The respondent Multiguide is entitled to the costs of these appeals. With respect to the cross appeals, the parties will bear their own costs.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Justice Dickson"

I agree:

"The Honourable Madam Justice Horsman"