COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dhillon v. Robertson,*
2023 BCCA 140

Date: 20230320
Docket: CA46870

Between:

Satinder Paul Singh Dhillon and Surjit Kaur Dhillon

Appellants
(Plaintiffs)

And

Michael Vincent Morancie Robertson, Parmjit Singh Aujla, Shantel Lamons, Mandeep Dhillon, and Harpreet Dhillon

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated April 24, 2020 (*Dhillon v. Robertson*, 2020 BCSC 641, New Westminster Docket S174187).

Oral Reasons for Judgment

Counsel for the Appellants:	G.A. Hooper
Counsel for the Respondents:	A. Eged T.M. Chan
Place and Date of Hearing:	Vancouver, British Columbia February 28, 2023
Place and Date of Judgment:	Vancouver, British Columbia March 20, 2023

Summary:

The appellants appeal a trial judgment entitling the respondents to the excess proceeds of a sale of a residential property sold under foreclosure, together with damages for its use and occupation. They allege that the judge erred by (1) permitting one appellant, a non-lawyer, to represent the other and (2) failing to consider whether the respondents' pleadings were inconsistent and amounted to an abuse of process. Held: Appeal dismissed. The judge did not err in the exercise of her discretion in permitting one appellant to represent the other. Further, the pleadings were not inconsistent and the appellants in effect told the judge not to consider whether the respondents' pleadings were inconsistent.

DICKSON J.A.:

Introduction

[1] Following a 12-day trial, Justice Douglas held that the respondents, Michael Robertson, Parmjit Aujla, Mandeep Dhillon and Shantel Lamons, were entitled to the excess proceeds of sale of a residential property sold under foreclosure, together with damages for its use and occupation. The registered owner of the property was the appellant, Surjit Dhillon. The other appellant, Satinder Dhillon, is her son. The respondents are members of their extended family and a family friend. Like the trial judge, I will refer to the central parties by their first names.

[2] The proceedings below were complex and protracted. However, this appeal concerns only two issues:

i. Did the judge err in permitting Satinder, a non-lawyer, to act as Surjit's representative throughout the trial?

ii. Were the respondents' pleadings inconsistent such that they amounted to an abuse of process, which the trial judge erroneously failed to consider?

[3] According to the appellants, the judge erred in exercising her discretion to grant the privilege of audience to Satinder, who was not a suitable representative for his mother, Surjit. In particular, they say, the judge failed to consider relevant factors

for determining Satinder's suitability, including Surjit's financial means, Satinder's role as the key witness and his partiality, such that Surjit was denied her right to a fair trial. In addition, they say, she failed to address the respondents' inconsistent pleadings with respect to an alleged buy-back agreement, thereby permitting the respondents to benefit from an abuse of process. Consequently, they submit, we should set aside the order and remit the matter for a retrial.

[4] In my view, the judge did not err in either respect alleged by the appellants. For the reasons that follow, I would dismiss the appeal.

Background

[5] It is unnecessary for present purposes to review the complex background facts in detail. In summary, the underlying action arose out of the 2009 transfer of the property from Surjit to Shantel for $370,000. Located in Abbotsford, British Columbia, the property was Surjit's residence. Shantel obtained mortgage financing from CIBC to complete the purchase. After the property was transferred, Surjit and Satinder continued to reside there and made monthly payments to Shantel in an amount intended to cover the mortgage payments.

[6] Surjit and Satinder did not keep up with the monthly payments. In 2014, Shantel transferred the property to her father, Mr. Robertson, and his friend, Mr. Aujla, who assumed the mortgage. Messrs. Robertson and Aujla owned the property until 2019, when it was sold under foreclosure back to Surjit for $645,000. After paying the principal, interest and costs on foreclosure, CIBC paid the $270,000 excess sale proceeds into court. Those proceeds represented the property's increase in value from 2009 to 2019.

[7] The parties' dispute centered on entitlement to the excess sale proceeds. The key issue at trial was whether the 2009 transfer was a *bona fide* purchase and sale, subject to a constructive trust, a verbal buy-back agreement or option to re-purchase, or a disguised mortgage.

[8] Prior to the trial, Shantel, Surjit and Satinder were involved in proceedings before the Residential Tenancy Board in connection with the missed monthly payments. In addition, Shantel, Mr. Robertson and Mr. Aujla commenced a petition proceeding naming Surjit and Satinder as respondents and seeking orders for vacant possession of the property and unpaid rent. In the petition, they pleaded that at the time of 2009 transfer the parties concluded a verbal agreement, defined as the "Buy-Back Agreement", which included, among others, a term that Surjit would buy back the property within three months of the transfer. However, they pleaded, the "Buy-Back Agreement" did not include a term regarding the price that Surjit would pay should she wish to repurchase the property and the three-month window had long since expired.

[9] In 2014, the petition was heard by Justice Mackenzie. He granted the orders sought by the petitioners, but this Court set aside the orders on procedural grounds: 2015 BCCA 469.

[10] In 2015, Surjit and Satinder commenced the underlying action. In their amended pleadings, among other things, they alleged that Shantel "agreed to transfer the Property back to Surjit for $370,000 on demand". In their responsive pleadings, the respondents alleged the central parties discussed Surjit having an option to buy back the property within three months of the transfer, but that there was no discussion regarding the repurchase price and an offer to repurchase was never made.

[11] The trial was conducted over a 12-day period in 2019. On the first day, Surjit did not attend. However, Satinder advised the judge that he had been representing himself and Surjit throughout and that Surjit's poor health might prevent her from attending the entire trial. The judge asked counsel for the respondents whether they had any objection to Satinder representing Surjit. They did not object, stating "we want this trial to proceed", the "matter has dragged on for long enough" and "if that's the way that [Satinder] feels is the best way to represent the plaintiffs, then we're entitled to go ahead on that basis".

[12] The judge provided Satinder with a Memorandum from the Court to Self-Represented Litigants on Trial Procedure at the outset of the trial. Later the first day, Satinder advised her that that he did not have a claim personally and was present in his capacity as Surjit's representative and a defendant on the counterclaim.

[13] On the second day of the trial, Surjit attended and spoke with the judge through a translator. She confirmed that she wanted Satinder to represent her even though he was not a lawyer and that she did not wish to be represented by a lawyer. She also confirmed that she understood costs could be awarded against her if her claim was unsuccessful.

[14] Later in the trial, after she testified, the judge raised the question of obtaining advice from a lawyer with Surjit again. They had this exchange:

The Court:	Your son has advised this court that he is not advancing any claim on his own behalf.
S. Dhillon:	Yes. I did it because it was my house.
The Court:	You are the only plaintiff in this action.
S. Dhillon:	Yes.
The Court:	I have heard your evidence, and I think you might benefit from obtaining some independent legal advice. I appreciate I asked you about your son representing you, but I thought it important to tell you that I think you might benefit from having your own lawyer. I propose, if you wish, that I give you time to consult with a lawyer.
S. Dhillon:	No. My son will fight my case.
The Court:	All right. I was going to say if you wanted that opportunity, I would be prepared to give you tomorrow morning to take those steps and to consult with a lawyer and to obtain some independent advice from a lawyer who is only acting for you.
S. Dhillon.	No. I don't think – that's fine. My son will do everything.
The Court:	Do you wish an opportunity to consider that?
S. Dhillon:	No. My son will do everything.
The Court:	All right.

[15] Throughout the trial, the judge also repeatedly advised Satinder that the appellants may benefit from obtaining legal advice, encouraged him to retain

counsel, and reminded him that he must follow the rules of evidence. On the second day of the trial, when he was bringing an application to amend pleadings, Satinder told the judge that he had the pleadings "reviewed by someone with extensive legal experience and we've gone over it". On the tenth day of the trial, Satinder requested and the judge granted a lengthy adjournment to give him time to order transcripts of the evidence and obtain legal assistance in preparing written closing submissions.

[16] During closing submissions, Satinder and the judge had this exchange:

> S. Dhillon: It is my respectful submission that Your Ladyship need not trouble yourself with some of the other legal steps that have occurred in this dispute. I'm referring to the petition filed in September of 2014; the trial decision granting the petition and the court of appeal overturning that decision; Justice Walker's decision on the summary trial application by the defendants; and the second RTB decision of May 24th, 2016. All of the above proceedings simply set the stage for this.
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> And the previous rulings from the court of appeal has noted that Mr. Robertson in his affidavit material, even under oath, there is no matching up of his own facts. So rather than –
>
> The Court: But I think you told me earlier that this court didn't need to concern with what had happened before the court of appeal or in any other proceeding.
>
> S. Dhillon: Yeah. So we made it really simple ...

Trial reasons: 2020 BCSC 641

[17] On April 24, 2020, the judge issued her reasons for judgment. At the outset, she commented on Satinder's representation of Surjit:

> [5] There were a number of procedural difficulties which arose as a result of Satinder representing his mother, Surjit, at trial. Although a named plaintiff, Satinder agreed that he was not advancing a claim on his own behalf. Through an interpreter, Surjit confirmed she wanted Satinder to represent her at trial.
>
> [6] Although Surjit was represented earlier in this action, and received some legal advice during the trial, Surjit was not represented at trial. She would have benefited from a lawyer.

[18] After a thorough review of the evidence, the judge concluded that Satinder was not a reliable or persuasive witness. Having previously noted that Surjit had a grade 3 education and spoke no English, the judge said this about her:

> [155] Surjit was an unsophisticated witness who demonstrated an obvious lack of understanding about the precise nature of the Transfer …It was my general impression much of Surjit's evidence was practiced, described matters she did not understand well, and relied heavily on information from Satinder.
>
> [156] I accept that Surjit was not deliberately attempting to mislead the court. It was apparent Surjit trusted Satinder, her only child, without hesitation or qualification, and that her evidence was heavily influenced by his views of the parties' dispute. I view it through that lens.

[19] Based on her factual findings and salient legal principles, the judge concluded that the transfer was a *bona fide* purchase and sale, that Shantel did not hold the property in trust, and that the appellants had failed to establish the parties reached a binding buy-back agreement on the terms alleged. In particular, she stated:

> [227] … At best, I conclude the Central Parties reached an agreement to agree about Surjit's possible repurchase of the Property. An agreement to agree is not sufficiently certain to constitute an enforceable contract…"

Discussion

Standard of review

[20] The decision of a judge to grant audience to a person other than a lawyer is a discretionary determination. It will not be reversed on appeal unless it is so clearly wrong that it amounts to an injustice or the judge gave no weight, or insufficient weight, to relevant considerations: *Kish v. Sobchak Estate*, 2016 BCCA 65 at para. 34.

[21] Whether a pleading is an inconsistent pleading amounting to an abuse of process is a question of law reviewable on a standard of correctness: *Glover v. Leakey*, 2018 BCCA 56 at para. 25.

Did the judge err in permitting Satinder to act as Surjit's representative throughout the trial?

[22] In the appellants' submission, the judge erred by failing to apply the requisite criteria for determining whether to grant Satinder the privilege of audience. Citing *YAL et al v. Minister of Forests et al*, 2004 BCSC 1253, they note that these criteria include, "[t]he nature and complexity of the proceedings, the suitability of the

applicant, the financial means of the plaintiffs and other relevant matters": at para. 62. However, they say, the judge did not consider any of these factors when she permitted Satinder to act as Surjit's representative. For example, she did not attempt to ascertain Surjit's financial ability to retain counsel, nor did she assess Satinder's suitability for the role.

[23] According to the appellants, Satinder was a manifestly unsuitable representative for Surjit. This is so, they say, because he was a key witness on her behalf and he was actively prosecuting the case himself when he had no claim personally. Moreover, they say, Satinder was in a potential conflict of interest and he was plainly not impartial. As a result, they submit, although they requested it, Surjit was denied her right to a fair a trial because the judge permitted Satinder to act as her representative.

[24] In support of their submission, the appellants emphasize Surjit's lack of education and sophistication, as well as Satinder's obvious influence over her and his unsavoury character. They also emphasize the importance of distinguishing between a non-lawyer being granted audience as a representative, which is permissible, and a non-lawyer being permitted to "run a case", which is not. As an example of the latter, they point to Justice Verhoeven's decision in *Renyard v. Renyard*, 2014 BCSC 2649. In *Renyard*, Justice Verhoeven declined to grant the privilege of audience to a proposed lay representative who, for all intents and purposes, had been acting as a lawyer on the claimant's behalf "but without the benefit of legal training, and without the benefit of legal oversight": at para. 17. The appellants submit the circumstances of *Renyard* are analogous to those in this case.

[25] I am not persuaded by these submissions. In my view, it is, at best, surprising that the appellants would come to this Court seeking a new trial on the basis that they should not have been granted the very indulgence they sought from the judge, and that they would rely in part on Satinder's unsuitability when the facts underlying that contention must have been well-known to them when it was sought.

[26] I accept that the discretion to grant audience to a non-lawyer should be exercised sparingly and with caution, based on the demands of the interests of justice: *Venrose Holding Ltd. v. Pacific Press Ltd.*, [1978] B.C.J. No. 1249 (C.A.). I also accept that, as stated in *Holland v. Marshall*, 2009 BCCA 311 at para. 39, it should be guided by considerations that ensure litigants "are competently and ethically represented, that the integrity and fairness of the court process is maintained, and that the proceedings are conducted in a manner that will command the respect of the community". For example, relevant considerations may include the extent of representation requested, the complexity of the case, and the competence of the proposed agent. They may also include prejudice to the opposing side, the objective of securing a just, speedy, and inexpensive determination of the proceeding, and whether the agent has a conflict of interest with the litigant or has displayed dishonestly or disrespect for the law: *Ayangma v. Charlottetown (City) et al.*, 2017 PECA 15; *Halifax Regional Municipality v. Ofume*, 2003 NSCA 110; *Re Facchin Estate*, 2012 BCCA 112. The overarching factor in all cases is the interests of justice: *Venrose* at para. 14.

[27] In this case, the judge clearly exercised her discretion based on relevant considerations and the interests of justice. She confirmed Surjit's desire to be represented by her son rather than a lawyer at the outset and repeatedly took steps throughout the trial to ensure that he represented her competently and ethically. For example, she provided Satinder with the Memorandum, reminded him of his responsibility to follow the rules, encouraged him to seek legal advice, and provided him the opportunity to do so. After Surjit testified, she suggested again that she consult with a lawyer. However, Surjit refused.

[28] The judge was aware of the nature of the case when she permitted Satinder to act as Surjit's representative. She also knew that Surjit had been represented by counsel earlier in the action and had received some legal advice during the trial. Nothing suggested that a conflict of interest or undue influence might exist as between Satinder and Surjit, nor is any such conflict or undue influence now apparent. In addition, and importantly, the judge was appropriately concerned with

the position of the respondents and their legitimate desire to avoid an adjournment and secure a just and speedy determination of the dispute.

[29] I see no error in the judge's exercise of discretion, which was rooted in the overall demands of the interests of justice. It follows that I would not give effect to this ground of appeal.

Were the respondents' pleadings inconsistent such that they amounted to an abuse of process, which the judge erroneously failed to consider?

[30] In the appellants' submission, the judge also erred by failing to address the respondents' inconsistent pleadings concerning the existence of an alleged buy-back agreement. In doing so, they say, she permitted the respondents to benefit from an abuse of process.

[31] According to the appellants, the respondents knowingly advanced irreconcilable positions by pleading in the petition, on the one hand, that the alleged buy-back agreement was a term of the agreement to transfer the property from Surjit to Shantel, but in the action, on the other, that the alleged buy-back agreement did not exist. However, they say, the judge failed to address this manifest inconsistency, which was material because if, as pleaded, the buy-back agreement was a term of the parties' agreement to transfer the property and if, as the judge found, it was void, the transfer would also be void.

[32] I reject this submission. Not only did the appellants fail to raise it before the judge—they specifically told her not to trouble herself with the petition. In addition, in my view, properly construed, the respondents' pleadings in the petition and the underlying action are not inconsistent. Rather, the respondents simply describe substantially the same factual allegations differently in the two sets of pleadings.

[33] Specifically, in their pleadings in the underlying action, the respondents describe the alleged verbal discussion regarding Surjit repurchasing the property within three months of the transfer of the property from Surjit to Shantel as the "Option Agreement". In contrast, in the petition, they describe it as the "Buy-Back

Agreement". Nevertheless, the respondents' pleadings are generally consistent regarding the essential facts alleged and not alleged in connection with the parties' discussions in and around the time of the transfer. In particular, none of the respondents' pleadings allege that a repurchase price was discussed or that Surjit offered to repurchase the property within the three-month window, which were key factual points underpinning the judge's conclusion that, at best, the parties reached an unenforceable "agreement to agree" regarding Surjit's possible repurchase of the property.

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

Conclusion

[35] For all of these reasons, I would dismiss the appeal.

[36] **HARRIS J.A.**: I agree.

[37] **STROMBERG-STEIN J.A.**: I agree.

[38] **HARRIS J.A.**: The appeal is dismissed.

"The Honourable Justice Dickson"