COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Kang v. Nijjar,*
2023 BCCA 262

Date: 20230628
Dockets: CA48648; CA48649

Docket: CA48648

Between:

Parmjit Singh Kang and Dr. Parmjit Singh Kang Inc.

Appellants
(Plaintiffs)

And

Avtar Singh Nijjar, AV Finance Ltd.

Respondents
(Defendants)

- and -

Docket: CA48649

Between:

Parmjit Singh Kang and Dr. Parmjit Singh Kang Inc.

Appellants
(Plaintiffs)

And

**Avtar Singh Nijjar, AV Finance Ltd., Parveen Nijjar,
Parveen Nijjar as Administratrix of the Estate of Anuraj Nijjar
and the Estate of Anuraj Nijjar, Deceased**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated October 4, 2022 (*Bahga Enterprises Ltd. v. Nijjar*, 2022 BCSC 1717, New Westminster Docket S150761 and Vancouver Docket S168102).

Counsel for the Appellants: C. E. Hunter, K.C.
D. Eeg

Counsel for the Respondents:	G. Allen K.M. Meyer
Place and Date of Hearing:	Vancouver, British Columbia June 15, 2023
Place and Date of Judgment:	Vancouver, British Columbia June 28, 2023

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellants appeal a judgment dismissing their claims in two actions: the Vancouver action and the New Westminster action. Held: Appeals dismissed. Although errors of law are alleged in the Vancouver action, those arguments only arise if the judge made a palpable and overriding error in a finding of fact that the appellants had not proven that they had repaid the principal on a loan in 2006. No such error is established on the evidence. The appeal of the New Westminster action fails for a similar reason. Although the principal ground on which the judge dismissed the action was that it was statute barred, the judge also found that the appellants had not proven their underlying claim. That conclusion was also open to him on the evidence.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] These appeals arise out of the dismissal of the appellants' claims in two actions referred to as the Vancouver and New Westminster actions.

[2] In the Vancouver action, the appellants alleged that they had paid off a mortgage-secured loan of $120,000 in October 2006, and were entitled to proceeds from the sale in 2011 of the property that secured the loan. The New Westminster action involved the appellants' contention that they had overpaid on a series of personal loans and sought recovery of the overpayment.

[3] The trial judge dismissed the Vancouver action on several grounds, including, critically, on a finding of fact that he was unable to find that Dr. Kang had repaid the principal amount of $120,000 by way of a $200,000 October 4, 2006 bank draft. The primary ground on which he dismissed the New Westminster action was that the claims for overpayment were statute barred. The reasons for judgment are indexed as 2022 BCSC 1717. The trial judge observed:

> [3] As a general comment at the outset, this case provides yet another stark reminder of the importance of fully and accurately documenting commercial transactions, whether those transactions involve friends, family or arm's length parties. The challenges presented here by the absence of clear documentation are compounded by the fact that the transactions in issue took place many years ago. Additionally, the memories of the two principal players, Dr. Kang and Mr. Nijjar, are incomplete and, as I will discuss further

> below, there are significant credibility and reliability issues with the evidence of both.

The Vancouver Action

[4] In respect of the Vancouver action, the appellants allege a series of errors. Quite properly, at the beginning of the appeal, the appellants acknowledged that their appeal could succeed only if they were able to persuade the Court that the judge had made a palpable and overriding error in rejecting the claim that the principal amount owing had been repaid in October 2006.

[5] As a result, we invited counsel to address that ground of appeal. At the conclusion of his able submissions, we informed counsel that we were not persuaded that the judge had made a palpable and overriding error of fact. Accordingly, we did not call on the respondents to address this ground of appeal, and it was unnecessary to hear argument on any other of the alleged errors relating to the Vancouver action.

[6] I will briefly explain our conclusion that the appellants had failed to demonstrate palpable and overriding error in the judge's conclusion that he could not find that Dr. Kang repaid the principal amount on the mortgage, referred to in the reasons as the Anuraj Mortgage, of $120,000 by way of the $200,000 October 4, 2006 bank draft.

[7] The judge described certain aspects of the dealings between the parties, including certain documentation evidencing those dealings:

> [8] As noted above, Dr. Kang and Mr. Nijjar and/or their respective companies, have been involved in numerous transactions spanning many years. It is not necessary to go through the entire history of their dealings, but it is useful to highlight some.
>
> [9] According to Dr. Kang, while he regularly obtained conventional bank financing for his real estate developments, he often needed additional or quicker money and would use private lenders such as Mr. Nijjar. Some of the loans from Mr. Nijjar were secured by mortgages and others were reflected in promissory notes. Some were done very informally with virtually no loan documentation or security.
>
> [10] Mr. Nijjar testified that he used both his own personal money as well as money provided by third party investors to fund the loans to Dr. Kang.

> [11] According to Mr. Nijjar, in September 2005, he and Dr. Kang agreed to consolidate a number of outstanding loans into a single loan for $700,000, which was evidenced in a promissory note dated September 2, 2005 that each signed. Mr. Nijjar reviewed a ledger listing a number of loans that made up the $700,000 total.
>
> [12] Subsequently, in July 2006, Mr. Nijjar and Dr. Kang agreed to consolidate some additional outstanding loans totalling $765,000. Both signed a document dated July 31, 2006 in which Dr. Kang acknowledged a number of loans that made up the $765,000 and the $700,000 debt reflected in the September 2, 2005 promissory note. Notably, neither document listed the Anuraj Mortgage as included in the consolidated debts.
>
> [13] Between April 2006 and January 2007, Dr. Kang paid Mr. Nijjar $1,465,000 to retire the consolidated debts referred to above. One of the payments was a $200,000 bank draft from Dr. Kang to Mr. Nijjar dated October 4, 2006. This payment is central to the dispute underlying the Vancouver Action in that Dr. Kang alleges that this payment was towards the loan secured by the Anuraj Mortgage, whereas Mr. Nijjar alleges the payment was concerned with other unrelated loans. [Emphasis added.]

[8] The Anuraj Mortgage was executed on December 2, 2004. The stipulated interest rate was 15% per annum, and the mortgage provided for interest payments of $1,500 per month payable on the first day of each month. The first payment was to be made on January 1, 2005, and the last payment on December 1, 2005. The judge noted:

> [18] There is a dispute in the evidence about payment of interest under the $120,000 loan. It is common ground that Dr. Kang made four payments of $1,500 each by way of cheques made out to Anuraj Nijjar dated the first day of each month, from January–April, 2005. Thereafter, Dr. Kang testified that he was directed by Mr. Nijjar to make the payments to a Mr. Kulwant Bhangu. Dr. Kang said he paid a total of $27,600 to Mr. Bhangu from May 1, 2005 to December 1, 2006. The majority of payments were in the amount of $1,500, although the last six payments were for $1,600.
>
> [19] I note that the interest payments made total $33,600, whereas the interest payments required under the $120,000 loan (see para. 16 above) total $33,000. This total reflects the fact that the loan was not paid off in one year as originally contemplated. It also lends some support to Dr. Kang's position that all of the payments made, including those to Mr. Bhangu, were in respect of the Anuraj Mortgage and that the additional $600 was to account for the fact that some of the interest payments had been late.
>
> [20] Dr. Kang testified that he also paid off the principal amount of $200,000 of the two Anuraj loans by way of a bank draft dated October 4, 2006 payable to Mr. Nijjar (see para. 13 above).
>
> [21] In addition to the interest payments, Dr. Kang made four payments to Anuraj Nijjar for $3,000 each on August 7, September 7, October 7 and

> December 5, 2006. Dr. Kang's evidence about those payments was vague. He agreed that the payments could have been towards the Anuraj Mortgage, but he had no explanation for why he would have made payments in October and December 2006, after he allegedly paid off the principal amount.

[9] It is important to note that the judge found that the evidence of both principal parties faced credibility and reliability problems. As a result, the judge approached the evidence of both witnesses with considerable caution.

[10] Dr. Kang supported his case with the evidence of a forensic accounting expert, Ms. Blacklock, who opined that Dr. Kang repaid the $120,000 principal amount of the mortgage plus interest of $33,600 by December 2006. The judge rejected a number of criticisms of the report:

> [55] I do not agree that Ms. Blacklock was not impartial or that she strayed into advocacy on behalf of Dr. Kang. I found her to be measured and professional in her evidence. I also do not agree that she improperly engaged in fact-finding. It is the very nature of forensic accounting evidence that the accountant offers opinions about the proper characterization of certain transactions. In this sense, an accountant like Ms. Blacklock is more akin to a fact witness, albeit one who draws on her training and expertise to support her findings.
>
> [56] In short, many of the defendants' objections to Ms. Blacklock's evidence are misplaced. However, the one central objection that has merit is that many of the assumptions relied on by Ms. Blacklock were not established by evidence led at trial. Failure to establish the facts and assumptions on which an expert opinion is based substantially diminishes the weight that can be attached to that opinion: *R. v. J.-L.*, 2000 SCC 51 at para. 59; *Blackwater v. Plint*, 2001 BCSC 997 at paras. 347-349, rev'd on other grounds 2005 SCC 58.

[11] In analysing the evidence, the judge said:

> [65] There are numerous problems with Dr. Kang's claim. First, the claim is premised on the fact, as alleged by Dr. Kang, that the Anuraj Mortgage was paid off by way of the $200,000 bank draft to Mr. Nijjar dated October 4, 2006 and the interest payments described in paras. 18 and 19 above.
>
> [66] With respect to the interest payments, I accept Dr. Kang's evidence that he made the payments as directed by Mr. Nijjar, including making most of the payments to Mr. Bhangu. That is consistent with the evidence about how Dr. Kang and Mr. Nijjar did business over the years. In contrast, much of Mr. Nijjar's evidence about the Anuraj Mortgage was difficult to accept. The loan underlying the mortgage was clearly a loan from Mr. Nijjar. Whatever reason he may have had for putting the mortgage in the name of his daughter, there is no evidence to suggest that she had any more than a

> passing involvement in the loan transaction. Certainly, there is no evidence to support Mr. Nijjar's position that he effectively loaned the money to Anuraj, who then loaned it to Dr. Kang. Therefore, I reject Mr. Nijjar's position that the interest payments to Mr. Bhangu do not constitute payments towards the Anuraj Mortgage.
>
> [67] However, I am unable to find that Dr. Kang repaid the principal amount on the Anuraj Mortgage of $120,000 by way of the $200,000 October 4, 2006 bank draft. As described in paras. 11–13, that payment was part of a series of payments totalling $1,465,000 that were paid to retire a number of personal loans from Mr. Nijjar to Dr. Kang as consolidated by way of the September 2, 2005 promissory note and July 31, 2006 debt acknowledgement document. Many of those loans were specifically identified yet there is nothing in the evidence to indicate that the $120,000 loan underlying the Anuraj Mortgage was included in those consolidated debts.
>
> [68] Ms. Blacklock's report does not assist Dr. Kang on this issue as she simply assumed, based on information from Dr. Kang, that the October 4, 2006 payment was intended to go towards both the Anuraj Mortgage and the other $80,000 loan. That assumption however was not established on the evidence. As discussed in para. 55 above, absent evidence to establish this assumption, it carries no weight.

[12] The appellants contend that the palpable and overriding error is found in para. 68, and, most particularly, in the observation that Ms. Blacklock's opinion rested on an assumption, based on what she had been told by Dr. Kang — that the October 2006 payment of $200,000 was intended to go towards repayment of the principal amount of the mortgage. They say that the foundation of Ms. Blacklock's opinion was that the financial documentation, principally the evidence relating to interest payments, was consistent with and probative of her conclusion that the October 2006 $200,000 payment was attributable to the repayment of the principal amount of the mortgage loan. It was an error, they contend, to treat her conclusion as entitled to no weight, because it is not solely based upon an assumption.

[13] We did not find that argument persuasive. In our view, the evidence before the court about whether the $200,000 payment was attributable to repayment of the principal was conflicting and equivocal. While it was true that certain payments of interest were consistent with the payment of interest on the mortgage, and that those payments ceased some months after the alleged repayment at the end of 2006, the inference that, therefore, the payment in October 2006 was on account of the principal under the mortgage, and not in respect of other debts consolidated, is not

necessary, inevitable, or most probable. What was required to support the ultimate conclusion that the $200,000 payment was on account of the principal amount of the mortgage was reliance on what Ms. Blacklock had been told by Dr. Kang.

[14] It may be helpful to explain this point a little more fully by reference to the evidence before the judge. That evidence disclosed that Dr. Kang paid off $1.45 million in consolidated loans through a series of payments over time. Those payments included the $200,000 payment on October 4, 2006, which is said to have included the payment of the Anuraj Mortgage. The payments compromising the $1.45 million are identified in a document signed by both parties in February 2007.

[15] The evidence supported the conclusion that the repayment of $1.45 million in consolidated loans reflected an aggregation of two sets of consolidated loans. The first was a consolidation of $700,000 in September 2005. The loans said to compromise the $700,00 are itemized on a spreadsheet. The Anuraj Mortgage is not included in that list. The second consolidation took various outstanding loans and amalgamated them into a single loan of $750,000. This occurred in July 2006, and is evidenced by a promissory note that itemizes the loans consolidated. The Anuraj Mortgage is not listed in that document. The key question, therefore, became whether the Anuraj Mortgage was part of the $700,000 consolidation.

[16] There is no document, as acknowledged by Ms. Blacklock, that directly evidences the Anuraj Mortgage as being consolidated as part of the $1.45 million loans that were repaid over time, and nothing that evidences that the $200,000 October 4 repayment was made in respect of the principal owing in respect of that mortgage.

[17] Dr. Kang, in his evidence, was unable to recall the specific loans making up the $700,000 consolidation. When taken to the February 1, 2007 document, Dr. Kang realized that the October 4, 2006 payment had been put toward the aforementioned consolidated loans. He then changed his evidence, testifying that the Anuraj Mortgage “should have been included” in the list of consolidated loans,

despite having given evidence that he had little recollection of what amounts comprised the consolidated loans beyond what he could see in the documentary evidence.

[18] As noted, Ms. Blacklock agreed that she had seen no documents to suggest that the Anuraj Mortgage formed part of the consolidated $700,000 loan. Rather, the import of her evidence was that the ledger had not captured all of the loans, and that Dr. Kang owed more than $700,000. Ms. Blacklock's conclusion was not that the $700,000 consolidation was incorrect, but that it was incomplete, as it did not include the Anuraj Mortgage. This much is consistent with the respondents' theory of the case: namely, that the evidence showed that the $700,000 consolidation did not include the mortgage, and it was not paid off when the $1.45 million was repaid.

[19] All of this evidence laid a foundation for the judge to conclude that the Anuraj Mortgage was not shown to have been paid off by the October 2006 payment. To overcome that conclusion, the appellants needed to persuade the judge that Ms. Blacklock's conclusion to the contrary should be accepted. That conclusion rested on two assumptions. First, that the pattern of interest payments was consistent with repayment of the principal and what she had been told by Dr. Kang. The interest payments standing alone ground only one possible inference. To conclude that the principal had been repaid, Ms. Blacklock had to assume the truth of what Dr. Kang had said.

[20] This is supported by the language of Ms. Blacklock's report. In her report, she said:

> 27. I have been told by Dr. Kang that this payment to Avtar Nijjar on $200,000 was intended to be a repayment of principal on the two Anuraj Mortgages: the 120K Mortgage and the 80K Mortgage.
>
> 28. The information from Dr. Kang regarding the repayment of the Anuraj Mortgage on October 4, 2006 is consistent with the dates that the second mortgage interest payments on the two loans ceased.
>
> ...
>
> 32. Based on my analysis and on the documents and information available, the 120K Mortgage including interest was fully repaid by Dr. Kang by December 2006.

[21] Respectfully, it was open to the judge to conclude that the documentation disclosing payments that were consistent with paying interest on the mortgage, and the fact that they ceased some months after it was said the principal amount had been repaid, was not sufficient to ground a conclusion, in light of the conflicting documentation, that the $200,000 payment was on account of principal in respect of that mortgage. That fact could only be established by other evidence. That evidence was the evidence of Dr. Kang, which the judge treated with scepticism. The judge did not fall into a palpable and overriding error in concluding that Ms. Blacklock's opinion depended on an unproven assumption based on what Dr. Kang had told her about the purpose of the payment.

[22] In short, the judge was involved in interpreting the evidence, weighing and balancing it, and drawing inferences from it. I see no error in principle nor a palpable error in the judge's conclusion that he could not give weight to Ms. Blacklock's ultimate opinion in the absence of proof of a critical underlying fact. He did not discount or ignore the probative value of the monthly payments which he accepted related to the mortgage. He found, as he was entitled to find, that Dr. Kang had not satisfactorily explained the continuation of interest payments after it was said that the principal had been paid off, and he was entitled to find that he had not been persuaded by Dr. Kang, in light of all of the uncertainties in the evidence, that the $200,000 payment was on an account of the debt in issue.

[23] For these reasons, I am of the view that the judge's conclusion was open to him on the evidence and does not reflect a palpable error. Accordingly, I would not accede to this ground of appeal. I would dismiss the appeal in the Vancouver action.

The New Westminster Action

[24] I turn now to the appeal in the New Westminster action. This action related to alleged overpayment of certain disputed loans. Originally in the notice of civil claim ("NOCC") filed April 22, 2013, the plaintiffs limited their claim to alleged overpayment of loans between 2008 and 2011. In February 2016, the plaintiffs successfully

applied to amend the NOCC to include loans dating back to 2003. Only certain of those loans (certain Visa and personal loans) are in issue on appeal.

[25] The primary ground on which the judge dismissed the action was that the claims were statute barred. The judge applied the former *Limitation Act*, R.S.B.C. 1996, c. 266 [former *Act*], because the facts giving rise to the claims occurred prior to June 1, 2013, the date on which the new *Limitation Act*, S.B.C. 2012, c. 13 [New *Act*], came into effect.

[26] The judge concluded that the claims were subject to the general six-year limitation period under s. 3(5) of the former *Act*. That conclusion is not in issue. The judge reasoned:

> [87] Assuming the limitation period on the claims to overpayment commenced running on the date of the final payment, the limitation period with respect to the personal loans expired in January of 2013, and for the Visa Loans, at the latest in November of 2013. However, these claims were not brought until the ANOCC was filed on February 29, 2016, well after the expiry of the six-year limitation period.

[27] The judge then turned to consider whether the running of the limitation period was postponed pursuant to s. 6 of the former *Act,* the argument being that their claims fell within s. 6(3)(f) in that they are seeking relief from the consequences of a mistake. The judge rejected an argument that the overpayment could not reasonably have been discovered by January 1, 2008, and accordingly the six-year limitation period expired on January 1, 2014, after the NOCC was filed on April 22, 2013. He said:

> [91] I do not accept the plaintiffs' position. The NOCC did not plead the personal and Visa Loans. Rather, these claims were not advanced until the ANOCC was filed on February 29, 2016. The plaintiffs provided no authority to support the proposition that the limitation period for these claims somehow stopped running upon the filing of the original NOCC.

[28] The appellants say that the judge erred because he failed to consider the effect of s. 4(4) of the former *Act*. That section provides:

> (4) In any action the court may allow the amendment of a pleading, on terms as to costs or otherwise that the court considers just, even if between the

> issue of the writ and the application for amendment a fresh cause of action disclosed by the amendment would have become barred by the lapse of time.

[29] They say that the effect of the section, coupled with the amendment of the NOCC, reserved the question whether their claims were statute barred to trial. They do not say that s. 4(4) extinguished the limitation defence as a result of the amendment being allowed, but that the judge ought to have considered the effect of the section in potentially avoiding the effect of a limitation defence. The judge did not engage with that analysis, and accordingly a new trial should be ordered to allow that question to be properly litigated.

[30] For their part, the respondents contend that this is a new issue on appeal. Section 4(4) was neither pleaded nor argued. The basis of the amendment was the potential application of a 10-year limitation period. The argument at trial had been about whether the running of the limitation period had been postponed under s. 6(3)(f). Leave to raise this issue is required, they say, but should not be granted. More fundamentally, whether the claim is or is not statute barred is beside the point, because the judge had also concluded that the appellants had failed to prove their underlying factual claim: namely, overpayment on the material loans.

[31] In reply, the appellants argue that if the issue is new, leave to raise it should be granted, and there is no alternative basis in the judge's findings to support the dismissal of the action.

[32] In my view, the issue raised is a new issue. The principles governing when leave to raise a new issue should be granted are so well settled there is no need to rehearse them here. Ultimately, whether to grant leave to raise a new argument is driven by an assessment of the interests of justice.

[33] In this appeal, I agree with the respondents that the limitations issue raised by the appellants, whatever theoretical merit it may have, does not affect the outcome of the appeal. This is so because, in my opinion, the judge found as a fact that the appellants had not made out their claim to have overpaid on the material loans.

[34] The appellants attempt to avoid this outcome by pointing out that the judge made several comments suggesting that he was not considering or addressing the merits of the underlying claim of overpayment. Hence, they draw attention to these remarks:

> [82] In terms of the Visa and personal loans, the plaintiffs' claim again relies almost exclusively on Ms. Blacklock's report as Dr. Kang was unable to recall many of the relevant details of the various loans.
>
> [83] It is unnecessary to consider Ms. Blacklock's findings, however, as I agree with the defendants that the claims of overpayment on the personal and Visa loans are statute barred.
>
> …
>
> [93] I therefore find that the claims for overpayment on the Visa and personal loans are statute barred. As such, there is no need to address the plaintiff's claims for unjust enrichment.
>
> [94] As I have indicated, given my findings on the limitation issue, it is not necessary to address the findings set out in Ms. Blacklock's report. …

[35] If these statements stood alone, I would tend to agree with the appellants, but they do not stand alone. Immediately, after the just-quoted sentence in para. 94, the judge said:

> [94] ... That said, I do want to reiterate the point I made in para. 54 above that I found her to be measured and professional in her evidence. Ms. Blacklock was presented with a very difficult task in that she was asked to review extensive yet often incomplete financial records with little assistance from Dr. Kang given his poor memory of many of the transactions in issue. In order to arrive at her opinions, Ms. Blacklock was required to make a number of assumptions, for example about how payments made by the plaintiffs were applied against the various debts (first in-first out) and the interest rate applicable to the many personal and informal loans.
>
> [95] Those assumptions may well have been reasonable, but they suffer from the same defect as the assumption that Dr. Kang repaid the Anuraj Mortgage by way of the October 4, 2006 bank draft to Mr. Nijjar. They are assumptions not established on the evidence led at trial.
>
> [96] Ultimately, this is the flaw that ran throughout the plaintiffs' claims in both actions. Given the lack of clear documentation with respect to many of the transactions and Dr. Kang's poor memory as well as his suspect credibility, the plaintiffs have simply failed to prove their claims.

[36] I can only conclude that in saying that it is not necessary to consider certain matters, the judge is acknowledging that if the claim is statute barred there is no

need to make further findings of fact about the underlying transactions because whatever the facts may be, the claim must fail. That is to say that the outcome is not going to be affected by a consideration of those issues. Nonetheless, it seems clear to me that the judge makes a clear finding of fact in paras. 95 and 96 that the appellants failed to prove their claims in both actions for substantially the same reasons. The claims are based on unproven assumptions and assertions in both actions.

[37] In light of these findings of fact, there is a clear alternative basis, not dependent on limitations issues, supporting the dismissal of the action.

[38] In the result, and principally because it would not alter the disposition of the appeal, I would not grant leave to raise the new issue. I would dismiss the New Westminster appeal on the ground that no error warranting appellate intervention has been established in relation to the judge's conclusion that the appellants had not, in any event, proven their claim to overpayment.

[39] One final point. The respondents apply for special costs of the appeal on the basis that the appellants advanced inconsistent positions at trial and on appeal. The criticism is not directed to appellants' counsel but to the parties. I do not think there is any reason to depart from the conventional order on costs and would, therefore, decline to award special costs.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"