

CANADA / JUDGMENT

672047 B.C. Ltd. v. Johal

2024 BCCA 427

COURT

British Columbia Court of Appeal

DECIDED

20 December 2024

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2024 BCCA 427 672047 B.C. Ltd. v. Johal COURT OF APPEAL FOR BRITISH COLUMBIA Citation: 672047 B.C. Ltd. v. Johal, 2024 BCCA 427 Date: 20241220 Docket: CA49598 Between: 672047 B.C. Ltd. and Avtar Singh Johal Appellants (Plaintiffs) And Harvinder Singh Johal and Susan Frances Little Respondents (Defendants) Before: The Honourable Madam Justice Fenlon The Honourable Madam Justice Horsman The Honourable Justice Iyer On appeal from: An order of the Supreme Court of British Columbia, dated December 28, 2023 (672047 B.C. Ltd. v. Johal, 2023 BCSC 2261, Vancouver Docket S218268). Oral Reasons for Judgment Counsel for the Appellants: J. Malik P. Malhi Counsel for the Respondent, Harvinder Singh Johal: R.C. Gallo Counsel for the Respondent, Susan Frances Little: L.R. Nambiar Place and Date of Hearing: Vancouver, British Columbia December 20, 2024 Place and Date of Judgment: Vancouver, British Columbia December 20, 2024 Summary: The appellants supplied funds to the respondents to help them purchase a home. After the respondents separated and listed the home for sale, the appellants commenced an action against the respondents, claiming the funds were not a gift. At trial, the appellants took the position that the individual appellant's intention, and not the intention of his company, was determinative. The trial judge concluded the funds were a gift and dismissed the action. On appeal, the appellants now argue the trial judge erred in failing to separate the intentions of the individual and his company. Held: Appeal dismissed. The appellants cannot argue a position on appeal inconsistent with their position at trial.

- [1] IYER J.A.: This appeal arises out of a dispute over the characterization of funds supplied by the appellants, Avtar Johal and his company, 672017 B.C. Ltd. ("Company"), to the respondents, Avtar Johal's son, Harvinder Johal, and his daughter-in-law, Susan Little. Mr. Johal is a 50% shareholder, director, and officer of the Company. The only other shareholder is Mr. Johal's wife, Pritpal Johal.
- [2] The respondents married in 2009. In 2010, they were looking to purchase a family home but did not have the funds to buy the kind of home they wanted. In April 2010, Avtar Johal caused the Company to provide a bank draft in the amount of \$500,000 ("Funds") to Harvinder Johal. The respondents used the Funds to purchase a family home.

- [3] The respondents separated in December 2018, and subsequently listed the family home for sale. The appellants commenced their civil claim in August 2020. They sought a beneficial interest in the family home, arguing that the Funds were an equity investment by Avtar Johal and the Company. In the alternative, they sought to have the Funds characterized as a loan. They also made a claim in unjust enrichment.
- [4] In his response to the claim, Harvinder Johal characterized the Funds as an interest-free loan. In her response to civil claim, Ms. Little characterized the Funds as a gift.
- [5] Based on the evidence before her, the trial judge found that the Funds were a gift. She dismissed the unjust enrichment claim on the basis that, since the Funds were a gift, there was a juristic reason for the enrichment.
- [6] The appellants' first and primary ground of appeal is that the judge erred in law by failing to appreciate that Avtar Johal and the Company are separate legal entities, and by treating the Funds as if they were Avtar Johal's funds. This argument is directly inconsistent with the appellants' pleading, the evidence they led at trial, and the submissions they made to the trial judge.
- [7] Although both Avtar Johal and the Company are named as plaintiffs, the notice of civil claim refers to the "plaintiff" in the singular throughout. No facts are pleaded relating to the Company's intention as distinct from Mr. Johal's intention. In the Legal Basis of the notice of civil claim, the appellants plead that Avtar "acted as a purchaser", and that the funds were an "advance by Avtar through 672047".
- [8] Consistent with the pleadings, the appellants' evidence at trial did not distinguish between the intention of the Company and that of Mr. Johal. Avtar Johal was the appellants' only witness. He testified that, although his wife is listed as secretary and 50% shareholder, Mr. Johal does "everything".
- [9] In closing submissions, counsel for the appellants stated, in response to questioning by the trial judge, that Avtar Johal's subjective intentions were determinative of how to characterize the Funds, despite the fact they were advanced by the Company: THE COURT: So, you're going to take me to case law that says that I need to -- the -- Avtar's subjective intention at the time he gave the money is what I look to? CNSL G. TIWANA: Yes. THE COURT: All right. CNSL G. TIWANA: And that it's his intention that matters when he gave the money. And at the time it was his testimony when he advanced the money that it was his investment. ... CNSL G. TIWANA: ... So then I refer to the case law with the resulting trust and how the -- Avtar's intention is what that [sic] matters. At paragraph 130, the case of Kerr: The actual intention of the guarantor is the governing consideration... [Emphasis added.]
- [10] As Justice Abrioux wrote in *Argo Ventures v. Choi*, 2020 BCCA 17, this Court has not permitted a party on appeal to take a position inconsistent with the position they took at trial:

- [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. See also *Deissner v. Boorsma*, 2023 BCCA 476.
- [11] Having taken the position at trial that Avtar Johal's subjective intention was determinative of the characterization of the Funds, even though the Funds were drawn from the Company, it is not open to the appellants to now argue that the trial judge erred by failing to treat the Company as a separate legal entity whose intention must be separately determined. This argument is inconsistent with the pleadings, the evidence at trial, and the submissions made by the appellants to the trial judge. For this reason, I would decline to entertain any arguments by the appellants on appeal that relate to the purported error of the trial judge in failing to distinguish between the Company's intention and Avtar Johal's intention.
- [12] In their factum, the appellants raise the additional arguments that the trial judge erred in finding that Ms. Little met her burden of proof to rebut the presumption of a resulting trust by showing that the Company intended a gift and then failing to explain how and why it was appropriate to pierce the corporate veil.
- [13] It is evident that both of these arguments are premised on the success of the first ground of appeal. For the reasons I have stated, it is not open to the appellants to advance these arguments at this stage. In oral submissions, counsel for the appellants made a different argument than the one made in their factum. The appellants point to discrete passages of the trial judgment in which they say the trial judge misstated the onus of proof in the context of a resulting trust. They say these errors are an independent ground for appellate intervention, apart from the question of whether the judge should have differentiated between the Company and Avtar Johal.
- [14] Even accepting that the judge may, in isolated passages, have misstated the applicable legal principles, such errors are inconsequential. Reading the reasons holistically, it is clear that the judge understood that the onus was on Ms. Little to rebut the presumption of resulting trust by showing that the appellants intended to gift the Funds. The judge extensively reviewed the evidence and provided detailed reasons for her conclusion that a gift was intended. The appellants also challenge the judge's treatment of the evidence in her analysis; however, they have not demonstrated any palpable and overriding error by the judge. Instead, their arguments invite this Court to reweigh the evidence and reach different factual conclusions on the evidence. This is not the proper role for this Court.
- [15] In conclusion, I would dismiss the appeal.

[16] FENLON J.A.: I agree.

[17] HORSMAN J.A.: I agree.

[18] FENLON J.A.: The appeal is dismissed. "The Honourable Justice Iyer"

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Prepared on 29 October 2026 · Esheria