

CANADA / JUDGMENT

Bajwa v. Habib

2020 BCCA 230

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 230 Bajwa v. Habib

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bajwa v. Habib,

2020 BCCA 230

Date: 20200814

Dockets: CA45721; CA45846; CA46122

Between:

Navdave Preet Singh Bajwa and Loveleen Kaur Bajwa

Respondents

(Plaintiffs)

And

Shahid Habib and Gulnaz Shahid

Appellants

(Defendants)

And

Jagmeet Khabra, doing business as Sutton West Coast Realty,

Rajinder Khabra, carrying on business as Sutton West Coast Realty,

Ahmad Buttar, carrying on business as Sutton West Coast Realty,

Gurtej S. Parmar, Navdave Preet Singh Bajwa, Loveleen Kaur Bajwa,

Ken Sinnott, Division of Sutton West Coast Realty

Respondents

(Defendants by way of Counterclaim)

Before:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Hunter

The Honourable Madam Justice Griffin

On appeal from: Orders of the Supreme Court of British Columbia, dated October 22, 2018 (Bajwa v. Habib, 2018 BCSC 1822; New Westminster Docket S193614); December 14, 2018 (Bajwa v. Habib, 2018 BCSC 2423, New Westminster Docket S193614); May 9, 2019 (Bajwa v. Habib, 2019 BCSC 721, New Westminster Docket S193614).

The Appellant, appearing in person:

S. Habib

Counsel for the Respondents Navdave Preet Singh Bajwa and Loveleen Kaur Bajwa:

K.P. Maki

Counsel for the Respondents Jagmeet Khabra, Rajinder Khabra, Ahmad Buttar, Ken Sinnott and Sutton West Coast Realty:

D. Rondeau

Place and Date of Hearing:

Vancouver, British Columbia

July 27, 2020

Place and Date of Judgment:

Vancouver, British Columbia

August 14, 2020

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

Summary:

The appellants appeal a series of orders arising from a failed agreement for the purchase and sale of residential property. They challenge certain procedural rulings and factual decisions made by the trial judge, as well as the decision to reopen the trial to hear further submissions on remedies. Held: Appeal dismissed. No error was shown in the judge's procedural or factual determinations. The judge did err in reopening the trial, but the error had no impact on the appellants.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] This appeal arises out of a failed real estate transaction in which the appellants agreed to sell residential property to the respondent Parmar or his assignee. The trial judge held that the appellants breached their contract when they refused to complete the purchase, and awarded the assignee Mr. Bajwa \$15,559.70 in consequential damages. The appellants' counterclaim against the plaintiffs and several realtors involved in the transaction was dismissed.
- [2] The legal proceedings began in a conventional manner, but took a somewhat unusual course after the initial judgment. After the transaction collapsed, the plaintiffs filed a claim for specific performance of the contract, or alternatively for damages in lieu of specific performance. The appellants admitted that they had executed the purchase agreement, but claimed that they had been tricked into signing the agreement by the realtors involved in the transaction.
- [3] The plaintiffs' claim was heard by summary trial. After the trial was concluded, the trial judge released reasons for judgment finding the appellants in breach of contract, dismissing the counterclaim, awarding one of the plaintiffs specific performance and modest consequential damages arising from the breach, and setting a new date for completion of the agreement. Shortly before the new date for completion and before the formal order was entered, the successful plaintiff Mr. Bajwa applied for an extension of time to complete. The trial judge treated this application as an application to re-open the trial, stated that she was vacating her order for specific performance, and scheduled new dates for submissions on remedies. When the matter resumed, Mr. Bajwa re-elected his remedy claim to damages, but the trial judge held that he had not proven any loss of bargain damages. The final order entered awarded Mr. Bajwa \$15,559.70 in damages and costs, which the judge stated should be assessed as special costs.
- [4] In the end, the trial judge had issued three sets of reasons, the initial summary trial judgment issued in October 2018 (the "October Judgment"), the reasons re-opening the trial issued in December 2018 (the "December Reasons") and the final set of reasons in May 2019 (the "May Judgment"). Three orders were entered in relation to these judgments. All of these orders were appealed by the appellants. The appeals were consolidated and were heard together before this division.

- [5] In this Court, the appellants raise a broad range of issues which can conveniently be grouped into three categories: procedural issues (the decision to hear this claim by summary trial and the refusal to receive evidence from the appellants filed just before the hearing); factual issues (concerning the judge's acceptance of the validity and enforceability of the contract, and her dismissal of the counterclaim); and a specific challenge to the judge's decision to re-open the proceedings for further submissions. The appellants also seek to introduce as evidence in this Court the late-filed material that was rejected by the trial judge.
- [6] As I will explain in this judgment, I do not see any merit in the procedural or factual issues raised by the appellants, and would not give effect to them. The appeal in relation to the dismissal of the counterclaim relates solely to these issues, and accordingly must be dismissed.
- [7] I do agree that the trial judge erred in her decision to set aside her decree of specific performance and re-open the proceedings in respect of Mr. Bajwa's claim, but I do not consider that the appellants were disadvantaged by this error. The substantive order made by the trial judge in the May Judgment is effectively the same as the order that would have followed from the October Reasons, except that the decree of specific performance was omitted. It is arguable that if any party suffered a detriment from the re-opening of the claim, it was Mr. Bajwa, but he has not appealed.
- [8] For these reasons and the reasons that follow, I would dismiss the appeal in relation to the decision to re-open and the final order. Finally, I would dismiss the application to introduce the evidence of the late-filed material in this Court.

Background

The Transaction

- [9] The appellants are owners of property in Surrey, B.C. (the "Subject Property"). In March 2017, they entered into an arrangement with a realtor, the defendant by counterclaim Jagmeet Khabra, whereby Mr. Khabra would seek out prospective buyers of the Subject Property and would accept a reduced commission if any sale resulted. In April and May, Mr. Khabra presented the appellants with three offers, but for various reasons, the first two offers did not lead to a completed contract and the third offer, which did, collapsed when the purchasers did not remove subjects.
- [10] Then on May 22, 2017, Mr. Khabra presented an offer from the respondent Gurtej Parmar at a purchase price of \$1,021,000, with completion and possession dates of July 31, 2017 and August 1, 2017. The offer was prepared on the standard BC Real Estate Association and Canadian Bar Association form of offer, and contained several terms and conditions for the benefit of the purchaser (the "Subject Clauses"). The pre-printed form also contained a provision concerning the assignment of the contract in these terms (the "Restriction of

Assignment clause"):

20A. RESTRICTION ON ASSIGNMENT OF CONTRACT: The Buyer and the Seller agree that this Contract (a) must not be assigned without the written consent of the Seller; and (b) the Seller is entitled to any profit resulting from an assignment of the Contract by the Buyer or any subsequent assignee.

- [11] On the offer, the words "(a) must not be assigned without the written consent of the seller; and" had been struck out. The effect of this change was that if the contract was made on these terms, it could be assigned by Mr. Parmar to anyone without the consent of the appellants, but the appellants would be entitled to any profit arising from the assignment.
- [12] The appellants delivered a counter-offer on the same day. The counter-offer proposed several additional terms, not material to this appeal, but also included a handwritten addition to para. 20A: "and the new assigned price will be paid to the sellers." The counter-offer was accepted by Mr. Parmar, and forms the agreement (the "Contract") sought to be enforced in this litigation.
- [13] In June and early July, the parties attempted to negotiate an extension to the completion and possession dates. The appellants wanted to extend the date to August 31 and September 1, but Mr. Khabra advised that the purchasers would only agree to August 22 and 25, 2017. No agreement to extend was made, and on July 13, Mr. Khabra confirmed that the completion and possession dates would remain July 31 and August 1 respectively. The next day, July 14, the appellants advised that they would not complete the sale of the Subject Property.
- [14] On July 20, the appellants advised that they would complete the agreement if the completion and possession dates were extended to August 31 and September 1, but the purchasers did not agree to the extension. On July 31, the purchasers tendered the closing documents, but they were not executed by the appellants and the sale did not complete.

The Lawsuit

- [15] On August 14, 2017, Mr. and Mrs. Bajwa filed a Notice of Civil Claim asserting that they were assignees of the Contract, outlining the circumstances of their claim, and seeking "an order for specific performance, or in the alternative, damages in lieu of specific performance", as well as damages for breach of contract. The appellants, who have acted on their own behalf throughout, filed their Response to Civil Claim on August 31, and with it a counterclaim against the plaintiffs, Mr. Parmar and the relators who had been involved in the transaction. In both pleadings, the appellants claimed that Mr. Khabra and the other realtors involved in the transaction (whom I will refer to collectively as the "Real Estate Professionals") "obtained the paper work fraudulently, because it was done through misrepresentation, and impersonation", and further that "the defendants by counterclaim tricked me to sign it through misrepresentation." These allegations were denied by the defendants by counterclaim.

- [16] In February of 2018, the appellants were examined for discovery. They admitted that they had signed the Contract and initialled changes in the Contract, but said they had been tricked into doing so by the Real Estate Professionals. In June of 2018, the plaintiffs and defendants by counterclaim filed summary trial applications, returnable July 12 and 13, 2018. On July 9, however, the appellants filed a Notice of Trial for December 2018, stating in the Notice that the parties had agreed on the length of trial. This resulted in an order on July 12, 2018 adjourning the summary trial application to August 21, 2018, directing that the appellants deliver any responding materials by August 2, 2018 and making the hearing of the application peremptory on the appellants.
- [17] The appellants did not file responding materials by August 2, 2018, but attempted to do so on August 15, 2018. The trial judge refused to admit this evidence as it had been filed outside the time frame required by the order of July 12, 2018. I will refer to this material as the "Late-Filed Material". The admissibility of the "Late-Filed Material" in both the trial court and this Court forms one of the issues in this appeal.

The October Judgment

- [18] The summary trial was heard on August 21 and 22, 2018. The appellants objected to the claim being heard summarily, but the trial judge concluded that the claim and counterclaim were suitable for disposition by summary trial. Judgment was pronounced on October 22, 2018 with reasons indexed at 2018 BCSC 1822. After a thorough review of the facts of the transaction, the trial judge allowed the claim for specific performance of the Contract of the plaintiff Mr. Bajwa (but not Mrs. Bajwa) and dismissed the counterclaim. She summarized her findings in a subsequent judgment issued in May 2019 (2019 BCSC 721) in this way:
- [5] In relation to the plaintiffs' claim, I found that:
- (a) the Contract was valid and enforceable against the defendants (October Reasons, at paras. 105, 109);
 - (b) on June 3, 2017, and following removal of the subjects, Mr. Parmar assigned all of his interest in the Contract to the plaintiff Navdave Preet Singh Bajwa and to Mr. Bajwa alone (October Reasons, para. 111);
 - (c) the plaintiff Loveleen Kaur Bajwa was not a party to the Contract and could not sue for or recover damages for breach of it (October Reasons, para. 114);
 - (d) on July 31, 2017, Mr. Bajwa was ready, willing and able to complete the purchase of the Property in accordance with the buyer's obligations under the Contract, and had so indicated (through his solicitor, Mr. Hogan) to the defendants and their notary. Mr. Hogan had the funds (apart from the mortgage proceeds) necessary to complete the transaction in his trust account (October Reasons, para. 115);

- (e) the defendants refused to complete the transaction, and, by doing so, they breached the Contract (October Reasons, para. 115);
 - (f) Mr. Bajwa was entitled to an order for specific performance (October Reasons, paras. 118-119); and
 - (g) Mr. Bajwa was also entitled to damages for breach of the Contract totalling \$15,559.70 (October Reasons, paras. 129 and 132).
- [6] In the result (and among other things), I made an order for specific performance of the Contract, and ordered that the adjustment, completion and possession dates were to be within 60 days of the date of the judgment (October Reasons, paras. 133 and 150).
- [19] In relation to the counterclaim, the judge found that there was no evidence supporting any of the allegations in the counterclaim. She summarized her findings in this way in her October judgment:
- [147] In my opinion, the evidence also overwhelmingly supports the conclusion that the defendants thoroughly understood and agreed to the terms of the Contract. The defendants were not the victims of any fraud, undue influence, impersonation, misrepresentation, cheating or deception. Evidence of conduct on the part of the Realtor Defendants that might amount to actionable fraud, harassment, intimidation, scare tactics, breach of trust or breach of either the Criminal Code or the Competition Act, as the defendants allege, is wholly lacking.
- [20] The effect of this judgment was that Mr. Bajwa was entitled to specific performance of the Contract, with completion to take place within 60 days of the October Judgment, and the counterclaim was dismissed. A formal order was drawn up to reflect this judgment, but was not signed by the appellants and accordingly was not entered at that time.

The Re-Opening of the October Judgment

- [21] On December 7, 2018, just prior to the end of the period set by the judge for completion of the Contract, and prior to the entry of the formal order reflecting the October Judgment, Mr. Bajwa applied for a variation of the order to extend the date for completion to April 30, 2019 and to direct the appellants to permit access by an appraiser for mortgage purposes. The basis for the application was that Mr. Bajwa required mortgage financing to complete the transaction and he had not been permitted to access the property for purposes of an appraisal. The Contract contained a term that "Seller will allow access to the property upon reasonable notice by the buyer for buyer or buyers agent for bank appraisal".
- [22] The application of December 7 did not request that the summary trial be re-opened. No reference was made by Mr. Bajwa to electing a remedy in damages. His position was that he wanted specific performance of the Contract, but needed time and access to complete the transaction.

- [23] Mr. Bajwa's application was heard by teleconference on December 14, 2018 and decided on that day. The trial judge considered that the relief Mr. Bajwa was seeking was "fundamentally different from the case presented at the summary trial". She held that "it would not be in the interests of justice to grant the orders now being sought by Mr. Bajwa without allowing the defendants to make submissions in the context of the summary trial." As a consequence, she made the following ruling, in reasons indexed at 2018 BCSC 2423:
- [12] In my view, the appropriate orders to be made at this time are the following and I make these orders:
- (a) the orders summarized in paras. 150 (a), (b), (c), (d) and (e) of my Reasons are vacated and set aside, as is the cost order in favour of the plaintiffs in para. 151, consequent on success on the summary trial;
 - (b) the plaintiffs' summary trial is adjourned for further submissions on the issue of remedies only, to a date convenient to the parties, to counsel, and to the Court;
 - (c) Ms. Bajwa's claim is dismissed with costs to the defendants, but with liberty to the parties if they wish to make submissions on costs;
 - (d) the orders summarized in paras. 150 (f) and (g) dismissing the defendants' counterclaim as against the plaintiffs and the Realtor Defendants and the order in para. 151 ordering costs consequent on those dismissals are confirmed.
- [24] Orders reflecting the October Judgment (as varied by the December Reasons) and the December Reasons were entered on February 20, 2019. The entered order dated October 22, 2018 was thus limited to the dismissal of the counterclaim. The entered order dated December 14, 2018 stated that Mr. Bajwa's summary trial application was "adjourned for further submissions on the issue of remedies only".

The May Judgment

- [25] Those further submissions took place on April 18, 2019. By then, Mr. Bajwa was not in a position to complete the purchase and sought an award of damages for the loss of bargain. The appellants took the position that it was not open to Mr. Bajwa to seek damages having elected the remedy of specific performance at trial. The trial judge treated Mr. Bajwa's submission as an election as to remedy and held that Mr. Bajwa was entitled to seek the alternative remedy of damages for loss of bargain notwithstanding his original position. However, she held that Mr. Bajwa had not proven any additional damages beyond the consequential damages she had assessed in her October Judgment.
- [26] In the result, the judge ordered that the appellants pay Mr. Bajwa the damages of \$15,559.70 she had ordered previously, as well as costs.

Issues on Appeal

[27] The appellants have raised a large number of allegations of error in their factums and oral submissions. Many are raised in the form of questions, and much of the appellants' position appears to seek a rehearing of the factual issues, which is not available in this Court. Extracting the issues as best I can, they appear to fall into three categories, which I would summarize as follows:

Procedural Issues

- Did the judge err in refusing to permit the appellants to rely on the Late-Filed Material?
- Did the judge err in hearing this case by summary trial?
- Should this Court receive the Late-Filed Material as fresh evidence in this appeal?

Factual Issues

- Did the judge err in concluding that the Contract was enforceable by Mr. Bajwa?
- Did the judge err in concluding that the evidence did not support the allegations made in the counterclaim?

The Re-Opening Ruling

- Did the judge err in re-opening the summary trial for further submissions on remedies? If so, what consequences flow from that error?

Procedural Issues

Did the judge err in refusing to permit the appellants to rely on the Late-Filed Material?

[28] The trial judge described the circumstances that led to the decision in her October Judgment not to receive the Late-Filed Material:

[88] The notice of application set the summary trial for hearing on July 12 and 13, 2018. The notice of application and related materials for the Realtor Defendants' summary trial were filed on June 27, 2018, setting the matter for hearing on the same dates.

[89] The hearing did not proceed on the merits on July 12, 2018. On July 9, and without notice to counsel, the defendants attempted to have the hearing adjourned generally, on the basis that they had filed a notice of trial, purporting to set the action for trial in December 2018. Despite that, on July 12, 2018, the summary trial applications came on before Verhoeven J., who made an order whereby: the hearing of the applications was set for 2 of the three days of August 20, 21 and 22, 2018; the defendants were required to file and deliver any responding material to counsel for the plaintiffs and counsel for the Realtor Defendants not later than 21 days from the date of the court's order; the hearing of the applications was peremptory on the defendants; and the defendants were ordered to pay to the plaintiffs and the Realtor Defendants lump sum costs (representing costs thrown away) no later than 30

days from the date of the court's order. As of the hearing in August, those costs had not yet been paid.

[90] The defendants did not file and deliver their materials by the deadline set by Verhoeven J. As a result, the hearing proceeded on the basis of the materials filed by the plaintiffs and the Realtor Defendants. However, the defendants were permitted to make submissions based on that record. I note that the record included substantial portions of the transcripts of the examinations for discovery of the defendants conducted by counsel for the Realtor Defendants, in which Mr. Habib in particular set out the defendants' positions in this action, particularly as they relate to the actions of the Realtors.

[29] I can see no error in the ruling of the trial judge, given the failure of the appellants to comply with the July 12 order.

Did the judge err in hearing this case by summary trial?

[30] At the return date for the summary trial application, the appellants objected to the case proceeding by summary trial. The trial judge considered the suitability of this case for summary trial at paras. 92-104 of her October Judgment. She referred to the principles set out by D. Smith J.A. for this Court in *Gichuru v. Pallai*, 2013 BCCA 60 and concluded that she was able to find the facts necessary to decide the issues of fact and law raised on the applications, and that it would not be unjust to do so in a summary trial.

[31] The trial judge gave particular attention to the paucity of evidence from the appellants, but came to the following conclusion:

[99] In my view, the defendants' failure to take the steps available to them under the Rules, and their conduct once the summary trial application materials were served on them, cannot be allowed to frustrate the benefits of the summary trial process and do not make it unjust to proceed to deal with the merits of the issues in this action by way of summary trial.

[32] It was open to the trial judge to consider the conduct of the appellants in this fashion: see *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34.

[33] The decision as to the suitability of proceeding by way of summary trial is a discretionary one to which appellate deference will be given unless the appellate court concludes that the discretion has been wrongly exercised or that the decision is clearly wrong and may result in an injustice: *Gichuru* at para. 34. I see no basis that would support such a conclusion in this case.

Should this Court receive the Late-Filed Material as fresh evidence in this appeal?

[34] The appellants have applied for leave to introduce the Late-Filed Material in this Court to support their appeal, primarily in respect of the counterclaim. If the evidence is admitted, the Real Estate Professionals apply to adduce responsive evidence. I would not give leave to either party.

[35] Except in unusual circumstances, this Court hears appeals on the record that was before the trial judge. A party who wishes to have evidence that was in existence at the time of the trial but was not before the trial court (referred to as "fresh evidence") considered by this Court must meet the tests set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775. These tests were summarized by Butler J.A. in *Doukhobor Heritage Retreat Society #1999 v. Vancouver Foundation*, 2020 BCCA 80 at para. 27:

1. Fresh evidence should not be admitted on appeal if, by due diligence, it could have been adduced at trial.
2. Fresh evidence is not admissible unless it is relevant in the sense that it bears upon an important issue.
3. The evidence must be credible in the sense that it is capable of belief.
4. Finally, the evidence must be decisive in the sense that if it is believed it might, along with other evidence from trial, be expected to have affected the result: *Palmer* at 775.

The due diligence factor is applied more strictly in civil cases: *Golder Associates Ltd. v. North Coast Wind Energy Corp.*, 2010 BCCA 263 at paras. 35-36.

[36] The Late-Filed Material consisted of two affidavits from the appellants in which they alleged that the Real Estate Professionals had forged their initials on the Contract, and an unsworn document from an individual identifying herself as a "questioned document examiner" noting that some of the initials had been written in freehand and some had been applied through the software program DocuSign, which raised questions in the mind of the examiner. In my opinion, the documents do not meet the *Palmer* test for two reasons. First, the appellants have not established that they could not have adduced this evidence at trial if they had exercised due diligence. The material was not admitted at trial because the appellants had not complied with the order of Verhoeven J. concerning the date for filing response material. It would not be in the interests of justice to permit them to rely on the same material in this Court in those circumstances.

[37] In addition, the evidence of the appellants alleging that their initials were forged is not reasonably capable of belief, given the position of the appellants throughout that they had executed the Contract but only because they had been tricked into doing so, a position that was reinforced by admissions made by each of them during examinations for discovery. A similar attempt to admit material inconsistent with the party's position throughout the proceedings was rejected by this Court in *Dairy Queen Canada, Inc. v. M.Y. Sundae Inc.*, 2017 BCCA 442 at paras. 39-41. In my opinion, it is not in the interests of justice to admit the Late-Filed Material in this appeal.

Factual Issues

Did the judge err in concluding that the Contract was enforceable by Mr. Bajwa?

- [38] The appellants raised a number of factual issues, often in the form of questions rather than submissions as to clear error. This Court does not retry cases, but rather reviews the decision of the trial judge to determine whether reversible error has occurred. Factual determinations are only set aside when there was no evidence capable of supporting the conclusion, or when a party can show that the judge committed a palpable and overriding error in making the factual determination: *Housen v. Nikolaisen*, 2002 SCC 33. A palpable error is one that is obvious; an overriding error is one that is determinative of the outcome of the case: *Salomon v. Matte-Thompson*, 2019 SCC 14 at para. 33.
- [39] None of the factual allegations made by the appellants demonstrates palpable and overriding error by the judge. There was evidence to support her determinations. She observed that there were gaps in the evidence, but she was satisfied that there was "no real doubt about essential points." This was a conclusion open to her on the evidence.
- [40] The two factual conclusions that the appellants objected to most strenuously were the conclusion that the Subject Clauses had been removed as required by the Contract, and the conclusion that Mr. Bajwa had been assigned the benefit of the Contract by Mr. Parmar such that he could enforce it.
- [41] Under the terms of the Contract as amended by the parties, Mr. Parmar was required to waive the Subject Clauses by June 3, 2018. The trial judge found that he had done so on a standard form document entitled "Removal of 'Subject To Clause'". The appellants object that the document was undated and was "too vague and subjective" but in my view the evidence supported the conclusion of the judge.
- [42] The judge also found that following removal of the Subject Clauses, Mr. Parmar assigned all of his interest in the Contract to Mr. Bajwa (but not to the co-plaintiff Ms. Bajwa). The appellants are suspicious of this assignment, in part because documents continued to be produced with Mr. Parmar's name on them, and in part because they were not advised of the assignment until just before the completion date. The appellants are also suspicious that this assignment was part of a "flipping" exercise that produced a profit that should, under the Contract, have been paid to the appellants. The evidence before the trial judge, however, fully supported her conclusions about the validity of the assignment, as well as her finding that no profit had been made as a result of the assignment.
- [43] None of the other factual matters raised by the appellants supports the conclusion that the judge made any palpable and overriding error in her conclusion that the Contract was enforceable by Mr. Bajwa. I would not give effect to these allegations of error.

Did the judge err in concluding that the evidence did not support the allegations made in the counterclaim?

- [44] The appellants continue to insist that the Real Estate Professionals acted improperly in this transaction, but the trial judge found that although some of the paperwork had been sloppy, the evidence did not support the allegations made by the appellants against the realtors. I can see no basis on which we should interfere with that conclusion.

The Re-Opening Ruling

- [45] The decision of the trial judge to re-open the summary trial arose from an application by Mr. Bajwa filed on December 7, 2018 for an order giving him access to the Subject Property so that a mortgage appraisal could be done, and an extension of time for the completion of the Contract to April 30, 2019. The trial judge treated this as an application to re-open the trial. She then "vacated" her decree for specific performance and ordered that the summary trial be "adjourned for further submissions on the issue of remedies only".
- [46] The appellants submit that this decision was inconsistent with the principles of *functus officio* and *res judicata*. I do not agree with that submission. A judge is not *functus officio* until her order is entered, and then only with respect to the issues resolved in the formal order: *Harrison v. Harrison*, 2007 BCCA 120 at para. 29, per Finch C.J.B.C. As the formal order reflecting the October Judgment had not been entered as of December 14, 2018, the trial judge had the jurisdiction to re-open the trial in a proper case.
- [47] Similarly, the doctrine of *res judicata* has no application. The doctrine of *res judicata* precludes parties from relitigating an issue in respect of which a final determination has been made as between them: *Régie des rentes du Québec v. Canada Bread Company Ltd.*, 2013 SCC 46 at para. 24. That was not the case here, as no final order had been entered determining the issue of what remedy was appropriate for the appellants' breach of contract.
- [48] Having said that, I am of the opinion that the trial judge did err in both "vacating" her judgment granting specific performance to Mr. Bajwa and in re-opening the trial. Trial judges have a broad discretion to re-open a trial after judgment has been given, but it is a discretion that should be exercised rarely and only when the interests of justice clearly require prolonging the litigation in order to avoid a miscarriage of justice. For example, the discretion to re-open may be properly exercised by a trial judge who is satisfied that his or her original judgment contains material errors that may be corrected by further submissions, or where evidence has been overlooked or misconstrued, or where the law has been misapplied, or where the reasons for judgment failed to address an argument advanced at trial: *Grewal v. Grewal*, 2016 BCCA 237 at para. 86.
- [49] Here, neither party took the position that the trial required re-opening, and no one took the position that there were deficiencies in the October Judgment that required correction. Mr. Bajwa wished to enforce the judge's order for specific performance of the Contract, but needed access to the property for mortgage financing purposes and an extension of time to complete. The trial judge might have concluded that the appellants had no obligation to

provide further access and dismissed the application; she might also have concluded that the appellants did have such an obligation and accordingly made the access order and extended the completion date. But there was nothing in the record that required setting aside her order for specific performance and re-opening the trial.

- [50] In making her decision, the trial judge applied what she referred to as an "unfettered discretion" to re-open a trial:
- [9] It is well established that, before judgment is entered, the trial judge enjoys an unfettered discretion to reopen the case. This discretion should, however, be exercised sparingly. The overriding objective is prevention of a miscarriage of justice. The leading case is *Clayton v. British American Securities Ltd.*, (1934), 49 B.C.R. 28 (C.A.), where the legal principles are set out by the majority. Subsequent decisions, including *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 (C.A.), have added further guidance. A judge should address two primary considerations in deciding whether to reopen: first, is it probable that a miscarriage of justice would occur without reopening; and, second, would a rehearing probably change the result. In general, a party should not be permitted to reopen if the sole purpose is to reargue or recast its case. Nevertheless, new evidence is not an essential prerequisite to granting an application to reopen. It will always depend on the individual circumstances and the overarching concern of the interests of justice.

[Emphasis added.]

- [51] Unfortunately, in adopting the "unfettered discretion" test from *Clayton*, the judge did not have drawn to her attention this Court's judgment in *Hansra v. Hansra*, 2017 BCCA 199 in which the term "unfettered" was expressly disapproved:
- [44] It is beyond doubt that a trial judge who has pronounced reasons for judgment has the ability, before a formal order has been entered, to reopen a matter. This power is often said to involve the exercise of an "unfettered discretion". Although the word "unfettered" continues to be used in the context of reopening, the discretion to do so is in fact fettered, in the sense that, "as with any exercise of discretion, it must be exercised 'judicially', in a principled and consistent way": *Fan v. Chana*, 2011 BCCA 516 at para. 61, 345 D.L.R. (4th) 453 (per Levine J.A.). This is reflected, in particular, in decisions of this Court in which the discretion has been held to have been exercised improperly. In my view, the time has come to jettison the adjective "unfettered" which, by definition incorrectly describes the discretion.

[Emphasis added.]

- [52] The judge properly recognized that the discretion to re-open should be exercised sparingly and only when it is probable that a miscarriage of justice would occur unless the trial was reopened. However, the record does not reveal in what sense a miscarriage of justice would occur if Mr. Bajwa's application were not dealt with on its merits, one way or the other, on December 14.

- [53] The judge seemed particularly concerned about the implication of Mr. Bajwa's evidence that he could not complete without mortgage financing and needed access to the Subject Property and additional time to complete, notwithstanding that he and his wife had arranged mortgage financing in July and had been in a position to complete on July 31. She expressed a concern that "the relief Mr. Bajwa is now seeking, and the basis for it, is fundamentally different from the case presented at the summary trial, and, in that sense, he is now recasting his case." With respect, I can see nothing in the record that would justify this conclusion.
- [54] The plaintiffs had sought specific performance or damages in the alternative from the commencement of the litigation. This plea kept the Contract open for performance. The plaintiffs were entitled to maintain both positions to the date of judgment: *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610. At the time of the summary trial, they elected specific performance. The trial judge expressly found that on July 31, 2017, Mr. Bajwa was ready, willing and able to complete the purchase of the property in accordance with the buyer's obligations under the Contract: October Judgment at para. 115. The trial judge then considered the specific performance remedy by reference to the principles in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, concluded that specific performance was an appropriate remedy, and made the appropriate order, though only to the benefit of Mr. Bajwa.
- [55] The factors that supported the order for specific performance were the appellants' breach of the Contract, the election by the plaintiffs to keep the Contract open by seeking specific performance, the fact as found by the judge that Mr. Bajwa was ready, willing and able to complete on July 31, and the trial judge's conclusion that the plaintiffs met the uniqueness standard required by *Semelhago* for the remedy of specific performance. None of those factors had changed. If on the new completion date, Mr. Bajwa had been unable to perform his obligations under the Contract (as appeared likely by the time of the December 14 hearing), he was in jeopardy of losing his right to any remedy for loss of bargain, although that consequence depended to some extent on the position of the appellants on the closing date: see *Toor v. Dhillon*, 2020 BCCA 137. He might also have applied to change his election to one of damages prior to the date for performance, relying on the principle in *Widrig v. Strazer Estate*, [1964] S.C.R. 376, if his application to extend the time for completion had been dismissed.
- [56] In concluding that Mr. Bajwa was recasting his case by requesting further time to complete and in unilaterally vacating the order for specific performance, the judge appears to have overlooked the range of options an innocent party in the position of Mr. Bajwa had in respect of the breach of contract by the appellants, as long as he kept the Contract open for completion. He could insist on performance, but his election for specific performance was not irrevocable. Since the judgment had not been entered, he could have changed his election to one of damages; he may well have had the ability at least to apply to elect damages even after the order was entered, as suggested in *Johnson v. Agnew*, [1980] A.C. 367.

The decision of the judge to set aside her own judgment removed Mr. Bajwa's ability to insist on performance of the Contract after December 14, or for that matter the appellants' ability to satisfy the remedial claim by tendering performance.

- [57] In my opinion, given that there was no application to re-open the trial, the judge erred in "vacating" her order of October 22, 2018 and re-opening the trial for further submissions. As was the case in Harrison at paras. 42-50, I can see no basis for concluding that to leave the October Judgment in place and either allow or dismiss Mr. Bajwa's application on its merits would result in a miscarriage of justice.
- [58] Following the December 14 ruling, the formal orders for the October Judgment as well as the December Reasons were entered, both on February 20, 2019. The formal order for the October Judgment simply recorded the dismissal of the counterclaim against the Real Estate Professionals with costs. The formal order for the December Reasons recorded the dismissal of Mrs. Bajwa's claim and the dismissal of the counterclaim against the plaintiffs (both adjudicated in the October Judgment), and stated that the summary trial application of Mr. Bajwa "is adjourned for further submissions on the issue of remedies only".
- [59] The appellants have appealed the December 14 ruling, but as I will explain, they have not incurred any additional loss as a result of the re-opening of the trial, and in fact are in a somewhat better position than if the judge had simply dismissed the application for an extension of the completion date. While there is some question as to whether the order emanating from the December 14 ruling is capable of being appealed (see the comments of Groberman J.A. in chambers, recorded at 2019 BCCA 98 at paras. 13-16), the three appeals have been consolidated, and it is accordingly unnecessary to determine whether the appeal of the December 14 order could have proceeded absent consolidation.
- [60] The further submissions as to remedies took place on April 18, 2019, with judgment being pronounced on May 9, 2019. In her May Judgment, the trial judge reviewed her earlier findings in her October Judgment and then referenced Mr. Bajwa's application of December 7, 2018, which the judge characterized as an application "to reopen the summary trial"; the judge also characterized her December Reasons as "allowing Mr. Bajwa to reopen". The judge then recorded Mr. Bajwa's desire to accept the appellants' repudiation and claim damages. The appellants objected to this re-election, arguing that it was not open to Mr. Bajwa to come back to court to claim damages having elected specific performance. The judge concluded that Mr. Bajwa could elect damages, relying on this Court's judgment in Inmet. I agree with the judge's conclusion on that issue.
- [61] The judge then went on to conclude that while Mr. Bajwa was entitled to claim a remedy in damages for loss of bargain, he had not proven that he had suffered any damages other than the consequential loss the judge had assessed in her October Judgment. That conclusion has not been appealed by Mr. Bajwa.

[62] As a consequence, the monetary order that was entered in respect of the May Judgment recorded that the appellants were to pay Mr. Bajwa \$15,559.70, together with interest and costs. This order reflected the monetary judgment assessed in the October Judgment, omitted from the formal order as a result of the decision to re-open, and then confirmed in the May Judgment.

Disposition

[63] This case involves the purchase and sale of residential property. The trial judge properly concluded that it was appropriate to deal with it through a summary trial, and properly held the parties to the pre-trial orders that had been made concerning the filing of evidence. In her October Judgment, the judge thoroughly reviewed the evidence and came to conclusions on fact and law that have not been shown to be erroneous in any way. Unfortunately, the formal order was not entered at the time, which may have contributed to the procedural difficulties subsequently encountered in this case.

[64] In my opinion, the October Judgment properly disposed of all the issues in the case, other than in relation to costs. I conclude that the decision to "vacate" that judgment and re-open the trial was an erroneous exercise of the judge's discretion. It has led to unnecessary proceedings, but it did not lead to any additional order against the appellants not contemplated by the October Judgment. Since appeals are against orders, not reasons for judgment, I cannot see any basis for appellate intervention in this case.

[65] For these reasons, I would dismiss the appellants' application to rely on the Late-Filed Material in this Court, and I would dismiss these appeals.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Griffin"

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