

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1104318 B.C. Ltd. v. Dr. Paul Wittenberg, Inc.*,
2025 BCCA 68

Date: 20250312
Docket: CA49383

Between:

1104318 B.C. Ltd

Appellant
(Plaintiff)

And

Dr. Paul Wittenberg, Inc. and Dr. Paul Wittenberg

Respondents
(Defendants)

SEALED (IN PART)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Abrioux
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated August 30, 2023 (*1104318 Ltd. v. Dr. Paul Wittenberg, Inc.*, 2023 BCSC 1520, Vancouver Docket S1912324).

Counsel for the Appellant:

P.A. Kressock
J.J.R. Schachter

Counsel for the Respondents:

G.E.H. Cadman, K.C.
L. Morris

Place and Date of Hearing:

Vancouver, British Columbia
October 31, 2024

Place and Date of Judgment:

Vancouver, British Columbia
March 12, 2025

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Justice Donegan

Summary:

Appeal from a trial order dismissing the appellant's claims of fraud and breach of contract against the respondents. The appellant argues the trial judge erred by dismissing their application to re-open their case to permit a new witness to testify and by making an adverse inference against them for not producing certain documents. Held: appeal dismissed. Both of these decisions were discretionary and are owed deference on appeal. The appellant has not identified any reviewable error in the trial judge's decision.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

[1] This appeal arises following the dismissal of the appellant's action, after a 24-day trial, in which they advanced claims of fraud and breach of contract in relation to the purchase and sale of a dental practice (the "Practice"). The trial reasons are indexed as 2023 BCSC 1520 [*Reasons*]. The action centered on the appellant's allegations that the respondents seriously misrepresented the value of the Practice, and in particular, falsely represented that it was legitimately capable of generating billings of approximately \$700,000 per year. The appellant seeks a new trial.

[2] Two discrete grounds of appeal are advanced, being that the judge erred:

- a) in dismissing the appellant's application to re-open it's case in order to permit a witness to testify; and
- b) by drawing an adverse inference against the appellant in respect of documents that the respondents alleged to be missing.

[3] For the reasons that follow, I would dismiss the appeal.

Background

[4] Some background is required to place the alleged errors in their proper context.

[5] Dr. Danny Shum is a dentist and the principal shareholder of the appellant company, 1104318 B.C. Ltd. ("Dr. Shum").

[6] The personal respondent, Dr. Paul Wittenberg, is a dentist who owned the Practice operated by the respondent Dr. Paul Wittenberg, Inc. (“Dr. Wittenberg”). During Dr. Wittenberg’s ownership, the Practice’s day-to-day functioning was overseen by Dr. Wittenberg’s wife, Ms. Susan Lazarus, who was the office manager.

[7] In May 2017, Dr. Shum and Dr. Wittenberg began negotiating the purchase and sale of the Practice.

[8] In June 2017, Dr. Shum consulted his accountant, Mr. Deol, and reviewed statements of income and retained earnings: *Reasons* at para. 36. Sometime prior to July 31, 2017, Dr. Shum engaged and was being advised by a lawyer, Mr. Ross Pollock. After several months of discussion and reviewing the Practice’s financial and patient records, which included performing a “chart review” as part of his due diligence, Dr. Shum advised Mr. Deol that he wanted to proceed with the purchase.

[9] The first draft of an asset purchase agreement was prepared by Mr. Pollock and sent to Dr. Wittenberg by Dr. Shum on September 11, 2017. Between then and October 18, 2017, Dr. Shum negotiated directly with Dr. Wittenberg. It was then left to the lawyers, Mr. Pollock for Dr. Shum and Mr. Stephen Cheng for Dr. Wittenberg, to negotiate the terms of what became the agreement entered into by the parties for the purchase price of \$870,000 (the “Agreement”). The purchase price consisted of \$20,000 provided by Dr. Shum and a \$850,000 loan provided by The Royal Bank of Canada (“RBC”): *Reasons* at paras. 54, 57–59.

[10] The purchase and sale of the practice was completed as scheduled on October 31, 2017. The closing documents included financial statements indicating the Practice’s income generated fees of \$706,525 in 2014, \$703,877 in 2015, \$694,887 in 2016, and \$689,873 in 2017. On the basis of these financial statements, Dr. Shum concluded the average fee income for the practice was around \$700,000 annually. Schedule B of the closing documents also included a list of dental and office equipment included in the purchase: *Reasons* at para. 66.

[11] The “two main provisions” of the Agreement, as identified by the judge were:

[263] ...Article 3.1(a), the provision which the [appellant] says the [respondents] breached:

3.1 Financial Representations. The Vendor and the Covenantor jointly and severally represent and warrant to the Purchaser (and acknowledge that the Purchaser is relying on such representations and warranties in entering into this Agreement and completing the transactions contemplated herein) that:

(a) the Financial Statements truly and accurately reflect the financial position of the Practice as of the last day of the fiscal period for which they were prepared and, since that time:

(i) there has been no material adverse change in the financial position or condition of the Practice nor any damage, loss or other change in circumstance materially affecting the Practice; and

(ii) the Practice and the business thereof has been carried on in the ordinary course;

[264] The second relevant provision is Article 5.4, which reads:

5.4 Financial Performance. The Purchaser understands that the financial results shown in the Financial Statements are the result of the Vendor and Covenantor’s efforts and there is no assurance by the Vendor or the Covenantor that the Purchaser will achieve the same (or similar) results.

[Emphasis added.]

[12] “Financial Statements” is a defined term in the Agreement:

1.1 Definitions. In this Agreement, including the recitals hereto:

...

“**Financial Statements**” means the Financial Statements of the Vendor pertaining to the Practice for the years ending January 31, 2015, 2016 and 2017, and an interim management prepare[s] statement of income and expense from February 1, 2017 to August 31, 2017, copies of which are attached hereto as Schedule “A”;

...

[13] The Financial Statements that comprised Schedule “A” took two forms. For the fiscal years ended January 31, 2015, to January 31, 2017, these were “Notice to Reader” statements prepared by Grant Thornton LLP. For the period from February 1 to August 31, 2017, they consisted of an interim statement prepared by Dr. Wittenberg and were identified as “In House.” Each of the Financial Statements

prepared by Grant Thornton LLP were identified as “(Unaudited - see Notice to Reader)”. That Notice to Reader included the following qualification:

We have not performed an audit or a review engagement in respect of these financial statements and, accordingly, we express no assurance thereon.

[14] Dr. Shum took over the Practice on November 1, 2017. His evidence at the trial was that revenues fell far below what he anticipated in the first month of operation. Dr. Shum testified that during this period there was a patient attrition rate of around 70%, whereas he had anticipated a drop of approximately 30%. Although revenues increased slightly in the following months, this was insufficient to render the Practice financially viable. He closed the Practice on February 9, 2018, and made a deemed assignment into bankruptcy on March 22, 2018: *Reasons* at paras. 89, 98.

[15] It was not a term of the Agreement that the Practice could generate service fee billings in the range of \$700,000 annually, nor was there a representation made by the Vendor and Covenantor that the Practice revenues were consistently \$700,000 per year.

[16] In October 2019, Dr. Shum commenced the underlying action against Dr. Wittenberg for fraudulent misrepresentation and breach of contract, alleging that Dr. Wittenberg fundamentally misrepresented the legitimate revenue-generating capacity of the Practice and engaged in various fraudulent billing practices that inflated revenues.

[17] At trial, the appellant alleged that Dr. Wittenberg systematically engaged in various categories of fraudulent billing practices, which resulted in a material misrepresentation of the legitimate revenue-generating capacity of the Practice. The categories of alleged fraudulent billing practices included: billing patients for services that were not provided, billing for services in excess of actual patient requirements, inflating for billing purposes the time taken to provide services to patients, up-coding patient procedures, failing to collect co-payment from certain patients, future-dating patient procedures, and “grossly overcharging” patients for general anesthesia.

The Trial Judge's Findings

[18] Prior to considering the two grounds of appeal, it is necessary to outline some of the judge's comments regarding the appellant's assertions at the trial, together with certain key findings and conclusions:

- (a) The essence and main focus of the appellant's case was the allegation of fraud or fraudulent misrepresentation (at para. 5).
- (b) The appellant said he relied on the respondents' "... representation that the practice was a genuine, i.e. legitimate, source of steady revenue year after year ..." (at para. 6).
- (c) The appellant submitted the evidence at trial established or supported the inference that the respondents engaged in fraudulent billing practices (at para. 135).
- (d) Neither Dr. Shum nor Dr. Wittenberg wished to retain a broker, however, the bank required a proper evaluation of the practice. Ultimately, RBC acknowledged it would accept an evaluation from Mr. Deol, who was experienced in dealing with the dental industry (at para. 40).
- (e) Dr. Shum did not have a business plan other than the projections prepared by Mr. Deol. He considered it his responsibility to do the dental work, with Ms. Tia Tanaka (the receptionist) responsible for booking patients (at para. 74).
- (f) Dr. Wittenberg had indicated in October 2017 that he would provide advice for six months without charge, and the asset purchase agreement contained a clause reflecting that agreement. Dr. Shum did not consult Dr. Wittenberg about the difficulties he experienced after taking over the practice (at para. 90).

- (g) The issues relating to supplies and equipment left at the Practice “bolsters the [respondents’] credibility” and “... reflects a purchaser who did not have a good understanding of how to profitably operate a small dentistry practice. This reality was, to a great extent, responsible for subsequent events” (at para. 85).
- (h) On December 26, 2017, the appellant emailed the BC Dental Association (“BCDA”) indicating “his rising stress level, the difficulties he was encountering with the dental practice, and his concerns over potential billing fraud”. The appellant also noted some issues with invoices which he thought may be related to possible insurance fraud (at para. 93).
- (i) Dr. Shum testified that he was advised by and relied on two experts, Mr. Deol and Ross Pollock, who both guided him through the acquisition process. He emphasized how his reliance on these two individuals was necessary because he was new to running his own business (at para. 101).
- (j) Dr. Shum agreed that he knew Article 5.4 of the asset purchase agreement contained a specific provision that Dr. Wittenberg provided no assurance that the purchaser would achieve the same financial results as the business produced under the vendor’s control. He said he also relied on the statements of income and financial documents attached (at para. 102).

[19] It is also necessary at this juncture to refer to the judge’s *voir dire* ruling, indexed as 2023 BCSC 1408 [*Voir Dire Ruling*], regarding the appellant tendering Dr. Robert Rosenstock as an expert witness.

[20] The appellant sought to have Dr. Rosenstock accepted as an expert on two topics: a) in general dentistry; and b) on billing practices in B.C. Before the *voir dire*, Dr. Shum requested that Dr. Rosenstock prepare a report analyzing Dr. Wittenberg’s financial statements and records. Specifically, Dr. Rosenstock was asked to respond

to six questions related to whether Dr. Wittenberg's records indicated he had billed for services not provided, provided unnecessary services, falsified the dates and circumstances of procedures in his records, and engaged in suspect record keeping practices in relation to outside laboratory bills. Ultimately, the appellant asked Dr. Rosenstock to give his opinion on what proportion of Dr. Wittenberg's indicated billing revenue was a product of services that were unnecessary, not actually performed, or overbilled. Dr. Rosenstock concluded that between 20% and 40% of the services detailed in the financial statements were not performed, unnecessary, or the related bills were inflated: *Voir Dire Ruling* at paras. 7–8, 16.

[21] The judge held that Dr. Rosenstock was not qualified to give an expert opinion on Dr. Wittenberg's billing practices and his evidence in response to the questions above was inadmissible. The judge found that Dr. Rosenstock was essentially being asked to perform a "forensic audit" and provide an opinion "as an expert in fraud investigation". He had no expertise beyond general dentistry and was unqualified to give the opinions being sought. The judge ultimately held that Dr. Rosenstock was qualified to give his opinion on the length of procedures and whether they should be done, but his answers to the six questions asked of him and referenced above were inadmissible. Much of the expert report he authored was ruled inadmissible and redacted: *Voir Dire Ruling* at paras. 8–9, 18–21; *Reasons* at para. 224.

[22] This ruling was significant, given the judge's findings at trial that:

[248] Indeed, one of the fundamental problems for the [appellant] is the lack of expert evidence establishing that Dr. Wittenberg engaged in fraudulent billing practices. It appears the [appellant] was attempting to produce a report along those lines, but with the Court's ruling that Dr. Rosenstock was not an expert in the required areas, the critical evidence and therefore a critical part of the [appellant's] case fell away. I concluded in *1104318 BC Ltd. v Dr. Paul Wittenberg, Inc.*, 2023 BCSC 1408, with respect to the tendering of Dr. Rosenstock's report in this matter as follows:

[18] There is no question that the nature of these conclusions reflects, as the [respondents] have argued, essentially a forensic audit of Dr. Wittenberg's practice in order to reach these conclusions. While the [appellant] maintains this is simply a matter of arithmetic, I disagree. Dr. Rosenstock is being essentially offered as an expert in fraud investigation and said to have analyzed Dr. Wittenberg's records to identify areas of fraudulent or insurance-abuse claims and matters of that nature. These have been identified as key issues in this case.

[19] While it would appear that Dr. Rosenstock has expertise in dentistry generally, I am not satisfied he has expertise in the second general area for which his opinion is now being proffered and the specific questions set out in the letter of instruction. While he may be able to proffer evidence about the length of time a procedure should take or whether one should have been undertaken, that would appear to be only one part of the expertise that would be necessary to ultimately proffer an opinion on this subject matter.

[20] Even if he is not a certified fraud examiner, there is no indication that Dr. Rosenstock has any particular expertise or training in the audit of dental practices generally or in auditing billings in dental practices. Indeed, as he candidly admitted, Dr. Rosenstock has never undertaken such work or an audit prior to doing so in this case. There is no indication that Dr. Rosenstock is qualified by way of forensic training or examination to say, as he did in his report, that the [respondents] falsified the dates and circumstances of Dr. Wittenberg's procedures in his billing practices.

[21] In view of all the above, while I accept Dr. Rosenstock may have expertise in general dentistry, the weight of which may be affected by its currency, I am unable to accept Dr. Rosenstock as an expert in dental billing practices with respect to the six questions asked in the report proffered as an expert report in this matter.

[249] I therefore conclude that the [appellant] has not proven this allegation, and I decline to make the requested factual inference.

4. Conclusion on Fraudulent Misrepresentation

[250] The [appellant] ultimately has failed to meet its burden, and the allegations of fraudulent misrepresentation are dismissed for the reasons set out above. I do not accept that the [respondents] misrepresented the legitimate revenue of the practice. This in large part deals with the crux of the [appellant's] case.

[Emphasis added.]

[23] The judge's ruling regarding Dr. Rosenstock is not challenged on appeal. I will now turn to the two grounds of appeal.

Did the judge err in dismissing the appellant's application to re-open their case?

[24] The judge's ruling regarding the application to re-open is indexed as 2023 BCSC 1541 [*Application Ruling/A.R.*].

[25] Dr. Shum applied mid-trial to re-open his case to allow direct evidence from Ms. Sabrina Lee, a receptionist who worked at Dr. Wittenberg's office between February 2013 and August 2014. Counsel for Dr. Shum had interviewed Ms. Lee six months before trial but decided not to call her as a witness as she claimed to have little memory of her employment with Dr. Wittenberg.

[26] According to Dr. Shum, one week before the trial commenced on March 20, 2023, their counsel learned about a possible invoicing scheme when they received third-party records from two dental laboratories: *Reasons* at para. 138; *A.R.* at para. 21. These records suggested to Dr. Shum and his counsel that Dr. Wittenberg's office had routinely altered laboratory invoices for submission to insurance providers. Counsel advised the judge they had no knowledge of these potential forgeries when they initially interviewed Ms. Lee, so they had not known to canvass the issue with her.

[27] Before closing their case, counsel for Dr. Shum contacted Ms. Lee on several occasions to inquire specifically about the possible forgeries, but she again denied having any recollection. After counsel notified Ms. Lee that she could be subpoenaed to provide her evidence, Ms. Lee acknowledged she had more information to share but was concerned about self-incrimination. Ms. Lee sought independent legal advice and subsequently provided a will-say statement advising that she would testify to having routinely adjusted invoice amounts and having sent these adjusted invoices to insurers for payment, at Dr. Wittenberg's express instruction: *A.R.* at paras. 17–18, 25.

[28] On June 6, 2023, after Dr. Shum had closed their case and the respondents' case was underway, Dr. Shum sought to re-open their case to tender the fresh evidence of Ms. Lee. The following day, the judge dismissed the application.

[29] During the application, Dr. Shum submitted they had acted with due diligence to bring the evidence forward, it was in the interests of justice to allow Ms. Lee to give her evidence, and any potential prejudice to the respondents could be remedied. The appellant had been in contact with Ms. Lee multiple times and only became aware of her potential evidence on the emergent forgery issue after they had closed their case. Ms. Lee's evidence went to the heart of the appellant's claim and consequently refusing the application could result in a miscarriage of justice. Her evidence would only require 20 minutes and therefore would not be unduly disruptive of the trial and any potential prejudice to the respondents may be addressed by the respondents having an opportunity to lead responsive evidence. Finally, the test for re-opening should be less stringently applied because the trial was still ongoing and closing submissions had not yet been made: *A.R.* at paras. 14–20.

[30] The respondents opposed the application on the grounds that the appellant failed to act with due diligence and that the prejudice to the respondents would be significant. The appellant had known of this witness for a long time and had failed to act with due diligence to bring out the evidence at issue. Further, the appellant had been shirking trial management deadlines throughout the litigation and the application to re-open their case was a continuation of this trend. Allowing the appellant to re-open their case would be disruptive because it could require the respondents' witness, who had already testified, to be recalled. Finally, Ms. Lee's potential evidence would be tainted because the appellant's communications with her had likely planted their theory of the case in her mind: *A.R.* at paras. 21–26.

[31] The judge instructed herself that in order to succeed, the appellant must establish, on a balance of probabilities, that: 1) a miscarriage of justice would probably occur if the trial was not re-opened; and 2) the new evidence would probably change the result of the trial: *A.R.* at paras. 7–9.

[32] The judge held that the application coming late in the trial process required a stringent application of the test: *A.R.* at para. 16. With this in mind, the appellant had not established either branch of the test. On the first, it was an “important consideration” that the appellant had been seeking to adduce new or belated evidence throughout the trial, and the re-opening application was a continuation of this trend. The judge concluded that allowing the application would negatively impact the respondents’ ability to defend themselves and any potential miscarriage of justice would be against them: *A.R.* at paras. 21–22.

[33] The judge found that the second branch of the test “... if indeed ... [it] is applicable when a judgment has not been rendered ...” did not persuade her that it would probably change the outcome of the trial. In part, this was due to concerns which related to the potential impact of the appellant’s counsel’s communications with Ms. Lee on her testimony. Counsel had repeatedly used the words “fake” and “forgery” in communications with Ms. Lee and the judge was concerned this would taint the veracity of her evidence and reduce its weight: *A.R.* at paras. 23–25.

The applicable framework

[34] A trial judge has broad discretion to permit a party to re-open its case so that it may tender new or fresh evidence. However, that discretion is not unlimited and should be exercised sparingly and only when it is “... probable that a miscarriage of justice would occur unless the trial was reopened”: *Bajwa v. Habib*, 2020 BCCA 230 at paras. 48, 52; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 61.

[35] In *Hansra v. Hansra*, 2017 BCCA 199 at para. 54, citing *Moradkhan v. Mofidi*, 2013 BCCA 132, this Court summarized the following principles that ought to be taken into account on an application to re-open:

- i. It is in the interests of justice to consider a trial complete when each side has closed their case and judgment has been delivered.

- ii. A re-opening is meant to remedy what might otherwise be a substantial injustice, and is not an opportunity to re-argue, re-cast or re-state one's case, nor to lead substantial new evidence.
- iii. Reasons why the evidence was not led in the first place may be relevant, particularly where the failure was a considered or pragmatic decision.
- iv. The discretion should only be exercised if the evidence would probably change the result of the trial.

[36] While these principles should guide a judge's decision of whether to re-open a trial, an appellate court's role in reviewing such a decision is more limited. An order granting or refusing to re-open a trial is discretionary and therefore attracts a deferential standard of review. The applicable standard was discussed by this Court in *Mayer v. Mayer Estate*, 2020 BCCA 282:

[22] First, as both questions, whether to reopen a trial to admit further evidence or declare a mistrial, are discretionary, the standard of review is highly deferential. As Justice Garson put it in *Shoolestani v Ichikawa*, 2016 BCCA 452:

[16] The appellate standard of review in respect of the appeal of discretionary orders was articulated by the Supreme Court of Canada in *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27:

[27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, 1989 CanLII 100 (SCC), [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 S.C.R. 3, at pp. 76-77.

[17] An appellate court may not interfere with a discretionary decision on the grounds that it would have exercised the discretion differently: see *Law Society of British Columbia v. Canada (Attorney General)*, 2002 BCCA 49 at para. 7, per Finch C.J.B.C. Intervention is only justifiable upon identification of a demonstrated error: see *Dhillon v. Pannu*, 2008 BCCA 514, per Tysoe J.A., leave to appeal ref'd [2009] S.C.C.A. No. 58.

[18] Mr. Justice Rothstein said in *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43 that “[t]he test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given weight to all relevant considerations”.

[37] Further, the discretion to allow a party to re-open should be considered within the broader scope of a judge’s trial management powers, which was considered by the Court in *R. v. Samaniego*, 2022 SCC 9 [*Samaniego*]. The Court emphasized that while discretionary, the trial management power is not unlimited and must be exercised carefully. Still, such an exercise of discretion should only be interfered with when there has been an error in principle or unreasonable exercise of discretion: at paras. 22, 26.

The parties’ positions

[38] The appellant submits that the trial judge made multiple errors in principle and misapprehended evidence in denying the application to re-open. These errors resulted in a failure to recognize the probability that a miscarriage of justice would occur if Ms. Lee was not allowed to testify and that her testimony would likely change the result of the trial.

[39] The appellant accepts that the test for re-opening a trial must be applied more stringently the later the application arises: *Cox v. Swartz Estate*, 2022 BCSC 1494 at para. 52 [*Cox*]. However, they say the judge erred in principle by concluding this required an especially strict application of the test in this case. The judge held the application called for a strict application because it was “... very late in the day, after the closure of the [appellant’s] case which ha[d] lasted over 16.5 days ...”: at para. 16. The appellant says this fails to properly consider where their application fell on the spectrum of applications to re-open.

[40] The appellant makes three points to support this position. First, the fact the appellant had already closed their case should not require an especially strict application of the test because such applications are, by definition, brought after the appellant has closed their case. Second, the appellant brought the application only two and a half days after closing its case. Finally, the spectrum of lateness includes

applications brought after a trial was completed and judgment has been rendered and the judge was referred to authorities decided in that context. In light of these considerations, the appellant's application to re-open the case should properly have been viewed as falling in the early part of the spectrum and consequently required a less stringent application of the test.

[41] The appellant further submits the judge's analysis of whether a miscarriage of justice would occur unduly focused on the appellant's perceived failure to bring the evidence forward earlier. This focus came at the expense of grappling with the importance and potential impact of Ms. Lee's evidence. The truth-seeking function of the courts requires prioritizing having the relevant evidence be heard, and no lack of due diligence on the part of the applicant should serve to justify an unjust outcome: *Clayton v. British American Securities Limited*, [1935] 1 D.L.R. 432, 1934 CanLII 229 at para. 98 (B.C.C.A) [*Clayton*].

[42] While a lack of due diligence may still be relevant despite the above, the appellant submits the judge's attribution of fault to the appellant for failing to bring forward Ms. Lee's testimony before closing its case reflects a misapprehension of the evidence. The evidence before the judge demonstrated that appellant's counsel interviewed Ms. Lee several times and she only came forward with the critical information after the appellant closed its case.

[43] The appellant submits the judge erred by finding the consideration of whether a miscarriage of justice would occur weighed in favour of dismissing the application because of potential prejudice to the respondents. They say she reached this conclusion by considering the cumulatively prejudicial effect of earlier (unopposed) changes to the appellant's witness list during the trial. Further, the judge did not grapple with whether any potential prejudice to the respondents posed by Ms. Lee testifying could be remedied.

[44] They also argue the judge erred in concluding that Ms. Lee's testimony would not change the outcome of the trial. Ms. Lee's evidence would have contradicted important parts of the evidence given by the respondents' witnesses—evidence which went to the heart of the appellant's case.

[45] Finally, they say the judge erred by speculatively pre-judging Ms. Lee's credibility. A trial judge should not pre-emptively assess the credibility of a witness before hearing from them unless they are clearly incapable of belief. On this point, the appellant relies on the decisions from the Ontario Court of Appeal and Supreme Court in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* (2000), 46 O.R. (3d) 760, 2000 CanLII 5624 (C.A.) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 [*Sagaz*] respectively, saying they stand for the proposition that a court should not pre-judge a potential witness' credibility without hearing from them. As will be discussed below, the respondents take a different view of these decisions.

[46] As an overarching consideration, the respondent emphasizes the deferential standard owed to discretionary decisions, and deference is especially required in the context of trial management decisions.

[47] The respondent further submits the trial judge rightly considered the appellant's lack of due diligence. The appellant had developed their theory of a "laboratory invoice scheme" before the beginning of the trial, but did not reach out to Ms. Lee to inquire about this alleged scheme until several months later—long after the trial had been underway.

[48] Regarding whether a miscarriage of justice was likely to occur, the judge rightly considered the potential prejudice to the respondent. The significant progress of the trial weighed in favour of a strict application of the test: *Cox* at para. 52. The majority of the trial had already occurred when the appellant brought their application to re-open their case, with only four scheduled days remaining. This is of particular relevance because the defence witnesses who had already testified may have needed to be recalled to give responsive evidence to Ms. Lee's testimony.

[49] Further, the judge was right to weigh the potential probative value of Ms. Lee's evidence against the potential prejudice to the respondent: *A.R.* at para. 22. The repeated instances of the appellant failing to adhere to case management directions throughout the trial—by adding new witnesses and recalling a witness who had already testified—created a pattern that was prejudicial to the respondents. Attempting to call Ms. Lee after the appellant had closed their case was a continuation of this pattern and the judge was right to dismiss the application to prevent a miscarriage of justice against the respondents.

[50] Regarding whether the evidence of Ms. Lee was likely to change the result of the trial, the respondents say the judge's conclusion was correct in light of the questionable usefulness and veracity of her evidence. Her potential evidence was undermined by controverting evidence from other witnesses and the appellant's failure to bring out similar evidence from other witnesses either in direct or cross-examination. Additionally, the contradictions between Ms. Lee's past statements in interviews with the appellant's counsel and her later will-say statement about her involvement in an invoicing scheme undermined the potential weight of her evidence. The appellant's counsel had also used charged terms while communicating with Ms. Lee that could have impacted her testimony.

[51] The respondents take a different view than the appellant on the Supreme Court's decision in *Sagaz* on the issue of credibility. They submit the Supreme Court's ruling stands for the proposition that in an application to re-open, a trial judge may make a determination with respect to a witness' credibility on the basis of the sworn evidence before them without hearing the potential witness testify.

Discussion

[52] In my view, it is first necessary to consider Dr. Shum's submissions on this ground of appeal within the broader context of how the allegations of fraud were framed at the trial.

[53] It is clear both from the notice of civil claim and the appellant's theory of their case advanced at trial that the allegation that the respondents had engaged in "systematic fraudulent billing practices" or "deceptive billing practice" were at the heart of the appellant's case. These alleged billing practices were the cornerstone of the appellant's allegations that Dr. Wittenberg had fraudulently misrepresented the practice as "... a genuine, i.e. legitimate, source of steady revenue year after year, which was therefore a promise of the legitimate earning potential of the practice": *Reasons* at para. 6.

[54] As the judge observed in her reasons, Dr. Shum "... in closing asked the court to infer that 'the discontinuance of the fraudulent billing practices was a material contributing cause of the failure of the Dental Practice' ...": *Reasons* at para. 182. She also observed in the *A.R.* that "... the question of the testimony of improper billings goes to the heart of the case and its allegations of fraud and misrepresentation ...": at para. 14.

[55] It was thus an explicit allegation at trial that, as a result of the alleged fraudulent billing practices, Dr. Wittenberg had committed fraud on both patients and insurers for certain of the procedures in question. This was particularly the case in relation to what were alleged to be false lab invoices and the remittance of fraudulent invoices to insurers for payment: *A.R.* at paras. 5, 15, 24.

[56] It is within this context that Dr. Shum contends that they provided what should have been a satisfactory explanation to the judge: (1) for the timing of their application to re-open such that Ms. Lee could testify; (2) that her evidence would probably have changed the result; and (3) a miscarriage of justice would probably occur if Ms. Lee's evidence were not before the Court.

[57] I do not agree with these submissions for several reasons.

[58] First, there was evidence on the record from which the judge could conclude that the appellant did not act with the utmost due diligence to bring the evidence of Ms. Lee forward earlier. The *A.R.* refers to Dr. Shum's submission that counsel

“... only became aware of this evidence this past weekend when it explored the possibility of rebuttal evidence”: at para. 18. However, the judge also observed that “[t]his issue with respect to lab invoices was specifically highlighted as early as March 10, 2023, as evident in a letter from counsel for the [appellant] and has been a central issue since”: at para. 21.

[59] The judge noted that Ms. Lee had been interviewed twice by counsel for Dr. Shum, once before the trial commenced and again prior to its continuation on May 27, 2023. In those interviews, Ms. Lee indicated she “... could not recall much relating to the laboratory invoices”. As a result, “... counsel chose to call Ms. Tanaka, the most recent receptionist in the practice, as part of its case and did not call Ms. Lee prior to closing its case”: at para. 17. I would add that Ms. Tanaka also testified as to events which occurred during the time frame she continued in that capacity, after November 1, 2017 and until Dr. Shum closed the practice. In summary, there is evidence supporting the judge’s conclusion that the appellant had not diligently attempted to bring forward Ms. Lee’s evidence in a timely fashion, and that this may have been a result of a pragmatic decision to favour Ms. Tanaka as a witness instead.

[60] The appellant’s lack of due diligence may be relevant to the analysis as a factor speaking to why the evidence was not brought forward earlier. Of greater significance, however, in my view, are the factors that bear more directly on the two branches of the test: 1) the probability of a miscarriage of justice if the appellant’s case was not re-opened; and 2) whether the evidence of Ms. Lee would probably have changed the result of the trial.

[61] I do not see the judge having committed any reversible error in her analysis of either branch of the test, which was in the exercise of her discretion within the scope of her trial management powers. In reaching this conclusion I am mindful that “... it is important on appellate review that trial management decisions are examined in the context of the trial as a whole, rather than as isolated incidents”: *Samaniego* at para. 26.

[62] The judge referred to the actions of Dr. Shum during the trial as reaching the point that "... adversely impacts the [respondents'] ability to defend themselves", concluding that "... to allow this evidence to be adduced would, in fact, more likely create a miscarriage of justice for the defendants—not the plaintiff": *A.R.* at para. 22.

[63] In the *A.R.*, the judge noted the length of the trial and the time it had taken for Dr. Shum to close his case. The application to re-open was made on day 20 of a 24-day trial with Dr. Shum having closed his case on day 16, and having called Dr. Wittenberg as an adverse witness. Furthermore, when the application to re-open was brought, Ms. Lazarus had been called as a witness in the respondents' case and been extensively cross-examined and Dr. Wittenberg had given some evidence in chief as part of the respondents' case.

[64] The judge stated that Dr. Shum's counsel had "... repeatedly used the word *fake* or *forgery* with respect to the invoices in the most recent dealings with Ms. Lee". She concluded that "... [t]hese conversations can well be said to have impacted the weight of the testimony of Ms. Lee who initially could not remember anything with respect to her employment 10 years ago ...": *A.R.* at para. 25, emphasis in original.

[65] Dr. Shum challenges this account and says that the correspondence between counsel was not in evidence at the hearing of the application. Dr. Wittenberg points out, however, that an affidavit from Dr. Shum's counsel, which was before the Court, detailed how the appellant's counsel had advised Ms. Lee that there were "... a significant number of apparent forgeries of laboratory invoices located in patient files", and that she would be called to testify with respect to "... whether she falsified any invoices while she was working at Dr. Wittenberg's office".

[66] There was thus some evidence upon which the judge could conclude that the communications between Ms. Lee and appellant's counsel "... can well be said to have impacted the weight ..." of Ms. Lee's testimony.

[67] I would observe that from my review of portions of the transcript that Ms. Lee's anticipated testimony that she "... routinely sent [dental laboratory invoices] to insurance companies for payment" was contradicted by the evidence of Mr. Carlos Sorenson, a claims manager of operations at Pacific Blue Cross ("PBC") who gave evidence for the appellant at the trial. Mr. Sorenson testified that claims submitted electronically were auto-adjudicated by their system and the insurer does not request, receive, or review the actual laboratory invoices in relation to which a claim is made.

[68] Dr. Wittenberg and Ms. Lazarus' evidence was that the overwhelming majority of their dental claims were submitted to insurers electronically, and no actual dental laboratory invoice was submitted for the insurer's review. This testimony was not challenged by Ms. Tanaka, who was employed at the practice from June 2017 onward, and whose responsibility it was to submit dental claims to insurers. In fact, during Ms. Tanaka's evidence in chief she was not asked any questions with respect to the alleged "laboratory invoice scheme".

[69] It is apparent, in my view, that Dr. Shum failed to establish that Ms. Lee's anticipated evidence would probably have affected the outcome of the trial; in particular, in seeking to establish a systematic fraudulent system of the respondents submitting false and/or forged invoices to either patients or insurers.

[70] In fact, it is noteworthy that Dr. Shum lead no evidence that any particular patient or insurer had complained of alleged acts of impropriety, let alone fraud, in relation to any of the respondents' billing practices, and in particular a "laboratory invoice scheme". As noted by the judge, there was "... no evidence of any insurance or [patient] claim or investigation": *Reasons* at para. 145.

[71] A miscarriage of justice is a matter that goes beyond mere unfairness that may result from the inability to present new evidence. Rather, it is "... 'a result that would leave one party with such an unfair benefit or advantage at the expense of the other that a reasonable person would regard it as shocking and unconscionable' ...": *Cox* at para. 56.

[72] In my view, Dr. Shum has fallen far short of establishing a reviewable error by the judge in her finding that Ms. Lee's anticipated evidence would probably not have affected the result of the trial and that a miscarriage of justice would not result if she were not allowed to testify. The *A.R.* was well within the parameters of the type of exercise of a judge's trial management powers to which an appellate court owes deference.

[73] I would not accede to this ground of appeal.

Did the judge err by drawing an adverse inference against the appellant in respect of documents the respondents alleged were missing?

The trial reasons

[74] At trial, Dr. Wittenberg requested the Court draw an adverse inference against Dr. Shum based on his failure to adduce certain documents. He argued that the documents would be exculpatory and had been in the control and possession of Dr. Shum since November 1, 2017. The documents at issue were appointment day sheets, patient charts, patient ledgers, lab invoices, consultation notes, and other documents the respondent said should have been in the patient files left with the appellant: at paras. 109, 116. On this point, the judge considered the testimony of Dr. Wittenberg and Ms. Lazarus (who had worked at the Practice as a dental assistant since 1995) to determine that the documents did exist. Further, the judge found that the documents had not been removed from the Practice as alleged by Dr. Shum. The judge highlighted that Ms. Tanaka, who had worked at the Practice through the change of ownership, did not substantiate Dr. Shum's allegations that supplies and materials had been removed from the office: *Reasons* at paras. 117–119.

[75] The judge concluded that the appellant was responsible for failing to produce the documents, this failure prejudiced the respondents, and ultimately, that an adverse inference against the appellant was warranted. She found that the respondents had left all patient and business records at the practice when they turned it over to the appellant. She also found there was no evidence substantiating

the appellant's allegation that any materials and supplies had been removed from the office. Consequently, these records had been in the possession and control of the appellant since 2017 and they bore the responsibility for failing to produce them, and this failure was "severely" prejudicial to the respondents: at para. 117. These findings led the judge to "... draw the adverse inference that, had such documents been retained and produced, the contents of those documents would support the evidence of the defendants": at para. 178.

The applicable framework

[76] An adverse inference may be drawn against a party who fails to adduce relevant evidence without sufficient justification. The nature of such an inference is that the evidence is being withheld because it undermines the withholding party's position. The trial judge relied on (at para. 105)—and both parties cite on appeal—the following passage from *Wigmore on Evidence*, 3rd ed. (1940) vol. 2 at 162, for the meaning and effect of an adverse inference:

"The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."

[Emphasis added].

[77] In order for a court to draw an adverse inference, the party seeking that inference bears the burden to establish a *prima facie* case by adducing at least some evidence to support it. In *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70 at para. 184 [Angel Acres], this Court held that "[i]f a party has not adduced sufficient evidence to support an invited adverse inference, no adverse inference will be drawn even if the opposing party has not called a material witness under its control". In *Pan v. Gao*, 2020 BCCA 58 at paras. 44–46 [Pan], this Court adopted the principle that

the party seeking an adverse inference bears the burden of proof to establish a *prima facie* case. In *Pan*, this Court held that the trial judge had erred by making an adverse inference because “... no *prima facie* case had been established by the defendant”. Notably, this holding was based on the Court’s conclusion that “[t]here was simply *no evidence* to [support] ...” the inference being sought: at para. 46, emphasis in original.

[78] The judge correctly held that drawing an adverse inference is a matter of discretion: at para. 104. The standard of review for such discretionary decisions is deferential. However, that deference is not absolute. While there must be at least some evidence which supports the inference drawn by the trial judge, a reviewing court should not interfere when such evidence exists. In *Singh v. Reddy*, 2019 BCCA 79 at paras. 17–22, Justice Newbury reviewed the relevant legal framework and concluded the applicable standard of review for an adverse inference in a context where the inference is “closely bound up with the fact-finding process” is that of palpable and overriding error. See also the discussion in *Pan v. Gao*, 2020 BCCA 58 at para. 15, where Justice Newbury stated that the “inference-finding process” is subject to the following standard from *Housen v. Nikolaisen*, 2002 SCC 33 at para. 22, although:

... it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support the inference, an appellate court will be hard pressed to find a palpable and overriding error.”

[Emphasis added.]

The parties’ positions

[79] The appellant makes four arguments in support of their position that the judge erred by drawing an adverse inference against the appellant:

- i. The respondents did not establish a *prima facie* case that the documents existed and were in the exclusive possession of the appellant.

- ii. The trial judge erred in accepting and relying on Ms. Lazarus' testimony that she found the office ransacked, contrary to the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), 1893 CanLII 65 (FOREP).
- iii. The trial judge forgot, ignored, or misconceived the evidence in determining that the appellant had failed to explain why documents were not produced.
- iv. The trial judge erred in creating a false binary with respect to the missing laboratory invoices.

[80] First, they submit that the respondents' uncorroborated and disputed oral testimony was insufficient to meet their burden of establishing a *prima facie* case. The respondents relied on oral testimony alone—which the appellant “vigorously disputed”—and tendered no documentary evidence in support of the assertion that the documents existed and had been left in the appellant's possession. Further, the existence of such evidence was contrary to affidavit evidence that Dr. Wittenberg gave before trial.

[81] Second, the trial judge erred by accepting and relying on Ms. Lazarus' testimony. Ms. Lazarus testified that she had found the office “ransacked” in March 2018 and this was used to support the conclusion that the appellant was responsible for the missing documents. This evidence was not in Ms. Lazarus' will-say statements and it was not put to Dr. Shum in cross-examination, contrary to the rule in *Browne v. Dunn*.

[82] Third, the judge forgot, ignored, or misconceived evidence explaining why the documents were unavailable. The appellant gave evidence that he did not lose or fail to produce documents and this was supported by photographs of the boxes of records received from the respondents. The absence of certain invoices was explained by affidavit evidence that Dr. Wittenberg gave before trial.

[83] Finally, the judge erred by failing to consider alternative possibilities that explained the missing documents.

[84] The respondents say there was independent documentary evidence supporting their claim that the records were missing and had been in the exclusive possession of the appellant. For example, invoices produced by the appellant indicated that certain (missing) documents were in the files. Further, there was independent witness testimony supporting the respondents' claim from Ms. Tanaka and Dr. Shum himself. Ms. Lazarus also gave evidence supporting these positions.

[85] The respondents submit that the alleged violation of the rule in *Browne v. Dunn* is immaterial because of the marginal importance of that piece of evidence in the judge's reasons. The trial judge referenced the statement put in issue by the appellant in only one sentence of her reasons and there is no basis to conclude the judge placed any significant weight on that evidence.

[86] In response to the submission that the judge failed to consider the appellant's evidence, the respondents highlight the extensive contrary evidence they put forward at trial. They further rely on the principle that a judge is not required to discuss or conduct an in-depth analysis of every piece of evidence before them.

[87] Finally, the judge's reasons explicitly indicate she did consider some of the alternative explanations suggested by the appellant.

Discussion

[88] I will address collectively the errors which Dr. Shum submits were made by the judge.

[89] The judge's drawing of the adverse inference in question was properly considered in the context of the claims of fraud being advanced by Dr. Shum. In *Angel Acres*, this Court commented on the applicable standard of proof required when considering allegations of fraud:

[122] ... They must be proven on a balance of probabilities; however, the quality of the evidence required is commensurate to the seriousness of the allegations: paras. 162–163.

[90] Certain of the judge’s findings are key to her reasoning that the adverse inference requested by Dr. Wittenberg should have been drawn:

- (a) The “overwhelming weight” of the evidence suggests that the respondent left all patient and business records at the dental practice before it was turned over to the appellant and those documents had been in his control and possession since that time (*Reasons* at para. 117).
- (b) The appellant’s claim that supplies and materials had been removed from the office was unsubstantiated (at para. 117).
- (c) The absence of the missing documents was prejudicial to the respondents (at para. 118).
- (d) The respondents were able to “systematically” point out deficiencies in the appellant’s claims of fraud using the documents available to the Court. Most notably, some of the invoices before the Court indicated that missing documents had been attached to them at some point (at para. 146).
- (e) Based on the evidence of Dr. Wittenberg and Ms. Lazarus, the judge found that the documents had existed in the patient charts and the respondents had not systematically destroyed them over the years or before turning them over to the appellant (at para. 175).
- (f) The documents were in the sole custody and possession of the appellant from November 1, 2017, onward (at para. 177).
- (g) The appellant’s testimony did not adequately explain the missing documents and undermined his position. For example, he agreed in cross-examination that he had seen some of the documents he later failed to produce (at para. 229).

[91] These findings provide a sufficient evidentiary foundation to support the judge's conclusion that an adverse inference should be drawn against Dr. Shum. There was both witness testimony and documentary evidence that supported the judge's conclusions about the missing records. For example, when Ms. Tanaka was asked on cross-examination about the existence of appointment day sheets she responded: "It sounds kind of familiar when you say it, but, yeah, I can't fully remember".

[92] The judge's conclusions were also supported by Dr. Shum's own testimony. For example, he admitted on cross-examination that he had full control of all the records at the Practice since he assumed control on November 1st, 2017, and to having seen consultation notes in the patient charts when he did the Chart Audit—documents which he later failed to produce.

[93] Ms. Lazarus, for her part, testified that consultation notes that had been turned over to the appellant were missing in their entirety from the appellant's production of the patient charts of the Practice. She testified in detail about where the missing records were previously stored and left in the office.

[94] It is also significant that some of the documents that were before the Court demonstrated that missing documents had been attached to them at some point. For example, certain invoices before the court indicated that a number of documents, such as pre-approvals, pre-estimates, and explanations of benefits "... had been attached to these forms, yet none of these documents had been produced by the [appellant] as part of these proceedings". When viewed in light of the judge's findings that the respondents provided their records to the appellant in their entirety—without removing anything—this provided an evidentiary foundation which supported the judge's conclusion that the appellant was responsible for the missing documents not being available. The judge found an adverse inference was warranted because these missing documents "... could well explain the irregularities alleged by the [appellant]": at para. 146.

[95] It bears repeating that at paras. 187, 248–250, the judge found:

- the absence of a forensic audit and relevant expert evidence was a “fundamental” problem in the appellant’s case; and
- that the appellant led no documentary evidence which could give rise to reasonable inferences being drawn that the respondents had committed fraud as to the Practice’s financial viability when it was sold.

[96] This being the case, I consider Dr. Shum’s challenge to the finding of an adverse inference to be little more than re-arguing the submissions made at trial in the hope that this Court would reach a different conclusion than the judge. He has failed to identify an error in principle or pointed to evidence that the judge must have forgotten, ignored, or misconceived.

[97] In fact, a review of the reasons as a whole leads me to conclude that the judge considered the many arguments now advanced in this Court and no reviewable error has been established.

[98] The judge’s conclusion that an adverse inference was appropriate was an exercise of discretion and is owed deference so long as there was evidence before her to support it. Such is the case here. This case is not analogous to *Pan*, where the court concluded there was “simply *no evidence*” that supported the adverse inference the trial judge had drawn: at para. 46, emphasis in original.

[99] In this case, both the appellant and the respondents led evidence on the issue. There was evidence that supported the judge’s conclusion that an adverse inference was warranted and it was open to the judge to prefer the evidence of the respondents over that of the appellant when they were in contradiction.

[100] In my view, the appellant has not identified an error in principle in the judge’s reasoning or a palpable and overriding error in her findings that warrant appellate intervention.

[101] Accordingly, I would not accede to this ground of appeal.

Disposition

[102] I would dismiss the appeal.

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Madam Justice Fenlon”

I AGREE:

“The Honourable Justice Donegan”