Court of Appeal for Saskatchewan

Docket: CACV4349

Citation: *Dawgs Canada Distribution Ltd. v Smith*, 2025 SKCA 81

Date: 2025-08-28

Between:

Dawgs Canada Distribution Ltd. (formerly known as Dawgs World Distribution Ltd.), Angie Friesen, 101086342 Saskatchewan Ltd., Steven Mann, and Top Dawg Management Inc.

Appellants
(Defendants)

And

Double Diamond Distribution

Appellant
(Defendant/Plaintiff by Counterclaim)

Lee Smith

Respondent
(Plaintiff/Defendant by Counterclaim)

And

Barrie Mann and BAM Marketing Inc.

Non-Parties
(Defendants)

Before:	Jackson, McCreary and Kilback JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Justice Keith D. Kilback
In concurrence:	The Honourable Justice Georgina R. Jackson The Honourable Justice Meghan R. McCreary
On appeal from:	2024 SKKB 33, Saskatoon
Appeal heard:	May 9, 2025
Counsel:	Tom C. Stepper for the Appellants Brandi Rintoul for the Respondent No one appearing for Barrie Mann or BAM Marketing Inc.

Kilback J.A.

I. INTRODUCTION

[1] In the summer of 2005, Lee Smith and Steven Mann discussed going into business together to import and sell a line of shoes that they eventually called Dawgs Clogs. Mr. Mann incorporated a company called Double Diamond Distribution Ltd. that was used to facilitate the venture.

[2] A dispute arose over whether their discussions ever amounted to a binding agreement for Mr. Smith to participate in the business. Following a trial, a judge of the Court of King's Bench found the parties had reached an agreement and that Mr. Mann had breached it by not bringing Mr. Smith into the company. The judge found Mr. Mann and Double Diamond liable for breach of contract and dismissed Mr. Smith's claims against the other parties (*Smith v Dawgs Canada Distribution Ltd.*, 2024 SKKB 33 [*Decision*]).

[3] The appellants appeal from the *Decision*. In general terms, Double Diamond and Mr. Mann say the judge made several errors in finding there was a binding agreement for Mr. Smith to participate in the Dawgs Clogs venture, determining they were liable for breach of contract, and awarding costs against them. The rest of the appellants argue the judge erred by not awarding them costs.

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

II. BACKGROUND

[5] Mr. Smith and Mr. Mann had been friends since their university days. When the initial discussions took place, Mr. Smith was living in Stockholm, Sweden, and Mr. Mann was living in Saskatoon. The original business idea was to arrange for a line of ethylene-vinyl acetate shoes to be manufactured in China that would then be imported into Canada and Europe for sale. Ethylene-vinyl acetate is a type of soft, flexible plastic.

[6] Mr. Smith claimed he entered into an oral agreement with Mr. Mann to participate in the business in June or July of 2005. He said the agreement was that Mr. Mann would incorporate a company for the venture and that he, Mr. Mann, and Mr. Mann's wife, Angie Friesen, would be

the shareholders. Their respective shareholdings would be proportionate to their financial contribution to the cost of the first container of shoes ordered from China. Mr. Smith said he paid $23,000, which was approximately one-third the cost of the first container, and that he understood he was to be issued one-third of the shares in the new company.

[7] Mr. Mann incorporated Double Diamond on June 7, 2005, without shareholders. The $23,000 paid by Mr. Smith was received and booked by Double Diamond as a loan. No shares were ever issued to Mr. Smith, but the following shares were issued on November 1, 2006:

Shares	*Shareholder*	*Beneficial Owner*
60,000	Top Dawg Management Inc	Steven Mann
20,000	1010866342 Saskatchewan Ltd.	Angie Friesen
20,000	BAM Marketing Inc.	Barrie Mann
6,000	101117188 Saskatchewan Ltd.	Not established on the evidence

[8] Concurrent with the issuance of these shares, Mr. Mann, Ms. Friesen, and Barrie Mann were appointed directors of Double Diamond. Dawgs Canada Distribution Ltd. (formerly known as Dawgs World Distribution Ltd.) was also incorporated by Mr. Mann but appears not to have been used for the venture.

[9] Mr. Mann said he incorporated Double Diamond before he had any discussions with Mr. Smith. His view was that their discussions about the venture amounted to no more than an agreement to agree if certain conditions were met. He said Mr. Smith's participation in the company depended on him (i) paying $35,000 USD; (ii) contributing substantially to the growth of the company; and (iii) working to develop the business in Europe. Mr. Mann said Mr. Smith did none of those things and therefore had no claim to an ownership position based on their discussions.

[10] Mr. Smith sued over Mr. Mann's failure to include him in the business. He advanced several causes of action but primarily based his claim in breach of contract. Along with other forms of relief, he sought specific performance of the alleged oral contract or, alternatively, damages or an order for disgorgement of profits realized by the business. Mr. Smith also advanced a claim for unjust enrichment seeking reimbursement of approximately $5,175 in costs that he incurred attending a trade show in Madrid.

[11] The appellants, together with Barrie Mann and BAM Marketing Inc., defended the action on the basis that the preliminary discussions between Mr. Smith and Mr. Mann did not establish the certainty of terms necessary to constitute a legally binding contract. In the alternative, they said Mr. Smith did not fulfil the conditions required for him to participate in the business.

[12] Double Diamond also counterclaimed against Mr. Smith, alleging he was carrying on an unauthorized business in Sweden in which he was unlawfully passing off his products as Dawgs Clogs.

[13] The trial was bifurcated and proceeded only on the question of liability in relation to Mr. Smith's claim and Double Diamond's counterclaim. The main issue at trial was whether there was an agreement for Mr. Smith to participate in the Dawgs Clogs venture.

[14] The judge held that there was an enforceable oral agreement between Mr. Smith and Mr. Mann. He found they had reached a consensus *ad idem* on the main terms, which were those identified by Mr. Smith. The judge determined Mr. Smith was initially supposed to receive 33% of the shares of Double Diamond but that the agreement was later amended to reduce his ownership interest to 8% when the company took on additional investors in May of 2006.

[15] The judge concluded that Mr. Mann breached the contract by not causing Double Diamond to issue shares to Mr. Smith. He found Mr. Mann personally liable and held that Double Diamond was also liable for the breach because Mr. Mann was acting as agent for Double Diamond throughout his dealings with Mr. Smith. In accordance with the bifurcation order, the judge determined that the specific relief to be awarded remained to be decided in future proceedings. He dismissed Mr. Smith's claim against the other parties and also dismissed Double Diamond's counterclaim.

[16] The judge then turned to the issue of costs. He awarded Mr. Smith costs of his claim against Mr. Mann and Double Diamond, and costs of successfully defending Double Diamond's counterclaim. He made no order as to costs in relation to Mr. Smith's claim against the other parties or Double Diamond's counterclaim against Mr. Smith.

III. ISSUES AND STANDARD OF REVIEW

[17] The issues raised on appeal may be addressed by answering the following questions:

(a) Did the judge err by finding a contract existed?

(b) Did the judge err by finding Mr. Mann liable for breach of contract?

(c) Did the judge err by finding Double Diamond liable based on agency principles?

(d) Did the judge err by declining to award costs to the successful defendants?

[18] As Mr. Mann and Double Diamond take the same position on the appeal, in these reasons I will refer to their collective position as being advanced by Mr. Mann.

IV. ANALYSIS

A. Existence of a contract

[19] The first issue is whether the judge erred by finding that a contract existed. Mr. Mann contends the judge erred by (i) misapplying the law of contract; (ii) finding that Mr. Smith's evidence about the contract and its terms was credible; and (iii) determining that an agreement on the contract terms was established on the evidence. I see no error on any of these points.

1. Applying the law of contract

[20] I begin with the argument that the judge misapplied the law of contract. The judge found there was a clear communication that a reasonable person would consider to be an accepted offer sufficient to form a binding contract, on the terms described by Mr. Smith (*Decision*):

> [50] I find that following the June/July 2005 discussions the evidence establishes a clear and unequivocal communication respecting the contractual terms that a reasonable person would consider to be the offer by Steve [Mr. Mann] and acceptance by Lee [Mr. Smith] that in return for his cash contribution to the first shipment of clogs and his other efforts to support Dawgs Clogs, he would receive a proportional (33%) shareholding interest in the corporation created by Steve for the Dawgs Clogs venture.

[21] Mr. Mann contends this was an error because a reasonable person in Mr. Smith's position would have documented the agreement in writing if it existed. In his factum, Mr. Mann advances the argument in these terms:

> 47. … under the reasonable man standard, if a consequential agreement was reached where Lee Smith was going to purchase one-third of a company that was going to manufacture, import, and distribute the hottest fashion trend clogs for $23,000 CDN, the reasonable man, Lee Smith, would have asked for a piece of paper, or a napkin, or the back of a bag, something, to write out the agreement in one sentence, and have Steven Mann and him sign and date it. That is what a reasonable man or woman would do.

[22] As I understand this submission, Mr. Mann says the judge misapplied the objective "reasonable bystander" test in the law of contract to the evidence when he concluded a reasonable person would consider there to have been an accepted offer forming a binding contract (on the nature of the test, see: *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 at para 35-36, [2021] 1 SCR 868; *Achter Land & Cattle Ltd. v South West Terminal Ltd.*, 2024 SKCA 115 at para 44). Whether the judge erred in applying the law of contract to the facts is a mixed question of fact and law reviewable only for palpable and overriding error (*Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para 43, [2017] 1 SCR 688 [*Teal Cedar Products*], and *Housen v Nikolaisen*, 2002 SCC 33 at para 36, [2002] 2 SCR 235 [*Housen*]).

[23] I see no palpable and overriding error in the judge's application of the reasonable bystander test to the evidence. Respectfully, Mr. Mann's argument is premised on a misunderstanding of how that concept operates in the law of contract. To determine that a contract existed, the judge was not required to find that Mr. Smith behaved in the same way a reasonable person would have behaved in his situation. Rather, the judge was required, in general terms, to determine whether a reasonable person would have considered there to have been an offer and acceptance.

[24] This is precisely how the judge approached the issue. When considering whether the evidence established a consensus *ad idem*, the judge extensively reviewed the applicable law, including citing the following passage from *Curry v Athabasca Resources Inc*, 2024 SKCA 7, [2024] 5 WWR 241, leave to appeal to SCC refused, 2024 CanLII 80689 (*Decision* at para 47). For present purposes, the key point in *Curry* is that in the absence of a written agreement, a court must determine whether a reasonable person in the position of one party would consider that the other party's conduct constituted an offer and whether a reasonable person in the position of the latter would consider the former's conduct to have constituted an acceptance. This was explained as follows:

> [36] A valid contract is only formed when three criteria are met from the perspective of an objective bystander: (i) the parties intended to contract; (ii) the parties reached an agreement on all essential terms; and (iii) the essential terms are sufficiently certain (*Jans*

> *Estate v Jans*, 2020 SKCA 61 at para 34 [*Jans*]; citing *Matic v Waldner*, 2016 MBCA 60 at para 57, [2017] 1 WWR 504 (leave to appeal to SCC refused, 2017 CanLII 1341)). Determining whether a contract has been formed and, if it has, on what terms, calls for the application of an objective test. *In the absence of a written agreement, or some other clear and unequivocal communication respecting contractual terms, a court must determine whether a reasonable person in the position of one party would consider that the other party's conduct constituted an offer and, conversely, whether a reasonable person in the position of the latter would consider the former's conduct to have constituted an acceptance* (*Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp.*, 2020 SCC 29 at para 33, [2020] 3 SCR 247). Where it is alleged that a party has agreed to a proposed contractual term through conduct – including through silence or acquiescence – rather than through express acceptance, such conduct must be sufficiently clear, unambiguous, or absolute to objectively demonstrate an intention to create binding legal relations on those terms (*AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers Local 119*, 2022 SKCA 99 at para 49, [2023] 6 WWR 74).
>
> (Emphasis added)

[25] After finding that Mr. Mann's evidence on the question of whether there was a consensus *ad idem* was not credible or reliable, the judge proceeded to consider whether the evidence as a whole established a meeting of the minds. As noted, he found the evidence established a clear communication regarding the contract terms "that a reasonable person would consider" to be an accepted offer (*Decision* at para 50). I am not persuaded the judge misapplied the law of contract in reaching this conclusion.

2. Finding Lee Smith's evidence was credible

[26] Mr. Mann contends the judge erred by finding Mr. Smith's evidence about the contract and its terms to be credible. Credibility is a finding of fact reviewable for palpable and overriding error (see *Co-operators Life Insurance Company v The Spencer Health Network Inc*., 2021 SKCA 161 at para 63, 25 BLR (6th) 221, and *Housen* at para 10).

[27] Mr. Mann says the judge should have rejected Mr. Smith's evidence that he was to receive an equity interest in the Dawgs Clogs venture because he testified that he was an "angel investor". Mr. Mann submits the notion that Mr. Smith was to receive an equity stake in the ongoing business was not credible in light of this testimony because, in his view, an angel investor is a wealthy individual who invests in a company but does not assume an active role in the ongoing management or operation of the business. He argues Mr. Smith's evidence that he was an angel investor therefore meant that he paid $23,000 for a one-third interest in the first shipment of shoes from China, not a one-third interest in the entire business. He says the judge erred by finding

Mr. Smith was entitled to an equity stake in the venture because his evidence on this point was not credible.

[28] I am not persuaded the judge made a palpable and overriding error in his assessment of Mr. Smith's credibility in the manner alleged. Without commenting on Mr. Mann's understanding of the term "angel investor", the judge was not convinced there was any significance to this characterization.

[29] Mr. Smith's evidence that he was to receive an equity interest in the Dawgs Clogs venture was consistent throughout his testimony. Regarding his use of the term angel investor, he testified in cross examination that he did not understand that term to have any special meaning. When asked what he meant when he described himself as an angel investor, Mr. Smith testified as follows:

> A An angel investor is an investor who invests in a business.
>
> Q What separates an angel investor from an investor?
> A Nothing.
>
> Q You don't know?
> A There's no difference between an investment and an angel investment.
>
> Q May I ask why you use the term if there is no difference?
> A Angel investors invest in companies that are ideas.
>
> Q That's why you've chosen to use that term today?
> A It's just what they do.
>
> Q They invest in companies that are ideas. Is that your testimony?
> A Angel investors invest in companies that have no history, no -- they're start-ups.
>
> Q Okay. But you would agree with me that it's possible for someone to invest in a start-up company and not be referred to as an angel investor?
> A For sure.
>
> Q Yeah. Is it fair to say you don't really know the definition behind the term "angel investor"?
> A Is there a specific term for angel investor?
>
> Q I'm asking you.
> A An investor who invests in start-ups.

[30] During argument, the judge stated he did not read much into Mr. Smith saying he was an angel investor. The judge said he understood Mr. Smith to be saying that he was coming in from outside the company to invest:

> Awe, you know, come on. Angel investor, that -- that's thrown around. We -- we -- we know the origin of it. It's a Silicon Valley thing. I don't read a lot into him saying angel investor, meaning, I -- I was coming in from the outside contributing money.

[31] The judge rejected Mr. Mann's evidence and found Mr. Smith's evidence "to be overall credible and reliable and supported by reasonable inferences to be drawn from the documentary evidence" (*Decision* at para 40). The judge reasoned that an objective reading of the correspondence between them "supports the inference that [Mr. Smith] was part of this new business venture" (at para 41). Contrary to what Mr. Mann suggested was Mr. Smith's role as an angel investor, the judge specifically found Mr. Smith "was actively involved in doing things for the benefit of the business venture", as he had testified:

> [42] Lee was actively involved in doing things for the benefit of the business venture – attending the Madrid Shoe fair, communicating with a Swedish investment bank for the benefit of the venture, communicating with the Swedish Association of Agents in an attempt to identify retailers to sell shoes to, working with Steve and [another party] on design of shoes for the upcoming year (in part with specific focus on differentiating the Dawgs Clogs from the design of [a competitor's] models) and transferring $23,000 to [Double Diamond] representing part of the cost of the first container of some 27,000 pairs of clogs imported by [Double Diamond].

[32] In these circumstances, I see no error in the judge's assessment of the credibility of Mr. Smith's evidence based on his self-characterization as an angel investor.

3. Finding agreement on the contract terms

[33] Mr. Mann contends the judge erred in finding that the essential elements of a contract were established on the evidence. Specifically, he argues the judge erred in concluding that there was a consensus *ad idem* with respect to: (i) the consideration that was to be paid by Mr. Smith; and (ii) the percentage of equity that he was to receive. Factual questions such as these are reviewable only for palpable and overriding error (*Teal Cedar Products* at para 43; *Housen* at para 25).

a. Consideration

[34] Mr. Mann submits the judge erred in determining that there was agreement on the consideration that was to be paid because he had testified Mr. Smith's participation in the company depended on him paying $35,000 USD, contributing substantially to the growth of the company, and working to develop the business in Europe.

[35] After noting that the testimony was conflicting, the judge rejected Mr. Mann's evidence about the terms of the contract, stating "I conclude [Mr. Mann's] evidence is not credible or reliable as it relates to the issue of whether there was a contract or *consensus ad idem*" (at para 45). Thus,

Mr. Mann's argument regarding the consideration to be paid by Mr. Smith is really a complaint that the judge did not accept his evidence about what the consideration was supposed to be. However, the fact that Mr. Mann's evidence was rejected does not establish a factual error.

[36] The judge was alive to Mr. Mann's argument about the consideration to be paid. He was satisfied that the initial agreement was for payment of $23,000 (being one-third the cost of the first shipment) and that the idea of paying $35,000 USD was not raised by Mr. Mann until much later:

> [51] In Exhibit D-1, Tab 36, his December 27, 2007 letter, Steve states in the first paragraph "Originally we discussed you putting in $35,000.00 US and being responsible for initiating sales of Dawgs in Europe". I accept the evidence of Lee that the agreement at the time was that he would pay for 1/3 of the cost of the first shipment of shoes and in return would have a proportionate interest in the venture. He forwarded $23,0000 CDN to [Double Diamond] on October 28, 2005, being 1/3 of the cost of that shipment before it arrived in Canada. At this stage the venture was speculative. The commercial prospects for the venture were going to depend on the success of marketing those initial 27,000 pairs. *I reject the evidence of Steve that Lee breached an agreement to contribute $35,000 US. The evidence satisfies me that at no point until December of 2007 did Steve even suggest to Lee that he was in default of an obligation to pay $35,000 US*. He acknowledged that [Double Diamond] recorded the $23,000 CDN received on its books as a loan and that it has had the use of such monies since.
>
> (Emphasis added)

[37] The judge accepted Mr. Mann's evidence about the understanding that Mr. Smith would also contribute to the business by undertaking efforts to initiate sales in Europe. The judge determined that this aspect of the consideration was performed by Mr. Smith and that his sales efforts in Europe were not successful in part because no shoes were available for him to sell, litigation had been commenced by a competitor, and Mr. Mann was not authorizing any European sales without his approval:

> [53] I am satisfied by the evidence that there was an agreement concluded between Steve and Lee that Lee would be a co-venturer in the Dawgs Clogs venture proportionate to his share of the cost of the first shipment of shoes. To use Steve's language, their deal was that Lee was to have skin in the game; but that agreed skin in the game was his contribution to the cost of the first shipment and understanding that he would contribute to the business by efforts to initiate sales in Europe. An obligation to extend efforts to initiate sales does not include an obligation to conclude sales, particularly when no shoes were made available for him to sell. The [competitor's] position and litigation intervened, and Steve and Barrie decided no shoes were to be sold in Europe without their approval. Thus there could be no breach on Lee's part in that respect.

[38] I am not persuaded the judge erred in finding an agreement on the consideration that was to be paid. There was no palpable and overriding error in the judge's determinations that (i) Mr.

Mann and Mr. Smith had agreed on an initial payment of $23,000, which was made by Mr. Smith and retained by Double Diamond; and (ii) that the notion of paying $35,000 USD was not raised when the initial agreement was made in the summer of 2005. As noted, the judge accepted Mr. Mann's evidence that efforts to expand the business in Europe were also required but found there was no failure to perform that aspect of the consideration notwithstanding that those sales efforts were ultimately unsuccessful. I see no error in these conclusions.

b. Equity

[39] Mr. Mann also argues the judge erred in finding that there was agreement on the percentage of equity Mr. Smith was to receive. He says emails sent by Mr. Smith suggest he had either a 33%, 15%, 8%, or 5% ownership interest in some yet to be formed company and that the judge erred in concluding there was a meeting of the minds on his equity stake in the Dawgs Clogs venture based on this evidence.

[40] Respectfully, this argument conflates the judge's findings about the initial agreement for Mr. Smith's participation in June or July of 2005 and the subsequent modification of that agreement when Double Diamond took on additional investors in May of 2006.

[41] The judge found the parties initially agreed that Mr. Smith was to receive one-third of the shares of Double Diamond, as he had claimed. However, this initial agreement was not the end of their business relationship (see *Decision* at para 59).

[42] The judge reviewed the parties' communications on January 28, 2006, leading up to a meeting held in Saskatoon in May of 2006. He found there was a need to raise capital at that time to finance the continued and expanding operation of Dawgs Clogs and to fund a response to litigation that had been commenced by a competitor. This led to discussions about bringing on additional investors, which would involve diluting the ownership interest each of the participants held in exchange for the injection of new capital. The judge noted that in one of the emails, Mr. Smith accepted that his ownership share would be reduced to 15% to accommodate the additional investors that were needed (at para 61).

[43] The judge then reviewed the evidence about the May 2006 meeting, which included rough notes prepared by Mr. Mann that were marked as Exhibit P-2 (reproduced at para 34 of the

Decision). The judge found Mr. Mann represented to Mr. Smith that his financial investment constituted 8% of the total financial investment in the venture and, on that basis, his shareholding in Double Diamond would be 8% (at para 63). The judge determined that Mr. Smith agreed at this meeting to reduce his ownership interest to 8% based on Mr. Mann's representations:

> [64] I am satisfied that Lee accepted Steve's representations at face value and accepted his shareholding would be 8% in light of the representations Steve made with respect to additional investors. This acceptance by Lee, if not an obligation arising from his duty of good faith in the performance of his contract with Steve, was at a minimum an appropriate or honourable thing to do in the circumstances. It was consistent with Lee's earlier acceptance of an ownership position reduced to 15% evidenced by their January 28 email exchange. Lee's acceptance of such a reduction was made accepting at face value Steve's representations with respect to the contributions of other investors. Beyond this document there was no evidence presented by the defendants that the additional investments recorded on Exhibit P-2 by Steve were accurate.

[44] The judge found this agreement to reduce Mr. Smith's ownership interest to 8% was an amendment of the original contract (at para 65).

[45] Several months later, in June of 2006, Mr. Smith and Mr. Mann discussed converting Mr. Smith's ownership interest in Double Diamond into a distributorship arrangement that would give Mr. Smith rights to distribute Dawgs Clogs in Sweden or Europe. The judge found Mr. Smith had suggested that he would reduce his ownership interest to 5% in exchange for a distributorship agreement if they could agree on a valuation of the enterprise, but this never happened. The judge found the only agreement was that Mr. Smith was entitled to an 8% interest in Double Diamond (at paras 67–70).

[46] I am not persuaded the judge erred in finding that there was agreement on the percentage of equity Mr. Smith was to receive. The judge explained his finding that there was an initial agreement in June or July of 2005 for Mr. Smith to receive a one-third interest in the Dawgs Clogs venture that was subsequently amended, culminating in an agreement for Mr. Smith to receive an 8% interest in May of 2006. I see no palpable and overriding error in these determinations.

[47] On the first ground of appeal, I see no error in the judge's finding that a contract existed on the terms described by Mr. Smith.

B. Steven Mann's liability

[48] The second issue is whether the judge erred by finding Mr. Mann liable for breach of contract. Mr. Mann argues any liability for breach of the contract should have accrued to Double Diamond and that the judge improperly pierced the corporate veil to hold him personally liable. I am unable to accept this submission because this is not what the judge did.

[49] The judge found the oral contract for Mr. Smith's participation in the Dawgs Clogs venture was between Mr. Smith and Mr. Mann personally (see *Decision* at paras 50, 53, 56, 58, 59, 60, 65, 70, and 72). He then determined that Double Diamond was the company that assumed the business:

> [53] I am satisfied by the evidence that there was an agreement concluded between Steve and Lee that Lee would be a co-venturer in the Dawgs Clogs venture proportionate to his share of the cost of the first shipment of shoes. …
>
> …
>
> [56] I find that there was consensus *ad idem* that a company was to be incorporated to carry on the Dawgs Clogs venture. Steve's agreement with Lee was that Lee would be issued shares in that company proportionate to his contribution to the cost of the first shipment of shoes. The evidence satisfies me that [Double Diamond] was the company that assumed the business and assets of the Dawgs Clogs venture.

[50] Since no shares in Double Diamond were ever issued to Mr. Smith, the judge found that Mr. Mann had breached the contract (at para 72).

[51] Contrary to Mr. Mann's submission, the judge did not find Double Diamond primarily liable and then go on to pierce the corporate veil to find him personally liable. As such, the judge did not err in the manner alleged.

C. Double Diamond's liability

[52] The third issue is whether the judge erred by also finding Double Diamond liable for breach of contract based on agency principles. To put this issue in context, it is helpful to begin with the judge's conclusion on liability.

[53] The judge found Mr. Mann personally liable for breach of the contract and also found Double Diamond liable because Mr. Mann was acting as its agent throughout (*Decision*):

> [72] It is my decision that the evidence establishes there was, by amendment of their initial agreement, an agreement between Steve and Lee that Lee would receive an 8% shareholder's ownership interest in [Double Diamond], being the corporation incorporated

> to hold and operate the Dawgs Clogs business. I find that Steve has breached his agreement with Lee, as I have above found the essential terms to be. *Steve is personally liable for his breach of contract and the specific relief appropriate for that relief remains to be decided in future proceedings. [Double Diamond]is also liable since on the basis of the evidence before me Steve was acting throughout as both the ostensible and actual agent of [Double Diamond]*.
>
> (Emphasis added)

[54] Mr. Mann argues the judge erred by finding him and Double Diamond both liable for the same breach of the same oral contract based on agency principles. I agree that, in many instances, an agent and principal are not liable for the same breach of contract. However, in these specific circumstances, the judge's conclusion is sustainable because it reflects the common law doctrine of alternative liability.

[55] As a starting point, the bifurcation order called for the judge to determine liability in relation to the claims advanced in the statement of claim and counterclaim. Mr. Smith pleaded there was an oral contract between him "and the Defendants" and that "the Defendants" had breached the contract by failing to acknowledge and reflect his ownership interest (statement of claim):

> 34. In the alternative, *by an oral contract between the Plaintiff and the Defendants*, it was agreed that, in consideration of the Plaintiff investing money in Dawgs Clogs, the Defendants would provide to the Plaintiff a Proportionate Interest of Dawgs World Distribution, or similar corporation, and such interest would not be diluted.
>
> 35. Pursuant to the agreement, the Plaintiff invested $23,000.00 CDN in Dawgs Clogs.
>
> 36. The Plaintiff says that in breach of the contract, *the Defendants have failed to properly acknowledge and reflect his ownership interest in a corporate structure*, as the Defendants had promised to do.
>
> (Emphasis added)

[56] Mr. Smith therefore alleged a single oral contract with all eight of the defendants. However, the judge expressly found there was an oral contract between Mr. Smith and Mr. Mann. This is evidenced in several passages in the *Decision*, including the following (all emphasis added):

(a) "the evidence establishes a clear and unequivocal communication respecting the contractual terms that a reasonable person would consider to be the *offer by Steve and acceptance by Lee*" (at para 50);

(b) "I am satisfied by the evidence that *there was an agreement concluded between Steve and Lee* that Lee would be a co-venturer in the Dawgs Clogs venture proportionate to his share of the cost of the first shipment of shoes" (at para 53);

(c) "*Steve's agreement with Lee* was that Lee would be issued shares in that company proportionate to his contribution to the cost of the first shipment of shoes" (at para 56);

(d) "*Lee's agreement with Steve* was that he was to receive 1/3 of the shares of [Double Diamond] he has claimed" (at para 58);

(e) "perhaps other factors *led to Steve and Lee modifying their original agreement*" (at para 59);

(f) "*[t]his acceptance by Lee,* if not an obligation arising from his duty of good faith in the *performance of his contract with Steve,* was at a minimum an appropriate or honourable thing to do in the circumstances" (at para 64);

(g) "I find that at this meeting, *as proposed by Steve, Lee agreed* his ownership interest would be reduced to 8%. This was an *amendment to their initial agreement*" (at para 65);

(h) "the only extant agreement was *Lee's agreement with Steve* that his ownership position in [Double Diamond] was 8% of the issued shares" (at para 70); and

(i) "the evidence establishes there was, by amendment of their initial agreement, an *agreement between Steve and Lee* that Lee would receive an 8% shareholder's ownership interest in [Double Diamond] … I find that *Steve has breached his agreement with Lee*" (at para 72).

[57] The judge also found there was no evidence of any contractual agreement between Mr. Smith and any of the defendants "other than [Double Diamond]" (*Decision* at para 75). Reading this statement together with the judge's conclusion that Double Diamond was "also liable" because Mr. Mann "was acting throughout as both the ostensible and actual agent" of Double Diamond (at para 72), the judge must be taken to have found that Mr. Mann was acting

both in his personal capacity *and* as agent for Double Diamond when he made and breached the oral contract with Mr. Smith.

[58] On its face, this finding seems inconsistent. However, on a contextual reading of the judge's reasons, his conclusion may be understood to reflect the doctrine of alternative liability.

[59] The doctrine of alternative liability is a common law doctrine relating to the liability of an agent or a principal to a third party in contact (Donald L. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed (Toronto: LexisNexis, 2021) at 561). In general terms, "the rule of alternative liability provides that either the principal or the agent may be liable to the third contracting party in the alternative. This alternative liability continues until the election of the third contracting party to accept one, either the principal or the agent, as the debtor" (*Lang Transport Ltd. v Plus Factor International Trucking Ltd*. (1997), 143 DLR (4th) 672 (WL) (Ont CA) at para 2 [*Lang*], citing *Murray v Delta Copper Co., Ltd*., [1926] SCR 144 at 152).

[60] For the doctrine to apply, the agent must have contracted with the third party in such a way as to be personally liable on the contract (*Lang* at paras 14–15). This can occur where a person contracts in his or her own name without disclosing the name or existence of a principal. In that case, the agent can be primarily liable on the contract even though they may be acting on behalf of an undisclosed principal. In *Gladue v Walch* (1918), 43 DLR 757 (WL) (Man CA), Haggart J.A. (dissenting, but not on this point) described the basis of an agent's liability in this situation as follows:

> [6] … Where a person makes a contract in his own name without disclosing either the name or existence of a principal he is primarily liable on the contract to the other contracting party though he may be in fact acting on a principal's behalf, nor does he cease to be liable on the discovery of the principal unless and until there has been an unequivocal election by the other contracting party to look to the principal alone. Every person who in making a contract discloses the existence, but not the name, of the principal on whose behalf he is acting is personally liable on the contract to the other contracting party. This is in substance the law as laid down in 1 *Halsbury*, p. 219. See also *Saxon v. Blake*, 29 Beav. 438; *In re Southampton, Isle of Wight & Portsmouth Improved Steam Boat Co. (Bird's Case)*, 4 DeG. J. & S. 200, 33 L.J. Bk. 49; *Hobhouse v. Hamilton*, I Hog. 401, and the cases cited in 2 *Corpus Juris* at p. 816.

[61] Put another way, "since the agent contracts personally where the principal is undisclosed, the agent may sue and be sued upon the contract" (Gerald Fridman, *Canadian Agency Law*, 2d ed (Markham: LexisNexis, 2012) at §6.57 [Fridman]; see also *M. Brennan & Sons v Thompson*

(1915), 22 DLR 375 (Ont CA) at 379, cited in *Tednick v Big T. Restaurants of Canada Ltd.*, [1983] 2 WWR 135 (Sask QB) at para 5; *Trans Western Drilling Company v Irando Oils Limited* (1953), 3 DLR (3d) 314 (WL) (Sask QB) at para 14, and Fridman at §6.52). Undisclosed principals can also "sue and be sued in their own name on any simple contracts made on their behalf by their agents as long as those agents have acted within the scope of their delegated authority in so doing" (*Friedmann Equity Developments Inc. v Final Note Ltd.*, 2000 SCC 34 at paras 15 and 18, [2000] 1 SCR 842).

[62] Under the doctrine, where an agent contracts in their own name for an undisclosed principal, the third party may sue the agent or the principal but only recover judgment against one of them (see *Lang* at para 9, citing *Kendall v Hamilton* (1879), 4 App Cas 504 (UK HL) at 514; see also *Hilltop Group Ltd. v Katana*, [2002] OJ No 2461 (Ont Sup Ct) at para 208).

[63] At trial, the question of whether there was a contract for Mr. Smith's participation in the Dawgs Clogs venture was framed by the statement of claim and his assertion that he had a single oral contract with all eight of the defendants. This pleading required the judge to consider the possible liability of each of them under the alleged contract.

[64] The potential application of the doctrine of alternative liability was not pleaded or raised in the court below; nor is it expressly discussed in the *Decision*. However, during the hearing in this Court, both counsel accepted that the judge's determination in paragraph 72 of the *Decision* (that Mr. Mann was personally liable and Double Diamond was also liable because he was acting as its agent) could be understood to reflect the doctrine of alternative liability. Since the trial was bifurcated, the remedies to be granted for breach of the contract – whether against Mr. Mann or Double Diamond, but not both – would remain to be determined in future proceedings.

[65] Where trial reasons are ambiguous, interpretations that are consistent with a correct application of the law are to be preferred (see *R v G.F.*, 2021 SCC 20 at paras 78–79, [2021] 1 SCR 801; *Sinclair v Amex Canada Inc.*, 2023 ONCA 142 at para 53, 478 DLR (4th) 683, leave to appeal to SCC granted, 2024 CanLII 536; *Kringhaug v Men*, 2022 BCCA 186 at para 56, 83 BCLR (6th) 287). Two aspects of the *Decision* support the conclusion that the judge found alternative liability for breach of the oral contract.

[66] First, the judge's detailed review of the evidence and the testimony at trial demonstrates that, from Mr. Smith's perspective, Mr. Mann was acting either personally or on behalf of an undisclosed principal. As a result, there was a legal and evidentiary basis for the judge to find both Mr. Mann (the agent) and Double Diamond (the principal) liable for breach of the same oral contract provided the doctrine of alternative liability limits Mr. Smith's entitlement to a remedy against only one of them.

[67] The judge found there was consensus *ad idem* that a "company was to be incorporated to carry on the Dawgs Clogs venture" and that Double Diamond eventually "assumed the business and assets of the Dawgs Clogs venture" (*Decision* at para 56). However, at the outset in June or July of 2005, it was not clear to Mr. Smith that Double Diamond was the company that would be used for the business. In cross examination, Mr. Smith testified he did not believe he had a contract with Double Diamond.

[68] The judge found the first evidence of Double Diamond being involved was Mr. Mann's use of an email address with the domain "@doublediamond.com" on August 31, 2005. Mr. Smith also began using an email address with that domain on October 1, 2005. A few weeks later, he sent $23,000 to Double Diamond in accordance with the oral contract (at para 30). However, Mr. Mann testified that this payment was recorded as a loan on Double Diamond's books because "the company that [Mr. Smith] was going to be involved with hadn't been set up yet". The judge found Mr. Mann did not know if he communicated to Mr. Smith that the $23,000 was booked by Double Diamond as a loan (at para 37).

[69] Mr. Smith did not know Double Diamond was the company Mr. Mann had incorporated to carry out the Dawgs Clogs venture when he made the $23,000 payment. The judge found that on January 28, 2006, Mr. Smith sent an email to Mr. Mann asking if Dawgs Global Sales Inc. was the company that he set up to "preserve the ownership of the founding partners" (at para 31). Another email was sent on January 31, 2006, in which Mr. Smith asked Mr. Mann to keep his interest in mind "when you are sketching out the structure of the company" (at para 31).

[70] Mr. Smith's lack of knowledge about the company that Mr. Mann intended to use to carry out the venture continued into the spring and summer of 2006. The judge found that on May 11, 2006, Mr. Smith sent an email to Mr. Mann complaining that he had not received shareholders

agreements or any documentation of his interest in the venture (at para 33). In July and August of 2006, Mr. Smith was again "asking for a shareholder's agreement and details of the incorporated company" (at para 35).

[71] The evidence reviewed by the judge demonstrates that at the time the original contract was formed in June or July of 2005 and for some time thereafter, Mr. Smith was not aware that Double Diamond was the company Mr. Mann had formed to carry out the Dawgs Clogs venture in accordance with their oral contract. From Mr. Smith's perspective, Mr. Mann was acting either personally or on behalf of an undisclosed principal when he made the oral contract.

[72] The second aspect of the *Decision* supporting the conclusion that the judge must have found alternative liability are his statements about the issues remaining to be determined at the remedies phase of the bifurcated trial.

[73] The judge held that "Steve is personally liable for his breach of contract and the specific relief appropriate for that relief [sic] remains to be decided in future proceedings" (at para 72). Thus, the remedy to be granted against Mr. Mann personally for his breach of the contract remains to be decided.

[74] After finding Double Diamond was also liable because Mr. Mann "was acting throughout as both the ostensible and actual agent" of Double Diamond (at para 72), the judge addressed Mr. Smith's claim for the remedy of specific performance. In doing so, he returned to Mr. Smith's assertion in the statement of claim that specific performance was required to address "the Defendants' breach of contract" (without indicating which defendant) and held that the remedy to which Mr. Smith may be entitled, whether specific performance or damages, remains to be determined (*Decision*):

> [74] Lee's claim states that specific performance is the only manner to adequately address "the Defendants' breach of contract" but in the alternative claims damages for the breach. Under the terms of the bifurcation order my role is to determine the specified liability issues only. The remedy(s) to which Lee may be entitled, whether a form of specific performance or damages, is a matter that remains to be tried and determined.

[75] Reading this passage in context, the reference to the potential remedy of specific performance must relate to performance of the term of the oral contract under which Mr. Smith was to receive an 8% ownership interest in Double Diamond. This is because that aspect of the

contract could only be specifically performed by Double Diamond, not by Mr. Mann in his personal capacity. Only Double Diamond can issue shares to Mr. Smith.

[76] The judge was therefore describing some of the possible remedies requested in the statement of claim that could be granted against Mr. Mann or Double Diamond, but not both. This is also consistent with a finding of alternative liability.

[77] Reading the judge's reasons in the context of the pleadings and the trial record, I am not persuaded he erred by finding Mr. Mann and Double Diamond both liable for the same breach of the same oral contract based on agency principles. The judge's finding that Mr. Mann was acting both in his personal capacity and as agent for Double Diamond when he made and breached the oral contract with Mr. Smith may be understood as reflecting the doctrine of alternative liability. In accordance with that doctrine, and as acknowledged by counsel for Mr. Smith at the hearing, Mr. Smith will only be able to obtain a remedy against either Mr. Mann or Double Diamond at the remedies phase of the trial.

D. The costs orders

[78] Finally, all appellants contend the judge erred in his treatment of costs. I disagree.

[79] The judge made the following orders:

> [76] Given my findings above I make the following awards of costs:
>
> a. As between Lee and the defendants other than Steve and [Double Diamond], they shall each bear their own costs. Lee was not successful in his claim against them, and they were not successful in their counterclaim against Lee. The participation of these defendants in the trial and the evidence of Lee directed against them was minor. Thus I find that it is appropriate that there be no award of costs among them.
>
> b. As between Lee and Steve and [Double Diamond], Lee has been successful in both his claim against Steve and [Double Diamond] and defending their counterclaims. Accordingly, Lee shall be entitled to his taxable costs of both aspects from Steve and [Double Diamond]. These costs shall be taxed at the Column 3 level.

[80] The discretion of a trial judge to award costs "has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case" (*British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 42, [2003] 3 SCR 371 [*Okanagan*]). An appellate court may only interfere with a costs

award if it is demonstrated that the judge who made the award "misapplied some governing principle or rule or disregarded some critical fact or other consideration" or if "the costs award is itself 'so obviously unjust as to invite intervention'" (*6517633 Canada Ltd. v Gibson Creek Farms Ltd*., 2023 SKCA 19 at para 43, leave to appeal to SCC refused 2024 CanLII 528; see also *Smiley Farming Co. Ltd. v John Deere Financial Inc.*, 2025 SKCA 25 at para 74; *Levesque v Klarenbach*, 2025 SKCA 38 at para 53).

[81] First, Mr. Mann and Double Diamond say the judge erred by awarding costs against them because costs are a component of damages and, as such, could only be addressed in the damages phase of the trial. I am not persuaded by this argument. There is some authority for the proposition that costs are not damages (see *Hrtschan c Mont-Royal*, [2004] RRA 329 (Que CA) at para 75, leave to appeal to SCC refused (2005), 336 NR 197 (note)).

[82] In *Okanagan*, the Supreme Court observed that "[c]osts awards were described in *Ryan v. McGregor* (1925), 58 O.L.R. 213 (App. Div.), at p. 216, as being 'in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought'" (at para 21). However, I do not read this statement as saying that costs are damages. It merely reflects the uncontroversial notion that indemnification of the successful party is one of the purposes of costs awards (at paras 22–25).

[83] The bifurcation order is silent as to the issue of costs and contemplates that the remedies phase of the trial would proceed "after resolution of the issues of liability by trial judgment and any appeals from trial judgment" (*Decision* at para 7(1)). Under Rule 11-1 of *The King's Bench Rules*, a judge has "discretion respecting the costs of and incidental to a proceeding or a step in a proceeding", subject to certain exceptions not applicable here. I see nothing in the wording of the bifurcation order suggesting that the judge did not have the discretion to award costs after the liability phase of the trial in accordance with Rule 11-1.

[84] Second, the rest of the appellants argue the judge erred by not awarding them costs because they were successful in defending the action and were therefore entitled to costs in relation to the concluded part of the litigation. The judge found the parties should each bear their own costs

because there was divided success and the participation of the appellants other than Mr. Mann and Double Diamond in the trial was minor. I see no error in this decision.

[85] As a general rule, costs follow the event, absent strong reasons to the contrary (see, for example, *Thomas v Lafleche Union Hospital*, [1991] 5 WWR 209 (CanLII) (Sask CA) at para 16; *Martin v Martin*, 2022 SKCA 79 at para 63; and *Smiley Farming Co.* at para 75). Notwithstanding this general rule, courts retain discretion not to award costs to a successful party (*Abrametz v The Law Society of Saskatchewan*, 2018 SKCA 37 at para 59; and *Prince Albert Right to Life Association v Prince Albert (City)*, 2020 SKCA 96 at para 89, [2020] 10 WWR 603). This sometimes occurs where there is divided success, as in this case (see, for example, *Canada (Attorney General) v Georgian College of Applied Arts & Technology*, 2003 FCA 199 at para 28, 228 DLR (4th) 201, citing *George v Penner*, 2020 SKQB 99, and *Rafan v Rauf*, 2021 SKQB 117).

[86] The judge's treatment of costs does not reveal the misapplication of a governing principle or disregard of a critical fact or other consideration nor is the judge's order as to costs so obviously unjust as to invite appellate intervention.

CONCLUSION

[87] For the reasons set out above, I would dismiss the appeal with one set of costs to Mr. Smith payable by Mr. Mann and Double Diamond calculated under Rule 54 of *The Court of Appeal Rules* on Column 3 of the tariff.

"Kilback J.A."

Kilback J.A.

I concur.

"Jackson J.A."

Jackson J.A.

I concur.

"McCreary J.A."

McCreary J.A.