

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Khela v. Rai*,  
2023 BCSC 1178

Date: 20230711  
Docket: S2013272  
Registry: Vancouver

Between:

**Harpreet Singh Khela**

Plaintiff

And

**Prabhraj Singh Rai also known as Prab Rai,  
Anastacia Kanellos also known as Anastacia Rai,  
Harbhajan Singh Rai also known as Bubby Rai,  
Gurjit Kaur Rai, Jasraaj Rai also known as Raju Rai,  
Joseph & Chanan Clothing Inc.,  
Lionsgate Enterprises Ltd.,  
1100020 B.C. Ltd., 1172323 B.C. Ltd.,  
Raiz Enterprises Ltd., John Doe, and  
John Doe Corporation**

Defendants

Before: The Honourable Master Robertson

## Reasons for Judgment

Counsel for the Plaintiff:

H. Parsons

Counsel for the Defendants, Harbhajan  
Singh Rai, also known as Bubby Rai, Gurjit  
Kaur Rai, and Jasraaj Rai also known as  
Raju Rai:

S. Tessarolo  
I. Ali

No one else appearing

Place and Date of Hearing:

Vancouver, B.C.  
June 13 and 15, 2023

Place and Date of Judgment:

Vancouver, B.C.  
July 11, 2023

**Introduction**

[1] The applicants and defendants, Harbhajan Singh Rai, also known as Bubby Rai, Gurjit Kaur Rai, and Jasraaj Rai also known as Raju Rai (collectively, the “Rai Family Members”) seek an order for leave to file a second amended response to civil claim to add and/or expand their response to include matters relating to the doctrines of clean hands and *ex turpi causa non oritur actio*, as generally abbreviated to *ex turpi causa*.

[2] The plaintiff argues that the proposed new defences are bound to fail as these are not defences available to the Rai Family Members on the facts of this case, and as such the amendments should not be allowed. Specifically, the plaintiff argues that there is no nexus between any of his alleged dishonest conduct, even if true, and his claims against the Rai Family Members which are based in knowing assistance and knowing receipt.

**Background**

[3] The plaintiff’s claims are factually complex and I do not intend to go fully into them for the purpose of these Reasons. They involve alleged fraudulent dealings between 2013 and 2020 whereby the defendant Prabhraj Singh Rai (“Prab Rai”), who is the son and brother of the Rai Family Members, is alleged to have defrauded the plaintiff of approximately \$2.9M through a series of fraudulent misrepresentations by which he induced the plaintiff to invest in various fictitious business ventures.

[4] As an example of one of the alleged schemes, the plaintiff claims that Prab Rai indicated that he had an opportunity to buy the Sutton Place Hotel and was seeking investors for the purchase, obtaining what was said to be a deposit of \$2.4M from the plaintiff for the fictitious purchase. This scheme, and others which includes purchases of other properties and/or businesses including a Tim Horton’s franchise, and involved the creation of various fake sale contracts, emails, and documents.

[5] A further example of Prab Rai's fraud arose when his various creditors began to demand repayment. Prab Rai is alleged to have claimed to have been kidnapped, with his computer and passwords being taken and all of his money stolen to explain why he could not repay any of his creditors. The plaintiff alleges specifically that the defendant, Jasraaj Rai, Prab Rai's brother, and one of the Rai Family Members, was directly involved in the "kidnapping" story, and to that extent he knowingly assisted to perpetuate the ongoing fraud.

[6] Prab Rai has filed a response to the notice of civil claim denying that he was part of the alleged fraud and in an amended response filed May 16, 2023, the filing for which he obtained leave by court order pronounced May 12, 2023, pleading in the alternative, among other things, that it is the plaintiff who "conceived, initiated and/or carried out all or alternatively many of those dishonest actions and schemes referred to in the notice of civil claim and that actually occurred", and setting out various allegations of misconduct by the plaintiff including that it was the plaintiff who created the fake documentation for these schemes (the "Alleged Misconduct").

[7] In addition, Prab Rai pleads that there was an agreement between the plaintiff and Prab Rai relating to a sharing of commissions received by the plaintiff in respect of the various business ventures and investments, such that any funds paid by the plaintiff to him were on account of that arrangement and funds owing to him by Prab Rai.

[8] The plaintiff claims against the Rai Family Members for alleged knowing assistance and knowing receipt of money and goods of approximately \$800,000 from Prab Rai, with the plaintiff claiming that the Rai Family Members had actual or constructive knowledge that the funds were either impressed with a constructive trust in favour of the plaintiff, or were derived from a breach of Prab Rai's fiduciary duties to the plaintiff.

[9] The Rai Family Members seek to raise and particularize the same defences as raised by Prab Rai in his May 2023 amended response to notice of civil claim based upon both those pleadings and evidence obtained during discoveries held to

date, namely to particularize the Alleged Misconduct by the plaintiff and to specifically plead that he is barred from any recovery by virtue of the clean hands and *ex turpi causa* doctrines.

[10] In their current response, the Rai Family members have already plead that they had no knowledge of the source of the funds received from Prab Rai and that they too are victims of his fraud, having been induced by him to, among other things, give up gainful employment to work for his new businesses, and that they themselves also paid significant money, over \$400,000, for the plaintiff's and Prab Rai's alleged business investments and that equity should not assist the plaintiff as he does not come to court with clean hands, given his conduct and own involvement in these transactions.

[11] The plaintiff has conducted discoveries of Prab Rai and the Rai Family Members. The plaintiff has not yet been discovered.

[12] A 15-day trial has been scheduled to commence on January 29, 2024.

**Legal Framework**

[13] The parties did not disagree as to the test for leave to amend pleadings pursuant to R. 6-1(1)(b)(i), which permits a party to amend its pleadings after a notice of trial is served, only with leave of the court.

[14] Specifically, as noted in *Wiggins v HMTQ*, 2007 BCSC 1644 at para. 17, the court is to take a generous and flexible approach to the proposed amended pleading, with the threshold for leave to amend being low.

[15] As summarized more recently in *Stewart v. Stewart*, 2018 BCSC 1266 at para. 14:

- a) amendments should be permitted as necessary to determine the real issues between the parties;

- b) the party seeking leave to file the amendments is not required to adduce evidence of a pleading before trial;
- c) the facts are taken as alleged in proposed amended pleading;
- d) discretion is to be exercised judiciously;
- e) only in the clearest of cases will an amendment be struck as not disclosing a reasonable claim or defence, and if there is any doubt on the facts or the law, the matter should be allowed to proceed to trial; and
- f) disallowance should be a last resort, and the party opposing the amendments must prove actual prejudice, and not just potential prejudice.

[16] In considering whether or not an amendment does not disclose a reasonable claim or defence, the court's consideration is similar to that on an application to strike under R. 9-5(1) that being whether or not the amendments do not advance a claim known to law, serve no useful purpose, or would be a waste of the court's time and public resources: *Madadi v. Nichols*, 2021 BCCA 10 at para. 22.

[17] However, as noted in *Thomas v. Rio Tinto Alcan Inc.*, 2019 BCSC 107, at para. 18, while useless amendments that do not advance a reasonable cause of action or defence are to be avoided, justice is generally best served by permitting amendments that will allow the real controversy between the parties to be decided on the merits.

[18] Further, as noted in *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122 at para. 23, litigation has an evolutionary quality, and there must be some flexibility in ensuring that pleadings adapt to changing circumstances.

[19] The court is not to merely rubber stamp amendments, but it should not deny an amendment unless it is clear that the claims are bound to fail as to do so would effectively prevent a full hearing on the merits. As such, at this interlocutory stage, even a slim, or novel claim should be allowed to proceed.

[20] Thus, in the context of this matter, the legal basis for the claims against the Rai Family Members must also be considered, as well as the legal basis for the defences, particularly given that the position of the plaintiff is that, as a matter of law, the proposed defences are not available to the Rai Family Members.

[21] To claim against each one of the Rai Family Members in knowing assistance and knowing receipt, by which equity may allow any of them, as strangers to the alleged trust between the plaintiff and Prab Rai, to be held responsible for the alleged breach of that trust, the plaintiff will have to establish that:

- a) There was a fiduciary duty between Prab Rai and the plaintiff;
- b) There was a fraudulent and dishonest breach of the duty by Prab Rai;
- c) There was actual knowledge by each of the Rai Family Members to both the fiduciary duty and the dishonest conduct; and
- d) There was participation by, or assistance of each of the Rai Family Members in Prab Rai's fraudulent and dishonest conduct.

*Imperial Parking Canada Corporation v. Anderson*, 2015 BCSC 2221 at para. 250, and *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60, at para. 211, as adopted by the Supreme Court of Canada at *Christine Dejong Medicine Professional Corp. V. DBDC Spadina Ltd.*, 2019 SCC 30

[22] The clean hands doctrine is a decree that he “who comes to equity must come with clean hands”: *Mayer v. Mayer*, 2012 BCCA 77. Given that the knowing assistance and knowing receipt claims are equitable remedies, the Rai Family Members argue that they are entitled to this defence.

[23] A clean hands defence is to be narrowly applied. It does not entitle a court to canvas all aspects of the plaintiff's alleged improper behaviour, even if it is fraudulent and dishonest. As noted in *DeJesus v. Sharif*, 2010 BCCA 121, at para. 85, citing *Snell's Equity*, 30th ed. (London: Sweet & Maxwell, 2000) at 32:

The maxim ... must not be taken too widely; 'Equity does not demand that its suitors shall have led blameless lives.' What bars the claim is not a general

depravity but one which has 'an immediate and necessary relation to the equity sued for,' and is not balanced by any mitigating factors.

[24] The alleged conduct must be fraudulent and dishonest conduct that has an "immediate and necessary relation to the relief sought" such that it would be unjust to grant the relief sought by the plaintiff: *Wang v. Wang*, 2020 BCCA 15, at paras. 46 to 53.

[25] In *Mayer*, at para. 86, the court noted that "the person seeking equitable relief must be required to rely on the misconduct to vindicate his claim..."

[26] The doctrine of *ex turpi causa* prevents a litigant from advancing a claim which depends, at its core, on an illegal or immoral act:

My own view is that courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances. The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand. ...

*Kim v. Choi*, 2020 BCCA 98 ("*Kim*"), at para. 44, citing *Hall v. Hebert*, 1993 CanLII 141 (SCC) ("*Hall*")

[27] The plaintiff argued that the doctrine of *ex turpi causa* only applies to situations where the plaintiff is seeking to profit from wrongdoing, and does not preclude a damages award as compensation for injuries suffered, as is the case here, and was commented upon in *Hall*. However, in *Hall* Justice McLachlin specifically refused to limit the applicability to that extent, stating as follows at pg. 177:

There may be cases where the principle of *ex turpi causa* should be invoked to prevent tort recovery which do not fall under the category of profit from illegality. Professor Weinrib, *supra*, suggests that the defence of *ex turpi causa* may properly be invoked to prevent the "stultification of the criminal law" or "evasion of the consequences of the criminal law": at pp. 52-53.

[28] In considering the defence in an unjust enrichment context, and considering Justice McLachlin's comments, the Court of Appeal concluded as follows in *Kim*:

[49] Stultification is the term used to describe events that defeat or frustrate the underlying policy behind the illegality. A remedial order arising from an illegal act may frustrate the policy underlying the illegality to such an extent that to make the order would be seen as creating an inconsistency. In those circumstances, it may be appropriate to refuse the remedial order in order to preserve the integrity of the legal system, whether or not giving effect to the claim would enable the plaintiff to profit from the illegality.

[29] Finally, in arguing against the amendments, the plaintiff sought to introduce various evidence, including that obtained at discoveries, as to the merits of his claim against the Rai Family Members.

[30] I agree with the Rai Family Members that the application is to be determined on the basis of the pleadings, including the proposed amended pleadings, assuming the facts plead are true, as noted in *McNaughton v. Baker*, 1988 CanLII 3036 (BCCA), at para. 28 to 29.

### **Argument and Analysis**

[31] The plaintiff argues that any conduct by the plaintiff which may give rise to the proposed defences is only relevant in respect of the transactions between Prab Rai and the plaintiff and that in so far as the claims against the Rai Family Members are concerned there is no nexus with the plaintiff's conduct, even if it is of a nature that could give rise to the proposed doctrines as defences.

[32] The plaintiff's arguments are that given the elements of knowing assistance and knowing receipt, it is only once a fiduciary duty and breach of that duty is found, that the court will be in a position to look further to the Rai Family Members in terms of the plaintiff's advance of the equitable remedies of knowing assistance and knowing receipt being sought against them.

[33] Thus, to the extent the clean hands and *ex turpi causa* defences may exist, the plaintiff argues, they can only be advanced by Prab Rai, as it is the claims against him that are founded in the fraud and breach of duty, in which the Alleged

Misconduct took place. In contrast, the specific relief sought by the plaintiff against the Rai Family Members relates to the transfer of the \$2.4M the plaintiff advanced to Prab Rai, and specifically the transfers of those funds by Prab Rai to the Rai Family Members directly, or through purchases of goods for them, while impressed with a constructive trust in his favour.

[34] The plaintiff notes that there is nothing in the proposed amendments to specifically plead that the Alleged Misconduct arose during those transactions. Given the lack of that nexus, the plaintiff argues that those defences are bound to fail if made by the Rai Family Members, even assuming the facts as plead are true, and the application to amend should therefore also fail as the amendments serve no useful purpose.

[35] The plaintiff's submissions in this regard are as follows:

If Prab Rai is correct in his defence of the action that there was no fraud, then there is no trust claim and no trust funds, and the knowing assistance claim against the [Rai Family Members] will be unsuccessful. If the plaintiff establishes his fraud claim at trial (i.e. that he was a victim of fraud, which necessary [sic] requires that he was not participatory in the fraud), then the only issue against the [Rai Family Members] is whether they had actual or constructive knowledge that the payments and benefits they received from Prab Rai were impressed with a trust. *Ex turpi causa* is not relevant of the inquiry regarding the Rai Family's knowledge.

[36] The frailty with the plaintiff's argument is that it ignores that a finding of fraud and a breach of fiduciary duty are elements that must be established in a knowing receipt and assistance claims as brought against the Rai Family Members. That Prab Rai is participating in this case and will be also defending the claims against him on those two points does not mean that they cease to be elements that must be proven to found the claims against the Rai Family Members.

[37] Notwithstanding that Prab Rai is a party to this action, his participations is not necessary for the claims of knowing receipt or knowing assistance to be advanced against the Rai Family Members. The plaintiff's position on this application depends upon the participation of Prab Rai in this action, presuming that he, and only he, will be in a position to argue that there was no fraud or fiduciary duty.

[38] There are various reasons why Prab Rai may no longer participate in these proceedings, either voluntarily or involuntarily. For example, there could be a bankruptcy staying the claims against him, or a settlement made with the plaintiff. Arguably, it would also be open to the plaintiff to discontinue the claim against Prab Rai if there is not likely to be any recovery due to a lack of exigible assets, choosing to pursue only the Rai Family Members.

[39] In such circumstances, the Rai Family Members ought to be entitled to, and would have to, defend each and every element of the knowing assistance and knowing receipt claims, including the fraud and breach of fiduciary duty elements, to which the Alleged Misconduct has an immediate and necessary connection.

[40] Notwithstanding that Prab Rai is currently participating in these proceedings, the consideration of the proposed amended pleadings is to be based on the claims as brought by the plaintiff against the Rai Family Members only. The proposed amendments do have a connection to the elements of the claims made in knowing assistance and knowing receipt, namely the threshold questions of whether there was a fraud and breach of fiduciary duty.

[41] Thus, the proposed amendments are necessary to determine the real issues between the parties. I also note that the plaintiff has not shown any prejudice to the amendments being made, particularly given that these defences have, for the most part, been raised by Prab Rai already and will have to be addressed at trial. As such, it is in the overall interests of justice that leave to make the amendments as sought by the Rai Family Members be granted.

### **Conclusion and Order**

[42] As such I order that the Rai Family Members are at liberty to file a second amended response to civil claim in the form attached as Schedule "A" to the notice of application filed May 30, 2023,

[43] The parties did not make submissions as to costs. Unless there is something to which I am unaware, given the nature of the claims and upcoming trial, costs shall be in the cause. If the parties do not agree, they make seek further directions.

“Master Robertson”