

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pacific Gate Development Group Ltd. v. Bui*,
2025 BCCA 12

Date: 20250122
Docket: CA49437

Between:

**Pacific Gate Development Group Ltd.
and Tom Trungh Thang Nguyen**

Appellants
(Defendants)

And

Thi Phuong Bui

Respondent
(Plaintiff)

Before: The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Winteringham
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated
September 28, 2023 (*Bui v. Pacific Gate Development Group Ltd.*,
2023 BCSC 1700, New Westminster Docket S205460).

Counsel for the Appellants: G.A. Hooper

Counsel for the Respondent: D. Gautam

Place and Date of Hearing: Vancouver, British Columbia
October 17, 2024

Place and Date of Judgment: Vancouver, British Columbia
January 22, 2025

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Donegan

Summary:

The appellants contracted to build a residence for the respondent. Disputes arose about construction details and delays and the parties terminated their joint project. The appellants had the respondent sign a release, releasing the appellants of all liabilities in exchange for \$250,000. The respondent commenced a lawsuit alleging breaches of the construction contract and the appellants defended the lawsuit, in part, by relying on the release. The trial judge dismissed the respondent's claim but awarded damages in the amount of \$100,000 on the basis that the appellants had failed to pay the full amount owing under the release. The appellants allege the judge erred because he decided the claim outside the scope of the pleadings, the respondent having not pleaded a breach of the release. Additionally, the appellants allege the trial judge erred when he drew an adverse inference against the appellants for failing to produce the \$100,000 bank draft. Held: Appeal dismissed. This was a lawsuit about the construction contract between the parties and the appellants sought to rely on the release to defend the claim against them. The legal issue about consideration under the release was captured by the pleadings and the issue was joined. Even if the payment fell outside of the pleadings, there was no procedural unfairness—the appellants had adequate notice of the issue and a full opportunity to respond. Regarding the alleged error about an adverse inference, although the judge was mistaken about the adjournment for the specific purpose of locating the bank draft, this mistake did not constitute an error that was either palpable or overriding.

Reasons for Judgment of the Honourable Justice Winteringham:**Overview**

[1] The respondent purchased a residential property from the appellant, Tom Trungh Thang Nguyen, and contracted with Mr. Nguyen and his company, Pacific Gate Development Group Ltd. (“Pacific Gate”), to construct a residence (the “Construction Contract”). Disputes arose between the parties about alterations to the original construction plan and subsequent delays with the construction. Mr. Nguyen had the respondent sign a “release” each of the three times there was an alteration to the original construction plan. Eventually, the parties decided to terminate their joint project. On July 3, 2017, the respondent signed a fourth release, drafted by Mr. Nguyen, releasing the appellants of all liabilities in exchange for \$250,000 (“July 2017 Release”).

[2] In August 2018, the respondent commenced a claim against the appellants, alleging various breaches of the Construction Contract. The judge, not knowing who to believe, dismissed the balance of the respondent's claim against the appellants: *Bui v. Pacific Gate Development Group Ltd.*, 2023 BCSC 1700. However, the judge found that the appellants had failed to pay \$100,000 owing under the July 2017 Release and granted judgment in favour of the respondent for that amount.

[3] The appellants contend the judge erred by awarding damages for \$100,000 for a breach of the July 2017 Release, a claim that the appellants assert was not pleaded by the respondents. Even if that issue was properly before the Court, which the appellants maintain it was not, then the judge further erred by improperly drawing an adverse inference against the appellants to find they were liable in the amount of \$100,000 on account of their breach of the payment obligations under the July 2017 Release. The judge rejected Mr. Nguyen's evidence that this \$100,000 was indeed paid when Mr. Nguyen failed to produce the bank draft corroborating his testimony and drew an adverse inference that the bank draft did not exist. The appellants assert that the judge reasoned he could draw an adverse inference because he had granted Mr. Nguyen an adjournment to produce the cheque and Mr. Nguyen had failed to do so. The appellants submit that the judge was incorrect in stating that he had granted an adjournment for this purpose. Although the judge had granted a brief adjournment at one point during the trial, the appellants submit it was for a different purpose. The appellants assert the judge thus erred when he relied on this mistake to reject Mr. Nguyen's testimony that he paid the \$100,000.

[4] As these reasons will explain, I would dismiss the appeal. The parties were embroiled in a dispute about the Construction Contract. The respondent focused the lawsuit on the damages claim for various breaches of the Construction Contract. The July 2017 Release formed a part of their arrangement. The appellants pleaded it and relied on it as a defence to the claim. I am not persuaded that the judge erred in law as alleged or at all. As I will explain, I am of the view that the issue identified by the appellants was squarely before the judge for several reasons: the appellants pleaded the July 2017 Release and indeed relied on it in their defence of the claim;

the parties testified about compliance with the July 2017 Release and the payments made pursuant to it; and the parties addressed the July 2017 Release in their closing submissions. The appellants made no complaint to the judge that this issue was outside the scope of the pleadings or that the judge did not have jurisdiction to resolve the issue of non or insufficient payment.

[5] In my view, the parties joined issue on this point early in the litigation. Though the July 2017 Release was not the focus of the respondent's claim, it was a part of it. Further, the appellants relied on the July 2017 Release as a defence to the respondent's claim. If there were any deficiencies with the pleadings, the appellants should have raised this issue at the trial. They did not.

[6] Regarding the alternative submission, that the judge should not have drawn an adverse inference about the "missing" bank draft, in my view, this finding was made by the judge following his extensive review of the evidence and was not based solely on the adverse inference. The appellants have not identified any palpable errors, let alone errors that could be said to be overriding.

[7] Accordingly, I would dismiss the appeal.

Background

[8] The respondent was the owner of a residential property on Killarney Street in Vancouver (the "Killarney Property"). The appellant, Mr. Nguyen, was the sole director of a residential construction company named Pacific Gate Development Group Ltd. Mr. Nguyen's sister is a real estate agent named Lynn Nguyen, also known as Thi Nhan.

[9] In 2015, Thi Nhan convinced the respondent to purchase from her a half-interest in a property on East Broadway in Vancouver (the "Broadway Property"). The respondent and Thi Nhan entered into a construction contract with Pacific Gate to tear down the existing house on the Broadway Property and construct a new one. After the construction was complete, the respondent moved into the new house.

The respondent purchased the remaining half interest of the Broadway Property from Thi Nhan in January 2016.

[10] While the Broadway Property was under construction, Mr. Nguyen arranged with the respondent to purchase the Killarney Property from Mr. Nguyen's mother. Mr. Nguyen suggested to the respondent that he "flip the property" in the same manner as the Broadway Property.

[11] On September 20, 2015, the respondent and Pacific Gate entered into an agreement for the construction of a new house on the Killarney Property. The respondent purchased the Killarney Property from Mr. Nguyen's mother pursuant to a contract of purchase and sale on June 22, 2016, with a completion date of July 22, 2016.

[12] Disputes arose between the parties with respect to the construction of the Killarney Property, resulting in delays. The parties tried to resolve these disputes and the original construction plan was revised several times according to the respondent's instructions. On September 29, 2016, the parties entered into two release agreements that purported to indemnify Pacific Gate from liabilities relating to the specific revisions in the Construction Contract. Mr. Nguyen drafted the releases, as he had developed a practice insisting that the respondent sign off on the revisions by executing release agreements. The respondent testified that Mr. Nguyen insisted on these releases and at one point, asked for an additional \$25,000 to continue with the work. On June 20, 2017, the respondent signed a third release related to an additional revision.

[13] After signing the first two releases and before signing the third release, further disputes between the parties led to Pacific Gate halting construction on the Killarney Property in June 2017. At that point, the respondent had already paid nearly \$1 million for the project, but the value of the completed work was estimated to be only \$786,000. Accordingly, the respondent believed he had overpaid approximately \$214,000 for the work done on the Killarney Property before the third release was executed.

[14] Mr. Nguyen testified that during the summer of 2017 Pacific Gate wanted to stop construction on the Killarney Project due to the disputes with the respondent. Mr. Nguyen decided to offer the respondent \$250,000 in exchange for a full release. This fourth release, the July 2017 Release, was also drafted by Mr. Nguyen; however, the content and format of this release was materially different from the previous three releases: at para. 37. The respondent claimed that he signed the July 2017 Release without understanding its content.

[15] Immediately following the signing of the July 2017 Release, the respondent received \$250,000 from Pacific Gate. However, the respondent testified he was instructed by Mr. Nguyen and Thi Nhan to return \$100,000 to Pacific Gate, a total of \$100,000 to an unknown person named Hoang Thi Hong Thuy, and \$50,000 to a law firm that advised him on earlier “paperwork” relating to the Killarney Property. In other words, the respondent suggested that he had not effectively received any money pursuant to the July 2017 Release.

[16] The respondent claimed that he complied with these “payment-out” transactions at Mr. Nguyen’s request because he was hoping that construction on the Killarney Property would resume. Despite ongoing communication between the parties—including the respondent’s offer to pay an additional \$98,000 in 2018—the appellants never went back to complete the project.

[17] The respondent commenced the legal proceedings against the appellants in August 2018. In the notice of civil claim, the respondent alleged that the parties agreed the appellants would construct a residence on the Killarney Property in accordance with certain specifications and that the respondent would make progress payments in accordance with the agreement. The respondent’s claim was for damages for breach of the Construction Contract. The appellants relied on the enforceability of the July 2017 Release as a defence to the breach of contract claim.

[18] The respondent agrees that, at the outset of the trial, he was not claiming damages for breach of the July 2017 Release—only that it was unenforceable. In the respondent’s opening statement at trial, the respondent set out his theory of the case: that is, the July 2017 Release was unenforceable on the basis of (a) *non est factum*, or (b) there was no consideration such that there was no defence to the respondent’s claim for breach of the Construction Contract. The respondent took the position that the appellants paid \$250,000 pursuant to the July 2017 Release, but then immediately directed the respondent to pay out these funds, resulting in nothing being paid.

[19] The appellants sought to rely on the July 2017 Release, which effectively barred the respondent’s various claims, including the alleged breach of the Construction Contract.

Judge’s Reasons

[20] At the outset of his reasons, the judge identified the central issue at trial “... was whether a written release agreement signed by all parties in 2017 is valid and binding, with the effect that it bars [the respondent’s] various claims against the [appellants], including alleged breach of the construction contract ...”: at para. 2. The judge identified, at para. 3, two main questions relevant to determining the central issue of validity and enforceability:

- a) whether the July 2017 Release should be set aside by operation of the doctrine of *non est factum*; and
- b) in the alternative, whether the appellants breached the terms of the July 2017 Release by failing to provide the respondent with sufficient consideration.

[21] The judge found there to be “serious credibility and reliability issues” with the only witnesses who testified at trial, the respondent and Mr. Nguyen: at para. 64. The two parties gave “very divergent narratives” and in the absence of any other

corroborating witnesses, the judge was "... left with the impression that there is much more to the story than either witness was willing to admit ...": at paras. 60, 68.

Non est factum

[22] The respondent argued that the July 2017 Release should be set aside on the basis of the doctrine of *non est factum*; that is, he signed the document without understanding its contents. The respondent claimed that he believed the July 2017 Release to be merely an apology letter due to his limited English skills and trust in Mr. Nguyen.

[23] The judge found the respondent's claim to be unconvincing. First, the evidence demonstrated the respondent's trust in Mr. Nguyen had "... clearly eroded by the time of the July 2017 Release": at para. 76. Moreover, the respondent signed the document without seeking further clarification from Mr. Nguyen, and without consulting his wife (who understands English) or a lawyer.

[24] Even if the Court had accepted that the respondent believed he was signing an apology letter, the judge found the respondent's failure to take reasonable precautions in the execution of the July 2017 Release precluded him from relying on the doctrine of *non est factum*. The judge found the respondent's actions to be reckless in the circumstances, particularly in light of his deteriorating relationship with Mr. Nguyen.

[25] In the end, the judge dismissed the *non est factum* claim and found the July 2017 Release to be a valid and binding agreement.

Breach of contract

[26] The judge then turned to consider the second question; that is, whether the appellants gave insufficient consideration under the July 2017 Release and therefore breached its terms. The judge reviewed the parties' testimony about the series of transactions following the execution of the July 2017 Release and found it difficult to comprehend the actions taken by both parties. Accordingly, the judge placed significantly more weight on the documentary evidence.

[27] The judge described the circumstances surrounding the July 2017 Release, finding that Mr. Nguyen decided he would stop working on the Killarney Property because of the issues with the respondent. Mr. Nguyen offered the respondent \$250,000 in exchange for a full release, which the respondent signed in July 2017. The judge found that the form and content of the July 2017 Release was materially different from the first three releases in at least three ways, stating at para. 37:

- a) It specified that the “Releasee” included both Pacific Gate and Mr. Nguyen and not just Pacific Gate, as in the prior releases.
- b) It specified that the consideration for the release was a payment to be made from both Mr. Nguyen and Pacific Gate to the respondent in the amount of \$250,000. Previously, no payment had been offered by either of the defendants to the respondent.
- c) It made no specific mention of the Killarney Property or the related construction project; it was a broader release encompassing all liability of any kind.

[28] The July 2017 Release included the word “RELEASE” in bold, underlined typeface at the top of the document, like the previous releases. The respondent’s wife witnessed the signing of the July 2017 Release: at para. 38.

[29] The parties offered different versions about payments made pursuant to the July 2017 Release. The documents established that there were a series of financial transactions between the parties that appeared to correspond roughly to the payment obligations stipulated under the July 2017 Release. However, the judge found that the parties’ testimony regarding the actions they took in relation to these payments to be “... confusing, contradictory and at times difficult to reconcile with common sense”: at para. 41. The judge found, at para. 42, that their evidence was consistent on these two points:

- a) On July 4, 2017, Mr. Nguyen arranged for a payment from Pacific Gate to the respondent’s account in the amount of \$100,000; and

- b) On July 6, 2017, Mr. Nguyen arranged for another two payments of \$100,000 and \$50,000 from Pacific Gate to the respondent's account.

[30] The respondent testified that Mr. Nguyen had directed him to deposit the funds into his account but then to make payments out of the same account in equivalent amounts to Pacific Gate and two third parties, stating this was all arranged by Mr. Nguyen and his sister, who accompanied him to the bank: at para. 44. The respondent complied because he wanted the construction to complete. At para. 44, the judge highlighted three aspects of the respondent's testimony about the payments:

- a) On July 6, 2017, the respondent gave Mr. Nguyen and his sister, at their request, a bank draft made out to Pacific Gate in the amount of \$100,000.
- b) On July 6, 2017, the respondent provided Mr. Nguyen and his sister with two bank drafts in the amount of \$50,000 each, made out to a person named "Hoang Thi Hong Thuy".
- c) On July 6, 2017, the respondent provided Mr. Nguyen and his sister, at their request, with a \$50,000 bank draft made out to Pham & Company, a law firm that had advised the respondent earlier about "paperwork" relating to the Killarney Property.

[31] Although the judge found the respondent failed to establish that the \$50,000 payment to the law firm and the \$100,000 payment to the mysterious Hoang Thi Hong Thuy to have been made at the direction of Mr. Nguyen, the judge found Mr. Nguyen to have directed the return of the \$100,000 from the respondent's wife to Pacific Gate on July 6, 2017.

[32] Mr. Nguyen testified that he initially paid \$100,000 to the respondent's wife but he later decided that the amount should have been made to the respondent directly. He claimed that he asked the respondent to return this amount to Pacific Gate so that he could issue a new payment to the respondent. Mr. Nguyen testified that he then issued a new cheque or bank draft directly to the respondent. The judge

found it difficult to accept Mr. Nguyen's evidence on this point in light of his failure to adequately explain why he made the initial payment to the respondent's wife and not the respondent. With respect to the original \$100,000 bank draft purportedly made out to the respondent's wife, the judge drew an adverse inference that "no such bank draft existed" in light of Mr. Nguyen's failure to adduce this evidence at trial, despite being given an adjournment by the Court to do so: at para. 66.

[33] The judge had identified significant flaws in the testimony of both Mr. Nguyen and the respondent, ultimately concluding:

[68] At the conclusion of the trial, I was left with the impression that there is much more to the story than either witness was willing to admit, and that many details were omitted by both witnesses. Despite the shortcomings in the testimony, I have sought in these reasons to avoid speculation or supposition and to resolve the case based upon the evidence actually adduced at trial.

[34] Having considered the relevant documentary evidence, the judge found that the appellants failed to make repayment of the \$100,000 promised to the respondent by Mr. Nguyen. The judge stated:

[88] With respect to the \$100,000 payment made by [the respondent] to Pacific Gate on July 6, 2017, the situation is different. The evidence at trial was clear, as admitted by Mr. Nguyen, that Mr. Nguyen had directed the return of the \$100,000 payment from [the respondent's wife] back to Pacific Gate. Mr. Nguyen testified that he made out the original bank draft to [the respondent's] wife and then asked [the respondent] to return that payment after which he wrote a separate bank draft out in the name of [the respondent]. However, I earlier found this testimony not to be credible and drew an adverse inference based upon Mr. Nguyen's failure to adduce the original bank draft to [the respondent's wife] as evidence. There was therefore no evidence of a further payment of \$100,000 from the [appellants] back to [the respondent] after July 6, 2017. I conclude that this \$100,000 was never repaid from the defendants to [the respondent].

[35] The judge concluded that the appellants had not given sufficient consideration under the July 2017 Release, and thus breached its terms, when they failed to make repayment of the \$100,000 promised to the respondent by Mr. Nguyen after the respondent had returned the original \$100,000 payment on July 6, 2017: at para. 89.

[36] The judge found the appellants were jointly and severally liable for breach of contract to the respondent under the July 2017 Release in the amount of \$100,000. All other claims against the appellants were dismissed: at para. 94.

On Appeal

[37] The appellants submit that the trial judge erred by:

- a) deciding damages based on a cause of action that was not pleaded or even argued until the closing submissions; and
- b) improperly drawing an adverse inference as a way of rejecting Mr. Nguyen’s uncontested evidence that he paid \$100,000 to the respondent’s wife, Ms. Bui.

Position of the parties

[38] The appellants take the position that this case was solely about the alleged breach of the Construction Contract. The appellants responded to that allegation at trial by relying on the July 2017 Release. The appellants state that the sole issue at trial was whether the July 2017 Release was a complete defence to the claim, submitting that at no point in the proceeding were the appellants given any notice that they had to meet a claim for damages for an alleged breach of that Release. The appellants submit that awarding damages on a cause of action not pleaded is an error of law. Alternatively, the appellants submit that if the judge had a discretion to decide a claim not pleaded, he exercised his discretion in error, as the appellants were not given notice of the case they had to meet. The appellants submit that it was not until after the close of evidence in closing submissions that any suggestion of a claim under the July 2017 Release was raised. In the further alternative, the appellants submit that the judge erred in his assessment of the evidence. The appellants submit that the judge’s sole basis for finding them liable was that they were unable to produce a bank draft despite, as the judge stated, being granted an adjournment for that purpose. The appellants submit that the judge erred when he

drew an adverse inference on this evidentiary point because no such adjournment was given by the judge.

[39] The respondent takes the position that the issue about payment pursuant to the July 2017 Release arose during the cross-examination of Mr. Nguyen. The respondent submits that Mr. Nguyen testified, for the first time, that he had paid \$100,000 of the \$250,000 agreed upon consideration by bank draft to the respondent's wife. The respondent submits that it was this evidence that gave rise to the claim for damages for breach of the Release. The alleged bank draft was not pleaded in the response to civil claim and the appellants had failed to disclose or produce the bank draft. The respondent submits that the consideration for the July 2017 Release was, at all times, a live issue upon which the parties were joined based on the response to civil claim. On this point, the respondent contends the issues and evidence supporting the award of damages for breach of the payment obligation in the July 2017 Release corresponded with the issues and evidence relevant to the defences pleaded. In response to the appellant's alternative ground, the respondent submits that the judge correctly exercised his discretion to draw an adverse inference that the alleged bank draft did not exist because the appellants did not disclose it either before trial or when given an adjournment to search for it. The respondent adds it is significant that the appellants have not produced the bank draft as fresh evidence at the appeal and their failure to do so supports the judge's finding.

Standard of review

[40] The parties agree that the first ground of appeal, whether the judge decided the case on a basis that was not pleaded, raises an error of law. Errors of law are reviewable on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33; *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at paras. 46–47; *Yoshikawa v. Dillon*, 2022 BCCA 180 at para. 18.

[41] The question of whether or not to draw an adverse inference from the absence of evidence is a question of fact owed deference on appeal, subject to there being a palpable and overriding error: *Benhaim v. St-Germain*, 2016 SCC 48 at paras. 36, 52; *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242 at para. 90.

Legal principles

[42] The appellants' primary submission is that it is a reversible error of law to decide a case on a cause of action that was not pleaded, relying on *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, 2002 CanLII 41834 (C.A.), where Justice Doherty stated:

[60] It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in 460635 Ontario Limited v. 1002953 Ontario Inc., 1999 CanLII 789 (ON CA), [1999] O.J. No. 4071 at para. 9 (C.A.) (QL):

. . . The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial. . .

[43] In *Kakavelakis v. Boutsakis*, 2017 BCCA 396, Justice Dickson, writing for the Court, stated:

[77] Lawsuits are decided within the boundaries of the pleadings: *Rodaro*... Pleadings define and clarify the factual and legal issues in an action, give opposing parties notice of the case to be met, and guide the presentation of evidence and argument at trial. By these means, pleadings allow the trial judge to understand what must be decided.

[44] In dissenting reasons in *Deildal v. Tod Mountain Development Ltd.* (1997), 33 B.C.L.R. (3d) 25, 1997 CanLII 4076 (C.A.), Justice Gibbs spoke of the importance of the judge grounding his jurisdiction in the pleadings. Justice Gibbs wrote that a damage award in slander could not stand because that cause of action had not been pleaded. Justice Gibbs questioned the trial judge's jurisdiction over a cause of action not pleaded:

[15] With respect, I do not understand the trial judge to have had any jurisdiction to award damages for slander. There was not a defamation claim in the pleadings; no claim in defamation was made at trial; the appellant had no opportunity to meet a defamation case by pleading, by pre-trial processes, by evidence at trial or by argument. In short, this was a breach of contract case and if the respondent was entitled to anything more than contract damages it would have to be under the rubric of aggravated damages.

[16] Accordingly, in my opinion the slander award cannot stand.

[45] In my view, *Deildal* is very different from the case at bar. *Deildal* was a wrongful dismissal claim based on an employment contract. Defamation was not pleaded nor was it raised during the testimony or at the closing argument. However, there was significant evidence elicited about the allegations of theft advanced by the employer as justification for dismissal.

[46] In *Deildal*, the majority agreed that the trial judge erred in awarding damages for defamation in the absence of relevant pleadings. However, the majority dismissed the appeal stating that the entire amount of the judgment could be justified in that the defamation carried out by the employer's representative formed an integral part of the breach of contract. As for the award of aggravated damages on account of mental distress and reputational harm, there was no need for the plaintiff to prove a separate, actionable tort as the employer's slanderous behaviour was an integral part of the breach.

[47] I have found *Chahal v. Chahal*, 2020 BCCA 147 to apply to the circumstances presented in the case at bar. *Chahal* was a lengthy family law dispute involving two spouses, their parents, a few siblings, and companies. The orders under appeal concerned the ownership and division of property claimed by the spouses or by other members of their families. Following a long, interrupted trial, the trial judge issued extensive reasons that made a number of findings about the source of funds for the purchase of property and the beneficial ownership of property. The documentary evidence was unsatisfactory, the principal witnesses were unreliable, and much of the evidence of those witnesses was directly contradicted by other witnesses. On appeal, the husband and his parents challenged some of the orders made by the trial judge and argued that she erred in law and fact. The Court of

Appeal dismissed the appeal. Relevant to the case at bar, the appellants raised issues about the adequacy of the pleadings to determine parts of the claim.

[48] On this point, Justice Butler stated that the core issue was not whether the pleadings contained specific information but whether the parties had been given notice of the issues and an opportunity to address them: at para. 116, citing *Canada Trustco Mortgage Co. v. Renard*, 2008 BCCA 343 at para. 39. Justice Butler stated that the court may exercise its discretion to decide issues that do not perfectly fit into the pleadings, so long as no party to the proceeding is surprised or prejudiced by it. Justice Butler concluded there was no support for the suggestion that the husband's parents had no knowledge of the respondent's position or that they did not have an opportunity to respond to her evidence or arguments. Justice Butler gave no effect to this ground of appeal.

Did the judge err by awarding damages based on a cause of action not pleaded?

[49] The appellants' principal ground of appeal is that the judge erred in law because he awarded damages based on a cause of action not pleaded. Alternatively, the appellants submit that the judge exercised his discretion incorrectly when he decided the issue of non-payment under the July 2017 Release, as the appellants were not given notice of the case they had to meet. In the further alternative, the appellants submit that the judge should not have drawn an adverse inference about the missing document and he then erred by relying on its absence to find the appellants liable.

[50] As these reasons will explain, the July 2017 Release was an important issue in the litigation, from the outset. The appellants relied on the July 2017 Release as a full defence to the respondent's claim and specifically pleaded it. It was their primary defence to the lawsuit. I agree with the appellants that, at least at the beginning of the trial, the respondent focused the claim on the validity of the July 2017 Release and not whether it failed because of lack of consideration.

[51] The appellants are correct that the respondent did not specifically plead a breach of the July 2017 Release. I will address the pleadings and then how the parties proceeded in light of the claim pleaded. In my view, the appellants hoped to enjoy the benefit of the July 2017 Release but not the obligation it imposed on them.

[52] The respondent commenced his claim against the appellants in August 2018. He alleged that the parties agreed the appellants would construct a residence on the Killarney Property in accordance with certain specifications and that the respondent would make progress payments in accordance with the agreement. The respondent referred to the releases in the notice of civil claim, referring to them as “amendments.” His pleading on this point is brief:

In breach of his duty to act in good faith, [Mr.] Nguyen made the [respondent] sign amendment(s) to the Agreement without accurately explaining the contents of such amendments to the [respondent]. More specifically [Mr.] Nguyen caused the [respondent] to sign a waiver for home warranty and cancellation penalty terms without explaining the meaning and effect of those terms and by not accurately explaining the true nature of the documents that he caused the [respondent] to sign.

(the “Amendments”)

[53] By way of relief, the respondent sought reimbursement of an alleged overpayment for \$213,800. In addition, he sought general, aggravated, punitive, and special damages for breach of contract, or in the alternative, damages for inducing breach of contract. Under the legal basis, the respondent pleaded that the appellants are jointly and severally liable in respect of any breach of the agreement, and that the appellants failed and/or refused to complete the work and thereby repudiated the agreement. Regarding the Amendments, the respondent pleaded:

- 5 The Amendments are void on the basis of *non est factum*.
- 6 The [respondent] was unable to read the Amendments and understand the contents of the Amendments, as it was written in English – a language which the [respondent] does not read, write or speak ... [Mr.] Nguyen ... knew this was the case and did not translate the Amendments to the [respondent].
- 7 The terms of the Amendments were different than what was explained to the [respondent] by [Mr.] Nguyen.

- 8 The [respondent] signed the Amendments in reliance upon the Representations of [Mr.] Nguyen and/or the translations of the Amendments by [Mr.] Nguyen.
- 9 The purported Amendments are therefore void on the basis of *non est factum* and [are] otherwise not enforceable at law.

[54] The appellants are correct that the respondent did not specifically plead a breach of the July 2017 Release. The appellants, however, specifically pleaded the terms of the July 2017 Release in their response to civil claim:

13. Pursuant to the Termination Agreement, on or about July 3, 2017, the [respondent] executed a release in favour of [Mr.] Nguyen and Pacific Gate whereby the [respondent] released [Mr.] Nguyen and Pacific Gate and their heirs, executors, administrators, successors and assigns of and from, *inter alia*, all manner of actions, causes of action, suits, debts, dues, sums of money, accounts and agreements arising directly or indirectly out of any matter (the “Release”).
14. In accordance with the Termination Agreement and the Release, the [appellants] paid the [respondent] \$250,000.00 in three installments as follows:
 - (a) \$100,000.00 on or about July 4, 2017;
 - (b) \$100,000.00 on or about July 6, 2017; and
 - (c) \$50,000 on or about July 11, 2017(collectively, the “Release Payment”).
15. Pursuant to the Termination Agreement, the Release and Release Payment, the [respondent] has no valid cause of action as against [Mr.] Nguyen or Pacific Gate, nor are any funds due and owing to the [respondent] from [Mr.] Nguyen or Pacific Gate.

The appellants sought to rely on the July 2017 Release, which effectively bars the respondent’s various claims, including the alleged breach of the Construction Contract.

[55] The July 2017 Release was thus an instrument that both parties raised in their pleadings. The respondent did not allege it was breached, however, until the trial.

[56] As will be seen, the July 2017 Release featured in the trial. It was attached to the parties' agreed statement of facts and filed as an exhibit when the trial commenced. Mr. Nguyen admitted that he drafted the July 2017 Release and the respondent admitted he signed it.

[57] In his opening statement, the respondent specifically identified the July 2017 Release and payments made (or not) respecting it:

CNSL R. ATWAL: ... The [respondent] will show that irrespective of his signature on that release document dated July 3rd, 2017, that the money which is written on that document, the payment of \$250,000, was paid but then was immediately paid out of his account. And we will lead that evidence.

[58] During the respondent's direct examination, he testified about the payments:

Q: But did you receive \$250,000 from Mr. Nguyen in July 2017?

A: Yes, I did, but he forced me to pay that out to somebody else. Each time he transfer[red] the money to me, if he gave me 100,000, 100,000, I ha[d] to write out a cheque paid out to the name, whatever name that he asked me to. He said that if I [didn't] do as he ask[ed] that he will stop the construction and I will lose everything ...

[59] The appellants also elicited testimony about the payments made pursuant to the July 2017 Release. Mr. Nguyen testified about the circumstances surrounding the drafting of the Release and payments made pursuant to it. During his direct examination, Mr. Nguyen testified that he prepared the July 2017 Release and that he paid \$250,000 to the respondent under the Release. In his testimony, he explained how the money was paid, including the different amounts. It was during Mr. Nguyen's cross-examination that the issue arose, apparently for the first time, about a bank draft for \$100,000 made payable to the respondent's wife. The cross-examination proceeded as follows:

Q: ... And if we go to tab 7(g), which is the July 3rd, 2017 release. Are you there, Mr. Nguyen?

A: Yes.

Q: This release, from your recollection, it was for termination of the Killarney construction agreement; correct?

A: Yes.

- Q: And that [the respondent] would no longer -- that you say you paid [the respondent] \$250,000 and there [were] no claims related to the Killarney construction; correct?
- A: Yes.
- Q: And that's what you explained to [the respondent]?
- A: Yes.
- Q: And I don't see anything in this release that mentions the Killarney house at all? Do you see that anywhere on this page, sir?
- A: No.
- Q: So you would agree with me, sir, that this release, similar to the releases in the tab 2(b) addendum, is broader than just the Killarney house; correct?
- A: No, because this is attributed to Killarney house because that was the only project I had with him at that time. And his understanding was that this is for the Killarney house. There is no other house involved.
- Q: Okay. But on the face of the release, the Killarney house is not mentioned; correct?
- A: It's not mentioned, correct.

[60] The cross-examination continued regarding the various payments but was interrupted when it appeared there was a disclosure issue about a payment Mr. Nguyen said he made to the respondent's wife:

- Q: You say there's a separate bank draft to his wife that you have not disclosed in this litigation?
- A: Yes, because the fact that the bank draft was from his wife.
- Q: The bank draft was to his wife?
- A: To his wife, yes.
- Q: And you didn't disclose that bank draft in this litigation, have you?
- A: Pardon me?
- Q: Have you disclosed the bank draft to his wife in this litigation?
- A: No, because this one here was just brought in to this thing just a few days -- yesterday or a couple of days ago.
- Q: Which one?
- A: This bank draft. \$100,000 Pacific Gate.
- Q: The one to Pacific Gate was only brought in a couple days ago?
- A: Absolutely. You gave it to my counsel here.
- Q: Well, sir, I think I have to disagree. This bank draft has been disclosed in this litigation --

A: Absolutely not. It has not been disclosed previously.

Q: And you haven't disclosed any bank drafts to his wife, have you?

A: Pardon me?

Q: You have not disclosed your bank draft you say you wrote to his wife?

THE COURT: Okay. I'm going to ask if you can step outside and in addition the other party step outside. We're going to have to have a discussion amongst lawyers about that.

[61] The judge asked counsel for submissions about the bank draft and whether it had been disclosed. In response to questions from the Court, the respondent's counsel told the judge that their alternative position in the litigation was that the appellants were (at least) \$100,000 short on their payment. However, counsel submitted that the shortfall was their alternative position only, maintaining the position that Mr. Nguyen had not effectively paid any of the \$250,000.

[62] In response to the respondent's submission about the missing bank draft, the appellants' trial counsel submitted:

CNSL W. RYAN: Again, you know this \$100,000 short, I understood everything had been agreed to in the statement of facts, right. And that --

THE COURT: Well, all right. Where in the statement of facts?

CNSL W. RYAN: Well, I thought -- I thought we were dealing with the claim in the notice of claim that which says he's owed \$223,000 to 213,000 and what he's now saying, and it's the first time for me is this they're 100,000 short and therefore they're asking for 313,000.

[63] The appellants submit that this was the first time they learned that the respondent was alleging a breach of the July 2017 Release for nonpayment. However, at trial, counsel did not take the position he takes on this appeal. That is, trial counsel did not object to the cross-examination continuing on the issue of payment. After the judge received submissions about the document and its relevance, the cross-examination continued on this very issue. As he was explaining his version of what occurred with the bank drafts, Mr. Nguyen testified that the respondent sent "two guys to [his] house". He testified that the next day, "... [the respondent] actually called with this gangster on the phone ...". Mr. Nguyen

testified that he recorded this phone call, "... and if the [C]ourt want[s] to hear that I do have that in my email".

[64] At this point, the Court adjourned the cross-examination so counsel could address production of the audio-recording of the call just mentioned by Mr. Nguyen. Very shortly thereafter, proceedings resumed and counsel informed the Court that there were technical issues with the audio. The judge stated, "... my inclination would be to say I think at this late time unless there's a compelling reason why it would really shed some light on a material issue in this trial I'd be inclined to say it's too late but I don't want to foreclose your right to bring an application to that effect".

[65] Counsel advised the Court that they did not seek to take any further steps to adduce the audio-recording, stating, "[w]e will not be bringing an application". Counsel moved on and the cross-examination concluded shortly thereafter.

[66] During closing submissions, both counsel advanced submissions about the payment of \$250,000. The respondent contended that the appellants had failed to pay any of the \$250,000, or at the very least, the \$100,000 referred to above. The appellants responded to this submission.

[67] In his submission, the respondent stated the following about the July 2017 Release:

CNSL R. ATWAL: The fundamental issue to be resolved in this matter is whether a release agreement, dated July 3, 2017, is valid and binding and essentially resolved this matter in its entirety prior to litigation being commenced.

Now [the respondent's] defence to this release, I will call it the July 2017 release, is twofold: first, he did not understand what he was signing and did not agree to releasing any claims he may have had against the [appellants].

...

CNSL R. ATWAL: [The second] defence to the release [the respondent] has is that he did not receive any consideration for signing the [July 2017 Release].

[68] In oral submissions, the appellants similarly addressed the July 2017 Release and payment:

THE COURT: Again, there are so many questions that arise from this case but what is also hard to understand is so Mr. Nguyen was obviously very careful about documenting this project, right?

CNSL W. RYAN: Absolutely.

THE COURT: Yes. So there's a construction agreement. That is all set out. He's got a standard form for that and he's got an addendum and then he has these very quite specific waiver and release agreements which identify what they're for, right?

CNSL W. RYAN: Yes.

THE COURT: And then you get to this release.

CNSL W. RYAN: Yes.

THE COURT: And the release makes no reference to the construction contract. Makes no reference to the context. Nothing.

CNSL W. RYAN: Correct. But he's not a lawyer, right. He doesn't have staff to be able to check to see whether he's missing something.

THE COURT: He didn't have a problem with all the other documents he created.

CNSL W. RYAN: But the fact of the matter is and my friend pointed that out to the [C]ourt and it's absolutely fair comment but \$250,000 did go to [the respondent]. That's everyone agrees to that.

THE COURT: M'mm-hmm.

CNSL W. RYAN: Right. If it had been 350,000 or 450,000 then perhaps we could throw out that release completely and say it's irrelevant. But the 250 did go --

THE COURT: And 100 went back.

CNSL W. RYAN: And we have covered that, correct.

THE COURT: Well, your client has provided some testimony about that.

[69] I have reviewed the trial transcript of the testimony, all of the exhibits including the agreed statement of facts and document agreement, and the submissions of counsel. Following the reasoning in *Chahal*, it is my view that there is no support for the suggestion that the appellants did not have knowledge of the position being advanced by the respondent or that they did not have an opportunity to respond to the respondent's evidence or arguments.

[70] In this case, the validity and enforceability of the July 2017 Release were relevant to the very legal issue the judge needed to determine. The appellants suggest the analysis should stop there. However, that is not the position the appellants took before the trial judge. I agree with the respondent that consideration for the July 2017 Release was expressly made a live issue at the outset of the trial, in the respondent's opening statement. The judge addressed the July 2017 Release when he considered the parties' testimony about how they dealt with one another in relation to payments made under the Release, which the judge found difficult to understand. In fact, the judge dismissed the balance of the respondent's claim when he concluded he did not know who to believe on certain points, but found that ultimately, it was the respondent who bore the burden of proof to establish non-payment. In my view, this was a lawsuit about the Construction Contract between the parties. The appellants sought to defend the claim against them based, in part, on the July 2017 Release. In my view, the legal issue about consideration under the July 2017 Release was captured by the pleadings and the issue was joined.

[71] However, even if the payment fell outside of the pleadings, there was no procedural unfairness. The appellants had a full opportunity to respond. In fact, the issue about the bank draft arose during Mr. Nguyen's cross-examination. In some ways, his testimony contradicted his own pleading. That is, his testimony that he paid \$100,000 of the July 2017 Release to the respondent's wife contradicted his express pleading that the appellants paid \$250,000 to the respondent in three installments. The respondent submits that up until this point, there had been no mention by Mr. Nguyen that he allegedly made one of the payments to the respondent's wife. The parties agreed that this bank draft, if it existed, was not disclosed or produced by the appellants. In my view, the bank draft would have been a relevant document subject to disclosure and production in the litigation.

[72] The respondent agrees that his original position at trial was that the July 2017 Release should fail as a defence based on the doctrine of *non est factum*. In the alternative, he submitted that it should fail for lack of consideration. Indeed, at trial, the respondent tried to suggest that he had received nothing from the

\$250,000. The respondent characterizes the “partial failure” of consideration as a new argument that arose during Mr. Nguyen’s cross-examination when he brought up the supposed bank draft to the respondent’s wife. I need not decide whether this was a new argument or not because, in my view, the judge was correct when he asked the appellants the question, “[h]ow could you be taken by surprise?”. Trial counsel had an opportunity to address this point if they wished to do so. They could have sought a remedy, such as an adjournment or a demand that the respondent amend the pleadings, or they could have produced the bank draft. They did none of those things.

[73] Similar to the finding in *Chahal*, I am not persuaded that the appellants were unfairly surprised by this issue. A trial judge must decide a case according to the facts and the law as they find them to be. Accordingly, there is no procedural unfairness where a trial judge, on their own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it: *Mylan Pharmaceuticals ULC v. Pfizer Canada Inc.*, 2012 FCA 103 at para. 27.

[74] This was not a case where the judge reserved his decision and returned with a damage award that had not been advanced during the litigation. At the very latest, the appellants became aware of the issue when the respondent provided a written submission where the issue was crystalized (though I am of the view that the disclosure occurred earlier). At the hearing of the appeal, the appellants suggested the alleged non-disclosure was unfair, even though they did not take any steps to cure the perceived unfairness at the trial. The judge had earlier granted an adjournment when another non-disclosure issue arose. There was no reason to suspect that he would not have done the same if trial counsel expressed a concern.

[75] The other point worthy of mention is that it was Mr. Nguyen who first raised the issue of the July 2017 Release and payments when he testified about a financial transaction that was different than that described earlier in the lawsuit.

[76] For all of these reasons, I would not accede to the first ground of appeal.

Did the judge err when he drew an adverse inference?

[77] The appellants submit that the judge drew an adverse finding against Mr. Nguyen based on his failure to produce the bank draft to corroborate his testimony on this point. In para. 66 of the reasons, the judge stated:

Mr. Nguyen’s testimony that he made out the original \$100,000 payment by Pacific Gate on July 4, 2017 to [the respondent’s] wife and then asked [the respondent] to return that payment after which he wrote a separate draft out in the name of [the respondent] is difficult to accept. He did not adequately explain why he would have made payment to [the respondent’s wife] in the first place (since his business relationship was with [the respondent]) nor did he adequately explain why he changed his mind. Further, Mr. Nguyen adduced no evidence at trial of a bank draft to [the respondent’s] wife, even though he was given an adjournment by the Court to search his files and adduce that evidence. I make the adverse inference that no such bank draft existed...

[78] Later in the reasons, the judge confirmed he drew an adverse inference based upon Mr. Nguyen’s failure to adduce the original bank draft to the respondent’s wife (at para. 88).

[79] In my opinion, the judge did not commit a palpable and overriding error in the manner in which he dealt with the missing bank draft. I agree with the appellants that the judge mistakenly stated that he granted an adjournment specifically for Mr. Nguyen to go and locate the bank draft. The issue of the missing bank draft arose in circumstances where there had been non-disclosure of an audio-recording, supposedly capturing the exchange between Mr. Nguyen, the respondent, and someone referred to by Mr. Nguyen as “the gangster”. The judge granted a brief adjournment for Mr. Nguyen to locate the recording. When the parties returned to court, counsel told the judge that he would not be bringing any application relating to the recording, despite the judge’s invitation to do so. Although the brief adjournment was granted in order to locate the audio-recording, this immediately followed the discussion of the missing bank draft. When the judge granted the adjournment, he commented generally on the large amount of evidence that had not been disclosed in advance of trial. In my view, the bank draft was included in the documents that

were relevant at the first instance and should have been disclosed. At the appeal, the appellants conceded as much. In my view, although the judge was mistaken about the adjournment specifically to locate the bank draft, this mistake did not constitute an error that was either palpable or overriding.

[80] I would dismiss this ground of appeal.

Disposition

[81] For the reasons stated, I would dismiss the appeal.

“The Honourable Justice Winteringham”

I AGREE:

“The Honourable Madam Justice DeWitt-Van Oosten”

I AGREE:

“The Honourable Justice Donegan”