IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trejo v. Pro-Align Heavy Suspensions Ltd.,* 2023 BCSC 929

Date: 20230601
Docket: S242860
Registry: New Westminster

Between:

Marisela De La Torre Trejo

Appellant

And:

Pro-Align Heavy Suspensions Ltd.

Respondent

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Appellant:	M. Harden
Respondent:	No Appearance
Place and Date of Hearing:	New Westminster, B.C. January 24, 2023
Place and Date of Judgement:	New Westminster, B.C. June 1, 2023

Introduction

[1] This is an appeal from the decision of a Provincial Court Judge in a small claims action, arising out of an employment relationship between Pro-Align Heavy Suspensions Ltd. (“Pro-Align”) and Maria de la Torre Trejo. Pro-Align sued Ms. Trejo claiming damages for some 800 hours of work that Ms. Trejo allegedly never performed. Ms. Trejo counterclaimed for non-payment of salary for two months of work for which she was allegedly never paid at all.

[2] A key issue at trial was whether Ms. Trejo’s employment contract was for a salary or for hourly wages. On that issue, the trial judge found in favour of Pro-Align, concluding that Ms. Trejo was an hourly paid employee. The judge went on to find that Ms. Trejo had been paid for more than 400 hours of work that she never performed, and thus allowed Pro-Align’s claim in part. The judge also allowed the counterclaim in part, finding that Ms. Trejo had not been paid for the first two months of her employment, and then pro-rating the damages award based on the finding that Ms. Trejo did not work as much as she claimed. Applying a set-off, the trial judge awarded net damages of $5,400 to Pro-Align.

[3] On appeal, Ms. Trejo alleges that the trial judge committed reviewable errors: (i) in finding that Ms. Trejo’s employment contract was based on an hourly wage rather than a fixed salary; (ii) in failing to hold that by approving Ms. Trejo’s pay stubs, Pro-Align was subsequently estopped from challenging their validity; (iii) in preferring the evidence of Pro-Align’s principal witness, Mr. Skakun, over the testimony of Ms. Trejo on the critical issue of Ms. Trejo’s hours of work; (iv) in finding that Ms. Trejo did not perform over 400 hours or work for which she had been paid, based on a spreadsheet that Pro-Align’s principal witness had prepared well after the events in question; and (v) in reducing the amount of Ms. Trejo’s counterclaim by one-half, based on an arbitrary assessment of the number of hours she worked during the relevant time frame.

Facts

[4] The basic facts underlying the case can be summarized as follows:

(a) Pro-Align is an incorporated company. During the relevant time frame, Pro-Align was a “start up” small business, focused on tire alignments for commercial vehicles.

(b) In the period which is the subject of the small claims action, Pro-Align had five or six employees. The operating manager of the business was Mr. Bentley.

(c) On 21 August 2017, Mr. Bentley hired his then-common law partner Ms. Trejo to be the company’s office administrator, bookkeeper, and controller.

(d) When Ms. Trejo accepted the job, the terms of her employment were not set out in a written contract. Some months later, Ms. Trejo herself prepared a written contract setting the terms of her employment. The document was signed by Ms. Trejo (as the employee) and Mr. Bentley (on behalf of the employer, Pro-Align) on 15 October 2017.

(e) During the time period when Ms. Trejo worked at Pro-Align, Mr. Bentley was her immediate supervisor. He assigned her work, supervised it, and approved her payroll.

(f) Throughout Ms. Trejo’s employment, Pro-Align did not require her to log in or out of work each day, or keep a time sheet. Her work schedule was flexible and she often worked remotely.

(g) In the course of her employment, Ms. Trejo basically performed all of the administrative and book-keeping tasks associated with the business. She did some of her work on computer programs, including Quickbooks, ShopController, and CRA software.

(h) Ms. Trejo was paid bi-weekly. She prepared her own pay stub and paycheque, which were then approved by Mr. Bentley.

(i) On 30 September 2018, Ms. Trejo and Mr. Bentley separated. Ms. Trejo continued to work at Pro-Align until the end of October 2018, but then took a medical leave of absence, and never returned to the job.

(j) Some time in 2019, Mr. Skakun – who had previously been a director and passive investor in Pro-Align – took a more active role in the company.

(k) On 12 July 2019, Mr. Skakun filed this small claims action on behalf of Pro-Align against Ms. Trejo, seeking damages for Pro-Align's payment of wages for work that Ms. Trejo allegedly never performed.

(l) By the time the matter came to trial, Pro-Align's position, as framed by Mr. Skakun, was that the company had paid Ms. Trejo for some 801.24 hours of work that she had never performed.

(m) Mr. Skakun admitted that during the period of time when Ms. Trejo worked at Pro-Align, he was not personally involved in the business.

(n) Pro-Align's position that Ms. Trejo was paid for 801.24 hours of work that she did not perform rested principally on a spreadsheet that Mr. Skakun had prepared after he became actively involved in the business, months after Ms. Trejo left the company. The spreadsheet was essentially Mr. Skakun's effort to forensically reconstruct Ms. Trejo's work history, using the records that were available to him.

(o) In her counterclaim, Ms. Trejo asserted that she began working for Pro-Align on 21 August 2017, but that the company never started paying her until the written employment contract was signed on 15 October 2017. Thus, Ms. Trejo counterclaimed seeking damages for two months of unpaid salary.

(p) Pro-Align's position in response to the counterclaim was that during the relevant time frame, from 21 August 2017 to 14 October 2017, Ms. Trejo was not a Pro-Align employee. Pro-Align asserted that if Ms. Trejo was employed by anyone during that time frame, she was a personal employee of Mr. Bentley.

The Trial Proceedings

[5] At trial, the claimant Pro-Align, who was represented by Mr. Skakun, called three witnesses, namely: (i) Mr. Skakun, who as noted was not personally involved in the business during the time frame in issue, but later assumed responsibility for running the business after Mr. Bentley relinquished that role on 29 February 2019; (ii) Mr. Motz, who was a Pro-Align employee during the time when Ms. Trejo worked as the office administrator; and (iii) Mr. Lockyer, another Pro-Align employee over the time period in issue in the proceedings.

[6] Pro-Align also relied on documentary evidence to prove its claim. The most contentious documentary evidence tendered by the claimant was the spreadsheet that Mr. Skakun had prepared, after the fact, in an effort to reconstruct Ms. Trejo's work history. The information in the spreadsheet was derived principally from log in and log out information in the Quickbooks software program (one of at least three software programs Ms. Trejo used as part of her work), supplemented by Mr. Skakun's review of other business records, including the dates and times of emails Ms. Trejo sent and received on her company email account. As explained in more detail below, the trial judge found that the Quickbooks spreadsheet was incomplete and not entirely accurate, but ruled it admissible and placed reliance upon it, over the defendant's objection.

[7] The defendant Ms. Trejo was the only witness called in the defence case.

[8] Like Pro-Align, Ms. Trejo also relied upon documentary evidence to support her position at trial. In particular, Ms. Trejo relied upon a budget document or general ledger, which she claimed to have created contemporaneously, and then regularly updated in the course of her work at Pro-Align. The trial judge found this document admissible as a business record, noting that its true relevance was not in proving the truth of the budget document's contents, but rather in merely showing that Ms. Trejo made various entries on the document on certain dates during her employment as evidence that she was working on those dates. Ms. Trejo also sought to tender a Google Maps document purporting to show her whereabouts and

movements on certain dates and times when she claimed to have been working. The trial judge admitted the Google Maps document, but was not prepared to place any weight on it in view of the concern that it could have been altered after the fact.

[9] Neither party called Mr. Bentley as a witness at trial even though, as the trial judge put it, he "would have known how many hours [Ms. Trejo] worked". The trial judge explained that Pro-Align chose not to call Mr. Bentley because "Mr. Skakun had to take over running the company after Mr. Bentley left", and Ms. Trejo chose not to call Mr. Bentley because at the time of the trial the two of them were "involved in family litigation".

The Trial Judge's Decision

(i) Trial Judge's Conclusions on Witness Credibility and Reliability

[10] Credibility and reliability of the witness testimony was a key issue for both parties at trial. I will briefly summarize the trial judge's credibility and reliability findings with respect to all four of the witnesses who testified at trial.

[11] The trial judge found Mr. Skakun to be a "generally" credible witness. His evidence about the defendant's work at Pro-Align, or lack thereof, effectively came from his effort to "reconstruct" her "work hours" using Quickbooks, which as noted was one of several software programs Ms. Trejo used in the course of her duties. The trial judge noted that Mr. Skakun fairly conceded certain points about the terms of Ms. Trejo's employment. He also admitted to having limited personal knowledge of the hours Ms. Trejo worked. Acknowledging these limitations, the trial judge found that Mr. Skakun was a credible witness because he "tried his best to reconstruct" Ms. Trejo's work hours using the records available to him after the fact.

[12] Although the trial judge did not make any adverse credibility findings in respect of Mr. Lockyer, she did not find his testimony helpful in determining the hours Ms. Trejo worked, because Mr. Lockyer had "no personal knowledge" of whether and to what extent Ms. Trejo performed work while not at the Pro-Align premises. This, coupled with the undisputed fact that Ms. Trejo was permitted to

work from home, meant Mr. Lockyer's evidence had no real value in addressing the key issue of whether Ms. Trejo was paid for work that she did not perform.

[13] Mr. Motz gave testimony about two specific time periods where Ms. Trejo allegedly did not perform any work, namely 18 to 19 April 2018, and 17 to 18 May 2018. With respect to the April dates, the trial judge found that Mr. Motz could not say whether Ms. Trejo might have been working from home or away from the Pro-Align site on those dates. With respect to the May dates, the trial judge accepted Mr. Motz's testimony that Mr. Bentley said he and Ms. Trejo were "going camping on the May long weekend", and Mr. Motz himself recalled that Ms. Trejo was not at Pro-Align on 17 to 18 May 2018. Although Mr. Motz's testimony about what Mr. Bentley said was hearsay, the trial judge found it admissible under s. 16 of the *Small Claims Act*, R.S.B.C. 1996, c. 430, and concluded that Ms. Trejo did not work on those particular dates in May. Other than this, the judge did not find Mr. Motz's evidence helpful because he had no direct knowledge of where or when Ms. Trejo worked.

[14] The trial judge did not find Ms. Trejo to be a credible witness, taking the view that she "exaggerated her evidence about the role she played in the company". To support this conclusion, the trial judge gave a number of specific examples where Ms. Trejo's testimony conflicted with the evidence of other witnesses. The judge concluded that where the evidence of Ms. Trejo conflicted with that of Mr. Skakun, she preferred the evidence of Mr. Skakun. For the sake of completeness, I should add an editorial comment here that in reality, on the trial judge's own approach, there was little room for conflict between the testimony of Ms. Trejo and that of Mr. Skakun, at least on the key issue of whether Ms. Trejo was paid for hours of work she did not perform. I say that because of the undisputed evidence – accepted by the trial judge – that Mr. Skakun had no personal or contemporaneous knowledge of Ms. Trejo's hours of work, the places that she worked, or the work that she performed. All of Mr. Skakun's knowledge on these topics was garnered after the fact, through his effort to reconstruct Ms. Trejo's work history based on a "forensic analysis" of whatever company records were available to him. Be that as it may, the

trial judge found that Ms. Trejo was not a credible witness, based on a thorough assessment of all the evidence tendered at trial.

(ii) Trial Judge's Analysis of the Admissibility and Weight Given to Key Documentary Evidence

[15] The trial judge carefully considered the admissibility of the Quickbooks spreadsheet prepared by Mr. Skakun. As noted, the judge characterized this spreadsheet as Mr. Skakun's effort to "reconstruct" the hours Ms. Trejo worked, using "logins and logouts" on the software programs she worked with, and making "extra time allowances for sent emails and document save dates". The judge recognized that the spreadsheet was hearsay and thus presumptively inadmissible, and reasoned that it did not meet the requirements of the business records exception under s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124, because it was "not created in the ordinary course of business within a reasonable time". However, the judge exercised her discretion under s. 16(1) of the *Small Claims Act* to admit the document. The judge gave two reasons for doing so. First, the entries in the spreadsheet were based on contemporaneously created documents, such as Quickbooks timekeeping logs, email records, and document meta data, all of which would qualify as business records. Second, the "sheer volume" of underlying records would have made their use at trial inconsistent with the objective of providing for the resolution of claims in a just, speedy, inexpensive and simple manner as provided for under s. 2 of the *Small Claims Act*.

[16] The trial judge went on to address the "proper evidentiary weight" of the Quickbooks spreadsheet. The judge found that the document was an "incomplete record" of Ms. Trejo's hours of work. Mr. Skakun acknowledged in his evidence that he may have missed some emails or documents worked on by Ms. Trejo, and further that the documents exchanged during disclosure were only "a sample of the defendant's work and not the sum". Further, Quickbooks was not the only software program Ms. Trejo used in the course of her work. She also used ShopController, and CRA software, neither of which were accounted for in Mr. Skakun's Quickbooks spreadsheet. Finally, the judge noted that Ms. Trejo was not actually required to log

in or log out of any software program at the beginning and end of her work day. In the end, the trial judge had no concern about the "credibility" of the Quickbooks spreadsheet, as she was satisfied that Mr. Skakun created it in a "good-faith effort" to "reverse engineer" Ms. Trejo's hours of work. The judge nevertheless concluded that due to its incompleteness, the Quickbooks spreadsheet was "not completely reliable" and did not "accurately represent" the hours Ms. Trejo worked at Pro-Align.

[17] The trial judge also considered the admissibility of a Google maps timeline, tendered by Ms. Trejo as evidence of her location on particular days, based on GPS data from Ms. Trejo's cell phone. Ms. Trejo admitted in her trial testimony that it would have been possible to edit or alter this document after-the-fact, and further admitted to making redactions to the timeline to prevent disclosure of the address of her son's school to Mr. Bentley, based on concerns about family violence. The trial judge referred to *R. v. S.S.*, 2019 BCPC 385, a case in which a Google maps timeline did not meet the standard for admission of electronic evidence under s. 31.2 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, based on evidence that such a document could be "manually altered". The judge acknowledged that the *Canada Evidence Act* does not apply to small claims proceedings. The provincial *Evidence Act* contains a business records section, but no provisions governing admissibility of digital evidence. The trial judge appears to have assumed without deciding that the Google maps timeline was admissible, but went on to observe that it was "not very helpful" and attached no weight to it, given her concerns about the reliability or integrity of the document itself, and the credibility of Ms. Trejo as the party who produced and tendered the document.

[18] Near the end of the reasons for judgment, the trial judge considered the admissibility of another document tendered by Ms. Trejo, referred to as a "budget document". Ms. Trejo explained in her evidence that she created and maintained the document in the course of her work at Pro-Align. The trial judge found the budget document admissible under the business records exception to the hearsay rule. The judge went on to observe that the budget document was not tendered for the truth of its contents in any event. Rather, Ms. Trejo tendered it as evidence of the particular

dates and times on which she made entries on it, to show that she was working during those times.

(iii) Trial Judge's Analysis of Pro-Align's Claim

[19] Near the beginning of her reasons for judgment, perhaps somewhat out of place with the remainder of her analysis, the trial judge considered and rejected Ms. Trejo's argument that under the written employment contract, she was a salaried employee and not an hourly paid worker. The written agreement (i) used the word "salary" to refer to Ms. Trejo's pay, (ii) specified that Ms. Trejo was to be paid at a rate of $20 per hour, and (iii) did not specify the required hours of work. The trial judge interpreted the term "salary" in the written contract to mean "wages". Taking into account "the context of the employment agreement in its entirety" and "the plain and ordinary meaning of the words" used in the agreement, the trial judge found it "more likely than not that [Ms. Trejo] was paid an hourly wage". The judge went on to observe that the burden was on Pro-Align to prove that Ms. Trejo was paid for more hours of work than she actually performed.

[20] Later in her reasons, the trial judge addressed some of the competing arguments bearing on the issue of whether Pro-Align had proven its claim that Ms. Trejo did not work the hours for which she had been paid. The judge gave little credence to Pro-Align's argument that the lack of "work product" and lack of work available for Ms. Trejo to perform was evidence that Ms. Trejo did not work the hours for which she was paid. The judge also addressed Ms. Trejo's contention that her pay stubs were proof of the hours worked, finding that this was a "circular argument". The judge reviewed the *viva voce* testimony of the witnesses about how many hours Ms. Trejo worked, but reached no conclusive findings on the basis of this evidence.

[21] In the end, the trial judge appears to have based her findings on Pro-Align's claim regarding hours worked principally, if not entirely, on the Quickbooks spreadsheet. The judge made two key findings in this regard.

[22] First, the trial judge reasoned that the defendant did not work any hours "on the days with no hours recorded and no emails or files" noted in the Quickbooks spreadsheet. This came out to 29 days, at eight hours per day, or 232 hours which the trial judge found Ms. Trejo did not work.

[23] Second, by parallel reasoning, the judge found that on the days when less than two hours of work was recorded in the Quickbooks spreadsheet, Ms. Trejo worked "equal to or less than the statutory minimum two hours per day". This came out to 31 days, with six hours of overpayment per day, for a total of 198 hours which the trial judge found Ms. Trejo did not work.

[24] The trial judge thus concluded that Ms. Trejo did not work a total of 430 hours for which she had been paid, at $20 per hour, meaning that Pro-Align had proven its claim in the amount of $8,600. The judge cited *Williams v. Stephenson*, 1903 CanLII 22 (S.C.C.), *Penvidic Contracting Co. v. International Nickel Co*., (1975) 53 D.L.R. (3d) 748 (S.C.C.) and *Wood v. Grand Valley R. Co.*, 1915 CanLII 574 (S.C.C.) in support of the "well-established principle that where damages in a particular case are inherently difficult to assess, the court must do the best it can in the circumstances". The trial judge observed that the amount of overpaid wages she had determined was "approximately fifty percent" of the 801.24 hours for work never performed according to the Quickbooks spreadsheet prepared by Mr. Skakun and relied upon by Pro-Align as proof of its claim.

(iv) Trial Judge's Analysis of Ms. Trejo's Counterclaim

[25] The trial judge first considered Pro-Align's argument that the issue in Ms. Trejo's counterclaim for unpaid wages was dealt with by the Employment Standards Board and therefore *res judicata*. The judge determined that Ms. Trejo's employment standards complaint was for two weeks pay following her termination on 15 October 2018, whereas her counterclaim was for allegedly unpaid work from 21 August 2017 to 15 October 2017, and thus was not barred by the doctrine of *res judicata*, and was within the jurisdiction of the Provincial Court under the *Small Claims Act*.

[26] The trial judge also considered whether Ms. Trejo's claim was barred under the *Limitation Act*, R.S.B.C. 2012, c. 13. The judge determined that Ms. Trejo filed the counterclaim more than two years after she knew or ought to have known that she had worked for a period of time without pay, but the judge exercised her discretion to allow the counterclaim to proceed under s. 22(1) of the *Limitation Act*. The judge noted, among other things, that Pro-Align did not raise the limitation period as an issue at trial, that the counterclaim was only two months out of time, and that it pertained to the same subject matter as the main claim, namely the pay Ms. Trejo received and the hours she worked during her employment with Pro-Align.

[27] Moving on to the merits of the counterclaim, the trial judge rejected the argument that for the period of time in issue – from 21 August 2017 to 14 October 2017 – Ms. Trejo was in fact an employee of Mr. Bentley and not Pro-Align. The trial judge also rejected Pro-Align's argument that Ms. Trejo did not do any work in starting up the business. The fact that Mr. Skakun submitted the incorporation paperwork was not proof that Ms. Trejo did no work for the company during the counterclaim period. The trial judge was satisfied on a balance of probabilities that Ms. Trejo in fact "worked for [Pro-Align] without pay" in the eight weeks in issue in the counterclaim, as evidenced by the "uncontested budget document".

[28] Even though there was no written contract during the period of the counterclaim, the trial judge relied on the evidence of Ms. Trejo to conclude that there was an employment contract in place, in the form of an oral agreement between Ms. Trejo and Pro-Align's then-principal Mr. Bentley. The judge was satisfied that Ms. Trejo "must have communicated her acceptance" of Pro-Align's employment offer, when she quit her previous job and began working for Pro-Align under Mr. Bentley's direction.

[29] The trial judge considered the arguments of both Pro-Align and Ms. Trejo as to the rate of remuneration during the period covered by the counterclaim. The judge considered it relevant that the written contract later created by Ms. Trejo specified a $20 per hour pay rate. The judge found that the same rate of pay applied to the

counterclaim period, either by way of inference based upon the subsequently agreed upon pay rate, or alternatively on the basis of *quantum meruit*. In reaching this conclusion, the trial judge expressly rejected Ms. Trejo's testimony that Mr. Bentley had in fact offered to pay her $30 per hour for her work during this time period.

[30] With regard to the number of hours worked during the counterclaim period, the trial judge referred back to the earlier finding in which she determined that Pro-Align was entitled to damages for roughly 50% of the hours that the company had allegedly overpaid Ms. Trejo. The trial judge applied the same ratio to the counterclaim, holding that Ms. Trejo was entitled to 50% of the amount that she claimed for unpaid work from 21 August 2017 to 14 October 2017. This worked out to $3,200. The judge referred once again to *Williams* and *Penvidic*, explaining that "[t]he court must do the best that it can in the circumstances".

(v) The Net Result

[31] The trial judge applied a set off of $3,200 for Ms. Trejo's counterclaim against Pro-Align's successful claim for $8,400, yielding a net judgment against Ms. Trejo in the amount of $5,400.

Analysis

Standard of Review

[32] Ms. Trejo's appeal is brought under s. 12 of the *Small Claims Act*. In *Smithers Parts Ltd. v. Hudson*, 2009 BCSC 1645, Justice MacKenzie, as she then was, described the standard of review in small claims appeals as follows:

> [26] The standard of review on pure questions of law is one of correctness, but the standard of review for findings of fact is they cannot be reversed unless the trial judge has made a palpable and overriding error. A palpable error is one that is plainly seen: *Housen v. Nikolaisen*, 2002 SCC 33. An appeal court should only intervene when there is a material error, a serious misapprehension of the evidence, or an error in law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 11-12; *R. v. Clark*, 2005 SCC 2. This court will only intervene in an appeal from Small Claims Court where the trial judge was clearly wrong in his apprehension of the law or the facts: *Priority Buildings Services Ltd. v. Ali*, [1999] B.C.J. No. 2820 at para. 10, and *Stewart v. Strutt*, [1998] B.C.J. No. 636 at para. 10, both being Provincial Court decisions.

(1) Whether the Trial Judge Erred in Finding that Ms. Trejo's Employment Contract was Based on an Hourly Wage and not a Fixed Salary

[33] It is suggested that the trial judge "erred in fact by finding that [Ms. Trejo] was paid on an hourly basis". On appeal, Ms. Trejo relies on her own "uncontested" testimony that Mr. Bentley offered her a salaried position, which she accepted. Ms. Trejo testified that she worked for a salary, and received bi-weekly pay cheques on that basis. She testified that at "no time" during her employment did Pro-Align advise her that she was to be paid at an hourly rate. Ms. Trejo also relies on a transcript of the family law proceedings between Ms. Trejo and Mr. Bentley, in which Mr. Bentley – representing himself – put it to Ms. Trejo in cross-examination that she received a "salary" of about $42,000 per year.

[34] The problem with Ms. Trejo's argument on this point is that it rests principally on her own *viva voce* evidence at trial. The trial judge found that Ms. Trejo was not a credible witness, based on a thorough assessment of all the evidence before her. As the trier of fact, the trial judge had the ability to assess Ms. Trejo's evidence and to determine how much of it, if any, she accepted as true. Absent some palpable and overriding error, the trial judge was free to accept all, some, or none of Ms. Trejo's testimony. The trial judge was not prepared to accept Ms. Trejo's evidence that she formed an agreement with Mr. Bentley (on behalf of Pro-Align) to work for a salary as opposed to working at an hourly rate. In my view, Ms. Trejo has not shown any palpable or overriding error in the trial judge's consideration of the evidence.

[35] With respect to the transcript of the family law proceedings in which Mr. Bentley put to Ms. Trejo a suggestion that she was paid a salary of approximately $42,000 per year, I see three problems with Ms. Trejo's argument. First, the transcript is hearsay. Mr. Bentley was not called as a witness in the small claims action, and what he said in some other proceeding is inadmissible for the truth of its contents. Second, the particular statement or assertion that Ms. Trejo is relying upon was not witness testimony by Mr. Bentley, but rather a question put by Mr. Bentley to Ms. Trejo as a witness. It is trite law that a question put to a witness is

not evidence. Rather, the evidence is the testimony given by the witness in response to the question. Third, even Mr. Bentley's assertion – that Ms. Trejo earned "a salary" of about $42,000 per year – is ambiguous. On the one hand, Mr. Bentley might have been using the term "salary" to describe a fixed rate of pay as opposed to an hourly rate of pay. On the other hand, Mr. Bentley might merely have been using the term "salary" as a synonym for Ms. Trejo's total "pay" or total "remuneration" over the course of a year. This speaks to the hearsay dangers associated with relying on Mr. Bentley's out of court assertion, without the ability to cross-examine him on what he meant. For all of these reasons, it cannot be said that the trial judge committed any reviewable error in failing to find that Ms. Trejo was a salaried employee, as opposed to an hourly paid employee, based in whole or in part on the content of a question Mr. Bentley put to Ms. Trejo in the family law proceedings.

[36] The trial judge found that Ms. Trejo was not a credible witness and chose not to accept her *viva voce* testimony as to the terms on which she was to be paid. Rather than basing her decision on Ms. Trejo's *viva voce* testimony, the trial judge relied on the written employment contract, which of course had been drafted by Ms. Trejo herself. As the trial judge put it, "[b]ased on the context of the employment agreement in its entirety" and the "plain and ordinary meaning of the words" in the written agreement, Ms. Trejo was "paid an hourly wage". More specifically, the judge found that there was an agreement between Pro-Align and Ms. Trejo for Ms. Trejo to work as an hourly paid employee at a rate of $20 per hour.

[37] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50, Justice Rothstein writing for the Court held that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix". Thus, the general rule is that the standard of review governing a trial judge's interpretation of a contract is palpable and overriding error, except in "rare" cases where the judge is shown to have committed some extricable legal error in the course of the interpretive process: *Ledcor Construction Ltd. v. Northbridge*

Indemnity Insurance Co., 2016 SCC 37 at para. 21, applying *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19 at paras. 21–24 and *Sattva* at paras. 53, 55.

[38] I see no palpable and overriding error in the trial judge's interpretation of the written agreement. Ms. Trejo may disagree with the trial judge's conclusion, but that is no basis for revisiting it in the absence of some identifiable error or patently wrong conclusion of fact. I therefore conclude that the trial judge did not err in finding on the record before her that Ms. Trejo was paid an hourly rate, and not a fixed salary. I agree with the trial judge that the burden was on Pro-Align, as the claimant in the action, to prove on a balance of probabilities that Ms. Trejo did not work the number of hours for which she had been paid.

(2) Whether the Trial Judge Erred in Failing to Give Effect to Ms. Trejo's Estoppel Argument

[39] The record reflects that Ms. Trejo prepared her own pay stubs, which were submitted to and approved by her then-supervisor Mr. Bentley, after which Pro-Align paid Ms. Trejo her wages, on a bi-weekly basis. Ms. Trejo was paid in this fashion throughout her tenure with Pro-Align, and the company only changed its position when it commenced the small claims action asserting that she had been overpaid.

[40] On these basic facts, Ms. Trejo argues that the trial judge erred in failing to give effect to the argument that Pro-Align was estopped from later challenging the accuracy or correctness of Ms. Trejo's pay stubs. As I understand it, this is an argument of "estoppel by conduct" as contemplated in *Vision West Development Ltd. v. McIvor Properties Ltd.*, 2012 BCSC 302 at paras. 62–65.

[41] The difficulty for Ms. Trejo is that estoppel by conduct is an equitable doctrine of fairness that can only be relied upon where the party invoking it is honestly mislead by the conduct of the other party. If, as alleged by Pro-Align, Ms. Trejo knowingly submitted false or inaccurate payroll records for work she did not do, then Ms. Trejo could not be said to have placed honest reliance on the conduct of Pro-Align in approving the invoices. The trial judge, having concluded that Ms. Trejo

prepared her own pay stubs for hours she did not work, cannot be said to have erred in failing to give effect to the doctrine of estoppel by conduct.

[42] Ms. Trejo's estoppel argument begs the question. As the trial judge put it, the argument was circular. It could only succeed if it were true that Ms. Trejo honestly believed that she worked the hours recorded in her payroll records. The real question is whether the trial judge committed any extricable legal error or any palpable and overriding error of fact in concluding that Ms. Trejo did not perform the work for which she had been paid.

(3) Whether the Trial Judge Erred in Preferring the Evidence of Pro-Align's Principal Witness Over Ms. Trejo's Evidence on the Critical Issue of Ms. Trejo's Hours of Work

[43] Ms. Trejo argues on appeal that the trial judge "erred in law" in finding that the "hearsay evidence of Mr. Skakun was more reliable than the direct testimony of Ms. Trejo recounting her own personal experience" as to the hours she worked. With respect, the trial judge's assessment of the evidence and the weight to be attached to it does not raise a question of law. Absent some extricable error, the trial judge's assessment of the evidence is subject to deference on appeal and is only reviewable on a standard of palpable and overriding error.

[44] The only extricable error alleged by Ms. Trejo under this heading has to do with the trial judge's ruling on the admissibility of the Quickbooks spreadsheet prepared by Mr. Skakun. The trial judge acknowledged that this document was hearsay, but relied upon her authority under s. 16 of the *Small Claims Act* to admit such evidence where it is found to be sufficiently "credible or trustworthy".

[45] In the introductory portion of her judgment, the trial judge cited *Kal Inspection & Truck Repair Ltd. v. King*, 2013 BCSC 110, for the proposition that, while s. 16 of the *Small Claims Act* allows for the reception of testimony, records, or other things that would not normally be admissible "under the laws of evidence", the small claims court must nonetheless be "mindful of first principles of admissibility". In considering the admissibility of the Quickbooks spreadsheet, the trial judge recognized that the

document was hearsay, and that it did not meet the requirements of a business record under the *Evidence Act*. The trial judge further reasoned that while the spreadsheet was not itself a business record, it was created on the basis of Quickbooks logs, email logs, and document properties that would have been independently admissible as business records. In the judge's view, it would have been inconsistent with the overall objectives of the *Small Claims Act* in providing for the just, inexpensive, and speedy resolution of claims to insist that the claimant tender the underlying records, given their sheer volume.

[46] On my reading of the reasons, the trial judge took into account the two key criteria of necessity and reliability when considering whether to allow the claimant to rely on hearsay evidence for the truth of its contents. The judge considered the spreadsheet necessary inasmuch as the alternative of requiring the claimant to tender all of the underlying records would have worked against the broader objectives of providing for just, speedy, and inexpensive resolution of small claims proceedings. The judge considered the spreadsheet reliable because, while the document itself was not a business record, the information contained in it was derived from records created in the ordinary course of business.

[47] I find the discussion of admissibility in *Stone v. Insurance Corporation of B.C.*, 2008 BCPC 382, to be helpful in delineating the contours of admissibility under s. 16 of the *Small Claims Act*. At issue there was the admissibility of a statement made by a person who was not a party to the litigation, which was directly contrary to the claimant's position that she was the one driving a vehicle when it was involved in a collision. Against that backdrop, Judge Woods reasoned as follows:

> [3] ICBC argues first that s. 16(1) of the *Small Claims Act* reflects a relaxed approach to the rules of evidence that is employed in this court and should be employed in this court. Undoubtedly, that section does confer jurisdiction on judges of this court to take a liberal and flexible approach to the rules of evidence in proper circumstances.
>
> [4] The question here is whether, given the crucially important character of the hearsay evidence that ICBC seeks to introduce, will the prejudice to Ms. Stone be offset sufficiently? Are considerations of necessity for the evidence and its reliability sufficient to persuade me that in all the circumstances the hearsay should be admitted?

> [5] It is trite law that all hearsay evidence is presumptively inadmissible. Accordingly, for ICBC to succeed on its preliminary application, it must either bring the statement within one of the common-law exceptions to the rule against hearsay or within the principled approach that the Supreme Court of Canada has outlined in what is sometimes referred to as the *Khan* trilogy and, more recently, in *R. v. Khelawon*.
>
> …
>
> [26] So, to summarize, on both of the issues of necessity and reliability, the case for admitting the out-of-court statement of Mr. Karesa, in my view, is not very strong. Mr. McDonald, in argument, stresses the prejudice that his client would suffer if the out-of-court statement were to be admitted. He says, echoing Mr. Moseley's submissions as to the relevance, that, yes, indeed, the statement is relevant. It is, *par excellence*, perhaps the most important piece of evidence in the case. Because it ranks so high in the arsenal that ICBC brings to this case, Mr. McDonald says, the court should be very hesitant to allow such a crucial piece of evidence to be admitted in circumstances where his client, Ms. Stone, is prevented from testing the reliability of that evidence through the mechanism of cross-examination.
>
> [27] It is true that s. 16 of the *Small Claims Act* allows for a more informal approach to be taken with respect to evidentiary matters than is taken in the Supreme Court and other courts. That is a legislated requirement that this court understands and respects, but it does not go so far in my view as to open the door to hearsay evidence for which a non-compelling case has been made for necessity, and for which the evidence of reliability is not particularly striking. Section 16 does not require that I relax the rules of evidence so far as to permit evidence of dubious necessity, somewhat questionable reliability, in circumstances where, as Mr. McDonald says in his argument, the prejudice to Ms. Stone would be very great indeed.

[48] In taking this approach, Woods P.C.J. acknowledged that s. 16 of the *Small Claims Act* gives the court some discretion to “relax the rules of evidence”, and that in deciding whether to exercise that discretion, the court must take into account the relevance of the evidence, its importance to the case, the reliability of the evidence or lack thereof, and the potential prejudice to the opposing party. In *Stone*, the evidence was an unsworn out-of-court statement made by a declarant whose account of the key event was in direct conflict to that of the claimant. Further, there was no ability to test the declarant’s assertions through cross-examination. In those circumstances, Woods P.C.J. was not prepared to relax the rules of evidence to admit the statement.

[49] In the case at bar, the spreadsheet was similarly a key piece of evidence in the case, and in this regard, it was highly relevant. However, unlike the situation in

Stone, in the present matter the trial judge considered that impugned evidence had an element of inherent reliability, in that the information contained within the document was obtained or derived from records created contemporaneously in the course of the claimant's business. What is more, there was an opportunity for the opposing party to test the evidence through cross-examination of the author, Mr. Skakun. The opposing party also had access to at least some of the underlying records, for the purposes of testing or challenging the accuracy of the spreadsheet. In the circumstances, I cannot say that the trial judge erred in finding the Quickbooks spreadsheet admissible under s. 16 of the *Small Claims Act*.

[50] Of course, that is not the end of the matter, because even where hearsay evidence is ruled admissible under s. 16 of the *Small Claims Act*, the judge must be mindful of the relevant hearsay dangers when deciding how much weight to give it. In this case, the trial judge found that the spreadsheet was incomplete and not entirely accurate, but placed some reliance upon it. The question becomes whether the trial judge's reliance upon this document was misplaced, having regard to the relevant hearsay dangers and the evidence as a whole. I will turn to that question next, acknowledging again that the trial judge's assessment of the evidence is entitled to great deference on appeal.

(4) Whether the Trial Judge Erred in Relying on the Quickbooks Spreadsheet to Find that the Claimant Did not Work All of the Hours for which She Had Been Paid

[51] It is important to acknowledge the limitations in the evidence relied upon by the claimant to prove its case at trial. First, Mr. Skakun himself had no direct knowledge of the hours Ms. Trejo worked or did not work, because he was not actively involved in the business at the time of Ms. Trejo's employment. Second, as noted above, the Quickbooks spreadsheet on which Pro-Align rested its case was incomplete in several important respects. Although the Quickbooks software had log in and log out capabilities, Ms. Trejo was not required to log her time as a condition of her employment. Further, Quickbooks was not the only software program

Ms. Trejo used in the course of her job. She also worked with ShopController and CRA software, neither of which were factored into the Quickbooks spreadsheet.

[52] The trial judge was alive to all of these limitations. The judge concluded that the Quickbooks spreadsheet was "not completely reliable" and did "not accurately represent the defendant's hours" of work. However, the judge went on to use the spreadsheet as a basis for what in my view were the two key aspects of her analysis of the hours Ms. Trejo actually worked.

[53] First, the judge noted that there were 29 days on which Ms. Trejo was paid for a full day's work, but for which there were "no hours recorded and no emails or files" in the Quickbooks spreadsheet. On this reasoning, the trial judge concluded that Ms. Trejo did not work at all on any of these 29 days.

[54] Second, the judge noted there were 31 days on which Ms. Trejo was paid for a full day's work, but the Quickbooks spreadsheet reflected "less than two hours" of work. From this, the judge reasoned that while Ms. Trejo may have worked on these days, she only did enough work to warrant being paid the statutory minimum of two hours per shift.

[55] Both of these conclusions rested principally if not entirely on the data recorded in the Quickbooks spreadsheets. Recall that the spreadsheet was a document created some 18 months after the fact, by a witness who had no direct knowledge of Ms. Trejo's work hours, based on an incomplete set of records. Even still, if this was all the evidence that was available to the judge, it might well have been within her purview as the trier of fact to reach the conclusions that she did.

[56] However, on appeal Ms. Trejo has pointed to other evidence, accepted as reliable by the trial judge in another context, which directly contradicts the trial judge's approach. In particular, in finding that Ms. Trejo had proven her counterclaim for work done in the period from 21 August 2017 to 14 October 2017, the trial judge considered and relied upon a "budget document" that had been created and maintained by Ms. Trejo in the course of her employment. The trial judge reasoned

that this document was admissible as a business record, created in the ordinary course of business, and further that its utility was not in proving the truth of its contents – that is, as proof that the tasks recorded on it were done – but rather, in proving that the entries on it were created when they were purported to have been created. In this way, the budget document was a contemporaneous record of the times when Ms. Trejo was actually engaged in doing work for Pro-Align. In contrast to Mr. Skakun's "Quickbooks spreadsheet" which was created after the fact, Ms. Trejo's "budget document" was created contemporaneously. Thus, despite the fact that the trial judge had serious concerns about the credibility of Ms. Trejo's *viva voce* testimony, the judge considered the budget document to be a reliable record of the times when Ms. Trejo worked, at least for the purposes of the counterclaim.

[57] What the trial judge's analysis of the evidence overlooked was that on many of the days when Mr. Skakun's Quickbooks spreadsheet recorded "no hours", and no emails, Ms. Trejo's budget document showed that she performed work-related tasks. In all, the budget document reflects that Ms. Trejo performed work-related tasks on 16 of the 29 days when the trial judge found, based on the Quickbooks spreadsheet, that Ms. Trejo did no work at all.[1] I therefore agree with Ms. Trejo's argument on appeal that the trial judge committed a palpable and overriding error in concluding that Ms. Trejo did not work on these days.

[58] This palpable and overriding error of fact speaks to a broader concern about the reliability and accuracy of the Quickbooks spreadsheet, and the manner in which the trial judge used it to conclude that the claimant had proven its case at trial. On more than half of the days when Mr. Skakun's after-the-fact document suggested that Ms. Trejo had done no work at all, Ms. Trejo's contemporaneous records reflected that Ms. Trejo had in fact performed work-related tasks. Thus, even though it was within the trial judge's purview to admit the Quickbooks spreadsheet under the "relaxed" standard of admissibility contemplated in s. 16 of the *Small Claims Act*, the

[1] 8 January 2018; 6 February 2018; 2, 7, 14, 15, 16, 19 March 2018; 9 April 2018; 11, 20, 27 July 2018; 30 August 2018; 13 September 2018; and 1, 5 October 2018.

judge made a palpable and overriding error in using it as a basis for finding that Ms. Trejo did not work on particular days.

[59] I agree with Ms. Trejo that the manner in which the trial judge used the Quickbooks spreadsheet had the practical effect of reversing the burden of proof, by requiring Ms. Trejo to prove that she had in fact done work, or in fact worked more than two hours, on days when the Quickbooks spreadsheet suggested that she had not. This approach not only produced a palpable and overriding error on the part of the trial judge in respect of the 16 days where Ms. Trejo had performed work-related tasks but the judge found to the contrary, it also worked a broader unfairness to Ms. Trejo at trial, as described below.

[60] In my view a number of factors coalesced to create an unfair situation in which, practically speaking, Ms. Trejo was required to disprove Pro-Align's claim. In particular: (i) the manner in which the spreadsheet was prepared, namely as a forensic reconstruction of hours worked; (ii) the trial judge's decision to admit the spreadsheet as a surrogate for the underlying records; and (iii) the trial judge's approach in focussing on specific days when there were no or minimal entries in the spreadsheet, all contributed to a situation in which, in a practical sense, the burden was shifted onto Ms. Trejo to rebut an inference that she did not work on these dates. And, since many of the specific dates were not put to Ms. Trejo in cross-examination, she did not tender any business records (aside from the budget document) to prove that she had done work on these specific dates.[2]

[61] Ms. Trejo further alleges on appeal that, in addition to the budget document, there were additional documents at her disposal that could have been tendered at trial to rebut the inference that she did not work on particular dates, and that she worked less then two hours on other dates. Ms. Trejo says she did not tender

[2] To be clear, in defending the main claim, it was not Ms. Trejo's burden to prove that she worked. However, as I have noted, that was the practical effect of the trial judge's reliance on the Quickbooks spreadsheet.

documents in relation to these specific dates because she was not aware or did not appreciate that these dates would be the focus of the trial judge's decision.

[62] There is no application before me to admit fresh evidence, so I cannot consider the records now relied upon by Ms. Trejo to prove her case or undermine the case advanced by Pro-Align at trial. However, in my respectful view, the failure to challenge Ms. Trejo in cross-examination on particular dates where she was alleged not to have worked or alleged to have worked less than two hours, coupled with the trial judge's admission of the Quickbooks spreadsheet as a surrogate for the underlying records, coupled with the trial judge's approach in relying on the absence of entries in the Quickbooks spreadsheet as *prima facie* evidence of a lack of work, all came together to place Ms. Trejo in a situation where she did not tender evidence of contemporaneous records, such as emails, invoices, and other documents, that might have been used to show that she actually worked on the dates in issue. In this regard, I simply rely on the references to additional evidence in Ms. Trejo's statement of argument on appeal as logical examples of documents that Ms. Trejo might have tendered.

[63] The effect of the trial judge's approach was to treat the Quickbooks spreadsheet as *prima facie* evidence of no work or minimal work on particular days. This approach was flawed, in a context where the Quickbooks spreadsheet was admitted as a surrogate for the underlying business records, and where Ms. Trejo was not given specific notice of the dates in such a manner as to allow her to tender contemporaneous records that might have contradicted the information in the Quickbooks spreadsheet. All of this simply highlights the lack of reliability in the spreadsheet, which formed the basis of the trial judge's conclusion that Pro-Align had proven its case against Ms. Trejo.

[64] I therefore accede to the argument that the trial judge made a palpable and overriding error of fact in finding that Ms. Trejo did not perform the hours worked, based principally if not entirely on the Quickbooks spreadsheet. In fact, there was another, contemporaneously-made record – the budget document – that directly

contradicted the Quickbooks spreadsheet. In the result, the judge's conclusion that Ms. Trejo did not work some 400 hours for which she had been paid cannot stand.

[65] Further, with one exception listed below, the *viva voce* evidence from Pro-Align's witnesses was unconvincing. Pro-Align's key witness, Mr. Skakun, had no first-hand knowledge of the hours Ms. Trejo worked or did not work. He only became involved in the business after Ms. Trejo left. For the most part, Pro-Align's other witnesses could offer nothing but anecdotal evidence of Ms. Trejo's work history.

[66] The sole exception is the testimony of Mr. Motz in relation to one particular block of time. The trial judge found Mr. Motz's evidence to be largely anecdotal or unhelpful, but did appear to rely on it to find that Ms. Trejo did not work on two particular days for which she had been paid, namely 17 and 18 May 2018.[3] However, in reaching this conclusion, the trial judge did not consult Ms. Trejo's budget document. The budget document reflects that Ms. Trejo performed some work-related tasks on 17 May 2018, but contains no reference to work done on 18 May 2018.

[67] Against this backdrop, it is hard to know what use could reasonably be made of Mr. Motz's testimony about 18 May 2018 on a proper assessment of the evidence as a whole. I consider it relevant that while Mr. Motz testified about other specific dates when Ms. Trejo allegedly did not work, the judge did not consider his evidence about those dates "sufficient to prove on a balance of probabilities that [Ms. Trejo] was paid more hours than she worked". Given the trial judge's failure to advert to the entries in Ms. Trejo's budget document on one of the two days, and given the judge's reluctance to base any conclusions of fact on Mr. Motz's evidence concerning other days addressed in his testimony, I would not allow the finding that Ms. Trejo did not work on 18 May 2018 to stand.

[3] In considering Mr. Motz's evidence about 17 and 18 May 2018, the trial judge also referenced an out of court statement of Mr. Bentley that he and Ms. Trejo were "going camping on the May long weekend", without a particularly thorough analysis of the admissibility of that hearsay statement. However, Ms. Trejo did not raise the admissibility of this evidence on appeal, and the trial judge may only have relied upon it to put Mr. Motz's evidence in context.

[68] Apart from the evidence I have just discussed about the weekend of 17 to 18 May 2018, the trial judge's conclusions as to the hours that Ms. Trejo did not work rested more or less entirely on the Quickbooks spreadsheet. The spreadsheet was incomplete and manifestly inaccurate when placed up against the budget document which the trial judge found to be admissible and reliable for other aspects of her analysis. I conclude that on a proper assessment of the evidence, Pro-Align failed to prove the entirety of its case.

(5) Whether the Trial Judge Erred in Reducing the Amount of Ms. Trejo's Counterclaim

[69] Ms. Trejo goes on to argue on appeal that the trial judge's flawed approach in relation to Pro-Align's claim also calls into question the judge's conclusion on the counterclaim. In particular, the trial judge reasoned that for the time period covered by Pro-Align's claim, Ms. Trejo only worked about one-half of the hours for which she had been paid. The trial judge then extended that finding to the counterclaim, to conclude that Ms. Trejo only worked half as much as she claimed to have worked during the time period covered by the counterclaim.

[70] I agree with Ms. Trejo that the trial judge's approach to the counterclaim can be called into question because it rested on her findings with regard to the main claim. However, the difficulty for Ms. Trejo on appeal is that the burden was on her to prove the counterclaim on a balance of probabilities. The trial judge considered Ms. Trejo's *viva voce* testimony and did not find her to be a credible witness. The trial judge relied on Ms. Trejo's budget document to satisfy herself that Ms. Trejo in fact worked during the counterclaim period, but the judge was not satisfied that Ms. Trejo worked as much as she claimed to have worked.

[71] On appeal, I am not in a position to substitute my view of Ms. Trejo's *viva voce* testimony in the place of the trial judge's view. The burden was on Ms. Trejo to prove her counterclaim, and the trial judge was only satisfied that Ms. Trejo worked half as much as she claimed to have worked. Although I have concluded that the trial judge erred in her reliance on the Quickbooks spreadsheet to find that Pro-Align

had proven its claim, this does not clear the way for me to rule that Ms. Trejo proved her counterclaim to any greater extent than that found by the trial judge. I therefore cannot accede to Ms. Trejo's argument on this ground of appeal.

Conclusion

[72] I would allow the appeal in part, and set aside the trial judge's finding on Pro-Align's claim. I would not disturb the trial judge's finding on Ms. Trejo's counterclaim. In the result, Ms. Trejo is entitled to judgment in her favour, in the amount of $3,200. Ms. Trejo is also entitled to costs of the appeal, at Scale B.

"Riley J."