

CANADA / JUDGMENT

Bahga Enterprises Ltd. v. Nijjar

2022 BCSC 1717

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1717 Bahga Enterprises Ltd. v. Nijjar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bahga Enterprises Ltd. v. Nijjar,

2022 BCSC 1717

Date: 20221004

Docket: S150761

Registry: New Westminster

Between:

Bahga Enterprises Ltd., Parmjit Singh Kang and Dr. Parmjit Singh Kang Inc.

Plaintiffs

And

Avtar Singh Nijjar and AV Finance Ltd.

Defendants

- and -

Docket: S168102

Registry: Vancouver

Between:

Parmjit Singh Kang and Dr. Parmjit Singh Kang Inc.

Plaintiffs

And

Avtar Singh Nijjar, AV Finance Ltd., Parveen Nijjar,

Parveen Nijjar as the Administratrix of the Estate of Anuraj Nijjar and

The Estate of Anuraj Nijjar, Deceased

Defendants

Before: The Honourable Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiffs:

D. Barker

K. Iacono

Counsel for the Defendants:

G. Allen

K. Meyer

V. Baylis, Articled Student

Place and Date of Trial/Hearing:

New Westminster, B.C.

April 20-22 and 25-28, 2022

Place and Date of Judgment:

New Westminster, B.C.

October 4, 2022

Introduction

- [1] Dr. Parmjit Singh Kang and Mr. Avtar Singh Nijjar are business associates who engaged in numerous financial transactions over many years. The majority of the transactions involved Mr. Nijjar, or his company AV Finance Ltd. ("AVF"), loaning money to Dr. Kang, or his companies Dr. Parmjit Singh Kang Inc. ("Kang Inc.") and Bahga Enterprises Ltd. ("Bahga"), for the purpose of funding real estate development projects.
- [2] While the value of these transactions is in the hundreds of thousands of dollars, the matters in dispute in this litigation are relatively small compared to the transactions themselves, and are the subject of two separate actions that were heard together:

- a) In Action No. S168102, Vancouver Registry (the "Vancouver Action"), Dr. Kang and Kang Inc. have sued Mr. Nijjar, AVF and the estate of Mr. Nijjar's daughter Anuraj Nijjar, as represented by its administrator, Parveen Nijjar, who is Mr. Nijjar's wife. In this action, the plaintiffs claim that they are entitled to some or all of approximately \$320,000 being held in trust, which are sales proceeds from a property formerly owned by Dr. Kang against which a mortgage had been registered in the name of Anuraj Nijjar (the "Anuraj Mortgage"). The plaintiffs claim that the mortgage was fully paid off and that they are therefore entitled to the balance of the sales proceeds. The defendants allege that the mortgage was not paid and that the estate of Anuraj Nijjar is therefore entitled to the funds in trust;
 - b) In Action No. S150761, New Westminster Registry (the "New Westminster Action"), Dr. Kang, Kang Inc. and Bahga have sued Mr. Nijjar and AVF claiming that they overpaid the defendants on certain loans (the "Disputed Loans") and they seek recovery of the overpayment pursuant to the doctrine of unjust enrichment.
- [3] As a general comment at the outset, this case provides yet another stark reminder of the importance of fully and accurately documenting commercial transactions, whether those transactions involve friends, family or arm's length parties. The challenges presented here by the absence of clear documentation are compounded by the fact that the transactions in issue took place many years ago. Additionally, the memories of the two principal players, Dr. Kang and Mr. Nijjar, are incomplete and, as I will discuss further below, there are significant credibility and reliability issues with the evidence of both.

Background

The Parties

- [4] The principal plaintiff in both actions, Dr. Kang, is a specialist physician in the field of endocrinology. He originally obtained his medical training in India and then qualified in Canada after immigrating in 1982.
- [5] In addition to his medical practice, since the late 1980's, Dr. Kang has been involved in real estate development. He began by purchasing lots and older homes for redevelopment and later expanded into developing multi-unit properties. Dr. Kang testified that before the market crash of 2008, he had upwards of \$90 million worth of real estate holdings.
- [6] Dr. Kang owns and controls two companies, Kang Inc. and Bahga, through which he conducts some of his business. As is often the case with closely held companies, the financial affairs of the owner and the corporate entities are highly intertwined.
- [7] Mr. Nijjar is a businessman who has been involved in the money lending business since the early 2000's. Mr. Nijjar incorporated AVF in 2007 to function as the corporate vehicle for his business.

Dr. Kang and Mr. Nijjar's Dealings

- [8] As noted above, Dr. Kang and Mr. Nijjar and/or their respective companies, have been involved in numerous transactions spanning many years. It is not necessary to go through the entire history of their dealings, but it is useful to highlight some.
- [9] According to Dr. Kang, while he regularly obtained conventional bank financing for his real estate developments, he often needed additional or quicker money and would use private lenders such as Mr. Nijjar. Some of the loans from Mr. Nijjar were secured by mortgages and others were reflected in promissory notes. Some were done very informally with virtually no loan documentation or security.
- [10] Mr. Nijjar testified that he used both his own personal money as well as money provided by third party investors to fund the loans to Dr. Kang.
- [11] According to Mr. Nijjar, in September 2005, he and Dr. Kang agreed to consolidate a number of outstanding loans into a single loan for \$700,000, which was evidenced in a promissory note dated September 2, 2005 that each signed. Mr. Nijjar reviewed a ledger listing a number of loans that made up the \$700,000 total.
- [12] Subsequently, in July 2006, Mr. Nijjar and Dr. Kang agreed to consolidate some additional outstanding loans totalling \$765,000. Both signed a document dated July 31, 2006 in which Dr. Kang acknowledged a number of loans that made up the \$765,000 and the \$700,000 debt reflected in the September 2, 2005 promissory note. Notably, neither document listed the Anuraj Mortgage as included in the consolidated debts.
- [13] Between April 2006 and January 2007, Dr. Kang paid Mr. Nijjar \$1,465,000 to retire the consolidated debts referred to above. One of the payments was a \$200,000 bank draft from Dr. Kang to Mr. Nijjar dated October 4, 2006. This payment is central to the dispute underlying the Vancouver Action in that Dr. Kang alleges that this payment was towards the loan secured by the Anuraj Mortgage, whereas Mr. Nijjar alleges the payment was concerned with other unrelated loans.

The Anuraj Mortgage

- [14] That brings me to the Anuraj Mortgage. Dr. Kang characterizes the transaction as a loan from Mr. Nijjar through his daughter, who Dr. Kang says he never met. For his part, Mr. Nijjar says he wanted to involve Anuraj in his business so he advanced money to her and she then made the loan to Dr. Kang.
- [15] There were in fact two loans: one for \$120,000 and the other for \$80,000. The \$120,000 loan was secured by the Anuraj Mortgage registered against two development properties in Surrey, owned by Dr. Kang:
- a) 025-966-227, legally described as Lot 14 Section 22, Township 2, NWD Plan BCP 11601 ("Lot 14"), and

- b) 025-966-090, legally described as Lot 17 Section 22, Township 2, NWD Plan BCP 11601 ("Lot 17").
- [16] The \$120,000 mortgage was executed on December 2, 2004. It names Kang Inc. as the borrower and Anuraj Nijjar as the lender. The stipulated interest rate was 15% per annum and the mortgage provided for interest payments of \$1,500 per month payable on the first day of each month. The first payment was to be made on January 1, 2005 and the last payment on December 1, 2005.
- [17] The \$80,000 loan was also secured by a mortgage; however the mortgage was never registered. It stipulated an interest rate of 14% per annum and monthly interest only payments of \$933.33 per month payable on the 27th day of each month. The \$80,000 loan is not in issue in this litigation.
- [18] There is a dispute in the evidence about payment of interest under the \$120,000 loan. It is common ground that Dr. Kang made four payments of \$1,500 each by way of cheques made out to Anuraj Nijjar dated the first day of each month, from January-April, 2005. Thereafter, Dr. Kang testified that he was directed by Mr. Nijjar to make the payments to a Mr. Kulwant Bhangu. Dr. Kang said he paid a total of \$27,600 to Mr. Bhangu from May 1, 2005 to December 1, 2006. The majority of payments were in the amount of \$1,500, although the last six payments were for \$1,600.
- [19] I note that the interest payments made total \$33,600, whereas the interest payments required under the \$120,000 loan (see para. 16 above) total \$33,000. This total reflects the fact that the loan was not paid off in one year as originally contemplated. It also lends some support to Dr. Kang's position that all of the payments made, including those to Mr. Bhangu, were in respect of the Anuraj Mortgage and that the additional \$600 was to account for the fact that some of the interest payments had been late.
- [20] Dr. Kang testified that he also paid off the principal amount of \$200,000 of the two Anuraj loans by way of a bank draft dated October 4, 2006 payable to Mr. Nijjar (see para. 13 above).
- [21] In addition to the interest payments, Dr. Kang made four payments to Anuraj Nijjar for \$3,000 each on August 7, September 7, October 7 and December 5, 2006. Dr. Kang's evidence about those payments was vague. He agreed that the payments could have been towards the Anuraj Mortgage, but he had no explanation for why he would have made payments in October and December 2006, after he allegedly paid off the principal amount.

The HSBC Foreclosure

- [22] In or around August 2005, Dr. Kang advised Mr. Nijjar that Kang Inc. was obtaining a loan from HSBC which was to be secured by mortgages registered against Lot 14 and another lot ("Lot 1"). As a result, Dr. Kang requested that Anuraj's mortgage be discharged from Lot 17. On August 11, 2005, Anuraj executed a discharge of the mortgage registered against Lot 17.

- [23] Anuraj passed away on February 22, 2009 and on November 18, 2011, Parveen Nijjar, Mr. Nijjar's wife and Anuraj's mother, was granted letters of administration for Anuraj's estate.
- [24] On September 9, 2010, HSBC commenced foreclosure proceedings against Kang Inc. with respect to its mortgage registered against Lots 1 and 14. HSBC's mortgage registered against Lot 14 was second in priority behind the Anuraj Mortgage. Despite this, Anuraj's estate was not named as a party to the foreclosure proceeding.
- [25] Dr. Kang testified that he was surprised to learn that the Anuraj Mortgage was still registered as he believed he had repaid the principal and interest. Dr. Kang and Kang Inc. did not file a response in the HSBC foreclosure proceeding.
- [26] On November 19, 2010, HSBC obtained an order nisi which provided that the total amount owing by Kang Inc. to HSBC was \$651,258.57. Again, Dr. Kang and Kang Inc. did not appear at or oppose HSBC's application.
- [27] On May 9, 2011, approximately four-and-a-half years after Dr. Kang says he paid off the Anuraj Mortgage, he emailed Mr. Nijjar asking for the payout amount on that mortgage.
- [28] On May 25, 2011, Dr. Kang and Mr. Nijjar both signed a handwritten note stating that they had agreed to put \$319,000 in a lawyer's trust account pending determination of the "exact amount and payment details". The \$319,000 represented net sales proceeds from the sale of Lot 14 in the HSBC foreclosure proceeding.
- [29] Dr. Kang then swore an affidavit dated June 21, 2011 in which he deposed that he had fully repaid the Anuraj Mortgage, although he adduced no evidence to support that repayment in his affidavit. He also did not identify the October 4, 2006 bank draft as the repayment.
- [30] On July 13, 2011, Master Baker granted an order approving the sale of Lot 14. That order included a term that the \$319,000 would be held in Dr. Kang's lawyer's trust account subject to the determination of various rights and priorities, including any amounts owing under the Anuraj Mortgage. Of note, the Baker order stipulated that the \$319,000 was to remain in trust pending further order of the court or agreement by all interested parties, who were defined in the order to include other creditors of Dr. Kang and Kang Inc.
- [31] It is this \$319,000, now increased to \$323,100.83 due to accumulated interest, that is the subject of the Vancouver Action.

The Nijjar Promissory Note and Settlement Agreement

- [32] In October 2012, Dr. Kang and Mr. Nijjar began discussing a potential deal that would permit release of the \$319,000 held in trust. This deal involved Amarjot Kang, who is Dr. Kang's son.
- [33] On November 7, 2012, Dr. Kang and Mr. Nijjar signed a handwritten document (the "Nijjar Promissory Note") that stated:

I Avtar S Nijjar hereby promise to pay Amarjot S Kang \$140,000 as soon as the full amount of \$319,000 is transferred into the estate of Anuraj K Nijjar.

In cross-examination, Dr. Kang acknowledged that neither he nor Kang Inc. had any claim to the \$140,000 intended to be paid to his son. Rather, it is apparent that the money was to be paid to Dr. Kang's son so as to keep it away from creditors of Dr. Kang.

[34] Also on November 7, 2012, Dr. Kang signed a handwritten document (the "Settlement Agreement") stating:

I Dr. [Parmjit] Singh Kang hereby agree to unconditionally release full amount of \$319,000 being held in my lawyer David Taylor & Co's Trust account to Barry Promislow lawyer for the Estate of Anuraj K Nijjar immediately. I have no more claim.

[35] Mr. Nijjar testified that this arrangement was related to other agreements he and Dr. Kang reached at the same time, including an agreement concerning a foreclosure proceeding AVF had brought against Dr. Kang and Kang Inc. in respect of a mortgage registered against another property located in Surrey. It is not necessary to discuss these other alleged agreements.

[36] Mr. Nijjar subsequently reneged on this agreement. Despite signing the Promissory Note, he told Dr. Kang that he could not in fact pay Amarjot but could pay the money to Dr. Kang. At trial, he tried to explain that there would be adverse tax consequences for Anuraj's estate if the money was paid to Amarjot rather than Dr. Kang.

[37] On November 27, 2012, Parveen Nijjar, in her capacity as administrator of the estate of Anuraj Nijjar, brought an application on behalf of Anuraj's estate and obtained an order from Master Muir that included the following terms:

1. The sum of \$319,000 as paid into the trust account of Taylor Nakai Litigation LLP pursuant to the Order of Master Baker dated July 13th, 2011 together with all interest accrued thereon be paid out to Barry Joseph Promislow in Trust for the absolute benefit of the applicant, Parveen Nijjar, Administrator of the estate of Anuraj Nijjar.
3. Upon receipt of the said money in trust by Barry Joseph Promislaw, the applicant shall execute and deliver to the Respondent Dr. Parmjit Kang Inc. a full and final release of the subject mortgage (the discharge of which in return for the \$319,000 paid from sale was ordered by Master [Baker] on July 14th, 2011).

[38] Neither Dr. Kang nor Kang Inc. appeared on or opposed this application. On December 3, 2012, Dr. Kang's counsel transferred \$323,100.83 to Mr. Promislow on an undertaking not to disburse the funds until Anuraj's estate provided a final release as provided in Master Muir's order.

[39] On December 24, 2012, Parveen Nijjar, on behalf of Anuraj's estate, executed a release in favour of Dr. Kang and Kang Inc. That release provided that in consideration of the payment of the \$319,000 held in trust plus accumulated interest:

PARVEEN NIJJAR in her capacity as Administrator of the Estate of ANURAJ NIJJAR does hereby for herself in such capacity as well as for any other person who may be interested in the said estate HEREBY REMISE, RELEASE AND FOREVER DISCHARGE DR. PARMJIT SINGH KANG INC., its officers, agents and employees, and assigns together with DR. PARMJIT SINGH KANG, his heirs, executors, administrators and assigns OF AND FROM ALL CLAIMS, CAUSES OF ACTION, SUITS AND DEMANDS whatsoever which arise out of the execution and delivery and registration of the said mortgage including repayment of principal and payment of interest and penalties all of which shall be and are hereby absolutely discharged.

[40] In January 2013, Amarjot Kang brought an action against Mr. Nijjar claiming the \$140,000 promised by Mr. Nijjar. Subsequently, on September 9, 2013, Amarjot's action was dismissed by way of a consent dismissal order. In his evidence at trial, Dr. Kang testified that Amarjot in fact had nothing to do with this claim and that it was him and his wife who instructed counsel.

The Disputed Loans

[41] Dr. Kang claims that the Disputed Loans total \$89,014.39, and consist of personal loans from Mr. Nijjar, certain Visa loans, and loans from AVF.

The Visa Loans

[42] At various times in 2004, 2005 and 2006, Mr. Nijjar used his Visa card to make payments on behalf of Dr. Kang (the "Visa Loans"). Many of these payments were for construction materials and other expenses related to Dr. Kang's real estate developments. As described above, Mr. Nijjar also made a number of personal loans to Dr. Kang, some of which were secured by mortgages and others that were unsecured.

[43] With respect to the Visa Loans, Dr. Kang's evidence was somewhat vague about the parties' arrangement, as was the case with his evidence generally about his dealings with Mr. Nijjar. For his part, Mr. Nijjar testified that when he paid a bill for Dr. Kang using his Visa card, Dr. Kang would typically repay the loan within the "grace period". If Dr. Kang failed to do so, Mr. Nijjar would charge Dr. Kang interest of 19.5% which corresponded to the interest rate on his credit card.

[44] Dr. Kang's position in the New Westminster Action that he overpaid on the Visa loans is based almost entirely on the analysis conducted by Jennifer Blacklock, a forensic accountant retained by Dr. Kang. I will return to her evidence below.

The AVF Loans

- [45] In 2007 and 2008, AVF made various loans to Bahga, which were secured by way of loans registered against properties owned by Bahga
- [46] As an example of the rather loose business arrangements between Dr. Kang and Mr. Nijjar and their respective corporate entities, in January 2007, Dr. Kang signed a document acknowledging that he had borrowed a total of \$1,000,000 by way of personal loans from AVF. While the document signed by Dr. Kang stated that he had personally borrowed the money, the loans were secured by way of a mortgage that named Bahga as the borrower. When asked about this, Mr. Nijjar said that while he loaned the money to Dr. Kang, he left it up to Dr. Kang as to the appropriate form of security.

Dr. Kang made payments against this mortgage, and, in addition, Dr. Kang transferred three units in one of his developments to Mr. Nijjar to further pay down the debt.

- [47] On January 26, 2011, AVF filed a petition seeking to foreclose on a second mortgage registered against property located at 12312-72nd Avenue in Surrey which was owned by Dr. Kang and his wife. Dr. Kang and Kang Inc. were named as respondents in the foreclosure petition, along with certain other creditors with interests registered against the property. AVF claimed that it was owed \$354,019.56 plus interest under the mortgage.
- [48] As appears to be typical of Dr. Kang's practice, neither he nor Kang Inc. responded to the petition.
- [49] On March 24, 2011, Master Keighley granted an order nisi in favour of AVF confirming that \$362,028.60 plus interest was due and owing under AVF's mortgage. Subsequently, despite not having appeared on or opposed the order nisi, Dr. Kang and Kang Inc. brought an application seeking to have AVF's mortgage discharged from title to the 72nd Avenue property on the basis that the mortgage had been fully paid. That application was dismissed by Master Keighley on September 27, 2011.
- [50] As will be seen, the defendants take the position that Master Keighley's order is determinative of what was owing to AVF and is thus fatal to the plaintiffs' claim that they overpaid the AVF loans.

The Blacklock Reports

- [51] Jennifer Blacklock is a forensic accountant retained by Dr. Kang to review records relating to the Anuraj Mortgage and the Disputed Loans and to opine on payments made by Dr. Kang towards those debts.
- [52] In a report dated November 10, 2020, Ms. Blacklock opined that Dr. Kang repaid the \$120,000 principal amount of the Anuraj Mortgage plus interest of \$33,600 by December 2006. She also opined that Dr. Kang then paid \$323,100.83 in December 2012 against the Anuraj Mortgage. These again are the funds paid into trust pursuant to Master Baker's order.

- [53] In a report dated January 25, 2021 dealing with the Disputed Loans, Ms. Blacklock opined that Dr. Kang overpaid Mr. Nijjar and AVF by a total amount of \$212,219.49. Ms. Blacklock subsequently prepared an addendum report dated April 13, 2022 based upon new documents that had been produced by the defendants. Based on her analysis as set out in the addendum report, Ms. Blacklock revised her opinion about Dr. Kang's overpayment of the Disputed Loans from \$212,219.49 to \$89,014.39. That amount comprises an alleged overpayment on the Visa Loans and other personal loans from Mr. Nijjar totalling \$53,536.77, and an overpayment of the AVF loans totalling \$35,477.62.
- [54] The defendants take issue with Ms. Blacklock's reports on several grounds. For example, they note that the reports do not comply with Rule 11-6(1)(c) in that they do not set out the instructions provided to Ms. Blacklock by Dr. Kang's counsel. The defendants also submit that the reports fail to identify the factual assumptions on which Ms. Blacklock's opinions are based, as required by Rule 11-6(1)(f)(i), and fail to list all documents she relied on, as required by Rule 11-6(1)(f)(iii). Lastly, the defendants submit that Ms. Blacklock engaged in improper fact-finding and that she was not impartial.
- [55] I do not agree that Ms. Blacklock was not impartial or that she strayed into advocacy on behalf of Dr. Kang. I found her to be measured and professional in her evidence. I also do not agree that she improperly engaged in fact-finding. It is the very nature of forensic accounting evidence that the accountant offers opinions about the proper characterization of certain transactions. In this sense, an accountant like Ms. Blacklock is more akin to a fact witness, albeit one who draws on her training and expertise to support her findings.
- [56] In short, many of the defendants' objections to Ms. Blacklock's evidence are misplaced. However, the one central objection that has merit is that many of the assumptions relied on by Ms. Blacklock were not established by evidence led at trial. Failure to establish the facts and assumptions on which an expert opinion is based substantially diminishes the weight that can be attached to that opinion: *R. v. J.-L.*, 2000 SCC 51 at para. 59; *Blackwater v. Plint*, 2001 BCSC 997 at paras. 347-349, rev'd on other grounds 2005 SCC 58.
- [57] I will return to this point below when dealing with the plaintiffs' claims in the two actions.

Credibility and Reliability

- [58] Numerous authorities have discussed the principles governing the assessment of credibility: see in particular *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357, 1951 CanLII 252 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, aff'd 2012 BCCA 296, leave to appeal ref'd 35006 (7 March 2013). In *Bradshaw*, Justice Dillon held that conflicting testimony should be assessed in light of the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (at para. 187, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13, 1993 CanLII 7140 (Q.B.)).

- [59] It is important to distinguish between credibility and reliability, which are different concepts. Credibility refers to the veracity of a witness's testimony whereas reliability is concerned with the accuracy of the testimony: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.).
- [60] Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93, 1996 CanLII 207; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 44, 2005 CanLII 253 (Ont. C.A.).
- [61] As I alluded to at the outset, there are credibility and reliability issues with the evidence of both Dr. Kang and Mr. Nijjar. The reliability concerns flow in large part from the absence of documentation and the inability of Dr. Kang and Mr. Nijjar to recall pertinent details of many of their transactions. Dr. Kang in particular was unable to recall many of the loans in issue, let alone relevant terms like duration and interest rate. Mr. Nijjar was also vague on many important details and both resorted to speculation to attempt to fill in gaps in their memory.
- [62] In terms of credibility, both Dr. Kang and Mr. Nijjar often failed to answer questions directly, defaulting instead to scripted narratives that better fit their version of events. Perhaps most troubling, both exhibited a willingness to sign documents with little or no apparent regard for the truth or accuracy of the documents.
- [63] As a result, I have approached the evidence of both Dr. Kang and Mr. Nijjar with considerable caution.

Analysis

The Vancouver Action

- [64] In the Vancouver Action, Dr. Kang seeks to recover the whole of the approximately \$320,000 held in trust pursuant to the orders of Master Baker and Master Muir. Alternatively, he seeks payment of the \$140,000 that was to be paid to his son Amarjot under the Nijjar Promissory Note.
- [65] There are numerous problems with Dr. Kang's claim. First, the claim is premised on the fact, as alleged by Dr. Kang, that the Anuraj Mortgage was paid off by way of the \$200,000 bank draft to Mr. Nijjar dated October 4, 2006 and the interest payments described in paras. 18 and 19 above.
- [66] With respect to the interest payments, I accept Dr. Kang's evidence that he made the payments as directed by Mr. Nijjar, including making most of the payments to Mr. Bhangu. That is consistent with the evidence about how Dr. Kang and Mr. Nijjar did business over the years. In contrast, much of Mr. Nijjar's evidence about the Anuraj Mortgage was difficult to accept. The loan underlying the mortgage was clearly a loan from Mr. Nijjar. Whatever

reason he may have had for putting the mortgage in the name of his daughter, there is no evidence to suggest that she had any more than a passing involvement in the loan transaction. Certainly, there is no evidence to support Mr. Nijjar's position that he effectively loaned the money to Anuraj, who then loaned it to Dr. Kang. Therefore, I reject Mr. Nijjar's position that the interest payments to Mr. Bhangu do not constitute payments towards the Anuraj Mortgage.

- [67] However, I am unable to find that Dr. Kang repaid the principal amount on the Anuraj Mortgage of \$120,000 by way of the \$200,000 October 4, 2006 bank draft. As described in paras. 11-13, that payment was part of a series of payments totalling \$1,465,000 that were paid to retire a number of personal loans from Mr. Nijjar to Dr. Kang as consolidated by way of the September 2, 2005 promissory note and July 31, 2006 debt acknowledgement document. Many of those loans were specifically identified yet there is nothing in the evidence to indicate that the \$120,000 loan underlying the Anuraj Mortgage was included in those consolidated debts.
- [68] Ms. Blacklock's report does not assist Dr. Kang on this issue as she simply assumed, based on information from Dr. Kang, that the October 4, 2006 payment was intended to go towards both the Anuraj Mortgage and the other \$80,000 loan. That assumption however was not established on the evidence. As discussed in para. 55 above, absent evidence to establish this assumption, it carries no weight.
- [69] Further, the issue of what was owing, or not, on the Anuraj Mortgage was conclusively determined in the HSBC foreclosure proceeding. As described in paras. 37-39 above, pursuant to the terms of Master Muir's order dated November 27, 2012, the approximately \$320,000 held in trust was ordered to be paid to the solicitor for Anuraj's estate on the condition that the funds not be disbursed until such time as the estate executed a full and final release in favour of Dr. Kang and Kang Inc. That occurred on December 24, 2012.
- [70] Kang Inc. was a party to the HSBC foreclosure proceeding. Had Kang Inc. and/or Dr. Kang been of the view that there was nothing owing on the Anuraj Mortgage, they had every opportunity to advance that position in the proceeding. They did not do so. In my view, it would be an impermissible collateral attack on the orders made in the foreclosure proceeding, and therefore an abuse of process, for Dr. Kang to now seek to essentially relitigate the foreclosure proceeding.
- [71] This brings me to the Settlement Agreement. Dr. Kang alleges that Mr. Nijjar repudiated the agreement when he refused to pay Amarjot Kang the \$140,000. Dr. Kang submits that the repudiation was accepted when Amarjot Kang filed the consent dismissal order dismissing his action against Mr. Nijjar on September 9, 2013. According to Dr. Kang, that signalled Amarjot's intention to no longer be bound by the Settlement Agreement. Thus, claims Dr. Kang, he is entitled to claim the entire amount in trust.
- [72] I am unable to accept Dr. Kang's position for several reasons:

- a) The acceptance of the repudiation is alleged to have occurred on September 9, 2013 when the consent dismissal order was filed in Amarjot's action. That is also the date on which the limitation period began to run for bringing an action based upon the alleged repudiation: *Glenn Schnarr & Associates Inc. v. Vector (Georgetown) Limited*, 2019 ONCA 1012 at para. 33. Under the Limitation Act, S.B.C. 2012, c. 13, the general two-year limitation period applies to this claim (see s. 6). Given that the Vancouver Action was not commenced until September 2, 2016, the claim is statute barred.
 - b) Even if the alleged repudiation was accepted and the action commenced in time, a repudiation does not result in rescission of the contract or a finding that the contract was void ab initio. Rather, upon acceptance of a repudiation, the contract is terminated, the parties are excused from prospective obligations and either party may sue for damages based on those prospective obligations: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at paras. 40-41. Here, the plaintiffs in the Vancouver Action, Dr. Kang and Kang Inc., are not entitled to damages in that neither was entitled to receive any money under the Settlement Agreement or the Nijjar Promissory Note.
 - c) The party who was entitled to receive money under the Settlement Agreement, Amarjot Kang, commenced an action to recover the \$140,000 but then dismissed that action by way of a consent order. It was a term of that order that the dismissal was "for all purposes of the same force and effect as if judgment had been pronounced at the trial of this action upon its merits". In other words, the order constituted a final determination of Amarjot's claim under the Settlement Agreement. For Dr. Kang to now attempt to relitigate the claim under the Settlement Agreement again amounts to an abuse of process, particularly given his own evidence that Amarjot had nothing to do with the claim and that it was Dr. Kang who instituted the claim and who agreed to its dismissal.
- [73] The defendants have raised a number of additional defences to the Vancouver Action. However, it is unnecessary to address those defences, as I dismiss Dr. Kang's claims. The one defence I will comment on is the defendants' allegation that the Settlement Agreement and the Nijjar Promissory Note constitute an illegal contract because Dr. Kang was attempting to divert funds from the HSBC foreclosure to his son and away from other creditors. As indicated, it is not necessary to decide this issue, but I would note that it lies ill in the mouth of Mr. Nijjar to allege illegality of an agreement that he freely and knowingly entered into.
- [74] For all of the above reasons, the plaintiffs' claims in the Vancouver Action are dismissed.

The New Westminster Action

- [75] In the New Westminster Action, Dr. Kang, Kang Inc. and Bahga seek to recover alleged overpayments of the Disputed Loans made by Mr. Nijjar and AVF. It is useful to note that in the original notice of civil claim ("NOCC") filed April 22, 2013, the plaintiffs limited their claim to alleged overpayment of loans between 2008 and 2011. However, when the action came on for trial on February 15, 2016, they applied to amend the NOCC to include loans

dating back to 2003. Justice Warren permitted the amendments and adjourned the trial. As part of her reasons (*Bahga Enterprises Ltd. v. Nijjar*, 2016 BCSC 2747), she directed the plaintiffs to specifically plead that the claims were subject to a ten-year limitation period (at para. 21).

- [76] The plaintiffs then filed an amended notice of civil claim ("AN OCC") on February 29, 2016 in which they advanced claims for overpayment of loans dating back to 2003. The AN OCC purports to identify specific loans in issue, but it fails to plead particulars about most of the loans including the parties to the loans, the specific dates, the term of the loan and the applicable interest rate. While the overpayment claim advanced at this trial totals approximately \$89,000, the AN OCC pleads overpayment of loans totalling \$578,515. The loans under the AN OCC include both personal loans from Mr. Nijjar and those from AVF.
- [77] Dr. Kang could not explain this difference, apart from a general suggestion that new information had come to light.
- [78] Dealing first with the AVF loans, I agree with the defendants that the issue of what was owing under those loans was conclusively determined in the AVF foreclosure proceeding and that the current claim constitutes an impermissible collateral attack on Master Keighley's order. The doctrine of collateral attack was described by the Supreme Court of Canada in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 71 as follows:

The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *D. J. Lange*, *The Doctrine of Res Judicata in Canada* (2000), at pp. 369-70). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at p. 599, this Court described the rule against collateral attack as follows:

It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

- [79] The doctrine of collateral attack may be properly applied in a subsequent proceeding to an order nisi in a foreclosure matter. That was the case in *HSBC Bank Canada v. Ba-Oose, Inc.*, 2011 BCSC 4, where Justice Willcock, as he then was, said at paras. 71-73:

- [71] The court should neither entertain an action premised upon a state of facts that could not exist consistently with a prior determination of the court nor hear a plaintiff seeking relief that could not be granted consistently with a prior determination of the court: see *Mohl v. University of British Columbia*, 2004 BCSC 1238; *Van De Mortel v. Bank of Montreal*; and *Hoque v. Montreal Trust Co. of Canada*. Such a claim constitutes a collateral attack and abuse of process.
- [72] In the case at bar, as in 420093 B.C. Ltd. v. Bank of Montreal (1995), 1995 CanLII 6246, 128 D.L.R. (4th) 488 (Alta. C.A.), the plaintiff impugns the Bank's entitlement to seek repayment of the loan secured by the mortgage upon which it has judgment. Dr. Metros claims to have entered into the mortgage loan on the basis of a misrepresentation and claims to have entered into the renewals of the mortgage under duress. These allegations should have been raised in defence to the claim for judgment on the mortgage. Those issues do not properly arise only in relation to the amount owing under the mortgage as interest, and are not matters for determination by the Registrar on a reference.
- [73] Had the matters which are the substance of this Stay Action been raised in defence to the foreclosure, they would have gone to the root of the Bank's claim and put in issue the Bank's right to an order nisi, and to judgment under the mortgage. This attempt to relitigate issues already decided or deemed to have been decided amounts to an abuse of process and is barred.
- [80] Dr. Kang and Kang Inc. were parties to the AVF foreclosure proceeding but chose not to respond. It is not open to them, in a wholly separate proceeding, to argue that not only was the mortgage in issue fully paid off, they in fact overpaid. I would add that, as noted in para. 49 above, Dr. Kang's application to discharge the AVF mortgage on the basis that it was fully paid was dismissed by Master Keighley on September 27, 2011.
- [81] The plaintiffs' claim with respect to the alleged overpayment of the AVF loans is therefore dismissed.
- [82] In terms of the Visa and personal loans, the plaintiffs' claim again relies almost exclusively on Ms. Blacklock's report as Dr. Kang was unable to recall many of the relevant details of the various loans.
- [83] It is unnecessary to consider Ms. Blacklock's findings, however, as I agree with the defendants that the claims of overpayment on the personal and Visa loans are statute barred.
- [84] The parties agree that it is the former Limitation Act, R.S.B.C. 1996, c. 266 that applies given that the facts giving rise to the claims occurred prior to June 1, 2013, the date on which the new Limitation Act, S.B.C. 2012, c. 13 came into effect.

- [85] As noted above, Justice Warren required the plaintiffs to specifically plead a ten-year limitation period in the ANOCC in respect of the loans dating back to 2003, however, the claims in respect of those loans do not fall within s. 3(3) of the former Act. Rather, the claims are subject to the general six year limitation period under s. 3(5). The plaintiffs did not seriously contend otherwise at trial.
- [86] In the ANOCC, the plaintiffs plead that the personal loans from Mr. Nijjar were fully paid, and indeed overpaid, by January 2007 when Dr. Kang made a payment of \$300,000 to Mr. Nijjar. With respect to the Visa Loans, the ANOCC pleads a final payment on those loans of \$50,000 to Mr. Nijjar on November 20, 2007. (I note that at trial, the plaintiffs argued that the ultimate overpayment on both the personal loans and the Visa Loans occurred by way of the \$300,000 payment made to Mr. Nijjar on January 17, 2007. This further demonstrates the inconsistency of the plaintiffs' claims).
- [87] Assuming the limitation period on the claims to overpayment commenced running on the date of the final payment, the limitation period with respect to the personal loans expired in January of 2013, and for the Visa Loans, at the latest in November of 2013. However, these claims were not brought until the ANOCC was filed on February 29, 2016, well after the expiry of the six-year limitation period.
- [88] The plaintiffs submit that the running of the limitation period was postponed pursuant to s.6 of the former Act, the relevant provisions of which provide:
- 6 (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
- (f) for relief from the consequences of a mistake;
- (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
- (5) For the purpose of subsection (4),
- (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
 - (b) "facts" include

- (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
 - (ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,
- (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.
- [89] The plaintiffs submit that their claims fall within s. 6(3)(f) in that they are seeking relief from the consequences of a mistake, i.e. the alleged overpayment of the loans. They submit that because Dr. Kang and Mr. Nijjar had a relationship of trust, Dr. Kang had no reason to suspect that he had overpaid Mr. Nijjar. Further, Dr. Kang testified that throughout much of his dealings with Mr. Nijjar, he relied on his former bookkeeper who he ultimately fired for stealing from him and his companies. He testified that it was only when he hired a new bookkeeper that she raised the possibility of overpayment to Mr. Nijjar. Dr. Kang could not recall exactly when she was hired, other than it was sometime after 2008.
- [90] In their written final submission at trial, the plaintiffs submit that taking the most conservative date, based on Dr. Kang's evidence about the hiring of the new bookkeeper, the overpayment could only have been reasonably discovered by January 1, 2008. Thus, say the plaintiffs, the six-year limitation period ran from that date and expired on January 1, 2014, after the NOCC was filed on April 22, 2013.
- [91] I do not accept the plaintiffs' position. The NOCC did not plead the personal and Visa Loans. Rather, these claims were not advanced until the ANOCC was filed on February 29, 2016. The plaintiffs provided no authority to support the proposition that the limitation period for these claims somehow stopped running upon the filing of the original NOCC.
- [92] I would add that the plaintiffs have not met the burden of establishing a postponement of the running of the limitation period, even to the "conservative" date they suggest of January 1, 2008. On their own pleading, as set out in the ANOCC, while lacking some key details, they nonetheless alleged facts setting out the identity of the lender (Mr. Nijjar), the amounts of the loans and the dates and amounts of the repayments. On this basis alone it is apparent that the plaintiffs had the information available to them in 2007 to determine if they had in fact overpaid Mr. Nijjar.
- [93] I therefore find that the claims for overpayment on the Visa and personal loans are statute barred. As such, there is no need to address the plaintiff's claims for unjust enrichment.
- [94] As I have indicated, given my findings on the limitation issue, it is not necessary to address the findings set out in Ms. Blacklock's report. That said, I do want to reiterate the point I made in para. 54 above that I found her to be measured and professional in her evidence. Ms. Blacklock was presented with a very difficult task in that she was asked to review extensive yet often incomplete financial records with little assistance from Dr. Kang given his poor memory of many of the transactions in issue. In order to arrive at her opinions, Ms. Blacklock was required to make a number of assumptions, for example about how payments made by the plaintiffs were applied against the various debts (first in-first out) and the

interest rate applicable to the many personal and informal loans.

- [95] Those assumptions may well have been reasonable, but they suffer from the same defect as the assumption that Dr. Kang repaid the Anuraj Mortgage by way of the October 4, 2006 bank draft to Mr. Nijjar. They are assumptions not established on the evidence led at trial.
- [96] Ultimately, this is the flaw that ran throughout the plaintiffs' claims in both actions. Given the lack of clear documentation with respect to many of the transactions and Dr. Kang's poor memory as well as his suspect credibility, the plaintiffs have simply failed to prove their claims.

Conclusion

- [97] The plaintiffs' claims in both the Vancouver Action and the New Westminster Action are dismissed.
- [98] At the conclusion of the trial, the parties requested that they be permitted to address the issue of costs after release of my reasons for judgment. They may make arrangements to do so through Supreme Court Scheduling.

"Skolrood J."

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