
CANADA / JUDGMENT

CIT Financial Ltd. v. Gee Force Logistics Inc.

2020 BCSC 18

COURT

Supreme Court of British Columbia

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2020 BCSC 18 CIT Financial Ltd. v. Gee Force Logistics Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

CIT Financial Ltd. v. Gee Force Logistics Inc.,

2020 BCSC 18

Date: 20200108

Docket: S145763

Registry: Vancouver

Between:

CIT Financial Ltd.

Plaintiff

And

Gee Force Logistics Inc. and

Kulwinder Singh Heer

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for the Plaintiff:

G.G. Plottel

C. Dayan

Counsel for the Defendants:

J. Virk

Place and Dates of Trial:

Vancouver, B.C.

September 16-17,

19-20 & 23-26, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 8, 2020

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Overview

- [1] This action concerns a commercial lease financing agreement for two commercial trucks. The former plaintiff, CIT Financial Ltd. was a national financing company based in Ontario. LBEL Inc. acquired CIT Financial's lease portfolio after this action was commenced and was substituted as plaintiff by consent. For ease of reference, the plaintiff will continue to be referred to as "CIT".
- [2] The defendants are Gee Force Logistics Inc. ("Gee Force"), a B.C. company which provides short-haul trucking services in the Lower Mainland, and its past sole director and officer, Mr. Kulwinder Heer. Mr. Sukhdev Bains, who is not a party in this action but played a key role throughout the events leading to this lawsuit, is currently the sole director and officer of Gee Force, and a director of Royal City Trucking Ltd. ("Royal City"), a long-haul trucking company incorporated in B.C. and operating across western Canada and the western United States. Royal City was the original lessor of the two trucks at issue here. Mr. Bains is Mr. Heer's brother-in-law.
- [3] The plaintiff seeks judgment, jointly and severally against Gee Force and Mr. Heer, pursuant to a lease for two commercial trucks to Gee Force (the "Lease") and the corresponding guarantee of Mr. Heer (the "Guarantee"). The plaintiff seeks to recover a balance of \$170,313.44 under these agreements, and additional contractual interest totalling \$72,060.08 as of the first day of trial. Also pursuant to the Lease and Guarantee, CIT seeks special costs.
- [4] The defendants argue in response that the Lease and Guarantee are unenforceable and the action against them should be dismissed. They argue by counterclaim that CIT is liable in tort for fraudulent misrepresentation and civil conspiracy for which Gee Force should be awarded damages.
- [5] The plaintiff seeks the dismissal of the defendants' counterclaim. If special costs are not granted pursuant to the Lease and Guarantee, the plaintiff seeks special costs resulting from the serious nature of the defendants' counterclaim against CIT and the baseless allegations of fraud and conspiracy.
- [6] Notably, the defendants attempted to serve a third party notice against Harbour International Trucks Ltd. ("Harbour International"), a commercial truck dealer based in Langley, B.C., in this action, but an order by Master Keighley dated January 28, 2015 denied them leave to do so.

Factual Background

- [7] In 2011, Harbour International provided five trucks under warranty for use by Royal City. The title to these five trucks was held by two financiers of the transaction that are not relevant to this litigation. The financier of the two trucks in issue was General Electric Canada Equipment Finance GP ("GE Financial"). By 2013, Royal City and its proprietor, Mr. Bains, were experiencing trouble with the maintenance of the trucks, allegedly causing difficulty particularly in the long-haul journeys in which Royal City specializes. CIT maintains it was unaware of the maintenance issues causing the animus between Royal City and Harbour International.
- [8] Due to trouble with the maintenance of the trucks, Mr. Bains asked Harbour International to facilitate the transfer of the trucks to Gee Force. This would allow Royal City to recover its equity in the trucks and Gee Force, which operated primarily in the Lower Mainland, could use the trucks experiencing mechanical failures in its short hauls and if necessary, have them promptly repaired by Harbour International which is based in the Lower Mainland. Only the transfer of two of the five trucks is at issue in this action.
- [9] The transfer was organized as a "flow-through" transaction. Title for the two trucks would pass from the financiers of the 2011 transaction through Harbour International and ultimately to CIT. CIT would finance this transaction in return for regular lease payments from Gee Force. Title to the trucks would pass from CIT to Gee Force after it completed two years of payments under the Lease. Any remaining balance of the purchase price paid by CIT to Harbour International and the lease buyout price paid by Harbour International to the 2011 financier would be paid to Royal City.
- [10] The defendants assert that CIT, Harbour International and Gee Force entered into a verbal agreement on March 13, 2013 (the "Supplementary Verbal Agreement"), most of which pertained to the maintenance and servicing of the trucks. It is clear the terms within this alleged agreement would pertain to the dealer of the trucks, Harbour International, rather than to the financier, CIT. There is no corroborating evidence to support the existence of this agreement. Moreover, CIT was not privy to any conversations between Mr. Bains and Harbour International prior to March 14, 2013. Therefore, I find that no such Supplementary Verbal Agreement was entered into that could affect the legal relationship between Gee Force, Mr. Heer and CIT.
- [11] On March 14, 2013, CIT was contacted by Harbour International and asked if it would facilitate Gee Force's acquisition of the trucks. Ms. Karen Coombes, the lease manager of Harbour International, sent Mr. Jay Cassels, CIT's B.C. account executive, an email attaching the credit application of Gee Force and Mr. Heer's personal financial statement. In the email, Ms. Coombes stated the personal financial statement of Mr. Heer was provided since "[t]here is no Equifax on the company". Equifax is a Canadian credit reporting service. CIT used the provided documents and conducted its own credit investigations and corporate searches to determine whether they would provide financing for the trucks.

- [12] On March 19, 2013, Mr. Cassels advised Ms. Coombes via email that CIT would agree to finance the acquisition of the trucks on certain terms. On March 26, 2013, Mr. Cassels forwarded the Lease documents to Ms. Coombes, in anticipation of a meeting on that day or the next with a representative from Gee Force to execute the Lease.
- [13] The flow-through transaction was to be completed in a meeting at the offices of Harbour International on March 26, 2013 (the "March meeting"). Resolving the legal issues in the case requires a description of the factual circumstances of the March meeting.

The March Meeting

- [14] Present at the March meeting were Mr. Heer, Ms. Coombes, Mr. Cassels, and Mr. Kartar Lakhesar, a salesman at Harbour International who speaks Punjabi. Mr. Milad Towers, who had been an employee of Gee Force for only two months starting February 2013, drove Mr. Heer to Harbour International's offices. Due to animosity between Harbour International and Mr. Bains, Mr. Bains had been asked not to come to Harbour International's offices and therefore did not attend the March meeting.
- [15] In March 2013, Mr. Heer was the sole signing authority for Gee Force. An immigrant to Canada, Mr. Heer neither speaks nor reads English, only Punjabi. The only words he can write in English are "K S HEER", which is how he signs his name. Mr. Lakhesar was present to translate the documents Mr. Heer was expected to sign from English to Punjabi. The plaintiff, CIT, was unaware of Mr. Heer's language barriers until he attended Harbour International's offices on March 26, 2013.
- [16] Mr. Heer brought with him a VanCity cheque for \$54,320 to be paid to Harbour International, as a down payment on all five trucks. Mr. Heer gave the cheque to Ms. Coombes. Mr. Bains instructed Mr. Towers and Mr. Heer to ask for Mr. Lakhesar at Harbour International, whom Mr. Bains knew to speak Punjabi through his past dealings with Harbour International. Mr. Heer also provided Ms. Coombes with his driver's licence as proof of identity.
- [17] It is not in dispute that Mr. Heer, Mr. Cassels, Mr. Lakhesar and Ms. Coombes attended the March meeting. Mr. Towers waited in the car or in the showroom while the documents were signed. It is not in dispute that the meeting lasted around 15 minutes. The parties agree Mr. Heer signed the following documents: The Equipment Delivery and Acceptance, the Lease Schedule, the Guarantee, and the Lease (also called the Master Lease Agreement). Some pertinent terms of the Master Lease Agreement are as follows:

This Master Lease Agreement ("Agreement"), including the terms and conditions on the reverse side hereof and any schedules hereto, correctly sets for the entire agreement between CIT Financial Ltd. ("Lessor") and Lessee [Gee Force]. No agreements or understandings shall be binding on either of the parties hereto unless in writing and executed by the parties hereto.

11. Default. Time Is of the essence and it shall be a default hereunder ("Default") and under all Schedules if:
 - (a) Lessee fails to pay any Rental or other amounts payable under any Schedule or hereunder when due in the manner specified;
 12. Remedies.
 - (a) Upon Default and any time thereafter Lessor may, in addition to any other right or remedy Lessor may have at law or in equity CIT shall have the rights and remedies set out below, all or which shall be enforced successively, concurrently and/or cumulatively:
 - (i) without further notice, take possession of the Equipment under any or all Schedules ("Repossession") and for such purpose Lessee hereby grants Lessor the right to enter its premises at the then current Equipment location for the purpose of Repossession and waives claims for any damages, whether to property or otherwise, arising out of a Repossession and acknowledges that Lessor may retain all prior payments as partial compensation for the use of the Equipment, and sell or lease the Equipment upon such terms as Lessor determines with our without notice, at private or public sale, with or without having the Equipment at the sale ("Disposition");
 - (b) Lessee will pay all costs arising or incurred by Lessor as a result of Default, including reasonable legal fees on a solicitor and his own client basis.
 15. Indemnification. Lessee shall be responsible for, and shall indemnify and save Lessor harmless from and against, all losses, claims, costs, expenses, damages, actions and liabilities, including without limitation solicitor's fees on a solicitor and his own client basis, in connection with, or arising from this Agreement and/or any Schedule, the Equipment and the acquisition, possession, return ownership, leasing, use and operation of the Equipment. This indemnity shall survive termination of this Agreement.
- [18] The plaintiff asserts, and the defendants deny, that Mr. Heer signed the Credit Application form dated March 13 and 14, 2013. It seems unlikely that Mr. Heer did not sign the Credit Application since it contains a substantial amount of personal information that would not have been known to anyone but Mr. Heer. Mr. Heer also signed documents pertaining to the three trucks which are not at issue in this action.
- [19] The Guarantee reads, amongst other things:
1. FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the undersigned [Mr. Heer] (the 'Guarantor'), and each of them jointly and severally (if more than Guarantor), hereby irrevocably and unconditionally guarantees as primary obligor and not merely as surety, without offset or deduction, the full and prompt performance and payment by Gee Force Logistics Inc. ("Debtor") to CIT Financial Ltd. ("CIT") of:

A. any and all present and future debts, liabilities, and obligations, direct or indirect, absolute or contingent, mature or otherwise ("Liabilities") incurred by the debtor without any limitations.

2. Guarantor also irrevocably and unconditionally guarantees, as primary debtor and not merely as a surety, all legal fees and disbursements and all other costs, charges and expenses that CIT incurs enforcing its rights against the Debtor.

Mr. Heer's signature appears above the line that states "(Corporate Guarantor)". The signature line above the words "(Individual Guarantor)" remains unsigned, with the corresponding contact information unfilled. The line for corporate guarantor is immediately above the line for individual guarantor.

- [20] The plaintiff's witnesses, Ms. Coombes, Mr. Cassels, and Mr. Lakhesar, testify Mr. Cassels described and explained the nature of each document Mr. Heer was asked to sign. These descriptions were translated into Punjabi for Mr. Heer by Mr. Lakhesar. Mr. Cassels would also point where exactly Mr. Heer was supposed to sign, after which Mr. Heer would sign the document. According to the plaintiff's witnesses, Mr. Heer appeared to understand and asked no questions.
- [21] In addition, had Mr. Heer been uncertain about the meaning and effect of the documents he was signing, Mr. Heer was free to take the unsigned documents away from the meeting and take them to Mr. Bains for review, or to Mr. Towers who was waiting close to where the meeting occurred. The plaintiff's witnesses testify Mr. Heer was provided with copies of all documents he signed, and Ms. Coombes forwarded the originals to CIT for approval.
- [22] In particular, Mr. Lakhesar testified that Mr. Heer appeared to understand when Mr. Lakhesar explained that the Guarantee had the effect of making him personally liable for Gee Force's payment obligations to CIT under the Lease.
- [23] There is a conflict on the evidence concerning the descriptions of the documents at the meeting. Mr. Heer testifies that he did not receive any descriptions or explanations of the documents he was presented. He further testified he was simply told to sign, and he did so where indicated on the documents. Contrary to the plaintiff's witnesses, Mr. Heer testifies he was not provided with copies of the documents he signed, but admits he forwarded a copy of the Lease sent to him by CIT Financial on April 5, 2013 to Mr. Bains.

After the March Meeting

- [24] After the March meeting, CIT paid Harbour \$203,251.24, the purchase price for the two trucks. Funding was accepted on April 5, 2013. Out of that, Harbour International kept \$1,250 as a facilitation fee. Allegedly, it disbursed a vast majority of that money to the 2011 financier who currently held title to the trucks, and the remaining \$35,872.57 to Royal City, Mr. Bains' long-haul trucking company, for its portion of the equity.

- [25] Mr. Bains testified Royal City never received the money towards the equity of the trucks. I need not make any finding on this allegation. Mr. Bains will have the opportunity to litigate this claim in a separate action he has commenced against Harbour International. Neither Harbour International nor Royal City are parties to this action before me.
- [26] At some point shortly after the March meeting, Mr. Bains found out from Goldmine Insurance that insurance on the five trucks had been completed. Mr. Bains was allegedly confused by this, since he maintains nobody from Gee Force signed the Bills of Sale which would be necessary to receive insurance.
- [27] Mr. Bains testifies that on April 5, 2013, Mr. Lakhesar advised Mr. Bains that the trucks were ready, but they were not.
- [28] It is not contested that Gee Force made no payments under the Lease. The trucks were never insured for road use and they stayed on Harbour International's premises until they were sold. On May 10, 2013, CIT demanded payment owed for the trucks under the Lease from Mr. Heer. No payment ever arrived. CIT repossessed the trucks on or about May 27, 2013 and after providing notice of disposition to Gee Force and Mr. Heer, sold the two trucks at issue on June 16, 2014 and realized net proceeds of \$58,836.80. As of July 4, 2014, the outstanding balance Gee Force owed to CIT was \$170,313.44.

Bills of Sale

- [29] In addition to the extent of Mr. Lakhesar's translation of the document descriptions at the March meeting, a major factual disagreement exists regarding signatures on the Bills of Sale. A Bill of Sale would be required to obtain insurance on the trucks and signifies that the title of the trucks has been transferred. Therefore, there are two Bills of Sale, one for each truck.
- [30] The Bill of Sale forms are identical, except each refers to the truck whose title it is intended to transfer. The standard forms are Harbour International documents entitled "Motor Vehicle Purchase Agreement" and dated March 26, 2013. The purchasers are listed as CIT and Gee Force, with a purchase price of \$97,000. The dealer is Harbour International Trucks. The serial number and a brief description of each truck is provided. The signature of a representative for the purchaser appears in two places on both of the documents, all four signatures are identical and each is different from Mr. Heer's signature.
- [31] Ms. Coombes testifies that after the March meeting, Mr. Towers returned to Harbour International to enquire about the documents needed to insure the trucks. Ms. Coombes testifies Mr. Towers signed the Bills of Sale at this point.
- [32] The plaintiff offers no explanation as to why the Bills of Sale were not signed by Mr. Heer at the March meeting, or why they are dated as being signed at the March meeting if they were signed at some point after the meeting.

[33] The defendants deny that anyone from Gee Force signed the Bills of Sale. They allege someone at Harbour International forged Mr. Heer's signature, or if Ms. Coombes' testimony is deemed credible, Mr. Towers himself forged Mr. Heer's signature. Based on the vast difference in the appearance of the signature on the Bills of Sale and Mr. Heer's signature on the other documents, a forgery is extremely unlikely. In addition, there is no evidence to support forgery.

Issues

[34] The parties agree that the issues to be determined in the action are:

- a) Are the Lease and Guarantee enforceable?
 - i. Is the Lease ineffective as the trucks were not accepted by Gee Force and Gee Force did not take physical possession of the trucks?
 - ii. Alternatively, does the doctrine of non est factum operate to render the Lease unenforceable against Gee Force?
 - iii. Does the doctrine of non est factum operate to render the Guarantee unenforceable against Mr. Heer?
- b) Is CIT liable in damages to Gee Force for fraudulent misrepresentation?
 - i. Was it reasonable for Gee Force to infer from the conduct of CIT that CIT consented to an agency relationship with Harbour International?
 - ii. In the alternative, is CIT liable as a joint tortfeasor?
- c) Is CIT liable in damages to Gee Force for civil conspiracy?

Evidentiary Issues

Credibility of Witnesses

[35] There were inconsistencies in the evidence provided by the defendants' witnesses and minor inconsistencies in the plaintiff's witnesses' evidence, particularly in relation to the March meeting. Therefore, the credibility of their testimony must be addressed. At trial, Ms. Coombes, Mr. Lakhesar, and Mr. Cassels testified for the plaintiffs. Mr. Heer and Mr. Bains testified for the defendants.

[36] The testimony of various witnesses is central to the issues in this case. *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A) outlines the approach to assess the credibility of witnesses:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the

real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[Emphasis added.]

[37] Since Faryna, courts have developed a set of factors which may be used to apply the test for assessing credibility. This non-exhaustive list of factors was summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-87, *aff'd* 2012 BCCA 296:

- a) the capacity and opportunity of the witness to observe the events at issue;
- b) his or her ability to remember those events;
- c) the ability of the witness to resist being influenced by his or her interest in recalling those events;
- d) the internal and external consistency of the witness's evidence;
- e) did his or her testimony change between direct and cross-examination; are there inconsistencies in between prior statements, discovery evidence and his or her evidence at trial;
- f) whether the witness's evidence harmonizes with or is contradicted by other evidence, particularly independent or undisputed evidence;
- g) whether his or her evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and
- h) the witness's demeanour, meaning the way he or she presents while testifying.

[38] The plaintiff argues Mr. Heer's evidence should be rejected for a number of reasons. First, Ms. Coombes, Mr. Lakhesar, and Mr. Cassels have vivid and actual recollections of the March meeting such as the seating arrangements of the individuals involved and even such details as Mr. Heer's eye colour. None of their recollections was contradicted at trial. Second, during Mr. Heer's cross-examination, his recollection of the meeting was selective to the point of damaging his credibility. Third, the occasional answer he did give other than "I don't recall", was clearly scripted. Fourth, in addition to the contradictions within Mr. Heer's evidence, Mr. Heer admitted to swearing an affidavit without knowing what it stated. Lastly, none of the Harbour witnesses or Mr. Cassels has any personal interest in the outcome of this case, whereas Mr. Heer has a motive for representing that the documents were not described to him or signed by him, as he is a shareholder of Gee Force and judgment is sought against him on his Guarantee. He stands to lose his personal assets if he is unable to satisfy any judgment against him.

[39] I agree with the plaintiff on the issues of credibility. The evidence of each of the plaintiff's witnesses largely corresponds with that of the other two. Mr. Heer's language barrier must be taken into account when considering his evasive demeanour on the stand. However, the

issues with Mr. Heer's testimony go much further than his inability to speak English. Mr. Heer's recollection of the March meeting is highly selective to the point of suspicion. Mr. Heer's testimony at trial deviated from his affidavits and was contradictory on several occasions. It seemed apparent that Mr. Heer's self-interest, or interest in protecting Mr. Bains influenced his testimony. In consideration of the relevant *Bradshaw v. Stenner* factors, I must find that where Mr. Heer's evidence contradicts that of the other witnesses, the evidence of other witnesses must be believed.

[40] Given this, I find that while Mr. Lakhesar did not do a line-by-line translation of the documents from English to Punjabi for the benefit of Mr. Heer, he translated Mr. Cassels' explanations at least to the extent that Mr. Heer would have known the general nature of each document he was signing, including the personal nature of the Guarantee and the consequences of non-payment under the Lease.

Failure to Subpoena Mr. Towers

[41] Both the plaintiff and defendants argue that an adverse inference should be drawn against the opposing party for failing to call Mr. Towers as a witness. The plaintiff quotes the following legal principles from *Singh v. Reddy*, 2019 BCCA 79:

[8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:

§6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:

An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a *prima facie* case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994) 110 D.L.R. (4th) 284 (Ont. C.A.) at 287. [At para. 35]

[Emphasis in original.]

- [42] The plaintiff argues the defendants' failure to subpoena Mr. Towers on the authenticity of the signatures on the Bills of Sale justifies an adverse inference be drawn against the defendants. Allegedly, Mr. Bains met with Mr. Towers the week prior to trial, but did not serve a subpoena on him. The plaintiff asks that an inference be drawn that Mr. Towers' testimony, if given, would not have supported the defendants' theory of forgery or lack of authority.
- [43] The defendants argue it is incumbent on the plaintiff to show that Gee Force signed the Bills of Sale to complete the transaction and rely on the Lease, and they have not done so. Based on this, they ask an adverse inference be drawn against the plaintiff which has the effect of impeaching Ms. Coombes' testimony on this point.
- [44] The defendants submit that Harbour International, acting alone and without authority, took it upon itself to execute the Bills of Sale on behalf of Gee Force and CIT and then proceeded to obtain insurance on the trucks without consent or knowledge of the defendants. Alternatively, the defendants assert Mr. Towers attempted to forge Mr. Heer's signature although they did not explain what benefit Mr. Towers would have received from his forgery.
- [45] In the absence of Mr. Towers' testimony, we have Ms. Coombes' uncontroverted word that Mr. Towers signed the Bills of Sale. In my view, the defendants have not been able to impeach her credibility. This in itself is enough to support a finding that Mr. Towers signed the Bills of Sale, and I do not need to draw an adverse inference with regard to Mr. Towers' proposed testimony.
- [46] Therefore, I find Ms. Coombes witnessed Mr. Towers sign the Bills of Sale. Whether Mr. Towers had any authority to do so is a separate question and will be addressed next.

Enforceability of the Lease and the Guarantee

- [47] In response to CIT's claims to enforce the Lease and Guarantee, the defendants argue that the agreements are unenforceable for two reasons. First, that a pre-requisite for the Lease to be enforceable, that Gee Force obtain possession of the trucks through a valid Bill of Sale, never occurred. Second, they argue the Guarantee is a corporate guarantee and hence unenforceable against Mr. Heer as an individual. Third, they argue the doctrine of non est factum applies to Mr. Heer's signature on the Lease and the Guarantee, ultimately preventing both agreements from being enforced against the defendants. I deal with each of these arguments in turn.

Bills of Sale

- [48] I have accepted Ms. Coombes' assertion that Mr. Towers signed the Bills of Sale. The defendants' response to this is that Mr. Towers had neither actual nor ostensible authority to sign on behalf of Gee Force. The plaintiff argues the representations made by the defendants suggested Mr. Towers ostensibly had the authority to sign on behalf of Gee Force.

Agency

[49] The meaning of an agency relationship was recently explored in *Basyal v. Mac's Convenience Stores Inc.*, 2018 BCCA 235:

[65] It may be useful to recall how an agency relationship may arise, and the meaning of "actual" and "apparent" agency. F.M.B. Reynolds, the author of *Bowstead and Reynolds on Agency* (17th ed., 2001) states succinctly:

Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.

Where the agent's authority results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority. (At 1.)

[50] An agency relationship can derive from actual or apparent (ostensible) authority. Further, actual authority can be attributed to an agent by a principal through express or implied conduct. Thus, the principal-agent relationship can manifest in three ways: express agency, implied agency, and ostensible agency.

[51] The parties disagree on which form of agency is relevant to the facts at hand. The defendants cite *Doiron v. Manufacturers Life Insurance Company*, 2003 ABCA 336, an authority on ostensible agency which has been cited favourably by this Court: see *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 348; *Vancouver Canucks Limited Partnership v. Canon Canada Inc.*, 2013 BCSC 866 at para. 156. In *Doiron*, the Alberta Court of Appeal states:

[13] The doctrine of ostensible authority serves to give an agent the authority to bind a principal to agreements made with third parties in circumstances where the agent has no actual authority to do so. The requirements to establish ostensible authority are set out in the leading case of *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 1 All E.R. 630 (C.A.). They are:

- a) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
- b) that such representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
- c) that the contractor was induced by such representation to enter into the contract (i.e. that he in fact relied upon it); and

- d) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.

[14] The test for ostensible authority has also been stated by Slade, J., in *Rama Corp. Ltd. v. Proved Tin & General Investments Ltd.*, [1952] 2 Q.B. 147 at pp. 149-50:

"Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance."

[52] On the other hand, the plaintiff cites the law on implied agency. The question to be answered in determining whether implied authority exists "is whether it is reasonable for the party asserting an agency relationship to infer from the conduct of the other party that he or she consented to an agency relationship": *Siemens v. Howard*, 2018 BCCA 197 at para. 12. This determination is based on the conduct surrounding the relationship that allows for the inference of actual authority, rather than on a representation by the alleged principal which gives rise to an appearance of authority whether or not the authority actually exists.

[53] The difference between the legal test for implied agency and ostensible agency is that the former requires conduct from the alleged principal and alleged agent which gives the reasonable impression to a third party that the agency exists. On the other hand, the latter requires specific representations pertaining to the agency, made to a contracting party. The facts alleged by the defendant in supporting their argument on the existence of an agency between CIT and Harbour International, discussed later in the judgment, do not suggest there were any representations by CIT or Harbour to establish apparent authority. The lack of such representations precludes an argument based on express agency or apparent agency. Instead, the defendant relies on the circumstances surrounding the relationship and the behaviour of the parties that led to the transaction, which may only support a claim of implied authority.

[54] On applying the law of agency to Mr. Towers, the defendants argue Mr. Towers had neither actual nor ostensible authority to sign on behalf of Gee Force. No conduct or representations to this effect had been evinced by Mr. Heer or Mr. Bains to Harbour International. As a result, even if Mr. Towers signed the Bills of Sale, he did not have the authority to do so and the Bills of Sale were never properly executed. However, based on Mr. Bains' testimony, the defendants concede that Milad Towers was intended to be the future General Manager for Gee Force if the company was able to acquire the five trucks and be successful, and if Mr. Towers was able to learn the business.

- [55] Conversely, the plaintiff argues Mr. Towers had ostensible authority to sign on behalf of Gee Force. He had been introduced as a Gee Force employee by Mr. Bains and drove Mr. Heer to the March meeting. They emphasize Mr. Bains' testimony that Mr. Towers was poised to be general manager. Additionally, they rely on Mr. Lakhesar's testimony that he corresponded with Mr. Towers multiple times through email and phone regarding the transaction, and that Mr. Towers was introduced to him as Mr. Heer's son-in-law on the day of the March meeting.
- [56] It is clear Mr. Towers did not have actual signing authority for Gee Force. This authority was held exclusively by Mr. Heer. However, I find the plaintiff's argument regarding the defendants' conduct to be persuasive. It was reasonable for CIT to infer from the conduct of Mr. Towers and Mr. Bains that he consented to an agency relationship. Therefore, I find Mr. Towers had ostensible authority to sign for Gee Force, and he executed this authority by signing the Bills of Sale.
- [57] The defendants argue the plaintiff must show that Gee Force signed the Bills of Sale to complete the transaction. The defendants argue the triggering event for CIT Financial to provide funding was the transfer of the trucks to CIT and Gee Force. Due to the issues with the Bills of Sale, the Lease was ineffective and CIT was not expected to fund the transaction. As a result, the defendants argue CIT has a cause of action against Harbour International in negligence or fraud.
- [58] The plaintiffs respond that CIT's claim does not rest on the Bill of Sale, which is a title document, but on the Lease. The Lease does not provide for title in the trucks to pass to Gee Force. Title would only pass to Gee Force after the 48 months of Lease payments were made to CIT. The Lease was in default after the first month, so title was not eligible to pass to the defendants. Lastly, the plaintiff argues despite the lack of physical possession, Gee Force had legal possession of the trucks. Gee Force had the right to use the trucks and take them from Harbour International's premises contingent on Gee Force obtaining the appropriate insurance. This is sufficient to grant legal possession: *Personal Property*, Third Edition, J. Crossley Vaines (London, UK: Butterworths, 1962) at 49-50.
- [59] Given I have found the Bills of Sale were properly executed, through Mr. Towers' ostensible authority to do so, it is not necessary for me to rule on the legal effect of the failure to execute the Bills of Sale.

Enforceability of the Guarantee

- [60] The defendants argue that interpreting the Guarantee as an individual guarantee would lead to an ineffective contractual provision, therefore this interpretation must be rejected: *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para. 42. In support, they cite the positioning of Mr. Heer's signature on the Guarantee, in addition to a clause in the Guarantee which compels the Guarantor to furnish financial statements annually based on generally accepted accounting principles. I find it difficult to conclude from a clause mentioning annual financial statements that a Guarantee must either be corporate or

completely unenforceable. The signature being in the wrong position seems nothing more than a slip. I do not find this slip to be of any particular moment, or on its own, to interfere with the legal effect of the Guarantee.

Non Est Factum

[61] Alternatively, the defendants seek to rely on the doctrine of non est factum for Gee Force to avoid liability under the Lease and for Mr. Heer to avoid personal liability under the Guarantee. It is not in dispute that Mr. Heer signed both the Lease and the Guarantee.

[62] The law on non est factum starts with the assumption that an individual signing a written agreement is presumed to know its contents (*Karroll v. Silver Star Mountain Resorts*, 33 B.C.L.R. (2d) 160 (S.C.)):

One must begin from the proposition set out in *L'Estrange v. F. Graucob* [citation omitted] that "where a party has signed a written agreement it is immaterial to the question of his liability under it that he has not read it and does not know its contents". Maugham L.J. went on to state two exceptions to this rule. The first is where the document is signed by the plaintiff "in circumstances which made it not her act" (non est factum). The second is where the agreement has been induced by fraud or misrepresentation.

[63] In *Farrell Estates Ltd. v. Win-Up Restaurant Ltd.*, 2010 BCSC 1752, Madam Justice Dardi summarized the principles governing non est factum, citing the leading case of *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774:

[100] The principles of non est factum, as formulated in the weight of the authorities, can be summarized as follows:

1. The burden of proving non est factum rests with the party seeking to disown their signature. For a person of full capacity the application of the doctrine must be kept within narrowly prescribed limits.
2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.
3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.

[101] The authorities also establish that non est factum may be raised as a defence notwithstanding a lack of agency between the party relying on the document and the person who made the alleged misrepresentation concerning the document: *Marvco; J. R. Watkins Company v. Hannah*, [1926] 2 W.W.R. 800 (Sask. C.A.).

- [64] In addition, the defendants rely on Farrell Estates at paras. 130, 139 for the proposition that the personal characteristics of the signing party, including the party's ability to communicate in English, and whether the party received independent legal advice, are relevant factors in a determination of non est factum.
- [65] Therefore, the defendant bears the burden to convince this Court the Lease and Guarantee signed by Mr. Heer were fundamentally different from the one he believed he was signing. As Mr. Heer is an individual with full capacity, the doctrine should be applied narrowly.
- [66] The fundamental difference relied on by the defendants with respect to the Lease is that Gee Force and Royal City understood the Lease to cover a simple transaction in which Gee Force would take over as the owner of the five trucks from Royal City so that it could operate the trucks locally rather than on long haul routes as they had been under Royal City. Additionally, the defendants argue they understood the transaction as maintaining the 2011 financiers of the trucks rather than having them re-financed through CIT. In support of these assertions, the defendants rely on the fact that prior to the March meeting, Ms. Coombes did not communicate to Mr. Bains, Mr. Heer or to Gee Force the terms of the Lease and the documents prepared by CIT.
- [67] The fundamental difference relied on by the defendants with respect to the Guarantee is that Mr. Heer did not understand that he was signing a personal guarantee. All Mr. Heer allegedly understood was that he was to sign some documents about trucks.
- [68] In response, the plaintiff argues that since Mr. Heer had been asked for his personal financial statement by CIT, he should have anticipated that the Guarantee was personal rather than corporate. I agree.
- [69] The plaintiff also argues that as a proprietor of a trucking company, Mr. Bains had past experience in such transactions and should therefore have known about the true nature of the Lease and Guarantee. It is difficult to see how Mr. Bains' past experience can be attributed to Mr. Heer's perception of what the Guarantee means, but as someone who was the operating mind of Gee Force, this argument certainly favours the plaintiff's assertion that the nature of the transaction was known to Mr. Bains.
- [70] The defendants argue Mr. Heer's illiteracy, language barriers, and inability to rely on independent legal advice are personal characteristics relevant to the application of non est factum. They rely on the facts of Farrell Estates, in which a signing party to a lease, Mrs. Su-Chen Wu Yang, successfully invoked the doctrine to invalidate personal liability under a commercial lease with the plaintiff Farrell Estates. Like Mr. Heer, Mrs. Yang was an immigrant, unable to read or write much English beyond being able to sign her name, and was not knowledgeable in sophisticated commercial matters. The key difference is that upon learning she would become personally liable in the matter, Mrs. Yang expressed to third parties who brought her into the transaction and the plaintiffs in the matter that she did not want to be personally liable. Despite her protestations, the plaintiff wished to hold her personally liable. Justice Dardi discussed the application of the third prong of the test from

Marvco to these facts at para. 156:

The unique factual matrix of this case renders the analysis in the authorities relied upon by Farrell inapplicable. In my view, justice requires that in this case Farrell bear the loss, because it was Farrell who by application of reasonable care was in the better position to avoid the loss. In the result, this is one of those exceptional circumstances in which the defence of non est factum therefore succeeds.

[71] The defendants' argument that all Mr. Heer knew about the transaction was that he would have to sign certain documents regarding trucks does not help them. Accepting an argument this broad on the doctrine of non est factum would be problematic because it would allow Mr. Heer to avoid any contractual obligation due to his language barrier. Mr. Heer understands the significance of contractual obligations. Indeed, the only words he could write in English were his signature, which indicates he knew the significance of his signature. He knew the documents he was signing were part of a commercial transaction involving trucks. His personal credit application had been sent to CIT through Harbour International, and Mr. Lakhesar testified specifically about explaining the personal nature of the Guarantee to Mr. Heer. In addition, there was no pressure on Mr. Heer to sign the documents at the March meeting. He could have asked to bring the documents to Mr. Bains or Mr. Towers and asked for their assistance.

[72] In these circumstances, under the third prong of the Marvco test, it fell to Mr. Heer to take reasonable care to ensure the documents he was signing were not fundamentally different from what he had been led to believe. Unlike Mrs. Yang in Farrell Estates, he did not make any protestations to this effect, and is liable due to the personal nature of the Guarantee.

Fraudulent Misrepresentation

[73] The elements for the tort of fraudulent representation were discussed by Justice Armstrong in *Neidermayer v. Gillies*, 2012 BCCA 143:

51 In *Catalyst Pulp & Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 (B.C. C.A.), Bauman J.A., as he then was, outlined the requirements to establish fraudulent misrepresentation inducing a contract. At para. 55 he said:

[55] Counsel for UPE cited G.H.L. Fridman, *Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at 309-310, where the learned author described a case of fraudulent misrepresentation as consisting of four elements:

- (a) the wrongdoer must make a representation of fact to the victim;
- (b) the representation must be false in fact;
- (c) the party making the representation must have either known it was false or made it recklessly without knowing whether it was true or false; and
- (d) the victim must have been induced by the representation to enter into the contract.

52 *Islip v. Coldmatic Refrigeration of Canada Ltd.*, 2002 BCCA 255 (B.C. C.A.) adds the requirement that the misrepresentor must have intended that the victim act on the representation at para. 11. Some subsequent cases do not explicitly list this requirement (see *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.*, 2008 BCSC 918 (B.C. S.C. [In Chambers])) while others do (see *Battrum v. MacKenzie Estate*, 2010 BCSC 1285 (B.C. S.C.) at para. 8).

53 It is well accepted that half-truths, while true in themselves but incomplete, can constitute legally significant misrepresentations: *Battrum* at para. 10.

54 Unlike negligent misrepresentation, an action for fraudulent misrepresentation will not be precluded where the plaintiff failed to exercise due diligence (*RC Hotel Ventures Ltd.* at para. 23).

[74] The defendants assert CIT and Harbour International agreed to a common action to secure a change in the financier for the two trucks. In furtherance of this common action, Harbour International committed torts of misrepresentation and deceit. The alleged false representations were that Harbour International would repair all five trucks, the financiers from the 2011 transaction would be maintained, and Royal City's extended warranties from 2011 would continue with Gee Force.

[75] The defendants make two arguments about the liability of CIT based on fraudulent misrepresentation. First, they assert that Harbour International acted as an agent of CIT in this transaction. As its principal, CIT would thus be held liable for Harbour International's actions. Alternatively, the defendants argue that Harbour International and CIT were joint tortfeasors. The alternative argument asserts that as a joint tortfeasor, CIT is liable for torts committed by Harbour International. As the plaintiff notes, neither argument asserts that the actions of CIT itself are sufficient to fulfil the elements of fraudulent misrepresentation.

[76] As a result, the conduct of Harbour International and CIT should be assessed to determine whether it would have been reasonable for the defendants to infer that CIT consented to Harbour International being CIT's agent.

[77] The defendants argue the conduct of Harbour International and CIT can be reasonably interpreted as giving rise to an agency relationship. They rely on the following facts to support their position. CIT did not contact Royal City or Gee Force at any time to negotiate the terms of financing. CIT relied on Harbour International to receive all information from Royal City and Gee Force, in particular information and documents regarding the financing of the trucks. CIT prepared the documents and sent them to Harbour International for review and signature. The March meeting took place at a Harbour International office. Harbour International accepted all funds in the transaction from Gee Force and from CIT. CIT paid a handling fee to Harbour International in relation to the transaction.

- [78] The plaintiff responds that nothing in the conduct of Harbour International or CIT implied CIT's consent to Harbour International acting as its agent. The plaintiff argues the mere fact that Mr. Cassels was present at the March meeting negates a reasonable inference of agency because his presence would not be required if an agency relationship existed and Harbour International could execute the documents on behalf of CIT.
- [79] The other conduct relied on by the plaintiff is as follows. Mr. Bains did not know of CIT's involvement until he reviewed the demand letter following Gee Force's default. The only involvement of CIT with any representative of Gee Force was the inclusion of Mr. Cassels at the March meeting where Mr. Heer signed the lease documentation. Furthermore, Mr. Cassels introduced himself to Mr. Heer as a representative of CIT and explained the company's role as a financier, distinguishing CIT from Harbour International.
- [80] Furthermore, the plaintiff argues clause 10 of the Lease explicitly refers to CIT's role as a mere financier, thereby denying any implication of agency:
10. Exclusion of Equipment Warranties. Lessee acknowledges that Lessee alone will have selected the Equipment, that Lessor does not deal in the Equipment and that Lessor does not and will not make any representation or warranty whatsoever, express or implied, with respect to the Equipment or its adequacy for Lessee's purpose or otherwise. Lessor will have no liability whatsoever (including, without limitation, liability for any indirect or consequential damages) arising from any latent or other defect in the Equipment including any fundamental breach, or other failure of performance, capacity, or operation of the Equipment. If any Equipment is unsatisfactory for any reason, Lessee shall pay the Rental owing in respect of such Equipment without abatement, and shall seek recourse solely against the supplier or manufacturer of such Equipment.
- [81] Lastly, the plaintiff relies on the express release contained in the Delivery and Acceptance document:

Without prejudice to the rights, if any, that the undersigned may have against manufacturers, suppliers or others, the undersigned hereby releases and discharges CIT from any and all actions, causes of action, claims, demands, rights, defenses, setoffs, abatements and compensation now or hereafter arising out of or in relation to the Equipment, including, without limitation, any latent defect therein.

- [82] In *Hans v. Volvo Trucks North America Inc.*, 2011 BCSC 1574, I considered the enforceability of an exclusion clause in the context of the relationship between dealers and equipment financiers. At para. 65, I reasoned:

A financier should not be required to give special notice that its role is limited to financing and that it cannot be sued for issues relating to the allegedly defective manufacture or condition of the vehicle. Furthermore, the covenant not to sue in this case is neither onerous nor stringent. The plaintiffs are not excluded from suing entirely. They are still entitled to sue VFS for matters relating to financing. As this ability to sue relates to the true nature of the relationship between the parties, the plaintiffs have not really suffered a detriment.

[83] I am of the opinion that the reasoning in *Hans v. Volvo* is dispositive of this issue. It is apparent to me that the defendants' primary action is against the dealer of the trucks, Harbour International, much like the plaintiffs in *Hans v. Volvo* who were successful in their action against the manufacturer of the trucks. An agency argument of the sort the defendants here rely on is not based on a reasonable interpretation of the commercial relationship between the parties, in which CIT was merely a financier. CIT is protected by the terms of the Lease and Delivery and Acceptance Document and cannot be found liable for representations that may have been made by Harbour International to Mr. Bains and Gee Force.

Joint Tortfeasors

[84] Joint tortfeasors are those "who act in 'concert' to further a wrongful act and deceitful conduct engaged in by one can be ascribed to another": *Cruise Connections Canada v. Szeto*, 2015 BCCA 363 at para. 45.

[85] The defendant alleges the common action linking CIT to Harbour International was to secure a change in the lessor for the CIT Trucks from GE Financial to CIT. Further, the defendant claims since Harbour International committed fraudulent misrepresentation and deceit, CIT is liable as a joint tortfeasor.

[86] The common action referred to by the defendant is a completely legitimate commercial transaction based on transparent contracts with legitimate business interests of each party being served. This cannot form the basis of a joint tortfeasorship for fraudulent misrepresentation, and therefore CIT is not a joint tortfeasor to any misrepresentations made by Harbour International.

[87] Since CIT is neither a principal of Harbour International nor a joint tortfeasor, there is no basis to find CIT liable for the tort of fraudulent misrepresentation.

Civil Conspiracy

[88] The parties agree that the elements of the tort of civil conspiracy are as set out in *Can-Dive Service Ltd. v. Pacific Coast Energy Corp.* (1993), 96 B.C.L.R. (2d) 156:

1. an agreement between two or more persons;
2. concerted action taken pursuant to the agreement;

3. (i) if the action is lawful, there must be evidence that the conspirators intended to cause damage to the plaintiff;
- (ii) if the action is unlawful, there must at least be evidence that the conspirators knew or ought to have known that their action would injure the plaintiff (i.e., constructive intent);

4. actual damage suffered by the plaintiff.

[89] There is a helpful discussion on the relationship between joint tortfeasors, fraudulent misrepresentation, and civil conspiracy in *XY, LLC v. Zhu*, 2013 BCCA 352:

[42] Obviously, the trial judge's finding that the Personal Defendants were joint tortfeasors with JingJing would fall if deceit on JingJing's part were not proven. If this is correct it would be unnecessary to consider the tort of civil conspiracy, which would "add nothing" and could be struck out or "merged". (See *Bank of Montreal v. Tortora* 2010 BCCA 139; *Le Soleil Hospitality Inc. v. Louie* 2011 BCCA 305.) In any event, there is very little difference apparent between being a joint tortfeasor in the sense of participating in a "concerted action between [the tortfeasors] to a common end" (see *Glanville Williams, Joint Torts and Contributory Negligence* (1951) at 1), and being a civil co-conspirator.

[90] Therefore, my finding above that there was no concerted action to justify a finding that CIT and Harbour International are joint tortfeasors applies here and the elements of the tort of civil conspiracy are not met in this action.

Remedy

[91] The defendants' counterclaims are dismissed.

[92] CIT is granted judgment under its Lease and Guarantee against Gee Force and Kulwinder Heer jointly and severally.

[93] Judgment is granted to CIT for the balance owing after the sale of the trucks in the amount of \$170,313.44.

[94] I will hear the parties on the issue of whether the contractual rate of interest on the judgment should be paid by the defendants or whether the court should confine the interest amount to that charged pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, s. 1.

Costs

[95] Costs follow the event and CIT will have its costs.

[96] CIT relies on its Lease at para. 12(b) and its Guarantee at paras. 2 and 5(e) to claim special costs on a solicitor and client basis or, in the alternative, claims special costs arising from the nature of the defendants' counterclaim in fraud and civil conspiracy.

[97] The plain wording of CIT's Lease and the Guarantee make clear that the consequences of default include CIT's right to recover special costs on a solicitor and client basis (Wanson (Bristol) Development v. Sahba, 2017 BCSC 2140; Epoch Press Inc. v. Sewak, 2011 BCSC 323). I therefore award special costs to CIT on a solicitor and client basis with such costs to be assessed by a reference to the Registrar.

"Russell J."

The Honourable Madam Justice Russell

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