

CANADA / JUDGMENT

Graham v. Hardy

2023 BCSC 645

COURT

Supreme Court of British Columbia

DECIDED

21 April 2023

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2023 BCSC 645 Graham v. Hardy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Graham v. Hardy,

2023 BCSC 645

Date: 20230421

Docket: S215404

Registry: Vancouver

Between:

Anne Graham

Plaintiff

And

Jeffery Les Hardy and Lifeguard Health Inc.

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:

P. Roberts, K.C.

Counsel for the Defendants:

M. Pontin

J. Kindrachuk

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 11, 2023

Place and Date of Judgment:

Vancouver, B.C.

April 21, 2023

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- [1] This is an application for a summary trial. The plaintiff seeks judgment for monies she advanced to one or both of the defendants between December 2018 and October 2019. The timing and quantum of the amounts loaned is not disputed. However, the parties disagree whether the matters are suitable for summary determination. They also disagree on to whom the loans were made, and what, if any, terms were agreed to regarding interest payments.

I. FACTS

- [2] The defendant Jeffrey Les Hardy is the founder and chief executive officer ("CEO") of the defendant Lifeguard Health Inc. ("Lifeguard").
- [3] The parties dispute whether the plaintiff, Anne Graham, was aware or ought to have been aware that the business was incorporated. Her evidence is that she believed it was, at all times, a sole proprietorship. I will analyze that issue later, but I will refer to "Lifeguard" throughout this judgment to refer to both the business as a sole proprietorship, and the company that is the defendant. I do so only for convenience.

- [4] Mr. Hardy lives in Vancouver, and he deposed that he struggled with alcohol use for many years. In 2017, he entered a treatment program to address that addiction. While there, a person he met in that facility died of a fentanyl overdose. This had a dramatic impact on Mr. Hardy, who was inspired to think of ways to protect people who use drugs alone.
- [5] Mr. Hardy conceived of an application (or an app) on mobile devices where users can input the substance and dose they are taking, which then starts a timer. When the timer runs out, the user must respond in some way. If no response is given that the user is okay within the pre-set time, the app triggers a message to 911 in order to have emergency responders come to the person's aid. The app also contains information about resources and supports, including local treatment options.
- [6] Although Mr. Hardy had experience as a salesperson in the communications industry for about 30 years, he had no experience launching a business in the technology industry. While he was in the recovery facility, he was introduced to a non-profit organization that helps entrepreneurs by offering business planning services. He registered with that program and was connected to Laura Aveledo who helped him prepare a business plan for Lifeguard, the company through which he intended to develop and launch the app. At first, Lifeguard was a sole proprietorship, but it was incorporated in 2018.
- [7] Ms. Aveledo also introduced Mr. Hardy to her friend, the plaintiff. Ms. Graham is a self-employed, experienced business consultant based in Vancouver, and at that time, she often assisted new start-ups with strategic advice and mentorship. Prior to 2000, she held sales, management, and executive positions in a number of well-established companies.
- [8] Ms. Graham agreed to act as an advisor and mentor to Mr. Hardy. She deposed that she believed at that time that Mr. Hardy's business plan for the app showed promise and would be important for society.
- [9] The two met once or twice every month over coffee to discuss developments with Mr. Hardy's business idea. They often talked about human resource issues that Mr. Hardy was dealing with as well as marketing efforts. Ms. Graham agreed to his request to serve as an occasional informal sounding board at no charge. However, Ms. Graham also provided funding, which is at the heart of this dispute.
- [10] There is no dispute that towards the end of 2018 and throughout 2019, Ms. Graham provided short-term bridge loans to keep the business afloat as Mr. Hardy continued to seek government contracts.
- [11] With regard to the fact that she continued to loan him money even though Mr. Hardy defaulted several times on the short-term loans, Ms. Graham deposed as follows:

I appreciated that early-stage business owners are frequently overly optimistic, do not close new contracts as quickly as they expected to, and often need additional cash infusions to achieve a breakthrough. I believed that helping Mr. Hardy and Lifeguard to reach a breakthrough in their sales efforts was not only the right thing to do, but was the only way to ensure repayment of the funds I have previously advanced.

- [12] Although there were difficulties in the start-up phase of the company, Lifeguard eventually got government contracts, and as of October 2022, the app had saved 50 lives.
- [13] Mr. Hardy deposed that Ms. Graham was always encouraging of the business and its eventual success in getting agreements with government. He stated that she "made clear that as a matter of her professional judgment and expertise, Lifeguard had a good chance of success."
- [14] There is no disagreement that Ms. Graham forwarded a total of \$158,000 towards the business, but the parties disagree on how much was paid back to her. Ms. Graham's position is that Mr. Hardy has only paid \$7,635. In her affidavit, she listed the dates and specific amounts received. I understand there is no dispute about the payments in that list.
- [15] However, Mr. Hardy deposed Ms. Graham's affidavit omits a \$2,000 payment made February 21, 2019. His position is that he has paid \$9,635. Ms. Graham deposed that a \$2,000 payment to her does appear on a February 2019 RBC statement of an account in Lifeguard's name. However, she reviewed all her business and personal accounts statements from February and March 2019 and said she "never received [the] \$2000 e-transfer payment that Lifeguard purportedly sent to me from its RBC account".
- [16] No further evidence was adduced about that \$2,000 payment. The most objective evidence produced is the bank statement, which I assume the parties agreed was a business record. I also note that the list of payments in Ms. Graham's affidavit accurately reflects the amounts listed on the bank records contained in the application record, but the specific dates differed (sometimes by several weeks). For those reasons, I find the bank record to be more reliable evidence. Accordingly, I find that Mr. Hardy did pay another \$2,000 that is not included in Ms. Graham's list of payments in her affidavit. Accordingly, I find he has paid \$9, 635.
- [17] The parties agree that discussions about the loans were in person, supplemented by text message exchanges as well as one handwritten promissory note sent as a picture via text in March 2019. However, they do not agree on other fundamental aspects of their agreement regarding the loans.

A. To Whom Were the Loans Made?

- [18] One fundamental dispute is whether the loans Ms. Graham made were only to Lifeguard, or whether they were also made to Mr. Hardy in his personal capacity. In other words, the parties dispute Mr. Hardy's personal liability for the loans.
- [19] Their affidavit evidence on this point is different. Ms. Graham deposed:

Prior to, and throughout, my discussions with Mr. Hardy regarding the Four Loans, I understood that Lifeguard was a sole proprietorship owned by Mr. Hardy. Mr. Hardy did not inform me that Lifeguard was an incorporated, limited liability entity. I lent each of the Four Loans to Mr. Hardy under the belief that Mr. Hardy and Lifeguard were one and the same in terms of their liability for the Four Loans.

Mr. Hardy did not, at any time during our discussions regarding each of the Four Loans, tell me that he was requesting the loan only on behalf of Lifeguard or that Lifeguard was an incorporated company.

- [20] She was aware that Mr. Hardy referred to himself as CEO of Lifeguard, but that did not cause her to believe Lifeguard was incorporated, because in her experience "as a business management consultant, it is not uncommon for sole proprietorships to give themselves the title of CEO".
- [21] Mr. Hardy deposed that "Ms. Graham knew that Lifeguard was incorporated", although he attached no text, email, or any other document in which he expressly informed her that Lifeguard is an incorporated or limited company.
- [22] He also stated that their discussions about the loans were focussed on Lifeguard's need for bridge-financing and how the expected contracts with government would facilitate repayment. However, that does not assist me to know whether Ms. Graham actually knew Lifeguard, at the time, was an incorporated business, rather than just a sole proprietorship.
- [23] Mr. Hardy recounted discussions in early 2020 about the continuing debt to Ms. Graham, and he deposed that certain terms were suggested on behalf of Lifeguard by someone at Ponderosa Capital. However, no agreement was reached. Mr. Hardy claims that it was during these discussions that for the first time Ms. Graham asserted the loans "to Lifeguard were made personally to [him], and that [he] was liable to repay them".

B. Details about the Loans

- [24] The following chronology summarizes the text messages exchanged between the parties, which I regard to be objective evidence about their financial dealings. I include some portions of the narrative content of their affidavits, some of which I note is disputed.
- [25] The parties discuss these are "separate" loans. It is not clear whether that is the best description. Instead, different amounts were loaned over a period of time, accompanied throughout by changes to the due date and the terms of repayment. They did record in writing at one point a summary of the terms agreed to up to that point. Accordingly, that could be characterized now as one loan; they agree more money was lent after that, but it was stated to be on the same terms. However, nothing turns on whether they are described as separate loans. For convenience, I will adopt the parties' description of three or four separate loans.

1. First Loan

[26] In a text message exchange between November 7 and 9, 2018:

- a) Mr. Hardy stated that funds from the government were taking longer than expected, and "[w]e are in need of some funds anywhere from 10-25k". He confirmed there would be an offer of a 50% return for quick turn-around of the funds, such that "10 would pay 15 or 25 would pay 37". He asked if Ms. Graham could help direct them to anyone who would be interested.
- b) Ms. Graham's response was to personally offer to advance \$25,000, writing that Mr. Hardy could "consider paying [her] back principal only and sell[ing] [her] shares in lieu of the interest".
- c) Mr. Hardy was very appreciative, but indicated "[a]s for shares the honest answer is depending on where Aranka lands I will have [an] idea what I could do know this I would love to have u part of our team seriously."
- d) Ms. Graham responded, "let's just keep this a quick repay for now, so it's clean and easy", suggesting they talk share purchase when Mr. Hardy was ready. She indicated that she was happy to loan the money so long as the repayment schedule was met, "but not at a 50% rate - that's usury, & that's not me. Cut it to 25% which is still outrageously high but makes sense given no collateral". She said she could do an e-transfer as soon as they had a bare minimum of paper, "just amount, due date, payment - a promissory note. Work for you?"
- e) In his response, Mr. Hardy agreed, but noted that he did not have access to a computer. He suggested handwriting the promissory note later, signing it, and either sending her a picture or an email.
- f) Ms. Graham responded that a text message containing the promissory note was sufficient.
- g) Mr. Hardy sent a text stating, "To confirm our loan arrangement to Lifeguard Health Inc. on this date November 7, 2018 in the amount of \$25000 and to be repaid on or before December 7, 2018 in the amount of \$31250".
- h) Ms. Graham accepted, and they corresponded about the e-transfer details.

[27] In a text exchange between December 6 and 9, 2018:

- a) Mr. Hardy told Ms. Graham that he had "reached out as far as [he] [could] re money" and they did not have enough "to get [them] through" before "things in the works" were finalized.
- b) She asked him to text her a promissory note for the amount to be loaned, "with repayment dates/amounts etc". She then asked if he wanted to extend the previous amount one more month and told him to send her a text message with those details.
- c) In his text response, Mr. Hardy wrote the following:

As discussed please accept this as a promissory note to our loan agreement to Lifeguard Health Inc. [C]urrently LGH owes \$31250 (\$25000 principle [sic] \$6250.00 interest) [a]s of December 07, 2018[.] As of December 10th, 2018, LGH will borrow an additional \$25000 plus \$6250.00 interest total owed \$62500.00 to be paid back in total on or before January 31, 2019.

d) In her response, Ms. Graham suggested "tweaks to align interest with duration". She stated it was no problem for him to keep the original amount until January 31 but that they would need to factor in the interest for December and January, and "ditto" for new loan. She also suggested if they started that week and repayment was January 31, then that would be more like six weeks instead of four.

e) He responded as follows:

When I'm calculating I'm going to break it down to a smaller interest calculation instead of monthly[,] I'm going to break down to a daily amount so it's easier and more flexible to determine interest, but first we need to agree on monthly interest is \$12500 on \$50000 correct? [A]nd there are 31 days in each of December and January (12500/31) \$403 per day.

Correct? [S]o if new loan was on the 10th interest starting on the 10th that would be 21 days December[,] 31 days January.. total 52 days x \$403 \$20956 interest + 50000 principal + 6250 interest original loan total is \$77,206.

Do u agree.

f) She responded that was "good enough" for her.

[28] In a text exchange between January 30 and February 1, 2019:

a) Mr. Hardy wanted to confirm the details they discussed. He wrote that they agreed their current agreement stood "as is and will be replaced Lifeguard Health will pay 1% of the principal \$50,000 monthly. \$500 [p]er month starting February 05."

b) Ms. Graham asked for a "slight tweak to the language just for clarity", writing:

[I]ntent is as agreed The \$77206.00 originally due remains in place but the due date will be extended indefinitely. Lifeguard will pay 1% interest monthly ON the principal of \$50,009 [sic] (not OF the principal) monthly i.e. \$500 monthly starting Feb 05.

c) Mr. Hardy agreed, except he changed the start date to February 6 instead of 5, to which Ms. Graham agreed.

2. Second Loan

[29] In text message exchanges starting February 5, 2019, the parties discussed another loan. Ms. Graham deposed that between February 5, 2019, and March 18, 2019, she loaned an additional \$53,000.

[30] The amount is not disputed (nor are the accompanying text messages), but Mr. Hardy's affidavit has a different characterization as to what constitutes the second and third loans. I do not find that difference material and, for convenience, will adopt Ms. Graham's characterization as to what constitutes the second and third loans.

[31] A summary of the evidence regarding the second loan follows:

- a) Mr. Hardy proposed a new agreement via text for money they expected but had not yet received and needed urgently (two payments of \$14,000). He offered to pay \$1,000 as a fee on each for a 15-day loan. Ms. Graham agreed to pay by cheque.
- b) On February 20, 2019, Mr. Hardy texted they did not receive the money as expected and stated he would send Ms. Graham \$2,000 and would "calculate based on the present arrangement a daily interest to make up for the overage".
- c) Despite that text message, Ms. Graham deposed that Mr. Hardy did not forward that \$2,000. Mr. Hardy relies on the bank statement showing that payment was made and I have accepted his position (see above, paras. 14-16).
- d) Their affidavits are consistent that starting in early March, they continued to discuss Lifeguard's continuing financial difficulties, and the possibility of Ms. Graham providing additional bridge financing.
- e) Ms. Graham deposed that when Mr. Hardy requested another loan of \$50,000 at a meeting on Friday, March 8, 2019, she was sympathetic but needed time to consider his request. Her characterization is consistent with the text exchange between them on March 11, 2019, when Mr. Hardy reached out saying "really sorry to bother you just wanted to follow up from our conversation". She apologized for her delayed response and texted, "I can do 25k now, 25k beginning of April."
- f) In a further text, she addressed the amount to be repaid:

Can we do 20% due to risk/uncertainty re repayment timing? I have a lot invested here & while I'm confident that dominoes will fall in your direction, none of the cheques you've been expecting have come in the timeframes we discussed I need to reflect that risk.

- g) He agreed to 20% but asked what balance that was based on and what would work out as the monthly payment.
- h) In her responding text, she suggested daily interest paid monthly, starting with the March \$25,000 balance and another \$25,000 balance in April. She also stated they should put together a spreadsheet since they had "a lot of texts flying around" and she did not want them to end up with misunderstandings.
- i) Mr. Hardy agreed, but asked "are we [talking] the current 3 loans and starting again adding in this 25k all at 20% and the stream as the additional 25k is added?".

- j) Ms. Graham responded that she did not really understand, but their "current agreements should remain as is, with new money at 20% calculated daily, paid monthly."
- k) Mr. Hardy agreed, indicating he would send something over in a couple of hours.
- l) A few texts later, he asked about the last loan for \$28,000. He stated that it was supposed to be repaid in a short period, but that was not possible. The arrangement was "2K 2 weeks/ 4K per month", which he stated could "be left" but that it would be "a tough monthly payment". He then copied and pasted a previous text from Ms. Graham, part of which is reproduced above in para. 28(b).

3. Third Loan

[32] Between March 11, 2019, and March 28, 2019, the parties began to more formally record the loan arrangements and agreed to an additional loan. Ms. Graham deposed that when making her affidavit, she no longer had access to all of the text messages exchanged during this period.

[33] However, they agree that there was a significant text exchange starting March 28, 2019, initiated by Ms. Graham. Ms. Graham wanted to renegotiate the loan terms to take into account the interest she was paying at her bank and to provide her a rate of return reflective of the risky nature of a loan for a start-up business.

a) In a series of texts sent March 28, 2019, Ms. Graham wrote:

I want to lower your monthly costs to make it easier for you, and add a balloon payment at the end (like our first loan) to generate a decent return for the risk after taxes - I will need to claim the interest and will lose about 50%. I don't deal with this with my other investment options.

We calculated our agreement on simple interest, the bank calculates my Line of Credit at compound interest

Long story short Can you live with a \$635/month pmt on everything including the new loan versus \$1333 on just the first 2, (that covers my LoC interest) & do the balloon pmts outlined in the attached snapshot at the end?

- b) The document attached to her text is illegible in the record. Mr. Hardy confirmed in the text exchange that he had read it and after a few more exchanges he sought to confirm "loan is 128,000 pay back 194,208". Ms. Graham agreed, stating after taxes that was "slightly more than a 20% return, & all interest is tax deductible for Lifeguard".
- c) Mr. Hardy handwrote a promissory note and, on March 28, 2019, sent a picture of it to Ms. Graham by text (the "March Note"). That document is only partially legible in the record, but the parties do not dispute its contents. It stated, in part, that the total amount loaned was \$128,000.00, the total to be repaid was \$194,206.00 and the monthly interest was \$635.00. It stated that the \$194,206.00 was "to be paid back no later than Dec. 31/2019". It further broke the details down as follows:

- i. Loan 1 for \$50,000 - amount to repay \$77,206.00
- ii. Loan 2 for \$53,000 - amount to repay \$79,500.00
- iii. Loan 3 for \$25,000 - amount to repay \$37,500.00
- d) Ms. Graham deposed that the March Note constitutes the agreement between them for the first three loans.
- e) The parties also agree that she sent Mr. Hardy first \$9,000 and another \$16,000 in April 2019.
- 4. Fourth Loan

- [34] The parties met in October 2019, and Ms. Graham learned that Lifeguard was invited to participate in meetings with US government officials that could represent a breakthrough for the company. Mr. Hardy sought a loan to cover expenses for travel to Washington, D.C., to attend those meetings.
- [35] Ms. Graham wanted time to consider the request, but deposed that Mr. Hardy "was in a rush to obtain the loan", and therefore they "did not negotiate the details". In his affidavit, Mr. Hardy stated they did not "discuss interest or fees".
- [36] Ms. Graham agreed on October 11, 2019, to loan him \$30,000. Ms. Graham deposed they agreed the repayment terms would be the same as the previous loans, and at a minimum, the repayment would be no worse than the terms Mr. Hardy provided to Ms. Aveledo from whom he had also borrowed money.

5. Default

- [37] There is no dispute that neither Mr. Hardy nor Lifeguard repaid the amount owing to Ms. Graham (\$194,206) under the March Note.
- [38] Ms. Graham demanded repayment of those funds, as well as the amount owing under the fourth loan, but they have not been paid.

C. Interest Rate

- [39] The parties' evidence is consistent that the loan arrangements were informal. The parties' evidence is also consistent that they did not turn their minds to what the effective annual interest rate was on the loans, although at times their texts referred to daily or monthly interest, or an interest percentage but unspecified as to time.
- [40] Ms. Graham deposed she was unaware of the Criminal Code, R.S.C. 1985, c. C-46, s. 347, prohibition on interest rates above 60% per annum.

[41] Ms. Graham's submission in her notice of application is that the following figures represents the effective annual rates of interest on the first three loans: 51.59% for loan 1; 63.15% for loan 2; and 68.87% for loan 3. She relies on an affidavit prepared by Jas King, a paralegal assisting the plaintiff's counsel, who prepared spreadsheets showing the effective annual interest for the loans recorded on the March Note.

[42] Ms. Graham seeks to enforce the parties' agreement about repayment, except where that amounts to an effective annual rate of interest (based on Ms. King's calculations) of over 60%, in which case she proposes the rate be read down to 60%. Her position is set out in the following table.

Loan No.

Principal Amount

Interest Rate

Interest Owed Until Date of Hearing (January 11, 2023)

Total

1

\$50,000.00

51.59% per annum from and after December 12, 2018

\$105,370.55

\$155,370.55

2

\$53,000.00

60% per annum from and after March 18, 2019

\$121,536.30

\$174,536.30

3

\$25,000.00

60% per annum from and after April 11, 2019

\$56,343.33

\$81,343.33

4

\$30,000.00

60% per annum from and after October 29, 2019

\$57,946.24

\$87,946.24

- [43] The parties agree the total money advanced by Ms. Graham was \$158,000. From the table above, the total interest payable would be \$341,196.42. Ms. Graham also agrees she received \$7,635 in interest payments. Mr. Hardy's position, which I accept (see above para. 16), is that he paid her an additional \$2,000 but the table above does not account for that. After deducting that and adding in the principal, Ms. Graham's claim is for \$491,561.42.
- [44] The defendants submit there is no basis to impose the interest rates sought by Ms. Graham because at her examination for discovery, Ms. Graham admitted she is unaware of how those interest rates were calculated. Further, they contend that, since the parties never came to an agreement about the effective annual rate, there is no agreement on interest and none is recoverable by Ms. Graham, effectively limiting liability to repayment of the principal sum of \$158,000.
- [45] However, Ms. Graham's position is that neither of them contemplated the effective annual rate, but not that they never came to an agreement on interest. In fact, the evidence is consistent that before the March Note, they both viewed the arrangement as an amount loaned, to which a "fee" was added to determine the amount to be repaid. For example, at his examination for discovery, Mr. Hardy agreed that with respect to the first loan, he proposed a 50% fee on money advanced by Ms. Graham, which she insisted be reduced to 25% (see above paras. 26(d) and (e)).
- [46] The only reason the parties now have to think about effective annual rates of interest is because of the prohibition in s. 347. The important point is that annual interest was at no time part of their agreement, and for a time before the March Note they did not think in terms of "interest" but fees.
- [47] I find the March Note clearly illustrates that the parties came to an agreement about the amount that had been loaned, how much had to be repaid, when it was due, and the breakdown between principal and other amounts owing.

II. ANALYSIS

[48] There are three issues:

- a) Is this matter suitable for summary determination?
- b) If it is, who is liable for repayment of the money loaned by Ms. Graham?
- c) What amount can be repaid over and above the money advanced?

A. Suitability

- [49] Rule 9-7(15) of the Supreme Court Civil Rules states that summary judgment is appropriate unless the court is unable to find the facts necessary to decide the issues, or is of the opinion it would be unjust to do so.
- [50] There is no dispute about the governing legal principles in assessing suitability. As set out in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31, among the factors a court can consider to determine if the matter is suitable for summary determination are the following: the complexity of the matter; whether credibility is a critical factor; and whether allowing a summary trial will unnecessarily complicate resolution of the dispute or result in litigating in slices.
- [51] I find this matter is not unduly complex and granting the application would not result in litigating in slices. I also find the costs of a conventional trial outweigh to a significant degree the cost of a one-day summary trial. These factors favour allowing the summary application to proceed.
- [52] Relying on *No. 2002 Taurus Ventures Ltd. v. Intrawest Corp.*, 2007 BCCA 228 at paras. 74-78, the defendants emphasize that there are fundamental conflicts in the evidence on key statements about the terms of their agreement, which necessitates a full trial. I find that case distinguishable. It was considerably more complicated as it involved allegations of negligent misrepresentation and the existence and validity of a "collateral contract" in the face of an "entire agreement" clause in the written contract.
- [53] However, the defendants are correct that the existence of direct and fundamental conflicts in the evidence does militate against summary determination.
- [54] The primary dispute between the parties is whether the loans from Ms. Graham were made only to Lifeguard, or to Mr. Hardy in his personal capacity and to Lifeguard. Both parties agree that the determination of this issue is based on an objective test (discussed below at paras. 68-69).
- [55] There is ample objective evidence about the formation of the loan agreements because the parties agree that their arrangements are set out in a number of text messages.
- [56] Ms. Graham deposed that she was never told that Lifeguard was incorporated, and her belief was that the loans were being made to Mr. Hardy and a sole proprietorship that he owned. Contrary to his submissions, there is no direct conflict in the evidence on this point. There would be a direct conflict if he deposed that he did tell her the company was incorporated. That is not his evidence.
- [57] He deposed:

Our discussion about the loans were always focussed on the Company's need for bridge-financing, and the Company's expected contracts with government that would facilitate repayment of the loans. Ms. Graham knew that Lifeguard was incorporated and was content to

document her agreements with Lifeguard by way of either text message, or a document, which I drafted and referred to as a "Promissory Note". The loans to Lifeguard were made on this informal basis. The loans were always discussed as loans to Lifeguard, and it was never suggested or discussed that the loans she made would be loans to me personally.

[Emphasis added.]

[58] Obviously, Mr. Hardy cannot speak as to what Ms. Graham knew, so his evidence that "Ms. Graham knew" the company was incorporated is akin to a submission; as such, I cannot place weight on that assertion.

[59] Mr. Hardy can ask the Court to find that Ms. Graham did have that knowledge from other evidence, but doing so would be based on inferences drawn from the text messages. Ms. Graham relies on the same evidence to buttress her statement that she was never told Lifeguard was incorporated. The text messages are objective evidence from which each party asks different inferences to be drawn. This does not reflect a direct conflict in the evidence, so I do not agree that is a bar to proceeding with a summary trial.

[60] Other references in paragraph quoted above from Mr. Hardy's affidavit to "the Company" or "Lifeguard" are unhelpful since those are terms Mr. Hardy defined in his affidavit to mean Lifeguard as a corporation. Nothing in the text messages purports to define those same terms in that way.

[61] Parties are expected to bring their full case to court even when they challenge suitability: Gichuru at para. 32. Had Mr. Hardy specifically told Ms. Graham that Lifeguard was incorporated, and all the loans he sought were only to that company, that evidence would have been in his affidavit. It is reasonable to assume their absence means those statements were not made.

[62] Accordingly, the resolution of the issue will have to turn on the text messages made at the time the loans were made, which are objective, and what if any inferences can be drawn from those messages.

[63] For that reason, I do not agree with the defendants that the state of the evidence is such that the Court cannot find the necessary facts.

[64] Lastly, the principal loan repayment amount at stake in this case is under \$200,000, which does not strongly support a full trial. The plaintiff seeks a significant amount more than that once interest is factored in, and that is the subject of dispute. However, they agree on the amount of principal owing.

[65] Also, the parties have already conducted examinations for discovery, so they have had some opportunity to test the evidence from the opposing party. In those circumstances, I do not find it unjust to proceed summarily.

[66] For all those reasons, I find summary trial is appropriate.

B. Is Mr. Hardy Liable Personally?

- [67] The parties agree on the applicable legal principles.
- [68] A person entering a contract on behalf of a limited liability company has an obligation to make that clear to the other party. If that is not done, the person can be held personally liable: *Pageant Media Ltd. v. Piche*, 2013 BCCA 537 at paras. 41-46.
- [69] Courts rely on an objective test to determine whether a limited liability company met its obligation to make its status clear to the other party. The question is whether an officious bystander, looking at all the circumstances at the time the transaction was made, would have concluded that that the person entering into the contract knew, or ought to have known, that they were contracting with a limited liability company rather than an individual: *Pageant Media Ltd.* at para. 47.
- [70] The defendants submit that Ms. Graham's position is merely a pressure tactic to force repayment. In support, they rely on *269893 Alberta Ltd. v. Petersen*, 2015 BCSC 184 at paras. 79, 84 [Petersen]. In that case, the court noted at para. 79 that subsequent conduct by parties can be considered to assist the determination of the parties' intent at the time the contract was formed. The court relied on that principle for assistance, in part, because of "grave doubts" about the accuracy of one party's evidence: *Petersen* at para. 65. The court stated that the party's evidence was "carefully worded and arguably technically correct" but "close to the line in misrepresenting to the court the actual events": *Petersen* at para. 41.
- [71] While the general proposition is sound, I find *Petersen* distinguishable on the facts. The only subsequent conduct Mr. Hardy refers to is his belief that it was during debt repayment negotiations in 2020 that Ms. Graham stated for the "first time" that he was personally liable. However, this evidence does not directly conflict with her position that she never knew the company was incorporated before that. It does not support a conclusion that her legal position is purely strategic and not genuine.
- [72] Ms. Graham emphasized in her evidence that at no time did Mr. Hardy inform her that he was only negotiating on behalf of the limited company. As noted earlier, that evidence is not directly contradicted. I do find this strongly supports her position, but it is not determinative.
- [73] She also submits there are other indicia that are consistent with her position. I agree the following would not result in an officious bystander knowing she was lending money only to an incorporated company, nor should she have known that:
- a) in the text messages, Mr. Hardy almost always spoke in the collective "we", which Ms. Graham reasonably presumed to mean him personally and the business and/or company;
 - b) Mr. Hardy gave Ms. Graham both his personal and work emails for e-transfers, and she sent e-transfers to his personal email;

- c) Mr. Hardy used his personal cell phone to text with Ms. Graham and not Lifeguard's phone number;
 - d) there are no records of funds from Ms. Graham being deposited into Lifeguard's bank accounts, but there are records of the funds going into Mr. Hardy's personal bank account; and
 - e) the March Note was signed by Mr. Hardy without any indication that he was signing on behalf of Lifeguard.
- [74] Ms. Graham also submits that Mr. Hardy personally requested and negotiated each loan. However, I do not find that is supportive of her position because he may have been the only person authorized to do so on behalf of the corporation. On its own, that evidence is unhelpful.
- [75] Mr. Hardy submits the following would alert an officious bystander that the loans were only to the corporation:
- a) There are two text messages which refer to Lifeguard Health Inc. One dated November 7, 2018 (see above para. 26(g)) and another dated December 9, 2018 (see above para. 27(c)).
 - b) Ms. Graham suggested repayment by way of shares for the first loan (see above para. 26(b)).
- [76] I agree the reference to the corporate name in two texts is consistent with Mr. Hardy's position. The problem is that there are a greater number of texts where he failed to include "Inc.". While the reference to repayment by way of shares by Ms. Graham also could be supportive of his position, Mr. Hardy's response to her suggestion was vague.
- [77] Moreover, missing from the record is confirmation of exactly when Lifeguard was incorporated. Mr. Hardy confirms it started as a sole proprietorship and was incorporated some time in 2018, but no further details are given. It is reasonable that a business begins and may even receive funds before incorporation, but the timing of that event is an important fact.
- [78] The absence of that fact (which would only be known to Mr. Hardy) leaves open the possibility that when Ms. Graham suggested repayment in shares, none existed at that time, although I am not making that finding. The point is that I am unable to conclude her reference to shares is determinative as to what she knew or ought to have known about the status of the business at the time she made the reference. She could easily have believed that incorporation was an event to occur in the future. That is also the only time shares are referenced.
- [79] Mr. Hardy referred to some other circumstances (Lifeguard's symbol being on the stationery used for the March Note and cheques being made payable to Lifeguard), but I do not find those to be significant or helpful to resolving this issue.

[80] Looking at the evidence as a whole, and considering the reasonable inferences that can be drawn from the entirety of the parties' text exchanges, I am not satisfied that an officious bystander would have known or ought to have known that Ms. Graham was lending money only to Lifeguard Health Inc.

[81] Accordingly, I am satisfied that Mr. Hardy is personally liable for the amounts loaned.

C. What Amount Has to Be Repaid?

[82] The parties agree that when extrapolated to represent an effective annual rate of interest, two of the loans in dispute appear to have charged a rate of interest over 60%, contrary to s. 347 of the Criminal Code.

[83] The defendants' position is that all four loans exceed the criminal rate. However, their primary position is that since there was no agreement about the interest rate, any order for repayment should be restricted to the principal amounts loaned. In the alternative, they rely on the provisions of the Interest Act, R.S.C. 1985, c. I-15, and submit the interest awarded must be limited to an effective annual rate of 5%.

1. Legal Principles

[84] The parties agree on the general legal principles arising from these issues. The definition of interest in s. 347 of the Criminal Code is broad and includes the sum of, among other things, all charges, fees, fines, penalties, commissions or other similar charges. There is no dispute that the amounts sought by Ms. Graham in addition to the principal amount loaned (meaning, the amounts sought more than \$158,000) do fall within the definition of "interest" for the purpose of s. 347 of the Criminal Code.

[85] The court has three options to remedy a criminal interest rate: (i) void the contract ab initio; (ii) strike out a term or terms in the contract (to effectively sever illegal interest from the principal owed); or (iii) read down the interest rate to 60%: *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2020 BCCA 70 at para. 52. Neither party seeks to void the contract, but they disagree on whether severance or reading down is the appropriate remedy.

[86] In *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 [Transport], the Supreme Court of Canada addressed the issue of whether the court can partially enforce a contract that contravenes s. 347 by reading down the interest rate. It concluded that option is available because of its preference for remedial flexibility: paras. 4-6, 40. In doing so, it discussed what it termed the problems of the "blue-pencil test", or severance: paras. 27-40.

[87] It was in this context that the Court in *Transport* set out the factors to consider when determining whether to allow an otherwise illegal agreement to be partially enforced rather than declared void ab initio (para. 42):

1. whether the purpose or policy of s. 347 would be subverted by severance;

2. whether the parties entered into the agreement for an illegal purpose or with an evil intention;
3. the relative bargaining position of the parties and their conduct in reaching the agreement;
4. the potential for the debtor to enjoy an unjustified windfall.

2. Remedy

[88] The parties disagree whether this Court should simply read down the interest rate or completely sever it. Considering the factors cited in *Transport*, I do not find severance is the proper remedy. Neither party suggested the agreements were illegal or motivated by evil intent, and I find consideration of the other factors does not favour severance.

[89] The following comments, at para. 6 of *Transport*, about the principles underlying the flexible approach to crafting a remedy for loans that run afoul of s. 347 are apt:

6 A spectrum of remedies is available to judges in dealing with contracts that violate s. 347 of the Code. The remedial discretion this spectrum affords is necessary to cope with the various contexts in which s. 347 illegality can arise. At one end of the spectrum are contracts so objectionable that their illegality will taint the entire contract. For example, exploitive loan-sharking arrangements and contracts that have a criminal object should be declared void ab initio. At the other end of the spectrum are contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable. Contracts of this nature will often attract the application of the doctrine of severance. The agreement in this case is an example of such a contract. In each case, the determination of where along the spectrum a given case lies, and the remedial consequences flowing therefrom, will hinge on a careful consideration of the specific contractual context and the illegality involved.

[90] The Supreme Court of Canada also noted the actual purpose of s. 347 was difficult to discern, beyond the prevention of loan-sharking. Because of that, "violations of the section that clearly do not involve loan-sharking should be approached cautiously, keeping in mind that there is no need to deter, through the criminal law, effective interest rates of up to 60 per cent per year": *Transport* at para. 43.

[91] In this case, the defendants do not suggest they were duped or misled by Ms. Graham. That is supported by the evidence in which they discussed terms and made changes to suit them both. Accordingly, I do not conclude that the policy underlying s. 347 would support severance in this case.

[92] Furthermore, I do not agree with the defendants that the relative bargaining position of the parties militates towards severance. Mr. Hardy submits that Ms. Graham knew the loans were arranged without Mr. Hardy receiving legal or any other professional advice, while he was recovering from alcohol addiction, implying he was in a vulnerable state. I do not accept that reasoning for three reasons.

- [93] First, there is no evidence that either party received legal advice regarding the loans. Ms. Graham specifically stated that she was unaware of the criminal prohibition on interest rates more than 60 percent.
- [94] Second, the only evidence about her knowledge of Mr. Hardy's alleged vulnerability is in his affidavit. He deposed that at their first meeting they discussed "the impetus for and [his] idea for the Lifeguard app" and "[his] continuing recovery and the treatment and programming [he] was attending". This evidence was uncontested.
- [95] It is reasonable to infer that Ms. Graham was informed of the tragedy that compelled Mr. Hardy to conceive of the app, and the fact that he was in a recovery facility when that happened. However, unless one takes a prejudicial view of those who suffer from and are receiving professional assistance for addiction, such knowledge does not automatically mean he was vulnerable in any way, or that she would have or should have believed he was in a vulnerable state.
- [96] Third, regardless of Ms. Graham's state of knowledge about Mr. Hardy's recovery, what is clear is that Mr. Hardy was able to conceive of an impressive idea, and take significant steps to have it implemented. Those steps included at the very least incorporating a company and being sufficiently successful at its promotion to be invited to meet with US federal lawmakers. Those are not indicia consistent with the type of bargaining imbalance that would prevent upholding the entirety of their agreements.
- [97] I also find that accepting Mr. Hardy's position would amount to a significant windfall for him and Lifeguard. There is no dispute that there has now been at least three-and-a-half years that Ms. Graham has been out of pocket \$158,000. The defendants' proposal would mean she would realize no return (beyond the \$9,635 already received) whatsoever for her investment in the venture.
- [98] The defendants cite two cases in support of their position that no interest should be paid, but both are distinguishable.
- [99] In *Canmerica Mortgage Corporation v. Yu*, 2015 BCSC 773 [Canmerica], Justice Sewell was satisfied that the evidence in that case satisfied the second consideration from *Transport*. This was based, in part, on his conclusion at para. 122 that the lender's evidence was "contrived and designed to persuade the Court that he did not intend to charge criminal interest." In other words, Sewell J. was satisfied that the lender was aware and intended that the loan included interest at a usurious rate. Justice Sewell severed the interest provisions from the balance of the amount advanced.
- [100] In the present case, the evidence is undisputed that neither party turned their mind to what the effective annual rate of interest was on any of the loans. In my view, that is sufficient to distinguish *Canmerica*. I add that Ms. Graham specifically deposed she was unaware of the criminal prohibition. I cannot, in those circumstances, conclude Ms. Graham knew or intended that the loans would contravene s. 347 of the Criminal Code.

[101] The defendants also rely on *William E. Thomson Associates Inc. v. Carpenter*, 61 D.L.R. (4th) 1, 1989 CanLII 185 (Ont. C.A.) [Thomson], where severance of interest was ordered and the defendants were only liable for repayment of the principal. In *Transport* at para. 24, the Supreme Court of Canada approved the proposition in *Thomson* at 12 that deciding whether "a contract tainted by illegality is completely unenforceable depends upon all the circumstances surrounding the contract and the balancing of the considerations discussed above and, in appropriate cases, other considerations".

[102] The Supreme Court was not purporting to favour the remedy of severance over any other. In addition, the factual circumstances of *Thomson* are quite different from the present case as they involve a failed mining development and the ability of the lender to realize repayment of a facility fee (that did amount to interest) from guarantors to the loan.

[103] For all those reasons, I do not find that limiting Ms. Graham's recovery to \$158,000 is the appropriate remedy.

3. How Much "Interest" Has to Be Repaid?

[104] The defendants rely on the Interest Act to limit any interest to 5%. This is an argument advanced in the alternative in the event "the Court concludes that the parties agreed to pay interest at the rates sought" in the notice of application.

[105] I agree with the defendants that the parties never agreed to the effective annual interest rates sought by Ms. Graham in her application because they did not contemplate annual rates.

[106] However, I do not agree that they "did not agree" on an "interest rate" at all. The parties clearly came to an agreement regarding an additional amount that would have to be paid, as they contemplated the payment of fees which are included in the definition of "interest" in the Criminal Code. The more difficult question is determining what the effective rate of interest should apply, and for what periods of time.

[107] The parties disagree about the appropriate methodology to employ to determine the appropriate interest to avoid a criminal interest rate. Ms. Graham essentially reverse engineers an effective annual rate based on the March Note.

[108] As an example, she claims the original loan of \$50,000 should attract an annual interest rate of 51.59% after December 12, 2018. That rate was determined by applying a particular formula--as set out in Ms. King's affidavit--in consideration of the following:

- a) Start date of loan: December 12, 2018
- b) Repayment date on March Note: December 31, 2019
- c) Number of days loan was outstanding by repayment date: 385
- d) Principal: \$50,000

e) Repayment amount stipulated in the March Note: \$77,206

[109] The formula applied was: $(365/\text{number of days outstanding}) * [(77,206/50,000)-1] * 100 = 51.59\%$.

[110] The defendants say that is incorrect. They assert the agreement was originally \$25,000, lent on November 7, 2018, for one month, to be repaid with an additional \$6,250 (total \$31,250). Their position is this represents an effective annual interest rate of 300%.

[111] I do not agree. On November 7, 2018, Ms. Graham advanced \$25,000 to be repaid in one month. However, repayment was extended in early December to the end of January, and then extended (indefinitely) in early February, before its terms were recorded in the March Note. In other words, I find the arrangements were at first fluid and subject to change on short order.

[112] It is clear on the record that neither party contemplated effective annual interest rates. The defendants accurately describe that the parties' early discussions contemplated "fees" to be charged over the amount loaned. It is clear that in a very short period, the loans were all extended and their repayment terms were changed from gross amounts to be paid sometimes with fees to gross amounts to be paid sometimes with "interest".

[113] I find that the parties' agreements were crystalized in the March Note. It is clear on its face about the amounts advanced, when repayment was due, and breakdown between principal and other amounts owing. Whatever their arrangements were before, I find on the evidence the March Note accurately represented their agreement at that point in time and going forward.

[114] Considering all the circumstances, I find it appropriate to rely on the March Note as setting out the terms of the loan, including for the purpose of calculating the effective annual rate of interest.

[115] Accordingly, I do not agree with Ms. Graham's position on how the effective annual rate of interest was calculated. She relies on calculations based on when the money was actually advanced. That is incompatible with my conclusion that the parties' agreement was crystallized by the March Note on March 28, 2019.

[116] Despite the fact that a significant amount of money was loaned by Ms. Graham before March 28, 2019, the March Note does not stipulate that the fee or interest attached to the repayment amounts will ultimately vary based on the date the money was advanced. Yet, that is what the calculations in Ms. King's affidavit do.

[117] In my view, the agreement is clear: the parties agreed on March 28, 2019, to a loan of \$128,000 (most of which had already been advanced) to be repaid on December 31, 2019, in the amount of \$194,206.

- [118] Accordingly, the parties need to determine what is the effective annual interest rate for a loan of \$128,000 given on March 28, 2019, which became due on December 31, 2019. If that amount is over 60%, then Ms. Graham is limited to 60% repayment, whatever that amount would be. I trust the parties will be able to come to an agreement about the applicable effective annual interest rate given my conclusions.
- [119] In terms of the "interest" payments of \$635 written on the March Note, I do not agree those sums were contemplated by the parties to be "interest" as that term is understood in either common parlance or the business sense. The March Note does not indicate as to how that amount was calculated, and I find no other evidence is definitive on that issue. Instead, despite the use of the word "interest", I find the parties treated that as a monthly "fee" that would be applied towards the total "fee" payable on December 31, 2019.
- [120] For that reason, I do not find the Interest Act applies. The parties agreed on a loan, with a fee, both payable on December 31, 2019. The monthly \$635 payments were partial payments of the fee.
- [121] Specifically, I rely on and find applicable the following remarks of Madam Justice Wilson about the Interest Act in *V.K. Mason Construction Ltd. v. Bank of Nova Scotia*, [1985] 1 S.C.R. 271 at 287, 1985 CanLII 608:

Section 4 is consumer protection law in the sense that, with respect to loans other than real estate mortgages, consumers are entitled to know the annual rate of interest they are paying. A sophisticated commercial borrower like Courtot, who in this case was borrowing at a floating rate of interest, is in scant need of protection by being informed of his rate of interest at the annual, rather than the 360 day, rate. More to the point, as Mr. Robinette points out, since the section allows a borrower to escape from what would otherwise be a valid arm's length financial transaction, it is unfair to adopt a construction which does not take account of the legitimate interests of the lender.

- [122] The situation at hand does not attract consumer protection legislation. While the parties in this case are not corporations or banks, I do find they both had a fair amount of business acumen and sophistication. More importantly, this was not a situation of a "consumer" purchasing a product or service and having to pay interest for the amount owed. Instead, the defendants sought out, time and time again, risky, short-term bridge loans to get their business up and running.
- [123] I find it would be significantly unfair to limit Ms. Graham to principal plus 5% repayment on those loans when both parties agreed they never turned their minds to effective annual rates of interest because of the expectation that these loans constituted short-term, bridge financing until government funds came into the business.

4. The April 2019 Loan

[124] The parties agree that after the March Note, Mr. Hardy requested and Ms. Graham agreed to loan money to help fund his trip to Washington D.C. She advanced \$30,000 on October 29, 2019. The evidence is clear that the loan was "on the same terms" as the March Note. Thus, I find she expected \$30,000 to be due on December 31, 2019, together with a "fee" that represents an amount calculated when the effective annual interest rate determined by the parties for the March Note (see above, para. 117 and 118) is applied to that amount.

III. CONCLUSIONS

[125] For the reasons stated in this judgment, I conclude:

- a) Mr. Hardy is personally liable, with his company, for the loans made by Ms. Graham.
- b) The March Note contains the terms of the parties' agreement. Thus, the first three loans were for a principal of \$128,000. The defendants are liable to pay this amount.
- c) The defendants are also liable to repay the fee on \$128,000, the amount of which is to be calculated as follows:
 - i. the parties must calculate the effective annual interest rate represented by the payment of \$66,206 (\$194,206-\$128,000) on a loan of \$128,000 advanced on March 28, 2019, to be repaid on December 31, 2019. If that rate is 60% or less, then the fee is the whole amount (\$66,206).
 - ii. If the rate calculated above is over 60%, the parties must apply an effective annual rate of 60% to \$128,000 for the period March 28 to December 31, 2019. The result of that calculation will be the fee on the March Note.
 - iii. From the figure obtained in either (i) or (ii) above, the parties must subtract \$9,635, and the remaining sum is the fee the defendants must pay in addition to the \$128,000.
- d) The defendants are liable for the final loan of \$30,000 advanced on October 29, 2019.
- e) The defendants are also liable for a fee on the final loan, which they must pay. The amount of that fee is to be calculated by applying to \$30,000 for the time period of October 29, 2019, to December 31, 2019, at the effective annual rate of interest determined under paragraphs (c)(i) or (ii).
- f) From the total of the amounts calculated above, the parties shall deduct \$9,635. The result of that calculation represents the defendants' liability to Ms. Graham.
- g) If the parties cannot agree on the amounts to be paid under paragraphs (c) or (e), they may seek leave for a brief appearance before me to resolve that issue.

[126] The plaintiff has been successful and is entitled to her costs. If there are issues relating to costs of which I am unaware, or the parties cannot agree on the amount the defendants must repay, the parties may seek a brief hearing before me to address those issues, but that request must be made no later than 30 days from the date of this judgment.

"Sharma J."

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