
CANADA / JUDGMENT

HSBC Bank Canada v. Singh

2017 BCSC 1893

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1893 HSBC Bank Canada v. Singh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

HSBC Bank Canada v. Singh,

2017 BCSC 1893

Date: 20171023

Docket: S146809

Registry: Vancouver

Between:

HSBC Bank Canada

Plaintiff

And

Manjeet Singh, a.k.a. Manny Singh,

and Dalvir Singh Narula

Defendants

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff:

P.J. Roberts

J.R. Pollard

Counsel for the Defendants:

J.S. Malik

D. Luddu, Articling Student

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 5-9, 13-14, and

August 14-18, 2017.

Place and Date of Judgment:

Vancouver, B.C.

October 23, 2017

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INTRODUCTION

- [1] The plaintiff alleges that Manjeet Singh, a.k.a. Manny Singh (who I will refer to as the defendant), in his role as shareholder, director, and general manager of 0762639 B.C. Ltd., doing business as New World Distributors (NWD), knowingly or recklessly provided false financial information to the plaintiff about NWD in order to enable it to borrow extensively from the plaintiff.
- [2] To describe the nature of the claim more fully, and the response to it by the defendant, I will give an outline of the pleadings.
- [3] The notice of civil claim alleges that:
- a) the defendant was a director, 50% shareholder, and the general manager of NWD;
 - b) the co-defendant, Mr. Narula (against whom default judgment has been taken and who played no role in the trial), was also a 50% shareholder of NWD;
 - c) NWD imported food [from India] and packaged and distributed it from their premises in Surrey, British Columbia;
 - d) in 2011, the defendant and Mr. Narula guaranteed the debts of NWD to the plaintiff;
 - e) the plaintiff provided "credit facilities" defined in "facilities letters" to NWD;
 - f) one of the credit facilities was an operating loan with maximum limits established by facilities letters as follows:
 - (i) September 27, 2012, a limit of \$700,000;
 - (ii) April 8, 2013, a limit of \$1,000,000;
 - (iii) June 24, 2013, a limit of \$1,500,000; and
 - (iv) November 29, 2013, a limit of \$2,000,000;
 - g) the plaintiff determined the credit limit for the operating loan (a process referred to at the trial as "margining") based on the aggregate value of:
 - (i) 75% of New World's "Acceptable Uninsured receivables" (as defined in the Facility Letters), being accounts receivable which have been outstanding for not more than 60 days and, after April 8, 2013, 90 days; plus
 - (ii) 90% of New World's "Acceptable Insured Receivables" (as defined in the Facility Letters), being inventory owned by New World for resale or for production of goods for resale; plus
 - (iii) 50% of "Acceptable Inventory" (as defined in the Facility Letters) to a defined maximum value of \$350,000 or, after April 8, 2013, \$400,000 or, after November 29, 2013, \$500,000; less
 - (iv) The value of "Priority Claims" (as defined in the Facility Letters).

- h) NWD agreed to provide the plaintiff monthly with the following "Reporting Records"
- (i) a profit and loss statement;
- (ii) a list of aged receivables;
- (iii) a list of accounts payable;
- (iv) a list of its inventory;
- (v) a statement signed by a senior officer of NWD "setting out the calculation of "Acceptable Receivables and the Acceptable Inventory".

These reports were described at the trial as "margin reports";

- i) the operating loan was repayable on demand;
- j) as of August 18, 2014, NWD was indebted to the plaintiff on various credit facilities in the sum of \$2,234,405.48 which it was unable to pay;
- k) on August 26, 2014, the plaintiff made demand on the defendants for payment pursuant to the guarantees but each has neglected or refused to pay the sum owed;
- l) NWD and the defendant were responsible for providing the Reporting Records;
- m) the defendant "knowingly created and submitted" to the plaintiff inaccurate Reporting Records "for the purpose of artificially inflating the credit limit available on the operating loans";
- n) the defendant's representations to the plaintiff were knowingly false or were made recklessly "without knowing whether they were true or false" and included:
 - (i) recording in the Accounts Receivable inflated amounts and values for accounts receivable;
 - (ii) recording in the Accounts Receivable fictitious accounts receivable;
 - (iii) recording in the Accounts Receivable sales and accounts receivable that were not the property of [NWD];
 - (iv) creating a payment cycle between [NWD] and related companies that artificially supported sales, accounts receivable and inventory counts for [NWD] and recording those in the Reporting Records;
 - (v) recording in the Inventory Listing inflated amounts and values of inventory;
 - (vi) recording in the Inventory Listing inventory that either did not exist or inventory that was not the property of [NWD]; and
 - (vii) signing the Reporting Records, including the Certificates of Compliance, that were inaccurate, misleading and incomplete.

- o) in reliance on the false representations of the defendant, the plaintiff extended credit to NWD and has thereby suffered damage.

[4] The response to civil claim:

- a) admits the defendant's guarantee and the demand for payment;
- b) denies the allegation of fraud; and
- c) alleges that:

- (i) the business of NWD included the operations of a related company in India;

- (ii) the terms on which the plaintiff provided credit to NWD were partly oral and partly the result of a course of dealings between the parties;

- (iii) NWD was a new business in 2011 when it first obtained credit facilities with the plaintiff which requested NWD "integrate its business with that of NA Food Corp. ("NAFC"), a related company" importing food into British Columbia, "in order to show sufficient revenues, and NWD carried out this request by arranging for NAFC to transfer its inventory and receivables to" NWD;

- (iv) at about the same time that NWD obtained the credit facilities, it was in discussions with Paragon Infratech Private Ltd. ("Paragon"), an Indian company in the food exporting business. The discussions concerned Paragon becoming a subsidiary of NWD.

- (v) The plaintiff was interested in acquiring the banking business of Paragon;

- (vi) the plaintiff encouraged NWD "to further integrate" the businesses of NWD and Paragon and encouraged NWD to report "the sales of inventory by Paragon on the books of" NWD;

- (vii) the nature of the reporting of NWD to the plaintiff "would have made the inclusion of Paragon's sales in the reporting obvious";

- (viii) regular visits by the plaintiff's representatives to NWD's Surrey warehouse "would have made obvious the fact that such warehouse could not hold the volume of inventory being reported as sold by NWD, and which would have made obvious the fact that other sales were being recorded by" NWD;

- (ix) in late 2013 the plaintiff agreed to provide further credit facilities to enable NWD to lease equipment and to purchase "inventory and materials to be used" with the equipment. The plaintiff breached that agreement by delaying the further credit facilities into early 2014 "in order to maximize the bonus payable to the plaintiff's representative";

- (x) by ultimately refusing to provide such further credit facility, the plaintiff "materially increased the risk to the defendant under his guarantee" and "impaired the security that would be available [to the defendant] on payment of his guarantee obligation"; and

(xi) on July 23, 2014 the plaintiff executed a release and covenant not to sue NWD (in favour of the defendant's father Ammar Jeet Singh) regarding its indebtedness to the plaintiff thereby increasing the risk to the defendant on his guarantee.

[5] The parties entered into an "agreed statement of facts" which includes the following:

- a) the defendant ceased to be a director and shareholder of NWD in May 2014 when he sold and transferred his shares to Ammar Jeet Singh;
- b) at all material times, NWD was in the business of importing, packaging, and distributing food out of their premises in Surrey, British Columbia;
- c) the plaintiff provided credit facilities pursuant to the facilities letters;
- d) on April 27, 2011, the defendant provided a written guarantee for the present and future debts of NWD to the plaintiff;
- e) on December 6, 2013, the plaintiff presented an "offer to lease" machinery to NWD;
- f) on April 17, 2014, Ammar Jeet Singh guaranteed the debts of NWD to the plaintiff;
- g) on April 23, 2014, the plaintiff transferred NWD's account to its "special credit" department;
- h) on May 12, 2014, the plaintiff made demand for payment of the total indebtedness of NWD of \$2,234,405.48;
- i) in July 2014, Ammar Jeet Singh paid \$190,000 to the plaintiff in exchange for a release by the plaintiff of all security it held over the assets of NWD and a covenant not to sue NWD or Ammar Jeet Singh;
- j) on August 20, 2014, the plaintiff made demand on the defendant's guarantee to which he has not responded; and
- k) on April 5, 2017, the defendant made an assignment in bankruptcy disclosing \$415 in assets and liabilities in excess of \$2.3 million dollars, including the debt to the plaintiff.

[6] The plaintiff's case rests on numerous documents as well as the testimony of Joseph Yeung, a retired account manager with the plaintiff at its Surrey branch; Ida Noohi, an account manager with the plaintiff who reported to Mr. Yeung; Christopher Dawe, an assistant vice president with the plaintiff; Kulraj Tiwana, an account manager with the plaintiff at its Surrey branch who reported to Mr. Dawe; Nadim Bhalesha, a senior account manager with the plaintiff in its leasing division; and Gordon Brown, a chartered accountant and employee of the Bowra Group which was engaged by the plaintiff in May 2014 to conduct a review of NWD.

[7] The plaintiff also read into evidence portions of the examination for discovery transcripts of the defendant which the defendant submits the plaintiff has thereby adopted as part of its case but which are consistent with his defence.

[8] Lastly, the plaintiff relies on the viva voce evidence of the defendant who testified as an adverse party pursuant to Rule 12-5(22)(a).

[9] I will briefly discuss the evidence of each of the witnesses.

Witness Testimony

Joseph Yeung

[10] Mr. Yeung was introduced to NWD by a man named Walt Fries, a former banker who purported to be knowledgeable about NWD. Mr. Yeung understood from Mr. Fries that NWD was a new company that required credit facilities. Mr. Yeung testified that the plaintiff provided such facilities to companies by "margining" which is a formula by which the amount of credit available would be calculated against "acceptable inventory" and "acceptable receivables" of less than 30 days. Each month, the borrower was required to provide a report of its aged receivables and payables and a list of its inventory.

[11] From time to time, Mr. Yeung dealt with Ammar Jeet Singh and the defendant in relation to NWD but Ms. Noohi was responsible for the day-to-day management of the account.

[12] The lending arrangements were formalized in facility letters which under the heading "margin requirement" read:

In addition to ensuring that no Loan exceeds its loan amount, as set out in this Facility Letter, the Borrower shall ensure that the aggregate Canadian Dollar Equivalent of:

- (a) the amount advanced and outstanding under the Operating Loan; and
- (b) 100% of the MasterCards issued under the MasterCard Indemnity;

shall at no time exceed the Margin Requirement, being the aggregate of:

- (f) 75% of Acceptable Uninsured Receivables; plus
- (g) 90% of Acceptable Insured Receivables; plus
- (h) the lesser of 50% of Acceptable Inventory and CAD 350,000; less
- (i) Priority Claims.

[13] Under the heading "Financial Statements & Reports" the facilities letters read:

8. Financial Statements and Reports

The Borrower shall deliver to the Bank the following:

- (a) Monthly, within 30 days of each calendar month end:
 - (i) internally-prepared profit and loss statements and balance sheet for the Borrower;
 - (ii) aged list of accounts receivable of the Borrower;

- (iii) aged list of accounts payable of the Borrower;
 - (iv) declaration of inventory in accordance with the Bank's format;
 - (v) statement signed by a senior officer of the Borrower setting out the calculation of the Acceptable Receivables and Acceptable Inventory as at the preceding month end;
- [14] Mr. Yeung acknowledged that the facilities letters contained no requirement that "acceptable inventory" had any geographical limitation.
- [15] Mr. Yeung testified that he was aware that NAFC was related to NWD as was Paragon. Mr. Yeung and Ms. Noohi communicated with Mr. Fries who managed the reporting requirements of NWD with the plaintiff. Mr. Yeung was aware that the defendant did not prepare the monthly reporting documents of NWD to the plaintiff which was a task undertaken by Mr. Fries. The defendant's principal role was in sales and marketing which kept him busy dealing with customers and potential customers as well as travelling extensively to tradeshow.
- [16] In an email of January 5, 2012, which Mr. Fries sent Ms. Noohi and copied to Mr. Yeung, he wrote:

Good evening to both of you. Ida, as promised, I enclose the following financial information for the period ended November 30, 2011.

Balance Sheet for 0762639 BC Ltd. as at November 30, 2011 Sales and Income Statement for 0762639 BC Ltd. as at November 30, 2011 Receivables List for 0762639 BC Ltd. as at November 30, 2011 List of Sales during the month of November 2011 Payables List for 0762639 BC Ltd. as at November 30, 2011

The Balance Sheet has only nominal changes from the period ending October 31/11. Total Payables are about \$10,000 higher than the month previous and \$74,424 of the total is due to the India based company, Paragon Infratech PVT Ltd. Inventories of \$187,916 are some \$54,000 lower than at October 31st. The company is holding the line on increasing holdings until the bank has finalized the paperwork to allow NWD to have access to increased operating funds. Receivables have increased to \$239,599.

[Emphasis added.]

- [17] Mr. Yeung was unsure about what he had been told about the nature of the relationship between NWD and Paragon, but accepted Paragon was NWD's main supplier of product.
- [18] The plaintiff relied on the integrity of the borrower when the borrower made monthly reports. The plaintiff did not ask for an audit of the reports. The plaintiff made no oral agreement with NWD about its credit arrangements. If the plaintiff had known that NWD was reporting inventory in India as its own, the loan facility would not have been advanced against that inventory. Mr. Yeung had no recollection of discussing "acceptable" inventory outside of Canada with the defendant nor any discussion about including inventory of NAFC

with inventory of NWD. There was no discussion about including inventory or receivables of Paragon with those of NWD as part of the plaintiff's lending margining formula.

[19] Mr. Yeung was asked about a provision in the facilities letter which read, under the heading "To Be Obtained," "assignment and postponement by NAFC ... of all present and future indebtedness and other accounts outstanding to them by the borrower". He could recall no discussion about this provision and no discussion about moving accounts receivable of NAFC into NWD. Mr. Yeung denied discussing moving NAFC's inventory and accounts receivable into NWD and shutting down NAFC.

[20] Mr. Yeung was shown an email on November 18, 2011 from Mr. Fries to Ms. Noohi, copied to Mr. Yeung, which read in part:

The inventory - As [the defendant] intends to put his full efforts towards NWD, he has decided to cease operations in NA Foods. In doing this, he has decided to move approximately \$100,000 in inventory held by NA Food, to NWD. This has caused the inventory level at September 30th, to reach \$238,142 and it is some \$54,000 more than the forecast figure. The NA Food inventory is in part, packaged cookie and biscuit items from manufacturers in Thailand that NA Food has been importing and re-selling. The rest of the inventory is the same cookies and biscuits now handled by NWD provided by the Indian manufacturer Paragon Infratech. The decision to close NA Foods, is to put everything under one roof for sake of efficiency. NA Foods has established many large and strong food clients over the past years, that are now or could soon become, clients for NWD as they already know [the defendant]. The level of inventory should soon be within the forecasted figure. Payables have increased to reflect this inventory acquired. [Emphasis added.]

[21] Mr. Yeung agreed he was aware of the above email but did "not encourage" this proposal. He denied that he accepted that Paragon's inventory should become part of NWD's inventory. He could not remember if the defendant told him about Paragon and its business in India.

[22] Mr. Yeung was shown a "conditions term sheet" which was an internal document of the plaintiff. He had read this document before approving the credit for NWD. It is a multipage document that includes a heading reading "North American Food Corp." under which there are several bullet point paragraphs, the first of which reads "North American Food Corp. is a company owned 100% by [the defendant] and was founded in January 10". Under a later bullet point there are these words: "the operation of North American Food Corp. will roll into New World Distributors going forward. This distribution network will also help the Borrower in their distribution effort". Mr. Yeung was "not sure" if he requested that the banking business of NAFC be moved to the plaintiff.

[23] Mr. Yeung was not aware if NAFC, unlike NWD, had a license from the Federal Government to import food into Canada and was not aware that NWD would need such a license. He did not agree that he knew that importing food required a Federal Government license, not simply a local government business license.

[24] Mr. Yeung could not recall if he was aware that all financial reporting for NWD to the plaintiff came through Mr. Fries. He understood that the defendant was often away from Vancouver "drumming up business".

Ida Noohi

[25] Ms. Noohi had been with the plaintiff for about nine years and was an account manager in business banking at the Surrey branch when Mr. Yeung was an assistant vice president. Ms. Noohi was aware that NWD had been referred to the plaintiff by Mr. Fries.

[26] Ms. Noohi was aware that the co-defendant, Mr. Narula, was the defendant's business partner who lived in Bangkok but intended to move to Canada.

[27] Ms. Noohi was shown an email of November 18, 2011 from Mr. Fries to the plaintiff. She described him as the "bridge" between the plaintiff and NWD.

[28] Ms. Noohi testified, like Mr. Yeung, that the lending facility from the plaintiff to NWD became a "margined" facility which was calculated against only Canadian and United States accounts receivable owned by the borrower as well as inventory. No inventory outside Canada was acceptable.

[29] The monthly reporting required by the plaintiff's facilities letters and year-end financial reports of borrowing companies had to be signed by a "senior officer of the borrower".

[30] If the plaintiff became aware that accounts receivable were not payable to NWD, but to Paragon, those receivables would be deducted and the margin against which lending was calculated would be affected. This would be a "red flag" for the plaintiff. She understood the margin reports were prepared by Mr. Fries and the defendant.

[31] In cross-examination, Ms. Noohi agreed she may have been aware that Mr. Fries "assisted" in preparing the loan proposal for NWD to the plaintiff and assisted in the preparation of pro forma financial statements.

[32] In further cross-examination, Ms. Noohi was shown the second facilities letter. She agreed that Mr. Fries had prepared financial documents on behalf of NWD such as a sales forecast and income statement. One of the financial reports required of the plaintiff was year-end financial statements of NAFC "for the last year". Ms. Noohi knew that NAFC was related to NWD.

[33] Ms. Noohi was shown a "loan proposal" from NWD to the plaintiff which she recognized as a document that came from Mr. Fries.

[34] Ms. Noohi testified that, after the first loan facilities letter between the plaintiff and NWD, she was aware that there was an agreement between NWD and Paragon to postpone a debt owed by NWD to Paragon in relation to an NWD payable so that the plaintiff was paid first. She was shown an email dated January 5, 2012 from Mr. Fries to herself in which he enclosed financial information for the period ended November 30, 2011. In the email Mr.

Fries reports that payables are higher than the previous month and "\$74,424 of the total is due to the India based company Paragon Infratech PVT Ltd".

Christopher Dawe

- [35] Mr. Dawe has been with the plaintiff since 1994 and, at the time of the trial, he was the assistant vice president of regional sales for British Columbia. He discussed NWD with Mr. Tiwana who had taken over management of the account of NWD from Ms. Noohi.
- [36] Mr. Dawe testified that "foreign" accounts receivable would not be acceptable to calculate the permissible credit limit for NWD unless they were insured. If the plaintiff became aware that margin reports had not shown the true value of accounts receivable or inventory, "we would ask the customer to pay us out".
- [37] Mr. Dawe could recall no discussion with the defendant about "acceptable" receivables or "acceptable" inventory. He was not told that NWD was largely located in India through Paragon. He had not heard of Paragon.
- [38] In cross-examination, Mr. Dawe was shown a credit memorandum dated December 12, 2013 in which the stated purpose for a loan of \$200,000 US to NWD was to allow it to put a deposit on equipment the plaintiff offered to lease to NWD. Mr. Dawe agreed that the plaintiff knew in April 2014 that the lease needed to be funded at that time. At about that time, Mr. Narula's guarantee of NWD's debts to the plaintiff was to be released with Ammar Jeet Singh providing his guarantee in its place. He was aware the equipment lease was to be funded at the same time as Ammar Jeet Singh gave his guarantee. He was also aware that Mr. Narula's guarantee was not released; the lease was not funded; the credit file of NWD was transferred to "special credit" and on May 12, 2014, the plaintiff's solicitors wrote to NWD to demand repayment of all indebtedness.

Kulraj Tiwana

- [39] Mr. Tiwana has been with the plaintiff since 2006 and from 2012 to 2014 was an account manager with the Surrey branch. He reported to Mr. Dawe regarding NWD and dealt with the plaintiff as well as Ammar Jeet Singh and Mr. Fries. He worked on the NWD account until April 2014 when it was transferred to "special credit".
- [40] Mr. Tiwana testified in chief that he understood the inventory of NWD was located in South Surrey and all reported accounts receivable were payable to NWD. He was not aware that any inventory reported by NWD was located in India. He accepted the monthly margin reports to the plaintiff by NWD were accurate at the time he received them. He had not suggested to the defendant that inventory in those reports could include inventory of Paragon in India nor that accounts receivable payable to Paragon could be reported to the plaintiff as accounts receivable of NWD.

- [41] Mr. Tiwana took over the NWD file from Ms. Noohi and he reviewed the facilities letters and learned that NAFC was a "related" company to NWD.
- [42] Mr. Tiwana would receive substantial "bundles" of documents from Mr. Fries concerning the financial affairs of NWD but did not examine them carefully because of their "bulk". He received a loan proposal from NWD which he recognized had been prepared by Mr. Fries. He was aware of the close relationship of NWD with Paragon and may have discussed opening an account for Paragon with the plaintiff.
- [43] Mr. Tiwana received an email dated January 28, 2014 from Mr. Fries attaching "the usual month-end reports for the period ending December 31, 2013". Mr. Fries advised that "payables are nearly all due to the related India firm".
- [44] Mr. Tiwana was aware NWD intended to lease new packaging machinery through the plaintiff at a cost of about \$500,000 which the plaintiff agreed to fund. An operating loan "sub- limit" of \$200,000 US was put in place to enable NWD to pay a deposit of \$160,000 US to the supplier of the machinery. For this purpose, guarantees were needed. Mr. Narula's guarantee was to be released and replaced with a guarantee from Ammar Jeet Singh.
- [45] Mr. Tiwana agreed in cross-examination that he speaks Punjabi but denied that he ever spoke to the defendant in Punjabi and, in particular, denied that he had ever spoken to the defendant about the annual bonus he may be entitled to through the plaintiff.
- [46] Mr. Tiwana agreed that he was aware of the nature of the defendant's role with NWD which was largely in marketing and sales involving extensive travel to attend trade shows.

Nadim Bhalesha

- [47] Mr. Bhalesha was a senior account manager in the leasing division of HSBC in 2013 to 2014. NWD's written detailed lease proposal came to Mr. Bhalesha from Mr. Fries and all of Mr. Bhalesha's discussions about the proposal were with Mr. Fries.
- [48] After the account of NWD was transferred to special credit the proposal to fund the lease was not processed by the plaintiff.

Gordon Brown

- [49] Mr. Brown is a chartered accountant but did not give evidence as an expert. At the request of the plaintiff, he attended the premises of NWD on four occasions in May and June 2014. His purpose was to place himself in a position to advise the plaintiff on whether its decision to make demand on its loan to NWD was reasonable.
- [50] Mr. Brown met with Ammar Jeet Singh to inquire about the background of NWD and to obtain financial information. Mr. Brown did not speak to the defendant nor did he make any attempt to contact him.

- [51] Mr. Brown was provided with little financial information that he believed was useful. He asked Ammar Jeet Singh about the relationship of Paragon to NWD and was told that Paragon sales were recorded on the books of NWD.
- [52] Mr. Brown's task, apart from advising on the reasonableness of the plaintiff's demand on its loan, was to determine if the plaintiff had adequate security for its lending. Mr. Brown asked for accounts and bank statements only from January through March 2014. He believed the plaintiff already had earlier information.
- [53] Mr. Brown prepared a report which did not become evidence at the trial.

Manjeet Singh

- [54] In response to questioning from the plaintiff's counsel pursuant to Rule 12-5(22) (a) and (26) (a), the defendant gave the following evidence.
- [55] He has a Bachelor of Arts in political science and an MBA. After several other ventures he eventually went into business with Mr. Narula through NWD. Their intention was that Mr. Narula would provide working capital and the defendant was to concentrate on marketing.
- [56] The defendant was not good at accounting. It was intended that Mr. Narula would handle the financial aspects of NWD.
- [57] Ammar Jeet Singh was also involved with the financial aspects of NWD and the defendant understood that Ammar Jeet Singh spoke with Mr. Fries about financial details of NWD but it was the latter who had the "primary dealings" with the plaintiff.
- [58] Counsel for the plaintiff drew the defendant's attention to the "loan proposal" prepared by Mr. Fries which contained the following under the heading "margin requirement":

We suggest the following formula be the margin requirement.

Loans outstanding under (1) and (3) shall at no time exceed the following:

75% of acceptable receivables from Canadian and USA accounts and 80% of acceptable foreign accounts covered by insurance from Export Development Canada or other insurer acceptable to the bank; plus 50% of dry food products in either bulk or re-packaged form. The inventory margin shall not exceed a maximum of \$350,000. Any priority claims shall be deducted from the margin total.

- [59] The defendant had seen the quoted portion from the document but only "glossed over it" because he never dealt with this type of information and left margin requirements and reporting mainly to Mr. Fries. He had no reason not to trust him to provide accurate information. He signed the margin reports confidently expecting they were accurate.

- [60] The defendant understood that Mr. Yeung knew about the relationship between NWD and Paragon and was aware that Paragon made sales on behalf of NWD. The defendant understood Mr. Yeung had initiated the proposal that NWD include Paragon sales as part of NWD's reported receivables because, if NWD was to obtain further credit from the plaintiff, it needed to report increased sales.
- [61] The defendant has always lived with his father Ammar Jeet Singh and, although they have a close relationship, they seldom discussed the banking arrangements of NWD, in part because the defendant was frequently away from Vancouver engaged in sales and marketing activities.
- [62] The defendant understood that the plaintiff was aware that the inventory NWD reported to the plaintiff was partly in Canada but also partly in India through NWD's arrangement with Paragon.
- [63] The defendant was aware that Mr. Fries submitted monthly margin reports to the plaintiff, which reports the defendant signed on behalf of NWD because he was told the plaintiff required margin reports signed by him, but Mr. Yeung had told him that the plaintiff's decision to provide credit was "based on a heck of a lot more" than the monthly reporting.
- [64] The defendant was shown a "certificate of compliance and security margin report" for the month ended December 31, 2012 which he had signed. It refers to accounts receivable totaling \$780,139.41 and inventory totaling \$380,868.93. The defendant understood the reported inventory included inventory of Paragon in India, which the plaintiff was aware of, and also aware that the reported receivables included those of Paragon. The defendant had no knowledge of the details of these matters at the time. He learned more about some details of the accounting only "after the fact" when the plaintiff made demand on its loan.
- [65] As the business of NWD grew it became increasingly difficult to manage its affairs from Surrey where there was a small staff. Its accounting, therefore, was outsourced to Paragon which had a large staff in India trained to do such work. The defendant understood that Paragon also had a sales team and it was asked to help with sales on behalf of NWD. The defendant also understood Paragon shipped merchandise directly to customers on behalf of NWD to avoid double shipping costs.
- [66] The plaintiff's counsel showed the defendant an email of Mr. Fries dated April 20, 2014 sent to Ammar Jeet Singh and copied to the defendant. The defendant agreed he had received it. Mr. Fries tells Ammar Jeet Singh in the email that Mr. Tiwana and Mr. Dawe are "prepared to accept" Ammar Jeet Singh's guarantee in place of Mr. Narula's to support the equipment lease loan. The email then refers to "the issue" which Mr. Fries describes as the overly complex "operating model" of NWD which left "a number of issues involving the security of HSBC credit". Nevertheless, Mr. Fries opines in the email "that [Mr. Tiwana] and [Mr. Dawe] are very much in support of NWD" and "[Mr. Tiwana] has indicated that any issues that are not fully in accord with existing terms and conditions for the credit facility will be amended at the coming annual review".

- [67] Mr. Fries observed in his email that the "operational chart is too complex" and that the Export Development Corporation "arrangement to support HSBC may now be flawed".
- [68] The defendant testified that he had only a "generic" understanding of what Mr. Fries meant by the "operating model" of NWD, and he understood that the Export Development Corporation, which insured some types of receivables, had "blessed our particular way of doing sales".
- [69] In response to questioning from his own counsel the defendant gave evidence, I will describe in the following paragraphs none of which was elicited through leading questions. I was informed by Mr. Malik that, prior to his cross-examination of his own client, he had not discussed the cross-examination conducted by counsel for the plaintiff pursuant to Rule 12-5(26)(a) with him.
- [70] Before starting NAFC, the defendant consulted with his father because "we come from an Indian family We come from a very patriarchal society and I defer to his judgment". His father supported him in the start-up of a food importing business but initially was sceptical that it could be successful. Later, he became persuaded of its success and advised the defendant that the best approach to achieve success for the business was to set up a manufacturing facility in India, because it would be cheaper to manufacture there than in Canada. This was the genesis of Paragon.
- [71] A decision was made to ship food in bulk from India and package it in Canada so that it could have a label reading "packaged in Canada". The defendant met Mr. Narula who expressed an interest in investing in the packaging business. Ammar Jeet Singh owned a numbered company which he suggested the defendant and Mr. Narula take over. It became NWD.
- [72] Mr. Narula was to provide working capital and to be responsible for administration and accounting. The defendant would be responsible for sales and marketing.
- [73] Ammar Jeet Singh has a background in engineering and agreed to assist in setting up a specialized packaging plant in a leased building. He also agreed to assist with making banking arrangements and contacted Mr. Fries who was an "old friend" now retired from the Royal Bank. A meeting took place with Mr. Fries at which the defendant attended and a "package" was put together to approach banks for credit. Then Mr. Narula left Canada and did not provide any working capital.
- [74] The defendant, along with Mr. Fries, met with Mr. Yeung and Ms. Noohi to discuss credit for NWD. There was a discussion about the background of those involved in NWD particularly the defendant's background in sales. The defendant told Mr. Yeung that he owned NAFC. NWD at that time was considered to be "nothing" but Mr. Yeung said he would base bank financing "on our backgrounds".

- [75] Mr. Yeung asked that the bank account of NAFC be transferred to the plaintiff and this was done. Mr. Fries then conducted all negotiations with the plaintiff about credit arrangements for NWD. The defendant was not present and played no role in those discussions.
- [76] NAFC continued to sell to customers but gradually they were transferred to NWD so that they purchased from it. Eventually a postponement of payables owed to Paragon was provided. The postponement came from NAFC, not from NWD. The assignment and postponement documents were executed by NAFC.
- [77] In an email of December 1, 2011 from Mr. Fries to the defendant, which was copied to Ammar Jeet Singh, Mr. Fries advised "[the defendant] called me since we talked yesterday, I have conveyed the new information regarding the placement of the postponement of \$150,000 from India to yourself HSBC seems to be happy with this". The defendant testified that the reference to "India" was to Paragon and "yourself" meant NAFC.
- [78] In early 2012 the volume of sales and the absence of Mr. Narula placed pressure on the defendant who was having trouble keeping up with the administration as well as sales and marketing of NWD. Ammar Jeet Singh suggested Paragon take over the accounting for NWD and, because Paragon had a full sales staff, it should conduct sales on behalf of NWD. The defendant understood from Mr. Fries that he had told Mr. Yeung and Mr. Tiwana about these arrangements.
- [79] The defendant testified that he had no reason to doubt the accuracy of the monthly margin reports provided by NWD to the plaintiff. He performed no independent "audit" of them.
- [80] In 2013, a decision was made by the defendant and his father to purchase new equipment for NWD to package food. Mr. Fries was instructed to speak to Mr. Tiwana about the plaintiff financing this purchase through a lease. Mr. Tiwana suggested that NWD make the down payment on the purchase from its line of credit, not the margined operating loan. The defendant was reluctant to do so because this would have exhausted the remaining funds in the line. Mr. Tiwana later called the defendant by telephone. They spoke in Punjabi. The equipment lease was to be made in December 2013 and Mr. Tiwana advised the defendant that his annual bonus from the plaintiff was calculated against business obtained up to the end of October and that any business he attracted in November or December 2013 would not count but "the clock starts again in January". Mr. Tiwana suggested a "sub - limit" to the line of credit be established in US Dollars so that the down payment could be made in US Dollars and timed to allow the lease to be concluded on a date that would assist Mr. Tiwana to obtain credit towards his annual bonus. Although the defendant testified that he thought this conversation was "extremely unprofessional", he was prepared to go along with the suggestion of Mr. Tiwana.
- [81] On December 16, 2013, Mr. Fries sent an email to the defendant with a copy to Ammar Jeet Singh. He attached an email from Mr. Tiwana to him earlier that day in which the subject line reads "sub - limit in place". The body of the email reads "just to let you know the USD sub - limit for the 200K in place". On December 31, 2013, Mr. Fries sent an email to Ammar Jeet

Singh, with a copy to the defendant. He forwarded an email from Mr. Tiwana of that date advising that "the increased O/D [to make the down payment on the equipment lease] will be available on January 2".

- [82] At some date in 2013, the defendant and his father agreed it would be desirable for NWD to purchase, instead of lease, a building in which to package food. Ammar Jeet Singh located a building in Surrey which could be purchased for \$5 million. \$4 million of that price would need to be borrowed.
- [83] Mr. Narula requested that his guarantee of the debts of NWD be released. Mr. Fries wrote to the plaintiff asking for the return of the guarantee. A meeting took place in early April 2013 among the defendant, Ammar Jeet Singh, Mr. Fries, Mr. Dawe, and Mr. Tiwana. The plaintiff wanted a guarantee from Ammar Jeet Singh to replace the guarantee of Mr. Narula. Ammar Jeet Singh expressed concern about providing a guarantee. He was neither a shareholder nor a director of NWD. The response of Mr. Tiwana was "don't worry, we are providing you with an equipment lease and will fund the real estate purchase and will provide additional funding to move into the new facility". Ammar Jeet Singh provided the requested guarantee.
- [84] The defendant understood that Ammar Jeet Singh had signed a memorandum of understanding for the purchase of the real estate and had paid a non-refundable deposit of \$25,000 personally.
- [85] In April 2013 the defendant learned through a telephone call from Mr. Tiwana that the account of NWD with the plaintiff had been transferred to "special credit". On April 23, 2014 a letter addressed to NWD to the attention of the defendant and to Mr. Narula, over the signature of Mr. Tiwana, advised that John Lee, an Assistant Vice President Special Credit with the plaintiff, would be contacting "you directly".
- [86] Without waiting to hear from Mr. Lee the defendant then called him by telephone. A meeting date was arranged which involved the plaintiff, Mr. Fries, Ammar Jeet Singh, Mr. Lee and another representative of the plaintiff whose name the defendant could not remember. The meeting initially was cordial but changed when the unnamed person began to ask questions about the accounting practices of NWD. The defendant had been giving information to Mr. Lee about NWD up to that point in the meeting but thereafter it was Mr. Fries and Ammar Jeet Singh who gave accounting information. The meeting ended with Mr. Lee informing the representatives of NWD that the plaintiff insisted that NWD obtain a new bank within 60 days. This was agreed to be extended to 90 days.
- [87] Mr. Lee then spoke of business difficulties the plaintiff was having with credit extended to many other small businesses. This information appeared to the defendant to explain why the plaintiff was calling its loan to NWD. The defendant requested an assurance NWD's account would operate normally during the transition period to a new banker. Mr. Lee assured him that it would operate normally and also agreed the equipment lease would be funded as would be the proposed purchase of real estate. The meeting ended and the defendant had no subsequent meeting in person with Mr. Lee. Mr. Lee did not testify at trial.

- [88] On April 29, 2014, the defendant emailed Mr. Lee and Mr. Tiwana regarding the NWD "machine lease" requesting that, "as the lease has been approved", the plaintiff "wire transfer the balance remaining on the invoice as full and final payment". The payment was not made by the plaintiff. NWD forfeited its deposit of about \$160,000 US which had been paid from the US sub-limit on the line of credit. The real estate transaction was also not funded and the defendant understood the \$25,000 deposit paid by Ammar Jeet Singh was also forfeited.
- [89] On April 29, 2014, Mr. Lee emailed the defendant reiterating that NWD had to obtain alternate financing to pay out all its borrowing from the plaintiff. Mr. Lee added, "please note that your father's indemnity will be required for the lease in lieu of Dalvir Narula". Ammar Jeet Singh's guarantee had been provided but the Narula guarantee remained in place.
- [90] The defendant, notwithstanding these difficulties, still had expectations that he could use Paragon as a means to refinance his food importing business. That was not realized.
- [91] The defendant denies that he was ever aware that the information NWD submitted to the plaintiff was false nor did he have any reason to doubt its accuracy. At trial he insisted he continued to believe the information given was accurate.
- [92] Mr. Roberts cross-examined the defendant about his attempts to contact Mr. Fries, which attempts were futile. The defendant was asked if he had disclosed in the litigation all emails he had sent to Mr. Fries. He insisted he had done so. I note that no attempt was made by the plaintiff to seek a pretrial order regarding disclosure of documents.

Ammar Jeet Singh

- [93] Ammar Jeet Singh did not testify at the trial. The defendant testified that, during the trial, his father was "somewhere in China" on a holiday having taken a flight booked "months ago".
- [94] The plaintiff attempted to serve Ammar Jeet Singh with a subpoena requiring him to testify at the trial on August 15, 2017. An affidavit of attempted service made by a process server was marked as an exhibit. The process server deposed that she attended at a residential address in Surrey, British Columbia on June 23, 2017 and was told by an "adult female resident" that Ammar Jeet Singh was "out of town" and "may be back in a week or two". On July 5, 2017, the process server returned to the same address and spoke to "an adult male" who said that Ammar Jeet Singh "is on an extended holiday" and "not back until the end of August". The process server re-attended on July 16, 2017 and "was confronted by the same adult male tenant" who "was very angry" and said "I told you he is not home until August 29".
- [95] Three further attempts to serve Ammar Jeet Singh at the same residential address were undertaken but "knocks on the door" received no response. The process server did not testify at the trial.

- [96] Mr. Malik, on behalf of the defendant, had been provided with a copy of the affidavit of the process server after it had been filed in the court registry on August 15, 2017, which was the same day Mr. Malik began his questioning of the defendant pursuant to Rule 12-5(26)(b). Mr. Roberts had no opportunity to ask the defendant about any of the contents of the affidavit which did not yet exist when he had questioned him at the trial in June pursuant to Rule 12-5(26)(a).
- [97] Mr. Roberts objected to Mr. Malik questioning the defendant about the contents of the affidavit on the basis that Rule 26-5(26)(b) permitted Mr. Malik to cross-examine his client only to obtain explanations about matters brought out "in the examination in chief". Mr. Roberts submitted that, if Mr. Malik wished to question the defendant about the affidavit, the proper procedure was for him to call the defendant in his own case.
- [98] I did not agree with Mr. Roberts proposed procedure. I ruled that, in the interests of a fair and orderly trial, Mr. Malik ought not to be required to call his client in his own case for the limited purpose of asking questions about the affidavit. If that had occurred Mr. Roberts could not assure me that he did not intend to conduct another full cross-examination of the defendant. In my view such a further extended cross-examination would provide for neither a fair nor an orderly trial. Mr. Malik undertook not to call any evidence in his own case. I permitted Mr. Malik to question his own client about the affidavit without being required to recall him in his own case.
- [99] The defendant testified that he was the "adult male" referred to in the process server's affidavit. The person who came to his door did not identify herself as a process server but identified herself as a friend of the defendant's father. The process server had documents to give to Ammar Jeet Singh but refused to give them to the defendant. She did not give the defendant her contact information. The defendant denies he became angry with the person who came to his door.

The Plaintiff's Submissions

- [100] The plaintiff submits the defendant was the "operating mind" of NWD and, in that capacity, deceived the plaintiff by submitting misleading "margin reports" each month which led the plaintiff to lend well in excess of \$2,000,000 to NWD, none of which has been recovered by the plaintiff. The plaintiff seeks a finding that the defendant's conduct was fraudulent and seeks judgment for the full amount of its losses. The plaintiff also seeks a declaration that the judgment survive the defendant's discharge from bankruptcy. The plaintiff acknowledged that, in the absence of a finding of fraud, the defendant's guarantee cannot survive his discharge.
- [101] The plaintiff set out what it described as the "Questions before the Court". The "Questions" are actually a statement of the plaintiff's position. I will quote them in their entirety as follows:

7. The issue in this case is whether the Defendant is liable to the Bank in fraud for submitting monthly margin reports that falsely represented the value of qualifying NWD inventory and accounts receivable ("A/R"). There are four determinations necessary to reach a conclusion on the Defendant's liability in fraud.
8. First, the Court must determine whether the monthly margin reports the Defendant submitted to the Bank falsely portrayed the financial position of NWD. The Bank argues that the margin reports were misleading because the Defendant reported inventory and A/R of a related company as though they were assets of NWD, contrary to the express terms of NWD's written agreements with the Bank. The Defendant argues that the margin reports were accurate because they complied with an oral agreement he had made with one of the account managers at HSBC, purportedly authorizing the inclusion of sales, A/R, and inventory of the related company in NWD's monthly margin reports. The Defendant variously recalls this agreement having been made with Joseph Yeung or Kulraj Tiwana. Both Mr. Yeung and Mr. Tiwana denied that any such oral agreement existed, or that they were ever made aware that NWD was recording this related company's sales, A/R and inventory on NWD's monthly margin reports. Neither Mr. Yeung nor Mr. Tiwana had their evidence on this point challenged in cross-examination.
9. If the Court concludes that the financial information provided by the Defendant was false, it must then determine whether the Bank acted on the false information. All of the Bank's witnesses responsible for administering NWD's account confirmed that they relied on NWD's margin reports - and the robust security values that these reports indicated - when making their decisions to grant and to extend further credit to NWD. The Bank's witnesses were unshaken on this point in cross-examination.
10. The third issue to determine is whether reliance on NWD's margin reports caused losses to the Bank. The Defendant has argued that the Bank brought about its own losses by failing to provide equipment financing under an Offer to Lease to NWD, and by agreeing to release its security over the assets of NWD in a settlement (the "Settlement") that the Bank entered into with Ammar Jeet Singh (the Defendant's father and the owner of NWD after May 2, 2014). This argument fails because NWD never met the conditions of financing under the Offer to Lease and because the Settlement was reasonable given the financial position of NWD at that time. In the Bank's submission, there was no prospect of recovering its advances once NWD's true financial picture became known. The payment pursuant to the Settlement was the only positive recovery available to the Bank.
11. Lastly, the Court must determine whether the Defendant submitted the false margin reports with the intent to defraud the Bank. Fraudulent intent can be proven if the evidence supports a conclusion that the Defendant knew the purpose of the margin reports and that the information contained in NWD's margin reports was inaccurate or misleading from the perspective of the Bank's intended use of the information.

12. This conclusion can be reached in the absence of direct evidence of the Defendant's knowledge. The fraudulent intent of the Defendant can be presumed if the facts proven suggest that the Defendant acted fraudulently and there is no other plausible explanation for the Defendant's conduct. In the Bank's submission, the fact that NWD received significantly more credit from the Bank than it would have otherwise qualified for - as a result of the misleading information contained in the margin reports - strongly suggests that the Defendant knowingly provided false information to the Bank in order to bring about this result. Secondly, the Bank submits that the Defendant's explanations for his conduct are fraught with inconsistencies and are not a credible explanation for the inaccuracy of the margin reports submitted to the Bank.

13. In conclusion, the Bank submits that a finding of fraud is warranted.

[102] The plaintiff submits that the outcome of this trial "in large measure" turns on the credibility of the witnesses. I agree but emphasize that the burden to prove fraud rests on the plaintiff and that if I ultimately conclude the defendant believed the information given to the plaintiff by NWD was correct he cannot be found liable for civil fraud.

[103] The plaintiff referred to *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186 where Dillon J. discussed the jurisprudence guiding the assessment of credibility as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[104] In the reasons indexed at 2012 BCCA 296, the Court of Appeal declined to criticize the approach taken to credibility by Madam Justice Dillon.

[105] The plaintiff relies on *Royal Bank of Canada v. Boussoulas*, 2014 ONSC 2367 where, at paras. 69 and 70, Lederer J. wrote the following:

The Supreme Court of Canada has recently confirmed the characteristics of civil fraud:

...[T]he tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss. [Hryniak v. Mauldin, 2014 SCC 7 (CanLII), at para. 87]

This is consistent with the older and seminal authority of *Derry v. Peek*:

First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made knowingly, or without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. ...Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made. [[1889] A.C. 337 (H.L.), per Lord Herschell.]

[106] The plaintiff accepts that it bears the burden of proof but refers to Boussoulas at para. 10 in stating that:

The idea that a legal determination may be presumed, where there is no other explanation, can have application in a claim for fraud. "Fraud is not, as a rule, discussed in the open or implemented where it can be widely observed." It follows that demonstrating fraud cannot be left to circumstances where it can be directly proved. Such a proposition would be untenable. "If fraud is the only consistent explanation for the facts proven, then the case for fraud is made out." [Citations omitted.]

[107] The standard of proof in a civil fraud trial is the same as in any other civil action, namely the balance of probabilities. See *F.H. v. McDougall*, 2008 SCC 53 at para. 46 which reads:

Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[108] I accept the plaintiff's description of the governing legal principles.

The plaintiff's submission that an adverse inference be drawn

[109] The plaintiff invites me to draw an adverse inference resulting from the defendant's failure to call his father Ammar Jeet Singh and Mr. Fries as witnesses.

- [110] When a party has advanced a prima facie case on an issue at a trial and there is evidence that an opposing party has control over a witness with material evidence on that issue, and that party fails to call that witness without adequate explanation, the trial judge may, but not must, draw an inference that the absent witness's testimony would not have supported the party which failed to call the witness. See: *Wiche v. Ontario*, [2001] O.J. No. 1850 at para. 20, affirmed [2003] O.J. No. 221 (C.A.) and *Levesque v. Comeau*, [1970] S.C.R. 1010 at pages 112 and 113.
- [111] An adverse inference should be drawn with caution. I agree that Mr. Fries would have material evidence to offer. It is clear on the evidence as a whole that he was responsible for preparing the monthly margin reports on the affairs of NWD and he would have been in the best position of any witness to explain them. Nevertheless, the only evidence I have about Mr. Fries' availability to testify is that all attempts to contact him for that purpose were a failure. Both the plaintiff and the defendant have his apparent contact information but neither was able to locate him. In that circumstance, I cannot draw an adverse inference for the failure of the defendant to call Mr. Fries.
- [112] In regard to Ammar Jeet Singh I have the following comments. This action was commenced on September 3, 2014. The plaintiff was alive to Ammar Jeet Singh's involvement in the affairs of NWD long before the action began. His whereabouts were known to the plaintiff. The trial began on June 5, 2017 and continued until June 14. It was then adjourned until August 14, 2017. Prior to the initial trial date, it appears the plaintiff had made no effort to depose Ammar Jeet Singh pursuant to Rule 7-8. It was not until June 22, 2017 that the plaintiff, having been informed that the defendant did not intend to call any evidence, attempted in vain to serve Ammar Jeet Singh with a subpoena. I recognize that the defendant's trial brief of April 21, 2017 indicated the intention of the defendant to call Ammar Jeet Singh but once the defendant's counsel advised at the trial, before the plaintiff closed its case, that he did not intend to call any evidence, and thereafter personal service of the subpoena on Ammar Jeet Singh had failed, the plaintiff could have taken steps to serve Mr. Singh substitutionally and to take his evidence on his return to Canada. A further adjournment of the trial might have been necessary. No such steps were taken.
- [113] More importantly, I am not satisfied that Ammar Jeet Singh's evidence would not have supported the defendant's evidence that he believed NWD's margin reports were accurate. An important part of the evidence is that Ammar Jeet Singh was asked by the plaintiff to substitute his guarantee of the debts of NWD for the guarantee given by Mr. Narula at a time when the plaintiff had expressed its discomfort with continuing as NWD's banker, and had told NWD to make other arrangements. Notwithstanding those danger signals Ammar Jeet Singh gave a guarantee. In my view his conduct was not indicative of knowledge, or even suspicion, that the margin reports were false, and that providing a guarantee was tantamount to agreeing to write a cheque to the plaintiff for well in excess of \$2,000,000. Further, the close relationship between the defendant and his father leads me to believe that, if the defendant had been aware of false reporting to the plaintiff, he would have

alerted his father to the profound risk of providing a guarantee. There is, of course, no evidence that he did and it is implausible that he did but Ammar Jeet Singh ignored that advice.

The defendant's submissions and my comments on them

- [114] The defendant submits that he should be believed when he testified that he was never the "operating mind" of NWD. He was on the marketing end of the company not the accounting and administrative end. His only role in making margin reports to the plaintiff was only to sign reports which had been prepared by Mr. Fries. I have no evidence on which to conclude that it was not reasonable for him to trust Mr. Fries at the relevant time.
- [115] The defendant also submits that the margin reports were, in fact, accurate. He understood that the plaintiff was aware that NWD was including inventory and accounts receivable of Paragon as inventory and receivables of NWD on the margin reports. If I conclude the defendant's evidence was truthful when he testified that he believed the margin reports were accurate I do not need to determine if the margin reports were indeed accurate. The defendant cannot be held to be guilty of civil fraud if he honestly believed the margin reports were accurate. I further note that there is evidence which strongly suggests the plaintiff, through Mr. Yeung and Mr. Tiwana particularly, knew that NWD had a complex structure of companies through which it did business, and, over a considerable period of time, was reporting receivables and inventory of Paragon as its own on the monthly reports without complaint from the plaintiff.
- [116] I find that there were varying and confused understandings by employees of the plaintiff and of the defendant about the nature of the web of corporate relationships surrounding NWD, which understandings led the defendant, and perhaps some employees of the plaintiff, to believe inventory and receivables, which did not always match the requirements of the facilities letters, were acceptable to the plaintiff to support NWD's borrowings.
- [117] The defendant was subject to a searching cross-examination by counsel for the plaintiff. I found the defendant's explanations of the many documents put to him to be both plausible and credible. He had portions of examination for discovery transcripts read to him in an attempt to impeach his credibility. In my view, those attempts were not successful. It is often the case that a party's memory will change between an examination for discovery and a trial which takes place many months, if not years, later. The defendant's memory, and therefore his evidence, changed somewhat over time but not in a manner which sapped my confidence in his credibility. I will add that it is apparent that the defendant learned much over the years between 2014 and the trial in 2017 about how NWD had operated, prepared its accounts, and reported to the plaintiff. Some of his evidence changed as a result of what he learned but, again, not in a manner which has led me to conclude that he did not genuinely believe that the margin reports were accurate. Even after the loan was called he continued to believe in the accuracy of the margin reports. He behaved in his meeting with Mr. Lee and other representatives of the plaintiff as if he had nothing to hide. This may have

been an attempt to brazen his way out of a major problem but I believe that would not be the correct conclusion. The defendant is an intelligent man. He could not have believed that simply putting up a brave front, while knowing of a deception, was a means to escape the difficulties. I believe he expected all would be well once explanations were given.

The plaintiff's Evidence From Discovery Transcripts of the Defendant

[118] The plaintiff read in as part of its case 691 questions and answers from the examination for discovery transcripts of the defendant, even though many of the answers were exculpatory. The defendant submits that the exculpatory answers support his defence and that the plaintiff, having made them part of its case, is bound by them. I will recite some examples of the exculpatory evidence.

[119] At questions 343 to 348 from his transcript of August 26, 2015, the defendant gave the following evidence:

Q And the inventory held in India was held by who?

A It was being stored by Paragon.

Q Okay. And was legal title to that inventory with Paragon or with New World?

A With New World.

Q But you have no documents to prove that?

A I, personally, don't have documents. I've already repeated the documents exist with the company in India, so you need to seek them from there.

Q Okay. I'm a little bit confused why New World wouldn't have documents establishing, as between itself and Paragon, that it owns inventory in Paragon's warehouse in India?

A Because Paragon was owned by my father, and therefore if my father says, I hold the inventory for you, then he holds the inventory for me.

Q So it was more of an oral family agreement?

A Yes.

Q Okay.

A But that doesn't preclude the fact that there were documents, documentation to the effect that that inventory belonged to New World.

[120] At questions 389 and 390 from that transcript, the defendant gave the following evidence:

Q Okay. And you knew that HSBC was relying on you to accurately report the various bits of data that are set out under the margin requirement?

A I've answered that previously, but to the effect that we basically sent them statements every month, and as far as I know they were absolutely correct.

Q And you did whatever you were required to do for your own purposes to make sure that those statements were accurate?

A Correct.

[121] At question 734 from the same transcript, the defendant gave the following evidence:

Q Did you give instructions to somebody to fill these out on your behalf?

A Again, I didn't give instructions to anyone as far as accounting went. That wasn't my job.

[122] At questions 740-746 from the same transcript, the defendant gave the following evidence:

Q And when you're signing this, [a "margin report"] that's what you're doing, you're confirming that?

A Because my assumption is it is accurate.

Q Okay. Did you provide any instructions to anyone to prepare these on a monthly basis?

A No.

Q Who did that?

A Company out of India, as far as I know.

Q Well, you were the president of New World?

A Yes.

Q And you knew that New World had an obligation to report this kind of information to HSBC on a monthly basis?

A Yes.

Q And you knew that was important because that was what led to the calculation of the amount of money New World could borrow on its operating loan from HSBC?

A Again, that's your characterization, but, yes.

Q Is that consistent with your understanding?

A My job as -- relationship with the bank was to provide them accurate statements every month, which we did.

[123] At questions 750-751 from the same transcript, the defendant gave the following evidence:

Q Well, if you record inventory of half a million, your loan limit is not going to be as high as if you record inventory of one million?

A That's incorrect, because there's a limit to how much inventory you can margin.

Q Right. But within that limit, which moved upwards always for you, for New World, it's determined by, among other things, the amount of inventory that qualifies for the margin calculation?

A But that makes no difference. We always reported honestly what we had and what we didn't have.

[124] At questions 1106-1110 from the transcript of the defendant's examination for discovery of May 31, 2017, the defendant gave the following evidence:

Q I've given you now a series of security compliance and margin report forms from our document production: Each of them is two pages long and they run chronologically from the first one being dated December 15th, 2012, and then they're monthly until the last one which is April 22nd, 2014. And if you could take a moment and confirm for me that all but one of these was signed by you and the one that wasn't signed by you, I don't think, was deep in the package and the number is 4498.

A Your dates were incorrect.

Q Okay.

A Can I mark on this? They're different pages I need to take note of. I have not signed HSBC004498. I have not signed HSBC004337. I have not signed HSBC004258.

Q But am I correct that other than those three certificates, you signed all the other ones?

A Yes.

Q And you understood that these were being sent to HSBC as part of the margin report requirements?

A These were signed and sent because those were the instructions of my bankers.

Q And it was your intention that these documents be truthful and accurate?

A They are truthful and accurate.

[125] The defendant cites *Welsh Enterprises Ltd. v. M. Milligan & Associates Ltd.*, 2005 BCSC 1095, for the proposition that because there was no evidence to contradict the portions of the defendant's discovery transcripts which were read in by the plaintiff, in which the defendant testified, for example, that the margin reports were accurate, the plaintiff's case must fail for that reason.

[126] In *Welsh Enterprises*, the plaintiff had read in portions of the defendant's discovery evidence which the defendant submitted contradicted the plaintiff's own witness and, by reading in portions of the discovery evidence of the defendant, the plaintiff had adopted it as part of its case and was not entitled to argue otherwise. At paras. 121 through 125 in *Welsh Enterprises*, Chamberlist J. wrote the following:

[121] The defence relies, in particular, on three decisions of this court where the issue of discovery evidence which the plaintiff read in as part of its case has been raised.

[122] The first of those decisions is *Tsatsos v. Johnson*, [1970] B.C.J. No. 115. In that case, Ruttan J. ruled that plaintiff's counsel at the end of his case had read in certain portions of the defendant's discovery, and in doing so, read in the explanation in the defendant's own words of how the accident, which was the subject matter of that litigation, occurred. Ruttan J. found that this explanation was a contradiction of the plaintiff's version and, if accepted, would exclude the defendant from any liability. At para. 10, Ruttan J. said:

... There was no need to put in this evidence of the defendant's version of how the accident happened. The plaintiff has, in effect, offered two versions and is not entitled to have me choose in favour of his client, since the burden of proving his case remains with him. Here there is no issue of credibility since the defendant's version has not been challenged and since the defendant did not testify in person. In the circumstances I cannot pick either story and must hold the plaintiff has not proved his case and must dismiss his action.

[123] In *Wilson v. Boltezar*, [1989] B.C.J. No. 592, Vancouver Registry No. C873747, Bouck J. had occasion to deal with a similar experience. In that case the action was for debt with the defendant defending on the basis that the money was advanced to him as a gift and not as a loan. Plaintiff's counsel, in that case, elected to read into the record as part of his case various portions of the discovery of the defendant where the defendant said the advances were gifts and not loans. Although Justice Bouck went on to consider the issues between the parties on the merits, he did say this, at p. 14, of the Quicklaw report:

Usually a plaintiff only reads into evidence those parts of the discovery of the defendant which assists his case. Now, the plaintiff elected to include as part of his case discovery evidence of the defendant which contradicts his claim. I must assume that counsel for the plaintiff read in the discovery on the instructions of his client. The weight of authority is to the effect that a plaintiff is not necessarily bound by reading in discovery evidence which is against him. It all depends upon the circumstances.

In this instance, the nature and extent of the discovery evidence given by the defendant and adopted by the plaintiff compels me to grant it more prominent attention in favour of the defendant. It clearly indicates the plaintiff accepts the evidence of Mr. Boltezar to the effect the advances were meant to be gifts and not loans.

[124] In the third case referred to me by counsel for the defendant, being *Chetwynd-Palmer v. Spinnakers*, [1993] B.C.J. No. 95, Victoria Registry No. 90-2189, Drake J. also had to deal with an application by the defence for dismissal of the action because of inconsistent evidence by way of read-ins on examination for discovery had been placed before the court as part of the plaintiff's case. In the end result, the plaintiff's case was dismissed on the authority of *Tsatsos v. Johnson*, *supra*. At para. 9, Drake J. said this of the plaintiff's case:

... He blew hot himself on the crucial issue and cold in the discovery evidence which he approbated by advancing it as part of his case.

[125] I have concluded, based on the read-ins that I have referred to, that I would have also dismissed that part of the plaintiff's claim that alleges breach of contract or negligence in relation to the roof on the basis that the plaintiff, by reading in the defendant's evidence which I have set out in this part of the judgment, made the defendant's explanation a part of his case and therefore there was no case to be met by the defence. That explanation is simply that MMA was awaiting CAD's choice of roofing material so that it could compare the choice with the catalogues it had in its possession to ensure that the contractor's choice met the owner's requirements and would be suitable for the supports it had designed. No evidence was led by the plaintiff to contradict this position.

[127] I do not agree with the defendant that *Welsh Enterprises* is the governing authority on this issue in the context of the decision I have to make. There is a wealth of authority establishing that there is no general rule found in the law of this province that, if a plaintiff reads in exculpatory discovery evidence of the defendant, the plaintiff is bound by that evidence.

[128] In *W. E. Sherlock Ltd. v. Burnett*, [1938] 1 D.L.R. 381 (B.C.C.A.) at 385 Martin C.J.B.C. spoke for the Court of Appeal as follows:

It is neither possible, nor desirable to attempt, to lay down any general rule as to the extent to which a party may be bound by using in evidence the examination of an opposite party, because that result depends upon the circumstances of each case:

[129] In *Johnson v. Kwon Poo Wong* (1957), 22 W.W.R. 565 (B.C.S.C.) at 570, Lett C.J.B.C., sitting as a trial judge, wrote:

Accordingly, I hold that the plaintiff is not disentitled to succeed by reason of the conduct of his counsel in putting in evidence certain questions and answers from the defendant's examination for discovery.

[130] In *Atkins et al. v. Ulrichsen* (1973), 37 D.L.R. (3d) 368 (B.C.S.C.) at 379, Aikins J. (later J.A.) wrote:

I have come to the conclusion that the plaintiff in this case is not bound by the passages from the examination for discovery which he put in evidence. I am of the opinion that the questions and answers put in evidence are evidence in this case just like any other evidence and that I must

consider it and weigh it and attempt, in conjunction with a consideration of the evidence given by the policemen, to decide whether the evidence is reliable or otherwise. I have said that the discovery put in evidence is evidence like any other evidence, but there is one qualification: I was denied the advantage of hearing the defendant in the witness stand and observing his demeanour for such assistance as I might gain in weighing the evidence.

[131] I note that, unlike Aikins J., I was not denied the advantage of observing the defendant give his evidence.

[132] In *Clock Holdings Ltd. v. Braich Estate*, 2008 BCSC 1697, Dickson J. (now J.A.) reviewed the relevant authorities on the implications of a plaintiff reading in discovery evidence of a defendant and then, later in argument, taking the position, as did the plaintiff before me, that the evidence given on discovery was untrue. I find paras. 37 - 41 in *Clock* to be helpful due to their similarity with the case at hand:

[37] The defendants submit that *Clock* cannot attempt to contradict by other evidence the discovery evidence it chose to read in as part of its own case. Rather, by so doing, the defendants submit *Clock* must be taken to have adopted the evidence read in as accurate and true. In support of this proposition they cite *Welsh Enterprises Ltd. v. M. Milligan & Assoc. Ltd.*, 2005 BCSC 1095.

[38] I do not agree that *Welsh* stands for the proposition advanced by the defendants. In *Welsh*, Chamberlist J. held that, by reading in the defendant's discovery evidence, the plaintiff made the defendant's explanation of its actions part of his own case. He noted that no contradictory evidence was led by the plaintiff and, given the nature of the explanation read in, concluded there was no case to be met by the defence.

[39] There is no general rule as to the extent to which a party is bound by using in evidence the examination of an opposing party: *Sherlock v. Burnett and Bullock* (1938), 1 W.W.R. 141. In *Wilson v. Boltezar*, [1989] B.C.J. No. 592 Vancouver Registry No. C873747, Bouck J. stated:

Usually a plaintiff only reads into evidence those parts of the discovery of the defendant which assists his case. Now, the plaintiff elected to include as part of his case discovery evidence of the defendant which contradicts his claim. I must assume that counsel for the plaintiff read in the discovery on the instruction of his client. The weight of authority is to the effect that a plaintiff is not necessarily bound by reading in discovery evidence which is against him. It all depends upon the circumstances.

[40] Generally speaking, the Court can accept some, all or none of the evidence of a witness. In some cases, when a plaintiff presents contradictory accounts of a crucial event by way of viva voce testimony, on one hand, and discovery evidence, on the other, the two competing versions, without more, simply cancel one another out. In such circumstances, the burden of proof is not met and the claim will be dismissed: *Tsatsos v. Johnson*, [1970] B.C.J. No. 115. In other cases, however, the Court is able to consider and analyse the competing accounts together with the other evidence presented in order to determine the appropriate weight to

be attached to each: Noel v. Mayer, 2007 BCSC 1892.

- [41] In this case, I conclude that Clock is not bound by the discovery evidence it read in at trial. Erwin, Surjeet, and several other witnesses, including an appraiser, testified at length regarding the contentious matters with which the discovery evidence is concerned. Although it was, in my view, unusual for Clock to read in unhelpful discovery evidence, I am able to weigh it, together with the other evidence, to decide whether it is reliable or otherwise: see Atkins v. Ulrichsen (1973), 37 D.L.R. (3d) 368.

[Emphasis added.]

- [133] In Hynna v. Peck, 2009 BCSC 1057 at para. 26, Ballance J. wrote:

Even if Mr. Peck's discovery evidence read in as part of the plaintiff's case genuinely contradicted other evidence led in the plaintiff's case, there is no absolute rule that would compel the Court to treat the conflicting evidence as cancelling itself out. My preference would be to follow the authorities that endorse the more flexible proposition that such evidence must be considered in conjunction with all of the evidence in the particular case: Atkins v. Ulrichsen, [1973] 3 W.W.R. 406, 37 D.L.R. (3d) 368; Noel v. Mayer, 2007 BCSC 1892; Clock Holdings Ltd. v. Braich, 2008 BCSC 1697, 44 E.T.R. (3d) 271.

- [134] Lastly, I will refer to the recent decision of Harvey J. in Teather v. Kawashima, 2016 BCSC 2231, in which passages from the examination for discovery of the claimant were read in at the trial by the respondents and later the respondents sought to cross-examine the claimant on the same matters. The claimant objected, taking the position that the respondents were bound by the answers that they had read in. At para. 79 of his reasons for overruling the objection, Harvey J. wrote:

Clock Holdings makes clear that when a claimant presents contradictory accounts of crucial viva voce evidence on one hand, and discovery evidence on the other, the two competing versions, without more, simply cancel one another out. . However, I am entitled to analyze separate accounts, together with the other evidence presented, so as to give the appropriate weight to each competing recitation.

- [135] The defendant submits the ratio in Welsh on this issue ought to apply because, as in Welsh, there was no evidence at the trial contradicting the discovery evidence of the defendant which was read in to the effect that the margin reports were accurate and that he had no reason to believe otherwise. I agree that the analysis is correct in a trial where two competing versions of important facts "cancel one another out" but that approach cannot be applied here. The factual and legal situations are distinguishable in the matter before me and in Welsh.

- [136] The matter before me alleges deceit, which, by its nature, may make it impossible for a plaintiff to present direct evidence of the defendant's knowledge and motives and thus the court is often invited to infer from the evidence as a whole that there was an intention on the part of the defendant to deceive, or at least a reckless indifference as to whether representations were true or false.
- [137] I find that the plaintiff is not bound by the answers read in from the defendant's discovery transcripts. Accordingly, like Dickson J. in *Clock*, I have weighed the excerpts from the discovery transcripts along with the other evidence adduced during trial in coming to my decision.

My Conclusion

- [138] The evidence does not persuade me that the plaintiff has established that the defendant knowingly or recklessly misled the plaintiff in order to obtain loans for NWD. On the contrary, I accept that the defendant reasonably believed the margin reports he signed, but which had been prepared by Mr. Fries who he trusted, were accurate. The result must be that the action is dismissed.
- [139] I will add that I make no finding that the plaintiff conducted itself improperly when it made demand for repayment of its loans. The defendant complains about the failure to fund both the equipment lease and the purchase of real property which failure caused NWD and Ammar Jeet Singh to lose their deposits. Notwithstanding the assurance of Mr. Lee and Mr. Tiwana, which I accept was given, the plaintiff had no enforceable obligation to fund the equipment lease or the real property purchase. The defendant and Ammar Jeet Singh may have a legitimate grievance for the timing of the plaintiff's request for the latter to give a guarantee but that has no practical consequence in this action. No claim against the plaintiff is made by the defendant or by Ammar Jeet Singh.
- [140] I also make no finding that Mr. Tiwana attempted to arrange the timing of the funding of the intended equipment lease to enhance improperly his annual bonus. I do not reject the proposition that there may have been a telephone conversation between the defendant and Mr. Tiwana in Punjabi in which the topic of Mr. Tiwana's annual bonus was mentioned by him. Both were under considerable stress at the time and memories can differ in such a circumstance. I am agnostic on whether that conversation occurred; a question which I need not decide.
- [141] The defendant is entitled to his costs.

"The Honourable Mr. Justice Affleck"

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