

CANADA / JUDGMENT

Skalbania v. 0055498 B.C. Ltd.

2022 BCSC 1922

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1922 Skalbania v. 0055498 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Skalbania v. 0055498 B.C. Ltd.,

2022 BCSC 1922

Date: 20221103

Docket: S168169

Registry: Vancouver

Between:

Nelson Skalbania aka Nelson M. Skalbania

Plaintiff/Defendant by Counterclaim

And

0055498 B.C. Ltd. formerly known as Archer Investments Ltd.

Defendant/Plaintiff by Counterclaim

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Plaintiff/Defendant by Counterclaim:

G. Douvelos

Counsel for Defendant/Plaintiff by Counterclaim:

B.M Gordon

Place and Dates of Summary Trial:

Vancouver, B.C.

April 19-20, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 3, 2022

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Introduction

- [1] The defendant applies pursuant to Rule 9-7 of the Supreme Court Civil Rules for judgment on its counterclaim in the amount of \$882,259.43 plus just under 40 years of interest at the Bank of Montreal prime rate plus 1.5%, compounded monthly, plus costs. The defendant says that, in the days leading up to a vote in January 1983 on the plaintiff's proposal to creditors pursuant to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA], the plaintiff and defendant entered into an undisclosed agreement by which the plaintiff agreed to repay a loan advanced by the defendant in 1981, notwithstanding that the original loan obligation was to be compromised as part of the proposal.
- [2] The plaintiff argues that the case is simply not suitable for resolution by way of summary trial. He says that any liability was resolved by agreement and through litigation in the previous century, argues that the claim is barred by limitations and by cause of action estoppel, and says that the alleged agreement is contrary to public policy and thus unenforceable in any event.

Background Facts

- [3] The plaintiff is a businessman who began his career in the early 1960s as a consulting engineer, then subsequently expanded into real estate development, sports enterprises, and various other businesses. He is now 84 years of age. In about 1970, he incorporated N.M. Skalbania Ltd. ("NMSL"), which operated primarily as a real estate development company.
- [4] The defendant 0055498 B.C. Ltd., which from 1963 to 2007 was known as Archer Investments Ltd. ("Archer"), was controlled initially by William Botham Sr. ("Botham Sr."). By the 1980s, his son William Botham Jr. ("Botham Jr.") was also a director and officer of the company.
- [5] Skalbania and Botham Sr. were friends who regularly played snooker, had lunch, and occasionally travelled together. Skalbania considered Botham Sr. to be a mentor.
- [6] In July 1981, Archer loaned \$750,000 to Skalbania Enterprises Ltd. The loan was secured by a fourth mortgage registered against title to a property in downtown Vancouver, which was then known as the Mayfair Hotel. Repayment of the loan was guaranteed by Skalbania in his personal capacity. Interest was payable at the Bank of Montreal prime rate plus 1.5%, compounded monthly.
- [7] By 1982, Skalbania and his various businesses were losing considerable money due to high interest rates and an economic recession. Skalbania had personally guaranteed a number of loans made to various companies he was involved with. After consulting with Henfrey & Co., Skalbania and NMSL made a joint proposal to creditors on December 13, 1982. The statement of affairs showed combined liabilities of \$39.7 million and total assets of just \$9.3 million.
- [8] I am advised the proposal was unique. The final version included the following:

6. That [Skalbania] will act as Manager of [NMSL] during the term of this Proposal and devote his entire time to the successful operation of the company. He will be paid a salary of \$90,000 per annum to be adjusted on the anniversary date by any increase in the Consumer Price Index. The salary will be a first charge on future profits only and will not be paid if profits are not earned. [NMSL] will provide monthly reports on his activities to the Trustee and financial statements of [NMSL] will be prepared at least semi-annually. The reports and financial statements will be provided to the Creditors Committee. If the Creditor's Committee is unhappy with results achieved it may instruct the Trustee to convene a further meeting of creditors.
7. That all business transactions of the debtors will be conducted in [NMSL] and/or in wholly owned subsidiaries in trust for [NMSL] during the term of this Proposal.
8. That all assets of [Skalbania], subject to an exemption totalling \$10,000 (Ten Thousand Dollars), and all assets of [NMSL] will vest in the Trustee under this Proposal, upon the filing of this Proposal with the Superintendent of Bankruptcy. The Trustee will have the power to sell the vested assets with the approval of the Creditors Committee and the proceeds will be available for distribution to creditors. As assets available as at the date of this Proposal are realized by the Trustee, the proceeds will be maintained in the Trustee's bank account as distinct from the operating account which will be maintained for the ongoing operations of the company. These funds will not be available to finance on-going operations but will only be available for distribution to creditors.
- [9] In support of the proposal, Skalbania wrote to his creditors setting out his view as to the reasons for his financial difficulties, noting that some 30% of his outstanding debt related to personal guarantees in relation to the public company, Skalbania Enterprises Ltd., commenting that his philosophy had always been to provide personal guarantees when borrowing other people's money, and concluding:

In the future armed with good health and my family I expect to do not the quantity of deals that I used to do but deals of higher quality. This then is my commitment: to erase as expeditiously and judiciously as possible my total debt. In the "old" days a good year is all that optimistically would be required to satisfy all my creditors, and although the future is uncertain there is definite potential.

- [10] On January 5, 1983, Archer filed a proof of claim asserting that it was owed \$882,259.43, comprised of the \$750,000 mortgage loan guaranteed by Skalbania plus interest that had accrued to that date. The trustee wrote back on January 7, 1983, accepting the claim other than interest charged subsequent to the date of the proposal, and concluding that the amount accepted as proved was \$876,485.46.
- [11] Also on January 5, 1983, Archer submitted a "voting letter" to the trustee advising that it voted in support of the proposal.

[12] At some point in early January 1983, there were discussions between Skalbania and Botham Sr. In a 2016 affidavit, Skalbania stated:

Prior to the Creditors Meeting, Botham Sr. suggested to me that [Archer's] claim, or a portion of it, be paid separately from the rest of the creditors subject to the Proposal. I understood from our discussion that he made the suggestion in light of the efforts he had undertaken to help get the Proposal accepted by the other creditors.

I agreed, on my own behalf and on behalf of [NMSL], that [Archer's] claim, or a portion of it, would be paid separately from the rest of the creditors

I cannot recall the specific terms of the Agreement nor the specific amount it was agreed was to be paid to [Archer]

To the best of my knowledge, Botham Sr. never disclosed the Agreement to Mr. Henfrey or anyone else with the Trustee. To the best of my knowledge, he never disclosed the existence of the Agreement to any of the other creditors

[13] Archer asserts that the actual agreement was for Skalbania to repay the entire amount of the Mayfair loan (to the extent not otherwise repaid through the proposal), and that the agreement was made on, or shortly after, January 4, 1983 - in advance of the creditors' meeting. Archer also asserts on this application that part of the consideration was Archer's agreement to provide an undefined amount of "seed money" to NMSL after the proposal had been approved.

[14] I will refer in this judgment to the subject agreement as the "Mayfair Loan Re-Promise". Whatever the specific terms of the Mayfair Loan Re-Promise might have been, it is clear that there was never a written record of what was agreed to.

[15] A few changes were made to the proposal to creditors after a meeting of major creditors on January 7, 1983. At the creditors' meeting on January 12, 1983, the proposal as amended was accepted by the creditors. On February 3, 1983, the amended proposal was approved by the Supreme Court.

[16] Skalbania acknowledges in his evidence that Botham Sr. was very supportive of the proposal, and that leading up to the creditors' meeting he spoke to other creditors in an effort to get them to vote in favour of accepting the proposal.

[17] Botham Jr. became a member of the creditors' committee, a position he held for the next several years.

[18] Beginning the day after the creditors' meeting, Archer began advancing funds by way of seed money. A reconciliation prepared in 1985 indicated a number of smaller advances (i.e., amounts of \$50,001 or less) plus three larger advances:

a) \$157,325.00 on March 1, 1983;

- b) \$105,738.91 on March 31, 1983, and
- c) \$75,481.99 in about early 1984.

The amount reflected in the 1985 reconciliation totalled \$550,982.99 in Canadian dollars plus \$252,725.00 in U.S. dollars. The great bulk of the advances were made in 1983.

[19] On December 8, 1983, Skalbania signed an acknowledgement stating:

I reconfirm our memos of 24th January, 1983 and 1st February, 1983 and subsequent undertakings covering our seed money arrangement and your several advances to various companies and/or interests at my request. I greatly appreciate your efforts to assist me to rehabilitate.

As of today you are asked to accept shares in respect of advances made at my request to Scandu.

I reconfirm my personal undertaking to repay you as fully as possible out of the first monies I receive or to give you a first charge on any asset I may obtain.

I also confirm my personal undertakings and that all monies advanced by you to me now approaching with interest \$1,000,000 are to be construed as monies lent to me. It is all time agreed and understood that my personal liability remains whether the projects I enter win or lose it will make no difference to my total and continuing liability to you.

[20] The two memoranda referenced in the first paragraph of this document were not in evidence.

[21] The 1985 reconciliation referenced above was attached to a formal agreement amongst NMSL, Skalbania, Dalbray Holdings Ltd (another Botham company), Archer, Botham Sr. and Botham Jr. dated July 15, 1985 (the "1985 Agreement"). The recitals to the 1985 Agreement confirmed that:

At the request of [NMSL] and Skalbania, or both of them, [Dalbray and Archer] have made certain loans specifically described in the Schedule of Loans attached hereto as Appendix 1

[22] The recitals to the 1985 Agreement also confirmed that Skalbania had asked the lenders to execute a settlement agreement, which was to be attached as Appendix 2. Unfortunately, the copy of the agreement in evidence did not include Appendix 2.

[23] The recitals further acknowledged that the lenders had agreed to forego demanding immediate repayment of the loans, subject to the terms and conditions set forth. It provided that 10% of the gross revenue of NMSL and Skalbania would be paid to the lenders until such time as the loans were paid, and that interest would accrue on the loan amount at 12% per annum from the date of the agreement.

[24] The agreement went on to set out certain remedies that would be available in the event of default by NMSL or Skalbania, and provided in a section headed "Miscellaneous Covenants" that:

4.9 The rights and remedies of the Lenders in this Agreement are cumulative and the Lenders may realize on any of them in any order it desires and no remedy or realization on or under any of them will bar any other remedy or realization.

[25] Skalbania's evidence was that at some point after the 1983 proposal, he and Botham Sr. agreed the Mayfair Loan Re-Promise was voided because they both realized it was inappropriate to have made a separate deal to the exclusion of the other creditors. Botham Jr. vehemently denied that his father agreed at any time to waive any right to repayment of the Mayfair loan.

[26] In late 1985, Skalbania sent a Christmas card to Botham Sr. In the card, he said:

These chocolates have no calories in them. Also, I said I would repay \$1 million before Xmas '85. But I'm afraid the \$1 million is like the chocolates.

[27] The five-year time period contemplated by the proposal came to an end in 1988. The evidence indicated that the profits from NSML available to the trustee were only sufficient to cover the trustee's fees of \$2.35 million, and some \$1.34 million which went to preferred creditors, leaving nothing for the unsecured creditors.

The Judgments

[28] In June 1989, Archer and Botham Sr. commenced action C893215 in the Supreme Court of British Columbia against Skalbania and NMSL. The statement of claim cites the 1985 Agreement, and asserts that the amount owing pursuant to the 1985 Agreement is \$1.15 million.

[29] The documentary evidence included a formal settlement offer dated October 2, 1989, which Botham Jr. says was accepted, settling action C893215 plus an unrelated action. With respect to action C893215, it provided in para. (a) for payment out of court to Archer of just under \$32,000 that had been garnished, and that:

(b) [Archer] and [Botham Sr.] will compromise the balance of the monies owed to them by [NMSL] and [Skalbania], which is in the approximate amount of \$1.2 million after the payments referred to in 2(a) above, to \$750,000.00 payable in three annual instalments, being three instalments of \$250,000.00 each, payable on August 1 of 1990, 1991 and 1992, together with interest at the rate of 12% per annum on the unpaid balance of the first \$500,000 of the said \$750,000.00, which interest shall be calculated and paid on the first day of each month provided that in the event the first two annual instalment payments of \$250,000.00 are paid on time [Archer] and [Botham Sr.] will waive payment of the final \$250,000.00

- (d) [Skalbania] and [NMSL] will execute and return to us the \$750,000.00 Consent to Judgment in favour of [Archer] and [Botham Sr.] in this action which we earlier delivered to Mr. Bragagnolo, which Consent to Judgment we will hold in trust and not enter or take any execution proceedings thereon so long as [NMLS] and [Skalbania] are not in default for longer than 7 days of any of their obligations to make the annual principal payments and the monthly interest payments which are referenced in 2(b) above;
- [30] The documents in evidence included a Consent to Judgment for \$750,000 in action C893215, dated October 16, 1989, and signed by Skalbania both in his personal capacity and as President of NMSL.
- [31] At some point in 1990, Botham Sr. passed away.
- [32] On December 14, 1990, Skalbania and NMSL were released from their obligations under the amended joint proposal from 1983.
- [33] On October 11, 1991, Mr. Justice Sheppard granted judgment in favour of Archer against Skalbania and NMSL in action C893215. The judgment was based on the Consent to Judgment signed in October 1989. The judgment stated that:
- THIS COURT ORDERS that the Plaintiff, Archer Investments Ltd., shall recover judgment in the amount of \$750,000.00 from [Skalbania] and [NMSL], jointly and severally, plus interest calculated at the rate of 12% per annum on the principal amount of \$500,000.00 from July 1, 1991 to this date, being the further amount of \$16,766.76, plus costs.
- [34] Some eight years later, on October 8, 1999, NMSL was dissolved.
- [35] On March 15, 2001, Archer commenced action S011508, by which it sought judgment on the basis of the 1991 judgment. On June 28, 2001, it obtained default judgment against Skalbania for the \$766,766.76 owing on the 1991 judgment plus interest in the amount of \$360,774.32 plus assessed costs of \$849.72, for a total of \$1,128,390.80.
- [36] On October 10, 2004, Archer applied for voluntary dissolution. It was subsequently dissolved. On December 7, 2007, the company was restored and changed its name from Archer to 0055498 B.C. Ltd. Although its name was changed, I will continue to refer to it herein as Archer.
- [37] On June 7, 2011, Archer commenced action S113822 against Skalbania, seeking judgment based on the 2001 judgment for \$1,128,390.80 plus interest and costs. On August 5, 2011, it obtained a court order for service on Skalbania by posting of the notice of civil claim on the door of his home.
- [38] Skalbania's evidence was that he did not have any recollection of being served with the notice of civil claim, but that in 2011 and 2012 he was preoccupied with caring for his terminally ill wife, and his affairs were being taken care of by his son-in-law.

- [39] On January 11, 2012, a consent order was made in action S113822 granting judgment for \$1,128,390.70 plus interest in the amount of \$505,441.96, and costs. It was signed by Skalbania's son-in-law.
- [40] After Skalbania's wife passed away, and upon settlement of an estate dispute, certain property became registered in Skalbania's name. Archer registered its judgment against title to the property and took steps to force a court-ordered sale. On August 31, 2016, Archer obtained an order in action S113822 to refer to the registrar the determination of Skalbania's interest in the property and whether it should be sold.

Commencement of Action S168169

- [41] The present action was commenced by Skalbania on September 7, 2016. In the notice of civil claim, he pleaded that prior to the creditors voting on the proposal in 1983, Skalbania and NMSL had agreed that the claim of Archer, "or a portion of it, would be paid separately from the rest of the creditors subject to the Proposal". He referred to this as the "Agreement". The pleading went on to assert that:
16. The Agreement was made in recognition of Botham Sr.'s efforts to convince other creditors to approve the Proposal.
 17. The Agreement was subsequently reduced to writing on or about July 15, 1985.
 18. The Agreement was not disclosed to the Trustee or to the other creditors subject to the Proposal.
- [42] The pleading asserted that the action commenced by Archer in 1989 was to collect monies owing on the Agreement (as defined). It sought the following relief:
1. A declaration that the Agreement is contrary to public policy and is of no force or effect pursuant to section 65.1(5) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
 2. A declaration that the Agreement is void ab initio.
 3. A declaration that the Consent Order is founded upon an illegal agreement.
 4. An Order setting aside the Consent Order on the grounds of illegality.
- [43] These pleadings reflect a misunderstanding of the facts. The portions of the 1985 Agreement that were in evidence relate only to post-proposal advances of seed money. It also seems clear that action C893215 pleaded only the 1985 Agreement - although the settlement letter arguably has broader application.
- [44] On September 15, 2016, Skalbania filed an application in action S113822 to stay proceedings in that matter. The application was supported by a lengthy affidavit setting out his understanding of what had happened in the 1980s.

- [45] The next day, September 16, 2016, Botham Jr. filed an affidavit in action S168169, containing a number of other documents including the 1985 Agreement (which it appeared Mr. Skalbania no longer had) and the October 1989 settlement correspondence. As well, Archer filed a Response to Civil Claim on September 19, 2016, asserting that the claims underlying the judgment were "post-proposal debts and not pre-proposal debts and were in addition to the as alleged by the Plaintiff".
- [46] That same day, Archer filed a Counterclaim in action S168169 claiming on the Mayfair Loan Re-Promise. It asserted that such claim was not subject to a limitation period because it was a counterclaim. Archer claimed judgment on its counterclaim for \$882,259.43 plus interest compounded monthly from January 1983 to the date of judgment at the Bank of Montreal prime rate plus 1.5%, compounded monthly. Skalbania filed a Response to the Counterclaim on October 11, 2016.
- [47] The application for a stay of proceedings in action S113822 was adjourned by consent and did not proceed. On November 2, 2016, Archer filed an Acknowledgement of Payment in that action acknowledging payment of \$1,839,850.62 in full satisfaction of the outstanding judgment in that proceeding.
- [48] On July 27, 2017, Archer filed an Amended Counterclaim, which specified that the agreement to repay the 1981 loan was entered into on or about January 4, 1983. The Amended Counterclaim stated the following in Part 1 with respect to the agreement:
8. On or about January 4th, 1983 and repeated on occasions up to and after July 15, 1985 the Plaintiff made a new agreement with the Defendant to repay the Defendant the amount unpaid on the Mayfair Hotel Loan. (the New Mayfair Agreement).
 9. The Defendant gave the Plaintiff fresh consideration for the New Mayfair Agreement.

The Rule 9-5 Decision and Appeal

- [49] On August 18, 2017, Skalbania filed an application for an order striking out the counterclaim pursuant to Rule 9-5(1)(a), (b) and (d). The application alleged, among other things, that the counterclaim was barred by limitations and that the October 1989 judgment included all outstanding matters between the parties.
- [50] It further alleged that the relief sought was barred by the doctrines of res judicata and cause of action estoppel, and that on the documentary evidence there was no merit to the claim. With respect to res judicata, Skalbania relied on the principle in *Henderson v Henderson* (1843), 3 Hare 100, 67 ER 313, as more recently confirmed in *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665 at paras. 17-18.

- [51] In response, Archer argued that both s. 22(1) of the current Limitation Act, S.B.C. 2012, c. 13 (the "New Limitation Act") and s. 4(1) of the old Limitation Act, R.S.B.C. 1996, c. 266 (the "Former Limitation Act"), allowed the claim to be brought as a counterclaim even after so many years, and that there was no illegality as it was up to Skalbania to pay money earned after the proposal had been approved to whomever he wished.
- [52] Skalbania filed a Reply to the Application Response, arguing that any alleged side agreement between the debtor and a creditor was contrary to public policy, relying on cases including *Cicoria (Re)* (2000), 18 C.B.R. (4th) 202, 2000 CanLII 22483 (Ont. S.C.) and *Hochberger v. Rittenberg* (1916), 54 S.C.R. 480, 1916 CanLII 49.
- [53] The application was heard by Justice Macintosh on September 20, 2017, who gave oral judgment the next day striking out the counterclaim. His reasons for judgment are indexed at 2017 BCSC 1995. At paras. 9-11, he concluded:
- [9] Regarding the so-called agreement between Skalbania and Archer, referred to in the affidavit as quoted above, such an agreement, even if it satisfied the contractual terms for certainty, which I do not address, would be unenforceable as being a fraud on the other creditors and on the trustee. Archer says there was fresh consideration for such an agreement as a result of Botham Sr. mustering the other creditors to vote for the proposal. However, no authority that was brought to my attention supports the argument that Botham Sr. getting out that vote amounts to fresh consideration as a matter of law. The parties probably knew at the time that there really was no new consideration, which perhaps serves to explain why they did not share news of their so-called agreement with anyone else.
- [10] Mr. Gordon for Archer, in my view, said all that reasonably could be said to maintain what is now a 34-year-old claim pursuant to the guarantee. However, I cannot accept that the claim remains valid, and I allow Skalbania's application under Rule 9-5(1)(a), (b) and (d). I heard very little or no argument from either party as to the meaning and application of Rule 9-5. Both sides devoted themselves instead to the factual matters summarized above.
- [11] Archer's 34-year-old claim may be statute-barred, as well, but I do not need to address that issue given my earlier findings and conclusions. To get around the limitations deadline that would otherwise be a bar to the counterclaim, Archer relies on s. 22(1) of the Limitation Act, S.B.C. 2012, c. 12. I have not considered whether that provision has application in light of the transition section in the 2012 Act, s. 30, and in light of the 2012 Act read as a whole.
- [54] Archer appealed the dismissal of its counterclaim. The appeal was heard on May 28, 2018, and on June 19, 2018, the appeal was allowed. Justice Newbury gave the judgment of the court, which is indexed at 2018 BCCA 247. She noted at para. 16 that, for purposes of an application under Rule 9-5(1)(a), the Court is required to assume the facts stated in the pleadings (in this case, the Counterclaim) to be true, and that for purposes of Rule 9-5(1)(a), only the pleadings may be considered. At para. 19, she noted the argument of Archer that an agreement to repay the loan would not have been a fraud on the other creditors because it was to be repaid out of the monies earned by Skalbania and NMSL post-proposal. At paras.

20-21, she concluded:

- [20] Also on the issue of illegality, counsel referred us to *Tildesley v. Weaver* (1998) 7 C.B.R. (4th) 313 (B.C.S.C.). It concerned the enforceability of a promissory note given by a bankrupt following his discharge from bankruptcy, "in respect of loans of money made to him prior to his bankruptcy and without any consideration other than the original debt". Mr. Justice Scarth ruled that a purely moral obligation did not provide sufficient consideration for the note. (At para. 16.) Further, given that s. 178(2) of the BIA provided (and still provides) that an order of discharge releases a bankrupt from all claims provable in bankruptcy, the original claim had been "extinguished" as against him. (Citing *Bowes v. Foster* (1858) 27 L.J. Ex. 262 at 266.) Thus, no consideration had been given to the lender for the note. This was consistent with the rationale underlying bankruptcy law, the purpose of which was said to be to "wind-up a person's previous liabilities and give him or her a fresh start in the business world". At least on one reading of *Tildesley*, however, it was possible that if fresh consideration had been given, a new promise enforceable in law might have arisen. (In the case at bar, of course, no bankruptcy or discharge from bankruptcy took place, given that the Skalbania proposal to creditors was approved.)
- [21] The issues of fact and law that arise in this case are obviously complex and cannot be resolved simply on a review of the pleadings. The facts of the case as presented at this stage, however, are such as to make any judge feel uneasy. Both parties assert the existence of an agreement the consideration for which and the terms of which are unclear. It may have been illegal; it may not have been. Various provisions of the BIA that might apply (see ss. 95 to 101) have not been considered. If the chambers judge was correct, Mr. Skalbania would be in the position of taking advantage of his own contravention of the bankruptcy scheme to walk away from a liability of well over \$1 million. At least three consent orders of the Supreme Court of British Columbia would have been improperly obtained. On the other side of the coin, Archer's assertion that a new agreement with fresh consideration was made, was rejected by the chambers judge notwithstanding that he was required to assume the assertion was true for purposes of Rule 9-5(1)(a). No finding was made as to Archer's version of the "Agreement". If one assumes that the pleading was correct - i.e., fresh consideration was given - it is not "plain and obvious", in my respectful view, that Archer's claim will fail.
- [55] The appeal was allowed and the order striking out the counterclaim was set aside.

The Summary Trial on Limitations

- [56] Little happened in this action for an extended period of time. On April 2, 2019, Skalbania discontinued the claims advanced in the notice of civil claim, leaving only the counterclaim outstanding. On April 15, 2019, he filed an application seeking to dismiss the counterclaim pursuant to Rule 9-7 or Rule 9-6 on the basis that it was barred by the applicable limitations statute. The application was heard by Justice Duncan who released reasons for judgment on July 22, 2019, dismissing the application. Those reasons are indexed at 2019 BCSC 1193.

- [57] Justice Duncan noted at para. 3 the comment of Newbury J.A. in the appeal:
- [21] The issues of fact and law that arise in this case are obviously complex and cannot be resolved simply on a review of the pleadings. The facts of the case as presented at this stage, however, are such as to make any judge feel uneasy. Both parties assert the existence of an agreement the consideration for which and the terms of which are unclear.
- [58] Justice Duncan then commented at para. 4:
- [4] The agreement in question dates back to January 1983. Its terms are still unclear based on the materials before me, which included affidavit evidence from Nelson Skalbania (sworn September 14, 2016) and William Botham (sworn September 16, 2016), as well as the affidavits of several legal assistants sworn and filed for the purpose of putting exhibits before the court.
- [59] She summarized the key arguments of the parties at paras. 39-42, after referencing s. 4(1) of the Former Limitation Act:
- [39] Section 4(1) was analyzed in *Lui v. West Granville Manor Ltd.*, 1987 CanLII 164 (B.C.C.A.). That authority stands for the proposition that whether or not a counterclaim is related to or connects with an existing claim is a fact-specific inquiry.
- [40] Mr. Roberts submits that Archer did not take any steps to enforce the New Mayfair Agreement in 1989 when it sued the plaintiff on the 1985 Agreement. As a result, Archer must be taken to concede in law that the New Mayfair Agreement is not related to or connected with the subject matter of the 1985 Agreement and it is statute-barred.
- [41] If it is connected to the 1985 Agreement, then *res judicata* and issue estoppel would operate to preclude the amended counterclaim because the 1985 Agreement was dealt with by way of C893215 and the subsequent consent orders.
- [42] Mr. Gordon's position is that Mr. Skalbania has confirmed the existence of the New Mayfair Agreement in his pleadings in this matter as well as in affidavits filed in connection with the litigation. He maintains that the New Mayfair Agreement is connected to an existing claim, and as a result any limitation period is overcome by operation of s. 4(1) of the Former Act.
- [60] She then concluded at para. 46:
- [46] As Newbury J.A. observed in the Court of Appeal's judgment allowing Archer's appeal against the dismissal of its claim, the terms of the New Mayfair Agreement were then unclear. They are no clearer on the application before me. What is lacking in the material and submissions is any discernible path to determining when Archer's right to sue on the New Mayfair Agreement arose, let alone what kind of loan it was. It may well have been the intention of the parties to subsume it into the 1985 consolidation that dealt with the 24 discrete loans, but I cannot determine that on the materials before me. The applicant's applications for summary trial and summary judgment are dismissed.

Subsequent Steps in the Litigation

- [61] Once again there was a lengthy hiatus in this litigation. Skalbania's lawyer withdrew in early 2021, and various steps were taken to obtain an examination for discovery of Mr. Skalbania - which ultimately occurred on June 16, 2021.
- [62] On August 20, 2021 - at a time when Skalbania was unrepresented - Archer obtained an order of a Master of the court pursuant to Rule 12-5(71) that the September 2016 affidavit of Skalbania in action S113822 was "to be admissible in evidence at the trial without calling [Skalbania] as a witness", and that a court-certified copy of the affidavit could be produced at the trial.
- [63] On September 14, 2021, Botham Jr. made his third affidavit in this proceeding, setting out hearsay evidence of what he had been told by Botham Sr. Also on September 14, 2021, Archer filed a notice of application with respect to the hearsay affidavit.
- [64] On October 4, 2021, Skalbania's current counsel filed a notice of appointment.
- [65] On October 26, 2021, the September 14, 2021 notice of application came before the court. An order of a Master was made by consent that:
1. That the evidence in chief of William Botham in this proceeding be given by in part by his affidavits Nos. 1, 2 and 3, filed in this proceeding.
 2. That the affidavit No. 3 of William Botham on information and belief as to paragraphs 13 and 14, be admitted into evidence and [Skalbania] may attack the truth, or contradict it in any way, or lead other evidence, including other documents, tending to contradict affidavit No. 1, 2 and 3 of William Botham, filed in this proceeding.
 3. That before using the affidavits Nos. 1, 2 and 3 at the trial of this action [Archer] must comply with rules 12-5(61) and (62) of the British Columbia Supreme Court Civil Rules to produce William Botham for cross-examination or if [Archer] brings on an application for summary trial under British Columbia Supreme Court Civil Rules 9-7 [Skalbania] be given a reasonable opportunity to examine William Botham, if William Botham is under any legal disability a representative of [Archer] for discovery.
 4. [Skalbania] is at liberty to subpoena the William Botham to be cross-examined at trial.
- [66] Archer filed a further notice of application on November 5, 2021, which led to a further consent order of a Master made on December 6, 2021. While the order has not been entered, I am advised that the operative provision is as follows:

The Registrar of this Court assess or calculate pursuant to rule 18-1 the amount owing by [Skalbania] to [Archer] pursuant to any judgment obtained at trial or summary trial of the counterclaim by [Archer] and certify the amount so calculated pursuant to 18-1(2) and 18-1(12) as the court may order at the any judgment at trial or summary trial.

[67] I understand that early in 2022, counsel discussed potential dates for a summary trial hearing and agreed to dates in April 2022. Those dates were reserved with Supreme Court Scheduling. Unfortunately, Archer did not file its application materials until March 28, 2022 - which was just two days before the last possible date permissible under the Rules. This led to the filing of response materials from Skalbania less than a week before the hearing and reply materials on the eve of the hearing.

[68] Although this action has been outstanding for six years, no trial date has ever been set.

Positions of the Parties

Archer

[69] Archer argues this case is appropriate for summary trial, pointing to Skalbania's 2016 affidavit which acknowledged the existence of an oral agreement, but uncertainty as to its precise terms. It says that Botham Jr.'s 2021 affidavit provides certainty as to those terms. It acknowledges that Botham Jr.'s evidence is hearsay in nature, but says that it has been deemed by a Master's order to be admissible. It says that Botham Jr.'s evidence should be presumed credible, relying on a suggestion in *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10 that the "typical starting point in a credibility assessment is to presume truthfulness". Archer argues that Skalbania's affidavit filed in this action, in contrast, should be disbelieved. It argues that the 1985 Christmas card sent by Skalbania to Botham Sr. must have been referring to the Mayfair Loan Repayment oral agreement, since the seed loans had not yet amounted to \$1 million by the time that card was sent.

[70] Archer further argues that the action is not barred by limitations. It acknowledges the decision of Duncan J. that the issue of limitations should go to trial, but says that judgment was in response to an application by Skalbania, and this is an application by Archer, which is different. Rule 9-7(16) only prohibits the applicant from the first summary trial application from applying again. Archer also argues that there have now been examinations for discovery by each side, and additional affidavit evidence from each party.

[71] On the substance of the limitations issue, Archer continues to rely on both s. 22(1) of the New Limitation Act and s. 4(1) of the Former Limitation Act. It argues that under both of these provisions, so long as a counterclaim is related to or connected with the plaintiff's claim, the fact that the counterclaim would otherwise have been statute-barred is excused and the counterclaim may proceed: *Cook v. Cook*, 2008 BCSC 1196 at paras. 25-28; *Raven v. A&W Ranching Limited*, 2014 BCSC 1359 at para. 30.

- [72] Archer argues that the question of whether the counterclaim is "related to" the claim that has been brought is determined based on the facts alleged in the pleadings, even if those facts are mistaken, rather than the relief sought. This is said to be the case even if the ultimate limitation period has passed: *Mathias v. Canadian Pacific Ltd.*, 1998 CanLII 3909 (B.C.S.C.) at para. 41. The fact that Skalbania's claim was subsequently discontinued is irrelevant.
- [73] With respect to cause of action estoppel, Archer argues that the claims advanced in action C893215 are substantively different than those advanced in the counterclaim in this proceeding. Archer relied on the summaries of cause of action estoppel found in *Royal Bank of Canada v. United Used Auto & Truck Parts Ltd.*, 2006 BCSC 1192 at para. 38-41 and *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180 at paras. 25-29. Even if cause of action estoppel might otherwise prevent the bringing of the counterclaim, Archer argues that it would not apply in light of s. 4.9 of the 1985 Agreement, which gives Archer the right to realize on its rights and remedies when, and in any order, it desires.
- [74] With respect to the question of whether the Mayfair Loan Re-Promise is contrary to public policy, and thus unenforceable, Archer argues that the arrangements made for seed money were of benefit to all the creditors. Archer argues that the agreement in this case was made after the proposal had been filed but before it had been voted on. It ensured that there was funding in place for the ongoing business activities of NMSL, which was necessary given the unusual nature of the proposal.
- [75] The twofold consideration (support of the proposal, and the provision of seed money) included acts by Archer subsequent to the making of the proposal to creditors. Archer argues the monies it was to receive would eventually come out of Skalbania's portion of the profits of NMSL, and would thus not depreciate the amounts going to the trustee. Archer also argues that the Mayfair Loan Re-Promise was not distinguishable from any of the other business dealings of NMSL and Skalbania after the approval of the proposal. Archer further argues that s. 65.1(1) of the BIA is not applicable to a new agreement, agreed to after the proposal was made, and continues to rely on the *Tildesley* case referenced by *Newbury J.* (quoted above).

Skalbania

- [76] Skalbania argues that it is inappropriate to decide a case of this nature on a summary trial. He argues that this is a claim to enforce an alleged and disputed oral agreement, now more than 39 years old, to pay a substantial amount of money, essential elements of which are based on unreliable hearsay evidence of a party with a significant financial interest.
- [77] Skalbania argues he is the only person remaining alive with actual knowledge of the key facts, that any difficulty he has had piecing together events nearly 40 years in the past is unsurprising, and that there is no basis on which to disbelieve his evidence that the loan was forgiven. He says that evidence is confirmed by the documents related to the

commencement and settlement of action C893215 in 1989, and that the 1985 Christmas card references an amount that is in fact comparable to the amount of the seed loans, and is expressed in nearly identical terms to the December 1983 acknowledgement which clearly relates to the seed loans.

- [78] He also argues that the behaviour of the parties post-1985, including the lack of any steps to demand payment on the Mayfair Loan Re-Promise, the failure to include it in action C893215, and the 1989 settlement letter which purported to "compromise the balance of the monies owed" by Skalbania to Archer, are all behaviour consistent only with the Mayfair Loan Re-Promise having been compromised. He argues post-agreement conduct should be given substantial weight in the circumstances of this case: *Oswald v. Start Up SRL*, 2020 BCSC 1730 at para. 122, citing *Matic v. Waldner*, 2016 MBCA 60 at para. 63.
- [79] With respect to limitations, Skalbania argues that this issue has already been referred to trial by Duncan J. and that there is no basis to reconsider her decision. Skalbania argues that Duncan J. was correct in concluding that limitations cannot be decided in an evidentiary vacuum, referencing *Jensen v. Ross*, 2014 BCCA 173 at para. 44. He notes the requirement in *Cook* at para. 26 that the connection between the claim and counterclaim be "real and substantial", and argues that such a connection does not exist between the claim he initially advanced in this action, which sought to have the judgment in action C893215 set aside, and the counterclaim, which advances a claim that is said not to have been included in action C893215.
- [80] With respect to cause of action estoppel, Skalbania argues that any rights that continued to 1989 were merged in the settlement and the judgment eventually obtained.
- [81] More generally, Skalbania advanced an argument with reference to s. 44 of the Law and Equity Act, R.S.B.C. 1996, c. 253, that the court's jurisdiction in equity can be used to relieve from a harsh and unconscionable result. I asked whether, given the large role that delay plays in this case, including prejudice from delay given the death of a key witness, this was meant to be a reference to the equitable doctrine of laches. Counsel advised that laches is "part of it", but also referenced unconscionability generally, as well as the nature of the agreement being contrary to public policy.
- [82] With respect to the public policy issues, in addition to the cases already noted, Skalbania referenced the discussion in *Hall v. Hebert*, [1993] 2 S.C.R. 159 at 170-171 regarding the court's role to prevent its powers from being used for abusive or unlawful purposes. He notes the complete lack of any written record of the Mayfair Loan Re-Promise, and suggests this reflects Archer's acknowledgement that the agreement would have been of concern to other creditors.

Issues

- [83] The primary issue for determination is whether this matter is suitable for summary trial.

Legal Principles

Appropriateness for Summary Trial

[84] Rule 9-7(15) provides that:

(15) On the hearing of a summary trial application, the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
- (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
- (c) award costs.

[85] Rule 9-7 discourages the making of multiple summary trial applications in an action by providing at Rule 9-7(16) that:

(16) If the court does not grant judgment under subrule (15), the applicant may not apply again under subrule (2) without leave of the court.

[86] Rule 9-7(6) provides that:

(6) Rule 12-5 (46), (49), (50), (51), (56) to (58) applies to subrule (5) of this rule.

[87] The Order of a Master made on October 26, 2021, permitting the use of hearsay evidence, was made pursuant to Rules 12-5(59) to (62) and (71). Those Rules are not available on a summary trial proceeding.

[88] The leading case on appropriateness under Rule 9-7 is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.). At para. 48, McEachern C.J. noted that the summary trial rule provides certain safeguards aimed at ensuring the proper attainment of judgment, including an extended notice period, the rule that a chambers judge cannot give judgment unless able to find the facts necessary to decide the issues of fact or law, and the ability of a chambers judge, even if able to find the facts, to nevertheless decline to give judgment if it would be unjust to do so.

[89] In *Gichuru v. Pallai*, 2013 BCCA 60, the court identified at paras. 30-31 a number of factors to be considered in determining whether a summary trial is appropriate:

- a) The amount involved;
- b) The complexity of the matter;
- c) Its urgency;
- d) Any prejudice likely to arise by reason of delay;

- e) The cost of taking the case forward to a conventional trial in relation to the amount involved;
- f) The course of the proceedings;
- g) The cost of the litigation and the time of the summary trial;
- h) Whether credibility is a critical factor in the determination of the dispute;
- i) Whether the summary trial may create an unnecessary complexity in the resolution of the dispute;
- j) Whether the application would result in litigating in slices; and
- k) Any other matters which arise for consideration on this important question.

[90] As noted in *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.*, 2008 BCSC 918 at para. 13(b):

While the court may in certain circumstances resolve issues and find facts in the face of conflicting evidence, it should be reluctant to do so where there are direct conflicts in affidavit evidence, the resolution of which will require findings with respect to credibility.

Limitations and Counterclaims

[91] Section 30(2) of the New Limitation Act provides that:

- (2) A court proceeding must not be commenced with respect to a pre-existing claim if
 - (a) a former limitation period applied to that claim before the effective date, and
 - (b) that former limitation period expired before the effective date.
- (3) Subject to subsection (2), if a pre-existing claim was discovered before the effective date, the former Act applies to the pre-existing claim as if the right to bring an action occurred at the time of the discovery of the pre-existing claim.

[92] The phrase "pre-existing claim" is defined in s. 30(1) to mean a claim:

- (a) that is based on an act or omission that took place before the effective date, and
- (b) with respect to which no court proceeding has been commenced before the effective date.

[93] The "effective date" for purposes of s. 30 is June 1, 2013.

[94] Neither party suggested that Archer had not "discovered" its claim on the Mayfair Loan Re-Promise. The obligation dates back to the 1980s. It thus seems clear that, to the extent the Mayfair Loan Re-Promise remained a valid claim, it would be governed by the Former Limitation Act.

[95] Section 4(1) of the Former Limitation Act stated:

If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to

- (a) proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim,
- (b) third party proceedings,
- (c) claims by way of set off, or
- (d) adding or substituting a new party as plaintiff or defendant,

under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

[96] In *Boutsakis v. Kakavelakis*, 2008 BCCA 13, Newbury J.A. commented at paras. 42-43:

[42] The appellants again argue that the summary trial judge erred in permitting the counterclaim to be filed in circumstances where the new claims alleged were barred in whole or in part by the Limitation Act. Both in the appellant's factum and in counsel's oral arguments, it was assumed that the same considerations apply to the counterclaim as to the other amendments to pleadings discussed earlier in these reasons. However, where a counterclaim is involved, it is s. 4(1) of the Limitation Act that applies, rather than s. 4(4). Section 4(1) states that if an action has been commenced, the lapse of time limited for bringing an action is no bar to proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim, with respect to any claims relating to or connected with the subject matter of the original action.

[43] Section 4(1) was considered by a five-judge panel of this court in *Lui v. West Granville Manor Ltd.* (1987) 11 B.C.L.R. (2d) 273. Mr. Justice Lambert for the majority reviewed the previous authorities and concluded at para. 49 that the legislative purpose underlying s. 4(1) was to "eliminate any limitation defence in all proceedings described in paras. (a) - (d) of that section. Section 4(1) must be considered to bear the meaning that carries that purpose into effect." (At 295.) Further, his Lordship stated at para. 71:

The legislative purpose must surely have been to permit those proceedings which are brought within the applicable limitation period to go ahead, and to permit all subordinate proceedings which are dependent on the main proceedings to go ahead with them, but to prevent any proceedings which are truly independent from using bogus subordinate status to avoid a limitation period which would otherwise be applicable.

[97] In *Cook*, after quoting these provisions, Hinkson J. (as he then was) summarized their impact at para. 26:

- [26] Before s. 4(1) of the Limitation Act can assist Alma Cook, it must be shown that there is a "real and substantial connection" between her counterclaim and the plaintiff's claims. Taking her pleadings at face value, the thrust of her position is that she and the plaintiff agreed to a distribution of their global assets in and around the time that she began her proceedings for a division of those assets and for spousal maintenance, and that she withdrew those claims as a result of that agreement.

Cause of Action Estoppel

- [98] Many of the recent British Columbia cases dealing with cause of action estoppel refer to the judgment of Carrothers J.A. in *Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.* (1980), 19 B.C.L.R. 59, 1980 CanLII 393 (C.A), at paras. 15-16:
- [15] This problem is not new. In 1843 Vice-Chancellor Wigram had this to say about it, as settled law at that distant time, in *Henderson v. Henderson* (1843), 3 Hare 100 at 114-15, 67 E.R. 313 at 319:

I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." (The italics are mine.)

- [16] This passage has been much quoted with approval and followed in the courts of England and Canada. These subsequent decisions appear to explain the "special circumstances" or "special cases" which render the principle of *res judicata* inoperative as those where the question of law or fact which is the subject of the later litigation is not identical with, or inextricably involved with, the question of law or fact previously decided. The maxim *res judicata* does not apply to distinct causes of action (*Hall v. Hall and Hall's Feed & Grain Ltd.* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.)), but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action, although based upon a different legal conception of the relationship between the parties (*Morgan Power Apparatus Ltd. v. Flanders Installations Ltd.* (1972), 27 D.L.R. (3d) 249 (B.C.C.A.)). It also applies not only to points on which the court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (*Winter v. Dewar*, 41 B.C.R. 336, [1929] 2 W.W.R. 518, [1929] 4 D.L.R. 389 (C.A.)). The principle of *res judicata* would also apply if the

issue in the present action was one of several issues essential for the determination of the whole of the first case, though merely a step in that decision rather than the main point of it (*Fidelitas Shipping Co. v. V/O Exportchleb*, [1965] 1 Q.B. 630, [1965] 2 All E.R. 4 (C.A.)).

[99] As noted in *Cliffs Over Maple Bay* at para. 28:

[28] Although grounded in the same basic considerations, each form involves, or has traditionally involved, criteria that have been expressed in slightly different terms. The traditional criteria for cause of action estoppel were summarized by Chief Justice Hewak :

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
3. The cause of action and the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

It is perhaps unnecessary to state that the doctrine contemplates two "causes" - the first having ended in a final judgment that bars a "second claim for the same cause". In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy.

[Citations omitted.]

Public Policy

[100] In *Hochberger*, a Mr. Grossman whose business was in difficulty called a meeting of his creditors in which they all agreed to an extension of time for payment. One creditor refused to sign the relevant documents, and insisted that new promissory notes be made in his favour, which Grossman did. Grossman subsequently went bankrupt. All five justices hearing the appeal wrote judgments concurring in the dismissal of the appeal, and concluding that the new promissory notes were contrary to public policy and unenforceable.

[101] In *Cicoria*, Dr. Cicoria had filed a proposal under the BIA, which was ultimately approved by his creditors. He was subsequently persuaded by Mr. Farmer, the commercial loans officer from his bank, to execute a "side agreement" which was to remain confidential from the other creditors (although the trustee was to be advised). Mr. Farmer was appointed as the sole inspector of the estate. Justice Yates, having referenced s. 65.1(1) and 65.1(5) of the BIA as well as *Hochberger*, concluded at para. 11 that:

- b) The conduct of the inspector and the trustee in participating in a secret side agreement is a fraud upon the creditors and requires that they both be removed forthwith, and

- c) The secret side agreement is contrary to public policy and of no force or effect.

[102] Section 65.1 of the BIA provides that

- (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that
- (a) the insolvent person is insolvent; or
- (b) a notice of intention or a proposal has been filed in respect of the insolvent person.
- (5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

[103] Archer relies on the judgment in *Tildesley*, which was referenced by Justice Newbury in the Court of Appeal judgment in this matter. In *Tildesley*, the defendant had been discharged from bankruptcy in 1990. In 1996, he signed a promissory note in respect of amounts borrowed from the plaintiff's father from 1981 to 1989. Justice Scarth described what was in issue at para. 1:

- [1] The question before the Court is whether a promissory note given following the discharge of the maker thereof from bankruptcy in respect of loans of money made to him prior to his bankruptcy and without any consideration other than the original debt is enforceable at law against the maker.

Justice Scarth commented at para. 4 that he saw the real question to be dealt with as whether there was sufficient consideration for the promissory note.

[104] In the course of his review of older cases, Scarth J. referenced *Trueman v Fenton* (1777), 2 Cowp 546, 98 ER 1232, a case in which a promissory note had been given after bankruptcy but before discharge. In that case, the debtor had on the eve of bankruptcy purchased a quantity of linen from the plaintiff. After he became bankrupt, the debtor by way of compromise gave the plaintiff a new note for approximately half the amount owing. Lord Mansfield at p. 1234 concluded there was sufficient consideration where a debt was "due in conscience" notwithstanding bankruptcy, while at p. 1235 Mr. Justice Aston stated:

As a case of conscience, I am clearly of opinion that the plaintiff is entitled. Wherever a party waves his right to come in under the commission, it is a benefit to the rest of the creditors. In the case of *Bailey versus Dillon*, the Court on the last day of the term were of opinion, "that the defendant could not be held to special bail; yet they would not say that he might not revive the old debt which was clearly due in conscience." A bankrupt may be, and is held to be discharged by his certificate from all debts due at the time of the commission; but still he may make himself liable by a new promise. . . .

- [105] However, after considering more recent authorities, Scarth J. concluded that, under the current law of British Columbia, a purely moral obligation does not provide sufficient consideration for a promissory note. Thus, the note was held to be unenforceable. Issues of public policy do not appear to have been raised in the Tildesley case - other than to the extent they might be seen to be implicitly dealt with through the quotation from Trueman. No reference was made to s. 65.1 of the BIA.

Analysis

- [106] I begin with a consideration of the factors identified in Gichuru for determining whether a summary trial is appropriate.
- [107] The amount involved in this matter is substantial. I have not been provided with a calculation of the amount of interest accrued, however, I would anticipate that the claimed sum of \$882,259.43 plus just under 40 years of interest at the Bank of Montreal prime rate plus 1.5%, compounded monthly, will likely be multiple millions of dollars.
- [108] This matter is complex. There are difficult legal issues with respect to limitations, cause of action estoppel and the question of public policy as it applies to creditors potentially seeking a preference in the context of proceedings governed by the BIA.
- [109] The determination of these issues is complicated by uncertainty as to the underlying facts. This claim arises from an alleged oral agreement, said to have been made nearly 40 years ago, as to which one side is relying on hearsay evidence from a witness with a substantial financial interest. The basis on which Archer seeks to avoid limitations is a connection with a notice of civil claim that appears to be based on a fundamental misapprehension of the facts. There is a settlement agreement from 1989 that appears on its face to reflect a "compromise of the balance of monies owing".
- [110] Nothing that has occurred since June 2018 would cause me to differ from Justice Newbury's assessment of this case as "obviously complex" and having facts that would make the court "uneasy".
- [111] There is no urgency in this matter. In terms of prejudice from delay, the fact is that Archer did nothing to advance its claim for over 33 years (from 1983 to 2016). During that time, Archer's primary witness (Botham Sr.) passed away. The recollections of remaining available witnesses have naturally dimmed over time - but it is the time that has already passed that lies at the root of that dimming of recollections. Those witnesses who remain are having to refresh and/or reconstruct their memories based on documents they have not seen for decades.
- [112] The cost of taking this matter to a conventional trial is small in relation to the amount involved. Given the complexity of the case, I would think that at least three days would have to be set aside for legal argument, in addition to any time required for viva voce evidence. The costs of a trial are minor in comparison to the millions of dollars at issue.

[113] I turn now to questions of credibility.

[114] I cited above the key paragraphs from Skalbania's affidavit filed in September 2016 in action S113822. In that affidavit, Skalbania expressed uncertainty as to the precise terms of the oral agreement that was made, noted that he had very little documentation remaining from the relevant time period, and stated that most of his documents had been turned over to the trustee.

[115] Botham Jr., in his Affidavit #3 filed September 14, 2021, gives extensive evidence as to discussions he had with the late Botham Sr., including the following:

13. My father advised me he was proposing that Archer provided positive advocacy for the proposal and business ventures funding to Skalbania or Skalbania entities provided Skalbania would agree in his personal capacity to pay the amount equal to the amount that would have been due, absent the Proposal, pursuant to the terms of the Mayfair loan after deduction of any amounts paid as a distribution in the Proposal. My father proposed this to Archer and myself in my capacity as an officer and director of Archer in the first week in January 1983. I agreed as an officer and director of Archer that this offer would be presented to Skalbania by my Father. This offer was a significant and important event for Archer, formulated in discussions between both of us, which terms William Botham Sr. put to Skalbania before the first meeting of creditor on January 12th 1983.
14. My father advised Archer and myself in his capacity as an officer and director of Archer that Skalbania had accepted the above-mentioned offer without any changes and agreed in his personal capacity to pay the amount that would have been due, absent the Proposal, pursuant to the terms of the Mayfair Loan after deduction of any amounts paid as a distribution in the Proposal.

[116] The various references in these two paragraphs to statements being made in their respective capacities as officers and directors do not change the fact that these statements are hearsay statements, recounted after several decades by someone with a significant financial interest in the subject matter, and deserving of careful scrutiny before they are accepted.

[117] The only affidavit filed by Skalbania in this proceeding is his affidavit of April 12, 2022, made in support of his response to the present application. After referencing what he had said in his 2016 affidavit in action S113822, and noting that he had subsequently had the opportunity to review the 1985 Agreement (which was Exhibit J to the September 2016 affidavit of Botham Jr.), he stated:

11. Having reviewed Exhibit J, I do now recall Exhibit J, and now having exhausted my memory, I recall and understand that William Sr., decided to waive any claim to any loan I or [NMSL] made or promised after the signing of Exhibit J, because we both realized that we could not have made a separate deal to the exclusion of the other creditors committee and it was on that basis that any arrangement or agreement between us was voided.

12. In preparing this affidavit, I have had to spend time exhausting my memory; that is now vivid having gone through various documents filed by [Archer]. I am the only one alive that is intimate with the matter and with direct knowledge with the issue.

[118] Skalbania also noted he had many dealings with Botham Sr. of which Botham Jr. was not a part.

[119] Botham Jr. made an affidavit on April 18, 2022, one day prior to the summary trial, responding to Skalbania's affidavit. He attached the 1985 Christmas card, and argued that:

5. The \$1,000,000 referred to in the 1985 Christmas Card is the approximate amount then due on the New Mayfair Re-Promise and is much larger than the amount due on the Business Venture loans of \$803,707.99 as of July 15th, 1985.

[120] He went on to assert that:

neither my father or I made significant decisions on behalf of Archer unilaterally without discussion and agreement with the other, and my father discussed the Christmas Card I 1986 as being Skalbania's commitment to pay the amount of the Mayfair Loan Re-Promise in due course.

[121] Excerpts from the examinations for discovery of both Skalbania and Botham Jr. were placed before me. They add little, other than to confirm that as of June 2021, Skalbania had not recently reviewed and had little recollection of the documents in this matter, that Botham Jr. did not dispute that Skalbania spent a lot of time with Botham Sr., including travelling with him to England and regular meetings to play snooker or have lunch, and that Botham Jr. was not involved in any discussions they had at those times.

[122] Having reviewed this affidavit and discovery evidence, along with the available documentary records, I conclude that this is not a case where the Court can safely accept either version of events in the absence of a proper trial at which both Skalbania and Botham Jr. can give viva voce evidence.

[123] I have some concerns about Skalbania's renewed recollection of events at a time shortly before the summary trial. The detailed review of documents he reflects in his recent affidavit should clearly have happened in advance of his examination for discovery. At the same time, he is being asked about events that occurred more than 40 years in the past, for which he has minimal documentation available to him, and he is now 84 years of age. His difficulty remembering has an air of reality to it.

[124] I am also concerned about the evidence in support of the Mayfair Loan Re-Promise. I do not see the Christmas card as clearly supporting the ongoing existence of the Re-Promise, given that the 1983 acknowledgement signed by Skalbania had already referenced an approximate \$1 million figure for the seed financing. \$1 million does appear to be a number being used with respect to the seed financing at least on an approximate basis as between Skalbania and Botham Sr.

- [125] It is of great concern to me that a debt obligation of this magnitude between experienced businessmen would be entirely undocumented. That, to my mind, lends support to Skalbania's assertion that Botham Sr. recognized some impropriety in such an obligation in connection with proceedings under the BIA. That in turn lends an air of reality to Skalbania's assertion that there was an agreement to void or cancel any obligation to repay the Mayfair loan. Given that Botham Jr. was a member of the creditors' committee, it would not be surprising for him to be shielded from discussions of the Mayfair Loan Re-Promise - whatever its terms may have been.
- [126] Similarly, the fact that the 1989 settlement agreement purports to compromise "the balance of the" monies owed by Skalbania to Archer is consistent with Skalbania's evidence, as is the fact that the six-year limitation then applicable to a debt obligation would have passed at about the same time as that settlement agreement. If Archer believed the debt was still outstanding, knew the limitation date was about to pass, and was engaging in litigation with Skalbania in any event - why would it not have included the other debt obligation in the same action?
- [127] In my view, there are serious and substantial issues as to credibility, as to which documents both contemporaneous and recent, and inferences available from surrounding circumstances, do not consistently favour the position advanced by one side or the other. This is a case in which a trial is necessary if these issues are to be resolved.
- [128] I turn briefly to the legal issues that have been raised.
- [129] With respect to limitations, nothing of substance has changed since Duncan J.'s ruling that would give rise to any change in her conclusion that this issue should go to trial. Archer advances a broad approach to the required connection between a claim and counterclaim for s. 4(1) of the Former Limitation Act to apply, suggesting that so long as there is some reference to the Mayfair Loan Re-Promise in the notice of civil claim, that will suffice. Skalbania advances a narrow view, on which the court would focus on the relief sought (setting aside the 1991 judgment, which may have been based only on the 1985 Agreement and not a compromise of all outstanding obligations). The determination of this issue should be based on a proper factual matrix, including conclusions as to what exactly was compromised leading up to the signing of the Consent to Judgment in 1989.
- [130] There may also be merit to the arguments, clearly not yet fully developed by Skalbania, that equitable doctrines may appropriately be brought into play in the event a strict application of s. 4(1), based on an error in 2016 as to what had happened in the 1980s, renders the limitation period inoperative. While laches rarely arises given the relatively short timelines now imposed by limitations statutes, nothing was drawn to my attention in argument that would suggest they have been entirely ousted by such statutes.

- [131] The cause of action estoppel issue is also a complex one that would be better resolved on a proper factual matrix rather than assumed facts. It will require determination of whether the cause of action now advanced "could have been argued in the prior action if the parties had exercised reasonable diligence".
- [132] Finally, it is my view that there is a substantial legal issue as to whether the Mayfair Loan Re-Promise was contrary to public policy and unenforceable on that basis. There do appear to be parallels between the situation in this case and that reflected in *Cicoria*, while *Tildesley* seems to be more focused on the question of whether there was proper consideration. The fact that Botham Jr. was a member of the creditors' committee is a potentially significant factor in common with *Cicoria*. Reconciling the principles set forth in *Cicoria* with what was said by Justice Aston in *Trueman* is more complex. Counsel for Archer, on the hearing of this application, went to great lengths to persuade me that the Mayfair Loan Re-Promise was actually for the benefit of all of Skalbania's December 1982 creditors. Whether it was, and whether that makes any difference given the principles in *Cicoria*, are matters best determined on a full factual matrix.
- [133] I conclude that the proper disposition of all of these complex legal issues is appropriately a matter for trial.
- [134] Before concluding, I wish to comment briefly on the two consent orders made by Masters in October 2021 (with respect to the admissibility at trial of hearsay evidence) and November 2021 (referring the calculation of interest to the Registrar). Both of these are matters that are normally within the discretion of a trial judge, and are not typically the subject of advance rulings from the Court. I want to be clear that, by referencing the fact that such orders were made in this case, I in no way want to endorse the making of such orders in advance of trial.

Conclusion

- [135] I conclude that this action is not suitable for determination by way of summary trial. Archer's application is dismissed.
- [136] If either party seeks an order for costs other than that provided by Rule 14-1(12), I would ask that they file written submissions not later than December 2, 2022, with the other party to respond by December 21, 2022, and any reply submission to be filed by January 9, 2023.

"Veenstra J."

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