

CANADA / JUDGMENT

Yin v. Hong

2025 BCSC 1841

COURT

Supreme Court of British Columbia

DECIDED

23 September 2025

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2025 BCSC 1841 Yin v. Hong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yin v. Hong,

2025 BCSC 1841

Date: 20250923

Docket: S230237

Registry: Vancouver

Between:

Xiao Hai Yin

Plaintiff

And

Flora Yunying Hong and Andy Ruilong Yin

Defendants

Before: The Honourable Mr. Justice Blok

Oral Reasons for Judgment

Counsel for the Plaintiff:

N. Yan

J. Gray

Counsel for the Defendants:

R. Lo

Place and Date of Hearing:

Vancouver, B.C.

August 26 and 27, 2025

Place and Date of Judgment:

Vancouver, B.C.

September 23, 2025

I. Introduction

- [1] The defendants apply pursuant to s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA] for relief from forfeiture.
- [2] Briefly, the parties settled a lawsuit on the defendants' agreement to pay \$3.5 million to the plaintiff, payable in two installments. As security for payment, the defendants provided an executed consent judgment for \$3.5 million (the "Consent Judgment"), which was to be held by plaintiff's counsel on an undertaking not to use it unless the defendants breached the payment terms.
- [3] The defendants failed to pay the first installment when it was due. The plaintiff then entered the Consent Judgment and thereafter took various steps in execution on that judgment.
- [4] The defendants say that on an examination of all the circumstances in this case, the Court ought to exercise its discretion to grant relief from forfeiture and reinstate the terms of the settlement agreement.
- [5] The plaintiff submits there is no basis to grant the relief sought.

II. Background

- [6] The parties are, or were, related to each other. The plaintiff, Mr. Yin, and the defendant, Ms. Hong are former spouses. The defendant Andy Yin ("Andy") is their adult son.
- [7] Mr. Yin and Ms. Hong married in China in 1995. Ms. Hong and Andy relocated to Canada in 2001, while Mr. Yin continued to reside in China. Mr. Yin and Ms. Hong formally separated in late 2004 but continued to interact on friendly terms.
- [8] There are two residential properties that have significance in this matter:
 - a) A property located on No. 6 Road in Richmond ("No. 6 Road"), which was purchased in 2003; and
 - b) A property located on Westminster Highway ("10500 Westminster"), which was purchased in 2008.

- [9] The No. 6 Road property was originally purchased in the joint names of Mr. Yin and Ms. Hong, but in 2005 Ms. Hong transferred her interest to Mr. Yin as part of their separation agreement. The 2008 purchase of the 10500 Westminster property was in Mr. Yin's name alone.
- [10] In 2016, Mr. Yin transferred 10500 Westminster to Andy, who was then 19 years old.
- [11] In or around 2017, Mr. Yin and Ms. Hong decided to redevelop both properties. Mr. Yin appointed Ms. Hong as his power of attorney and subsequently transferred title to No. 6 Road to Ms. Hong.
- [12] Between 2017 and 2021, the house on 10500 Westminster was rebuilt. The construction or redevelopment of No. 6 Road is not yet complete.
- [13] The relationship between the parties broke down in 2022. Mr. Yin commenced this action in January 2023 and filed CPLs against both properties. Mr. Yin alleged that: (1) Ms. Hong had agreed to act as project manager for the redevelopment of both properties; (2) Andy and Ms. Hong held their properties in trust for him; and (3) he had advanced sums totalling about \$7 million to fund the redevelopment of the two properties.
- [14] A 15-day trial was scheduled in this matter for March 2025.

III. The Settlement Agreement

- [15] The parties settled the action in early July 2025 and entered into a written settlement agreement dated July 2, 2025 (the "Settlement Agreement").
- [16] The Settlement Agreement was reached after months of negotiations, which included a mediation. The parties were represented by counsel throughout.
- [17] The essential terms of the Settlement Agreement are as follows:
- a) Ms. Hong and Andy will pay Mr. Yin the sum of \$3,500,000 (the "Settlement Amount");
 - b) The schedule for the payments of the Settlement Amount is as follows:
 - i. Ms. Hong and Andy will pay \$1,000,000 (the "First Settlement Payment") within six months of the execution of the Settlement Agreement (the "First Payment Period");
 - ii. The remainder of the Settlement Amount shall be paid to Mr. Yin within two years of the execution of the Settlement Agreement; and
 - c) In the event that Ms. Hong and Andy require additional time to make the First Settlement Payment, the First Payment Period shall be extended by no longer than 30 days, in which case Ms. Hong and Andy shall pay Mr. Yin a one-time interest payment of \$15,000.
- [18] The following clause dealt with the Consent Judgment:

6. To secure the Settlement Amount, within 14 days of execution of this Settlement Agreement, Ms. Hong and Andy will deliver to counsel for Mr. Yin an executed Consent Judgment in the form attached and marked as Schedule "A" to be held by counsel for Mr. Yin on their undertaking not to use or otherwise deal with it except in the event that Ms. Hong or Andy breach the Payment Terms at which time Mr. Yin shall be entitled to enter the Consent Judgment in court without further notice to Ms. Hong or Andy.
- [19] Other clauses dealt with the CPLs on the two properties. The CPL on No. 6 Road was to be "temporarily discharged", meaning discharged and then re-registered, to allow Ms. Hong to secure further construction financing for that property. The 10500 Westminster CPL was to be discharged absolutely, although with a condition that on entering a contract for the sale of that property, Ms. Hong and Andy would instruct counsel to hold \$1 million from the net proceeds of sale "to facilitate the payment of the First Settlement Payment", if it was still outstanding.
- [20] Finally, other clauses of the Settlement Agreement confirmed that Ms. Hong and Andy would be responsible for all costs and expenses relating to the properties, and that Ms. Hong would be solely responsible for amounts owing on an RBC credit card in the joint names of Mr. Yin and Ms. Hong that she alone had been using.

IV. Post-Settlement Events

- [21] On July 12, 2024, the defendants, through their counsel, delivered the executed Consent Judgment to Mr. Yin's counsel, and in their covering letter they confirmed that Mr. Yin was entitled to enter the Consent Judgment without further notice if they breached the Settlement Agreement payment terms.
- [22] Mr. Yin discharged the CPL on 10500 Westminster and temporarily discharged the No. 6 Road CPL. These discharges allowed the defendants to refinance the two properties in July and August 2024 with the following mortgages:
- a) A construction mortgage on No. 6 Road in the amount of \$3.5 million which, after repayment of an existing mortgage, generated about \$600,000 in additional funds for the defendants; and
 - b) A mortgage of \$2.2 million on the 10500 Westminster property which, after repayment of an existing mortgage, generated further funds of about \$416,000 for the defendants.
- [23] A later examination in aid of execution revealed that the defendants used some of the funds generated from the mortgages to fund their personal expenses and vacations, including cosmetic surgery for Ms. Hong in Los Angeles at a cost of US\$19,000. Ms. Hong explained that she used these monies for personal expenses as she had no other source of income. She also said the cosmetic surgery was a necessary procedure to correct an eyelid issue that interfered with her daily life.

- [24] In late August 2024, the defendants listed 10500 Westminster for sale at an asking price of \$7,780,000. In October 2024 they relisted the property for sale at an asking price of \$6,880,000. They received no offers in response to those listings.
- [25] On December 13, 2024, Mr. Yin reminded the defendants of the upcoming deadline for them to make the First Settlement Payment, which was due by January 3, 2025. On December 16, 2024, the defendants exercised the one-time payment extension clause in the Settlement Agreement, which extended the due date to February 3, 2025, but along with the obligation to pay the additional sum of \$15,000 for interest. On January 20, 2025, the defendants provided Mr. Yin with an updated executed Consent Judgment to reflect that additional payment.
- [26] On January 29, 2025, the defendants asked for a further extension. The Settlement Agreement did not provide for any further extensions and Mr. Yin did not consent to a further extension.
- [27] The defendants failed to make the First Settlement Payment, or to pay any part of it, by the extended deadline of February 3, 2025.
- [28] On February 4, 2025, Mr. Yin submitted the revised Consent Judgment for entry in court. On February 19, 2025, Mr. Yin registered a CPL against title to the 10500 Westminster property as security pending the entry of the Consent Judgment. The Consent Judgment was formally entered on March 14, 2025 and it was subsequently registered against title to each of the properties.

V. Later Events

- [29] On February 13, 2025, Andy executed a contract of purchase and sale for 10500 Westminster, with a purchase price of \$5,380,000 and a completion date of April 15, 2025. On February 18, 2025, Andy notified Mr. Yin of this prospective sale.
- [30] On February 24, 2025, Mr. Yin notified the defendants that the Consent Judgment had been submitted for entry, a CPL had been registered against 10500 Westminster, and that he would be seeking to recover the entirety of the net proceeds of sale of 10500 Westminster towards payment of the judgment.
- [31] Negotiations ensued in an effort to resolve the situation but those negotiations were unsuccessful.
- [32] The sale of 10500 Westminster did not close on April 15, 2025, and the closing date was extended several times before finally closing on June 2, 2025.

- [33] On May 12, 2025, the defendants filed the current application seeking relief from forfeiture. The matter came to Court on May 29, 2025, but it was soon apparent that the matter could not be heard in ordinary chambers as it would take longer than two hours. Instead, the parties agreed to a consent order with terms addressing the closing of the sale and release of registered charges, with the net proceeds of sale to be dealt with by payment of \$1.2 million to Mr. Yin and the balance to be held in trust.
- [34] The sale garnered net proceeds of \$1,764,449.41. Of that sum, \$1.2 million was paid to Mr. Yin and the balance of \$564,449.41 was paid into a solicitor's trust account, where it remains.
- [35] In April and May 2025, the plaintiff took a number of steps in execution on the judgment. Garnishment proceedings secured funds of about \$20,000 and a writ of execution resulted in both the seizure of a 2016 Ford F-150 truck and the seizure of coin collections and other memorabilia from a safety deposit box. Both defendants were examined in aid of execution in late April 2025.
- [36] On May 28, 2025, the plaintiff filed two applications, one for document production and examination requests, and the other for a "show cause" hearing as part of the process for the sale of land under the Court Order Enforcement Act, R.S.B.C. 1996, c. 78. On June 2, 2025, the defendants filed an application for a stay of execution. These applications were heard on June 13, 2025. The stay application was adjourned generally, the show cause hearing was granted, and the document application was allowed, with August 8, 2025 set as the deadline for production "unless otherwise ordered".
- [37] On August 13, 2025, the plaintiff filed an application seeking a declaration of contempt against the defendants for failing to obey the document production order.
- [38] At the conclusion of submissions at this hearing on August 27, I adjourned the contempt application generally and ordered an interim stay of execution proceedings while this matter was under reserve.

VI. Positions of the Parties

A. Applicants (Defendants)

- [39] The defendants acknowledge that they breached the Settlement Agreement by failing to make the First Settlement Payment by the agreed deadline, but they say their breach was not wilful or intentional. To the contrary, they maintain did all they could to raise the necessary funds through the listing and sale of the 10500 Westminster property, but properties of this type are not easily sold and their efforts were also hampered by a downturn in the real estate market.

- [40] The defendants responded to the plaintiff's criticism that they failed to use any of the monies generated from the mid-2024 refinancing of the two properties to fund the First Settlement Payment. The defendants note that although this refinancing generated \$1,016,000 in new funds, this money was needed elsewhere, as the plaintiff knew, because in May 2024 his counsel was told the defendants needed \$860,000 for the various loans, expenses and taxes associated with both properties.
- [41] The defendants say that the sale of the 10500 Westminster property was the only way they could have raised sufficient funds to make the First Settlement Payment.
- [42] The defendants argue that the forfeiture here is the loss of entitlement to the remaining net proceeds (about \$564,000) from the sale of 10500 Westminster. There will also be an additional forfeiture in the event the plaintiff executes his judgment against the No. 6 Road property, because a distress sale will cause the loss of all the funds the defendants invested in the property, which they quantify at approximately \$2 million.
- [43] The defendants made submissions on the test to be applied, noting two sets of factors mentioned in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490 [Saskatchewan Bungalows], one which derives from *Shiloh Spinners v. Harding*, [1973], 1 All E.R. 90 (H.L.) [Shiloh] and the other from *Liscumb v. Provenzano* (1985), 51 O.R. (2d) 129, aff'd 55 O.R. (2d) 404 (C.A.).
- [44] The defendants also cited *Gagliardi v. Al-Karawi*, 2023 ONSC 6853, Ontario (Attorney General) v. 8477 Darlington Crescent, 2011 ONCA 363, as well as other cases where relief from forfeiture was granted for non-payment of commercial tenancy rent or mortgage amounts in mortgage cases.
- [45] The defendants addressed the factors from *Saskatchewan Bungalows* as follows:
- a) Conduct of defendants/Gravity of the breach: The defendants repeat their submissions that their breach was not wilful and that they took reasonable steps to sell 10500 Westminster. As to the plaintiff's criticism that funds generated from the remortgaging of the two properties were not used to fund the First Settlement Payment, the plaintiff knew that approximately \$860,000 was needed over the ensuing six months to maintain the properties and continue the construction on No. 6 Road.

As to the plaintiff's allegation that the defendants do not have clean hands and should therefore be denied equitable relief, the defendants submit that none of the actions constitute unclean hands on their part and, in any event, the conduct relied upon occurred only in response to Mr. Yin's enforcement and execution efforts and took place after their claim to equitable relief was established.

- b) Object of the right of forfeiture was to secure payment of money: The right of forfeiture in this case was only for the purpose of securing payment, which has now occurred. The plaintiff has been made whole.

- c) Disparity between value forfeited and damage caused by the breach: The plaintiff maintains that the value forfeited is the balance of the net sale proceeds from 10500 Westminster (\$564,000) and the loss of expected profit on the sale of No. 6 Road (\$2 million).

By contrast, the plaintiff has suffered no prejudice and in fact has benefitted by garnering \$200,000 more than was due to him for the First Settlement Payment.

[46] The defendants also cited *Airside Event Spaces Inc. v. Langley (Township)*, 2021 BCCA 306 [Airside] and *British Columbia Development Corp. v. NAB Holdings Ltd.* (1986), 6 B.C.L.R. (2d) 145 (C.A.), where the Court of Appeal said an applicant for relief from forfeiture must demonstrate that it is unconscionable for the other party to retain the benefit. Here, they argue that it is unconscionable for the plaintiff to have received more money than he bargained for and, if relief is not granted, for the defendants to lose both the remaining sale proceeds and the expected profit on the sale of No. 6 Road.

[47] The defendants submit that relief ought to be granted in order to allow them to complete the construction on No. 6 Road and realize its full value. They say the plaintiff's interests can continue to be secured by way of a revised consent judgment in the same terms as before, which the defendants are willing to provide.

[48] In terms of specific relief, they ask for the following:

- a) relief from forfeiture, but on condition that they pay contractual interest of \$60,000 for the late First Settlement Payment;
- b) reinstatement of the Settlement Agreement;
- c) the Consent Judgment and other orders be set aside;
- d) repayment to the defendants of \$220,739.49, representing the sums received by the plaintiff in excess of \$1 million (\$200,000 from the closing of the sale of 10500 Westminster, plus \$20,739.49 in funds obtained from garnishment proceedings); and
- e) the return of all goods, items and chattels seized in execution of the Consent Judgment.

B. Application Respondent (Plaintiff)

[49] The plaintiff emphasizes that the Settlement Agreement was the product of vigorous negotiations through counsel. Although during those negotiations the defendants sought to make the timing of the First Settlement Payment conditional on the sale of 10500 Westminster, that link was never agreed to by the plaintiff and it is not part of the Settlement Agreement. As the plaintiff said in his submissions, how Ms. Hong came up with the money to make the payment was her business.

- [50] Even if it is the case that the sale of property was the only way the defendants could make the payment, the plaintiff says the defendants did not take reasonable steps to sell 10500 Westminster in a timely way. There was an apparent settlement of the action in May 2024 (following which Ms. Hong backed out), which ought to have prompted the defendants to commence the sale process at that time, yet the property did not sell until over a year later.
- [51] The plaintiff submits that the defendants not only failed to pay the full settlement amount, but they also took steps to thwart or delay the plaintiff's enforcement efforts through litigation misbehaviour, misleading a court bailiff, conceding in their affidavits that they have dissipated assets since they breached the Settlement Agreement, failing to disclose a bank account, threatening bankruptcy, and failing to comply with the court order requiring them to produce documents and provide responses to requests made at their examinations in aid of execution.
- [52] The plaintiff notes the defendants' position appears to be that they need funds to live on, yet neither defendant is employed or, apparently, seeking to become employed. Instead they have lived off borrowings, racking up \$200,000 in personal expenses over the course of a year, and living rent-free at 10500 Westminster.
- [53] The plaintiff says the defendants now ask for relief from forfeiture in an attempt to restore a situation where they will continue to live off and dissipate their assets for a further two years. The plaintiff says the defendants have lived off Mr. Yin and his properties for many years, and granting relief from forfeiture would simply allow the defendants to continue their freeloading ways.
- [54] The plaintiff also notes that one of the terms of the Settlement Agreement required that the defendants keep any mortgages on the two properties in good standing, but they failed to do so. The plaintiff says the abject state of the defendants' finances means that the risk he will not be paid the Settlement Amount has increased substantially. This is a factor that ought to be considered in weighing the plaintiff's application for equitable relief.
- [55] The plaintiff pointed to another incident that occurred on May 30, 2025, at a time when counsel were attempting to close the sale of 10500 Westminster. The order to pay prepared for the closing included a holdback of about \$65,000 for payment of charges owed on the No. 6 Road property. This would have been a breach of both the agreement between the parties and the court order of May 29, 2025, which required that the full net proceeds from the sale of 10500 Westminster be withheld and either paid to Mr. Yin (\$1.2 million) or held in trust (the balance of the funds). Although that order to pay was amended after plaintiff's counsel objected, the plaintiff nonetheless characterizes this as an attempt by the defendants to surreptitiously obtain funds.
- [56] Still later, in the time leading up to the examinations in aid of execution, the defendants produced only redacted documents, with licence plate information removed for vehicles and account numbers and branch location information removed from bank statements.

- [57] The plaintiff says that testimony given on the examinations in aid of execution showed that mortgage proceeds were being used to pay personal expenses and credit card debt. While Ms. Hong testified that these personal expenses only totalled about \$2,000 per month, subsequent analysis shows that non-property-related expenses totalled \$200,000 in one year.
- [58] Testimony from the examinations in aid also suggests the defendants continued to hide or dissipate assets, with bank accounts having balances of \$375,000 and \$404,000 in mid-2024 being depleted to respective balances of \$16,000 and \$1,300 just six months later. Moreover, Andy has not provided any explanation for a number of transfers that were made out of his account to another account owned by him but not yet disclosed. For her part, Ms. Hong removed jewellery and gold that, as of April 29, 2025, was in her safety deposit box, but which she recently disclosed she had removed and pawned for \$26,500.
- [59] These matters, together with the fact that neither defendant has any paid employment, give rise to a substantial concern that the plaintiff will not recover the full Settlement Amount if the defendants are granted relief from forfeiture.
- [60] The plaintiff also submits that, based on the monies the defendants had available to them in late 2024 and early 2025, the defendants had the ability to make the First Settlement Payment, or a substantial portion of it, but instead paid nothing.
- [61] In terms of the test to be applied, the plaintiff cites *Dabanxiong Trading Corp. v. 0733849 B.C. Ltd.*, 2025 BCCA 96 [Dabanxiong], which in turn cited *Airside* at paras. 21-22; and *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105 [Sechelt] at paras. 138-139. The plaintiff emphasized that the remedy of relief from forfeiture is granted sparingly and the party seeking relief from forfeiture bears the burden of establishing a sufficient basis for it: *Airside* at para. 73.
- [62] The plaintiff submits the various factors expressed in the authorities can be grouped into two general categories: (1) whether the value forfeited is disproportionate to the damages caused by the breach; and (2) whether there is conduct on the part of the applicant that would disentitle them from relief.
- [63] In terms of proportionality, the plaintiff emphasizes that he bargained for the payment schedule because he did not trust the defendants and he doubted their sincerity. He expressly refused to settle on those terms that the defendants now seek through this application; that is, that the timing of the payment be tied to the sale of one or both of the properties.
- [64] The defendants benefitted from the Settlement Agreement by retaining title to the properties and having an ongoing ability to access the equity. They made a choice to promise payment of the First Settlement Payment regardless of the sale of either of the properties.

- [65] The loss to the defendants, caused by their breach, is the loss of two additional years to pay the Settlement Amount. The loss to the plaintiff, if relief from forfeiture is granted, is the loss of the ability to take collection steps now, plus the additional risk associated with a two-year delay in his ability to collect the \$2.3 million owing to him. The plaintiff submits there is no disproportionality here.
- [66] Further, the benefit to the plaintiff is not at all unconscionable. It is the product of negotiation and agreement between the parties. To the contrary, granting relief would be unconscionable because it would deprive Mr. Yin of substantially what he bargained for.
- [67] Dealing with the defendants' conduct, the plaintiff says they do not come to court with clean hands, noting several items of litigation misbehaviour, delaying tactics, obstructive behaviour in producing documents, and threats of bankruptcy.
- [68] As to whether the defendants are prepared to do what is right, the plaintiff notes the defendants: (1) made no effort to comply with the Settlement Agreement; (2) allowed the mortgages to fall into arrears; and (3) used mortgage proceeds to fund personal expenses.
- [69] The plaintiff also noted the difficulties in terms of remedy in this case, insofar as relief from forfeiture will not, in itself, restore the pre-breach situation because there is a Court order in place, and there are other steps that would also have to be unwound. Citing *Verma v. Verma*, 2007 BCCA 566 at para. 28, the plaintiff submits that there are limited grounds on which a consent order may be set aside, none of which is present here. He says that while the defendants have focused on acts taken in performance of the terms of the Settlement Agreement, they have said nothing to challenge its validity.

C. Defendants - Reply

- [70] The defendants made reply submissions on the inferences urged by the plaintiff, on some factual matters, and on the law.
- [71] On the matter of inferences, the defendants challenged some of the inferences urged by the plaintiff, noting that:
- a) the failure to make the First Settlement Payment does not necessarily lead to the conclusion that the defendants never intended to pay, as the better conclusion is simply that the defendants had no means to make that payment other than through the sale of 10500 Westminster;
 - b) the mention of possible bankruptcies was not an improper threat but merely a mention of a potential outcome;
 - c) the hearing on May 29 was set not for the purpose of creating a false sense of urgency and deliberately underestimating the time, but because the parties had to come before the Court to address the closing of the sale; and

- d) information was redacted from documents not to prevent enforcement but because the defendants believed settlement was possible and so only limited information was needed.

[72] The defendants made the following factual responses, among others:

- a) the defendants were constrained in their ability to list 10500 Westminster for sale prior to August 2024 because Mr. Yin had filed a CPL against title and did not remove it until July, and they also needed refinancing money to renovate and repair that property's backyard;
- b) the defendants' object is not to claw back Mr. Yin's judgment and use the money for their own purposes, but instead to reinstate the payment timeline so that they can pay for the construction loan and complete the construction work on No. 6 Road;
- c) the defendants have not been hiding and dissipating assets and the defendants have accounted for all expenses since July 2024; and
- d) the June 13 orders have not been flouted given that they contained the term "unless otherwise ordered", which allowed for a scenario where the judge hearing the relief from forfeiture application could extend or temporarily stay the orders.

[73] The defendants say these matters mean there is no basis on which the Court could reasonably conclude they have not come to court with clean hands.

[74] In reply to the plaintiff, the defendants reject the plaintiff's claim that he needs to "avoid further loss" as the defendants have made it clear that they are willing to compensate the plaintiff by paying him \$15,000 for each month of delay.

[75] The defendants say the plaintiff has not suffered any loss, yet they stand to lose both the balance of the sale proceeds held in trust and their investment in, and expected profit from, No. 6 Road. They maintain that this cannot be proportionate.

[76] Given that the breach has now been cured and thus the plaintiff has suffered no loss, it would be unconscionable to deprive the defendants of the opportunity to generate the funds necessary to make the second settlement payment on its original due date.

VII. Discussion

A. Availability of Relief from Forfeiture

[77] During submissions, it emerged that there was an issue as to whether there was any forfeiture in this case. As a result, I brought to counsel's attention the decision in *Emerald Christmas Tree Company v. Boel & Sons Enterprises Ltd.*, 1979 CanLII 607 (B.C.C.A.) [Emerald], and invited submissions on it.

[78] In *Emerald*, the Court of Appeal held that an acceleration clause - that is, a clause that renders the full balance due when a debtor fails to make an agreed payment - is not a forfeiture, and so the remedy of relief from forfeiture is not available.

- [79] Some of the consequences of Emerald were later addressed through an amendment to the LEA, with s. 25 now allowing relief against acceleration provisions, but only where they are contained in mortgages of land or agreements for the sale of land.
- [80] Although Emerald is an older case, it remains good law and has been cited relatively recently by both this Court and the Court of Appeal as authority on the scope of the power to relieve against penalties and forfeitures under s. 24 of the LEA: see *Wilkie v. Jeong*, 2017 BCSC 2131 at paras. 49-51 and *Seignoret v. Bakonyi Holdings Ltd.*, 2019 BCCA 105 at paras. 35-38.
- [81] Turning to the submissions of the parties, the defendants submit the clause in the Settlement Agreement that causes the entire sum to become due is not an acceleration clause, and so the principle in Emerald does not apply. They argue that typical acceleration clauses provide for notice and time to cure the default, whereas here there are no such terms, and so the subject provision is not an acceleration clause.
- [82] The defendants submit, alternatively, that one of the exceptions created in s. 25 of the LEA applies here because the Settlement Agreement creates an equitable mortgage in favour of the plaintiff. On that point, the defendants note the Settlement Agreement provides that a CPL was to remain on title to one of the properties and they submit this was, in essence, a mortgage meant to secure the debt. The defendants say the CPL meets the definition of "equitable mortgage" adopted in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2020 BCSC 637 at para. 178, insofar as it demonstrates the "common intention of the parties to the mortgage contract to make the property in question security for the debt due".
- [83] For his part, the plaintiff says the principle from Emerald applies here and so relief from forfeiture is not available to the defendants.
- [84] The plaintiff notes that the Court of Appeal in Emerald defined an acceleration clause as a clause "where, when the payment that is due is not made, the full principal balance becomes due". There is no mention in Emerald of requiring a provision granting the opportunity to cure a breach or of any requirement for notice. Instead, the provisions in the Settlement Agreement fall within the definition of "acceleration clause" because the plaintiff is entitled to claim the entire Settlement Amount following a breach of the payment terms.
- [85] The plaintiff also submits that s. 25 of the LEA does not apply because the Settlement Agreement is neither a mortgage of land nor an agreement for the sale of land. In answer to the defendants' submission regarding the CPL registered against No. 6 Road, the plaintiff says a CPL is not a pledge of the property as security but is merely notice of a pending claim. In any event, there is no pledge here because the subject CPL was already in place at the time of the Settlement Agreement and it did not arise by operation of any terms of the Settlement Agreement.

- [86] I conclude that the provision in the Settlement Agreement that entitles the plaintiff to enter judgment for the entire amount owing where the defendants breach the payment terms is, in substance, an acceleration clause. While the subject provision is in a somewhat different form than the more common forms of acceleration clauses, it meets the definition of acceleration clause set out in *Emerald*. I note that it also accords with the description of acceleration provisions set out in s. 25 of the LEA, as it provides for "the payment of money at an earlier time than would be the case if the default had not occurred".
- [87] I turn now to s. 25 of the LEA, which provides for two exceptions to the law as stated in *Emerald*. Essentially for the reasons submitted by the plaintiff, I conclude that the Settlement Agreement does not involve a "covenant contained in a mortgage for the sale of land or an agreement for the sale of land", to quote s. 25. Specifically, I agree that a CPL is not a pledge of property as it is merely notice of a claim and, in any event, the subject CPL was pre-existing and was not something created through the provisions of the Settlement Agreement.
- [88] For these reasons, I conclude that the remedy of relief from forfeiture is not available to the defendants.

B. Exercise of Discretion

- [89] In the event I am wrong in my conclusion that relief from forfeiture is unavailable to the defendants, I will proceed to consider whether the Court's discretion should be exercised in their favour.
- [90] In terms of the factors to be considered, the usual starting point is *Saskatchewan Bungalows*, where the Supreme Court of Canada said:

The power to grant relief against forfeiture is an equitable remedy and is purely discretionary. The factors to be considered by the Court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 691 (H.L.); *Snell's Equity* (29th ed. 1990), at pp. 541-42.

The Ontario High Court in *Liscumb v. Provenzano* (1985), 51 O.R. 92d) 129, aff'd 55 O.R. (2d) 404 (C.A.), relying on the *Shiloh* decision, summarized the governing principles as follows (at p. 137, per McKinlay J.):

I consider that the following are the appropriate questions to consider in determining whether there should be relief from forfeiture in this case: first, was the conduct of the plaintiff reasonable in the circumstances; second, was the object of the right of forfeiture essentially to secure the payment of money, and third, was there a substantial disparity between the value of the property forfeited and the damage caused the vendor by the breach?

[91] In terms of appellate cases in British Columbia, recent authority (Dabanxiong) endorsed the factors for consideration listed in Sechelt at para. 139 and Airside at para. 22. The two lists are essentially the same, with the court in Airside summarizing those factors as follows:

- proportionality between the amount forfeited by the lessee and the loss suffered by the lessor
- whether it would be unconscionable for relief not to be granted
- the conduct of the applicant who seeks relief, including the gravity of their breaches
- collateral equitable grounds that reasonably affect the analysis, including a party having "unclean hands"
- whether the applicant is prepared to do what is right and fair under the lease.

[92] I will now discuss each of those factors.

Proportionality

[93] In examining the proportionality of the loss forfeited by the defendants compared to the loss suffered by the plaintiff, I conclude that the essential loss to the defendants is the contractual right to delay payment of the remaining debt up to two years after the execution of the Settlement Agreement. I do not accept the defendants' submission that their downstream or collateral losses are properly included in the proportionality analysis as these are not "forfeitures" pursuant to any terms within the Settlement Agreement. Instead, these are extraneous losses or potential losses arising from the manner in which the defendants arranged their financial affairs. To be more specific, the losses or potential losses are the result of the defendants having arranged their finances and assets in a way that meant they did not have sufficient liquid assets to make the necessary first payment.

[94] Although post-judgment execution measures garnered \$1.2 million on the sale of 10500 Westminster, this is not a loss or forfeiture to the defendants as, by the terms of the contract, \$1 million was already due and the additional \$200,000 was part of the debt payable later, meaning that this was not a forfeiture of money but instead was a loss of the right to pay \$200,000 of the debt at a later time.

[95] In terms of the loss suffered by the plaintiff, I accept that he has been made whole in terms of the First Settlement Payment, although this took place four months after it was due, and he has also received \$200,000 earlier than the contract provides. However, I also consider it relevant to note that granting an order for relief from forfeiture in this case would mean the acceleration provisions would be entirely negated because the next payment due is also the last payment due. That would be a loss to the plaintiff should relief from forfeiture be granted.

[96] I conclude that this factor favours the defendants, but only to a relatively modest extent.

Conduct of Applicants/Gravity of Breach/Other Equitable Grounds

[97] I accept that the defendants' breach was not wilful, but on their own evidence, they entered into the Settlement Agreement knowing they did not have the means to make the \$1 million payment without completing a sale of 10500 Westminster. I am also not persuaded that they listed that property for sale as early as they could have. The fact that there was a CPL on title was no bar to them doing so. These are matters weighing against granting relief from forfeiture.

[98] The plaintiff raised a number of matters said to constitute misconduct or unclean hands on the part of the defendants, but I am not persuaded that most of those matters rise to such a level that they would bear on the exercise of discretion. The plaintiff argued there was misconduct because the defendants had the means to make the \$1 million payment from their refinancing proceeds, but it appears the plaintiff was given notice that the mortgages taken out by the defendants would be used to service both past and ongoing debt relating to the properties as well as construction costs. While the defendants also funded personal expenses, and may even have been profligate in doing so, the sums involved would have made no difference in terms of making the First Settlement Payment.

[99] Dealing briefly with some of the other matters raised:

- a) Underestimating the time needed for the May 29 court hearing so as to allow the matter to be scheduled in regular chambers and not long chambers: this deserved the scolding the presiding judge gave to the defendants, but it was not misconduct of the type that would amount to unclean hands or conduct bearing on the exercise of discretion. I appreciate that the defendants urgently needed to get before the court somehow, and they would have been better advised to limit the relief sought to interim relief that could be dealt with in regular chambers, but this was not material misconduct;
- b) Misleading a court bailiff: the evidence on this is not clear enough to make a finding. This could have been a misunderstanding;
- c) Threatening bankruptcy: this was no more than stating an obvious potential outcome; and
- d) Failing to disclose a bank account: Andy provided an explanation that may or may not neutralize the plaintiff's allegation, leaving me unable to assess its merits. I am therefore unable to conclude there was misconduct here.

[100] The plaintiff raised other matters but I do not consider that any of those amounted to unclean hands or misconduct relevant to the exercise of discretion.

[101] I hold a different view regarding the defendants' failure to properly disclose documents relating to the examinations in aid of execution. Their duty was to comply, not to convey just the limited information they felt was enough. This is a matter weighing against the defendants in the exercise of the Court's discretion.

- [102] Airside also mentions "collateral equitable grounds that reasonably affect the analysis": para. 22. Although it is not clear what this may encompass, I consider it relevant to note that there is a lot to unwind here in terms of execution measures, should relief from forfeiture be granted, and the defendants did not move with the utmost despatch required in taking steps to stay execution on the judgment. The defendants knew by February 24, 2025 that the Consent Judgment had been submitted for entry, yet they did not bring their relief from forfeiture application to court until May 29 and they did not file an application to stay execution until June 2.
- [103] I appreciate that during this time the defendants were attempting to negotiate a settlement, and they then changed their counsel, but this is still a delay that allowed execution proceedings to carry on, which included garnishment proceedings, the seizure of the contents of a safety deposit box and the seizure and sale of a vehicle.
- [104] None of these proceedings are incapable of being unwound or, in the case of the sold vehicle, addressed by other means, although likely with the defendants having to bear the associated costs, but nonetheless it is a factor militating against making an order in favour of the defendants.

Whether the Defendants are Prepared to do the Right Thing

- [105] On the evidence before me, I am prepared to assume the defendants are willing to do "what's right and fair" under the Settlement Agreement, but there are matters that give rise to a real concern about whether they will be able to do so.
- [106] I do not attach much significance to the fact that the defendants did not remedy their breach voluntarily, given that the CPL immediately filed against 10500 Westminster meant they had no effective opportunity to do so.
- [107] However, there is evidence that the defendants are in fairly straitened financial circumstances; this is demonstrated most obviously by the fact that they had allowed the prior mortgages to go into default. Although there were various numbers thrown about during the hearing of this matter such that firm conclusions are not possible on this point, there does appear to be a risk that the defendants simply do not have enough funds to complete the construction on No. 6 Road. This would affect the ultimate sale price and significantly undermine the prospects for a profit on sale that would be enough to pay the outstanding amount owed to the plaintiff.
- [108] This factor favours the plaintiff.

Whether It Would Be Unconscionable Not to Grant Relief

- [109] The defendants seek to be relieved from the consequences of their breach and of the effects of the bargain they entered into. As noted earlier, they entered into the Settlement Agreement knowing they did not have the means to make the First Settlement Payment without completing a sale of 10500 Westminster. They counted on completing the sale in time, but that did not happen, and now they seek to avoid the consequences.
- [110] The plaintiff says it is now apparent the risk is now greater that the defendants will not make, or be able to make, the full final payment. I accept there is a reasonable basis on which to draw that conclusion.
- [111] Accordingly, from my consideration of all the relevant factors I am unable to conclude that it would be unconscionable not to grant the relief sought by the defendants.
- [112] As noted in Airside at para. 73, relief from forfeiture is granted sparingly, and the party seeking relief bears the onus of establishing a sufficient basis for it. I find that the defendants have failed to meet that burden.
- [113] For these reasons, the defendants' application is dismissed.

"Blok J."

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Prepared on 25 October 2026 · Esheria