IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Baumeler v. Ross,*
2024 BCSC 133

Date: 20240130
Docket: S220751
Registry: Victoria

Between:

Richard Baumeler, Lisa Baumeler, Les Feil as trustee of the Queen-Hashmi Family Trust, 0899285 B.C. Ltd., and Tricolor Enterprises Inc.

Plaintiffs

And:

Lindsay Adam C. Ross, Joanne Lynn Ross also known as Joanne Lynne Ross and 0510818 B.C. Ltd.

Defendants

Before: The Honourable Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs:	M.W. Hundleby
Counsel for the Defendants:	W.E. Pedersen
Place and Dates of Hearing:	Victoria, B.C. January 16–18, 2024
Place and Date of Judgment:	Victoria, B.C. January 30, 2024

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Introduction

[1] The plaintiffs, Richard Baumeler (“Richard”), Lisa Baumeler (“Lisa”), Les Feil as trustee of the Queen-Hashmi Family Trust (the “Trust”), 0899285 B.C. Ltd. (“0899285”), and Tricolor Enterprises Inc. (“Tricolor”) (collectively, the “plaintiffs”) apply for a determination of their claim by way of summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules* [*SCCR*].

Background

[2] A four-storey office building in Victoria located at 888 Fort Street (the “Building”) is legally owned by 888 Fort Street Holdings Ltd. (“888 Holdings”) as bare trustee pursuant to a Bare Trust and Agency Agreement dated January 6, 2006.

[3] The plaintiffs and the defendant, Joanne Lynn Ross (“Joanne”), are collectively the beneficial owners of the Building. The beneficial owners are parties to a “Co-Ownership Agreement”. Their respective shareholdings in 888 Holdings matches their respective beneficial ownership of the Building, as follows:

Joanne:	40%
Richard and Lisa:	20%
The Trust:	20%
0899285:	10%
Tricolor:	10%

[4] The Building was originally purchased in 2006. At that time, the interests of 0899285 and Tricolor were owned by others. Joanne contributed $250,000 for her 40% interest. The other shareholders collectively contributed $750,000 for the remaining 60% interest. The pro-rata shortfall in Joanne’s contribution was apparently justified on the basis that her husband, the defendant, Lindsay Ross (“Lindsay”), was responsible for finding the Building and securing its purchase.

[5] The original purchasers granted a mortgage over the Building to Manulife in the principal amount of $2.75 million with a term of ten years amortized over 12 years (“Manulife Mortgage”).

[6] The applicable Co-Ownership Agreement is dated February 15, 2011 ("the "Co-Ownership Agreement"). It replaced an earlier version when 0899285 and Tricolor purchased their respective beneficial interest in 2011. The provisions of the Co-Ownership Agreement that are material to this application are:

> […]
>
> 2.00 TENANCY-IN-COMMON
>
> The Parties shall acquire and hold beneficial ownership of the Lands in the following proportions, namely:
>
> | | |
> |---|---|
> | Joanne | 40% |
> | 0899285 | 10% |
> | Tricolor | 10% |
> | The Trust | 20% |
> | Baumelers | 20% |
>
> as tenants-in-common, each with the other. Nothing in this Agreement shall imply or be construed as evidence of any joint tenancy, partnership or agency whatsoever between the Parties, or any of them, nor shall any Party hold themselves out as a partner of, agent of, or as authorized to represent or bind any other Party, except as may be specifically set out in this Agreement. In addition to the foregoing, no Party shall, without the consent of all other Parties, take any action that would affect the Lands or any tenant in occupation and all Parties covenant and agree that all such actions are in the nature of management and shall be reserved to the Manager as hereinafter provided.
>
> 3.00 MANAGEMENT
>
> The Parties acknowledge the Company has entered into a Management Agreement to appoint, for the period commencing July 1, 2006 and ending January 15, 2018, 0720405 B.C. Ltd. Property Manager (the "Manager") with the powers and obligations as set out in the said Management Agreement.
>
> 4.00 FINANCING
>
> The parties acknowledge that the Lands have been purchased and will be financed by Manulife Financial as follows: $2,750,000, 5.35% interest, 10 year term and amortized over 12 years. The Parties will, prior to such maturity date, cooperate in obtaining replacement financing in such amount as is considered appropriate by a majority vote of the Parties. In pursuance of such financing, the Parties shall each, if so required and recommended by the Manager, either provide such further capital as may be necessary to affect such refinancing, or furnish such personal or corporate financial disclosure and guarantees as may be required. In the case of any corporate Party, such guarantees may, if required, include the personal guarantees of the principals of such corporate Parties.

> 5.00 CAPITAL CONTRIBUTION AND FURTHER FINANCING
>
> To the extent that any further financing is required, for the proper management, upkeep and operation of the Lands, at the discretion of the Manager then such additional financing shall be sought first by way of borrowing, in the event that borrowing is either impractical or inadvisable (such decision to be made by the Manager) then the Manager may, in writing (and including its reasons for reaching such a conclusion), request each Party to contribute the required capital pro rata in the proportion that each Party's interest in the Lands are to all Parties' interest in the Lands. Such proportionate share shall be delivered by each Party to the Manager with [sic] 15 days of delivery of such notification by the Manager. In the event that any Party fails to provide its proportionate Share of such defaulting Party [sic], and such sum shall constitute a loan from such lending Party to the defaulting Party, shall bear interest at the Toronto Dominion Bank prime rate from time to time plus five (5%) per cent per annum, and shall be repayable on demand. Any distribution of income or capital to be made to such defaulting Party shall be made by the Manager to the lending Party to the extent required by the lending Party to the extent required by the lending Party [sic] to repay such a loan, including accrued interest thereon and any balance thereafter to the defaulting Party.
>
> […]
>
> 7.00 DECISIONS
>
> All the decisions to be made, other than as specifically set out herein, and, other than those which are the responsibility of the Manager pursuant to the Management Agreement, shall be made by a simple majority of the ownership interests of the Parties. For the purposes hereof, "simple majority" shall mean a vote assented to by the parties who own, in aggregate, a number IN EXCESS OF FIFTY (50%) PER CENT of the total ownership interests. […]
>
> […]
>
> 8.10 Arbitration of Disputes – All disputes and claims between Parties arising out of this Agreement which cannot be reasonably resolved between the Parties shall be at the instance of any Party be [sic] submitted to and finally resolved by arbitration by a single arbitrator pursuant to the rules of commercial arbitration under the *Commercial Arbitration Act* of British Columbia, who will act a sole arbitrator with regard to the dispute. The award of the arbitrator will be final and binding upon all Parties and this covenant to submit to arbitration is to be construed as an integral part and fundamental term of this Agreement.
>
> […]

[7] It is noteworthy that, despite the acknowledgement of the parties set out in Clause 3.00 above, no "Management Agreement" was ever entered into.

[8] At all material times prior to June 2013, Lindsay was *de facto* responsible for managing the operation and finances of the Building, including property management, bookkeeping, and accounting. Joanne and her father, Rolf Paterson ("Rolf"), assisted Lindsay with those duties. Lindsay was paid $2,000 per month by 888 Holdings for his services.

[9] Lindsay's law corporation, the defendant, 0510818 B.C. Ltd. (the "Law Corp."), was a tenant in the Building.

[10] In early 2013, the plaintiffs determined that there were significant irregularities regarding 888 Holdings' finances, including mismanagement and conversion by Lindsay and Joanne of its money to their personal use. In June 2013, Lindsay resigned from his property management role. Andrew Hashmi ("Hashmi"), an accountant and principal of the Trust, and Richard took over the Building's management. They received $1,000 per month each for their services (the "Plaintiffs' Management Fees").

[11] On June 17, 2013, Hashmi and Leslie Feil (the principal of 0899285) were added as directors of 888 Holdings.

[12] Shortly thereafter, steps were taken by the plaintiffs to adjust the accounting of 888 Holdings' shareholder capital accounts, purportedly in order to rectify the shortfall in Joanne's capital contribution in 2006 and "equalize" the capital accounts to accord with the proportionate shareholding percentages (the "Reallocation").

[13] On September 4, 2014, the plaintiffs caused 888 Holdings to commence an action against Lindsay, Joanne, the Law Corp. and Rolf (the "2014 Action").

[14] On March 30, 2015, Richard replaced Lindsay as president of 888 Holdings and Lindsay was removed as a director of 888 Holdings. The Law Corp. ceased its tenancy in the Building.

[15] The ten-year term of the Manulife Mortgage expired in February 2016. Manulife was not prepared to renew it. In the result, Hashmi caused his personal

holding company, 0955541 B.C. Ltd. (“0955541”), to lend 888 Holdings approximately $600,000, which is used to payout the principal owing under the Manulife Mortgage (“0955541 Loan”). The 0955541 Loan was secured by a mortgage granted by 888 Holdings to 0955541 at an interest rate of 8%.

[16] On August 31, 2017, Joanne filed a petition (“Joanne’s Petition”) against the plaintiffs as well as 888 Holdings, Hashmi, and Leslie Feil (trustee of the Trust), alleging that the conduct of 888 Holdings’ majority shareholders was oppressive and unfairly prejudicial to her minority interest. She sought, *inter alia*, full financial disclosure and the appointment of a receiver/manager.

[17] Joanne’s Petition was subsequently abandoned by her.

[18] Also on August 31, 2017, Joanne served the plaintiffs, 888 Holdings, and others with a Notice to Arbitrate, pursuant to the provisions of the Co-Ownership Agreement (“Joanne’s Notice to Arbitrate”). In it, Joanne alleged that “[888 Holdings] could only act on the unanimous written instruction of all the owners” and that “the agreement with the Manager was a verbal one and never committed to writing”. The remedies sought by Joanne included many of those set out in Joanne’s Petition.

[19] In January 2019, Joanne filed an application with the British Columbia International Commercial Arbitration Centre for the appointment of an arbitrator. In a written decision dated April 3, 2019, the application arbitrator ruled that several of the parties named in the Notice to Arbitrate were not proper parties and that no arbitrable issue had been raised in the Notice to Arbitrate. He declined to appoint an arbitrator and awarded costs against Joanne. In doing so, he wrote:

> 23. Further, on examining the pleadings in the [2014 Action], I accept the Claimant’s position that the issues in the [2014 Action] are distinct from those in the Notice to Arbitrate […]

[20] On November 29, 2019, the plaintiffs produced to Joanne all of 888 Holdings’ general ledgers dating back to 2013. Those general ledgers disclosed the Reallocation, the 0955541 Loan, the Plaintiffs’ Management Fees and the interest payable/payable to the plaintiffs in respect of the Reallocation, their Shareholders’

Loans, the 0955541 Loan and legal fees being paid by 888 Holdings in connection with the 2014 Action.

[21] The 2014 Action was settled in November 2020 (the "Settlement") on terms that included a promissory note payable by the defendants to the plaintiffs (the "Note") in the amount of $297,737.90, together with interest on that amount until payment as well as "reasonable costs and expenses, including costs on a solicitor and own client basis". As part of the Settlement and in order to secure the payment of the Note, Joanne granted the plaintiffs an equitable mortgage of her beneficial interest in the Building.

[22] Specifically, the Note provides, in relevant part, that Lindsay, Joanne, and the Law Corp. (collectively, the "defendants"):

> […]
>
> Jointly and severally promise to pay to [the plaintiffs]
>
> the principal sum of TWO HUNDRED NINETY SEVEN THOUSAND SEVEN HUNDRED THIRTY SEVEN DOLLARS AND NINETY CENTS ($297,737.90) (the "Principal Sum"), in the following manner, and hereby acknowledge, covenant and agree with the [plaintiffs] that:
>
> a) The [defendants] will pay to the [plaintiffs] the Principal Sum, interest and all other money payable under this promissory note, in lawful money of Canada, by certified cheque or bank draft, payable to cox Taylor In Trust, and delivered to Burnes House, Third Floor, 26 Bastion Square, Victoria, British Columbia V8W 1H9.
>
> b) Interest will accrue at the rate of the RBC Royal Banks's prime rate plus 5%, compounded quarterly, to the date of payment, and will be calculated from a starting date of November 21, 2020.
>
> c) The balance of the Principal Sum, plus accrued and unpaid interest then outstanding, is due and must be fully paid to the [plaintiffs] before 4 p.m. on the 31st day of December 2021.
>
> d) The [defendants] will have the privilege of paying all (but not less than all) of the Principal Sum secured under this Promissory Note, plus accrued and unpaid interest then outstanding, at any time, without notice, bonus, or penalty.
>
> e) As security for the obligations of the [defendants], the [defendants] acknowledge and agree that Joanne Lynne ross will grant to the [plaintiffs] an equitable mortgage of her beneficial interest in and to [the Building].
>
> f) The [defendants] agree to pay all reasonable charges and expenses, including costs on a solicitor and own client basis, that

> the [plaintiffs] may incur in order to enforce the terms of this Promissory Note and the joint and several obligations of the [defendants]. The [defendants], nevertheless, confirm that this Promissory Note is for a sum certain as contemplated by the *Bills of Exchange Act* (Canada).
>
> g) The [defendants] waive presentment, protest, notice of protest, and notice of dishonor.

[23] As the Note specifies, payment was due on December 31, 2021. No payment was made.

[24] On January 10, 2022, Joanne commenced an action (Victoria Registry Action No. S220058) ("Joanne's Action"), raising claims related to the financial management of 888 Holdings after Lindsay resigned in June 2013. She alleges that, by virtue of financial shenanigans committed by 888 Holdings' new management without her knowledge or consent, the plaintiffs have effectively received full payment under the Note.

[25] Joanne's Action was commenced on March 3, 2022. Joanne claims she is entitled to an equitable set-off in respect of misappropriation of 888 Holding's funds that she alleges occurred after mid-June 2013.

[26] In this application, the plaintiffs seek judgment on the full amount of the Note as well as payment of all accrued and unpaid interest and the costs and expenses they have incurred in seeking payment under the Note. They also seek a declaration that they are entitled to Joanne's beneficial interest in the Building pending full payment of the Note, costs, and expenses.

[27] The defendants claim that Joanne is entitled to an equitable set-off of her liability under the Note and that the equitable set-off extinguishes the debt owed by all of the defendants under the Note. They submit that proof of the repayment/misappropriation alleged in Joanne's action and the equitable set-off to which she is entitled is factually complex and that the plaintiffs' claim in this action is unsuitable for summary trial.

The Defence of Equitable Set-Off

[28] In a nutshell, the defendants say that an analysis of the plaintiffs' management of 888 Holdings after mid-June 2013 demonstrates that the defendants' joint and several liability under the Note has been satisfied in full. They say that after management of 888 Holdings was assumed by Richard and Hashmi in mid-June 2013, the plaintiffs failed to follow the governance and decision-making processes stipulated in the Co-Ownership Agreement and that they engaged in mismanagement and fiscal improprieties that constituted breaches of the Co-Ownership Agreement, breach of fiduciary duty, breach of trust, conversion, and an actionable conspiracy; all of which enriched themselves at Joanne's expense.

[29] The defendants say that they were completely unaware of what took place regarding 888 Holdings' books, records, and management until 2021 when they received 888 Holdings' financial statements dating back to 2013. They say that, upon receipt, they discovered what they allege was a "scheme manufactured by the plaintiffs to divert money to themselves to the exclusion of Joanne". They say that, from and after mid-June 2013, the plaintiffs:

a) converted their past non-interest bearing shareholders' loans totalling $432,656 to interest bearing loans at 8% retroactive to 2011 as part of the Reallocation;

b) approved the 0955541 Loan and thereafter caused 888 Holdings to make interest-only payments at 8%;

c) documented all additional capital contributions made after 2013 totalling $634,100 as shareholder loans earning interest at 8%;

d) charged 888 Holdings management fees of $2,000 per month;

e) commencing in 2019, caused 888 Holdings to make payments totalling $983,400 to them as repayments of a portion of their shareholders' loans (with 8% accrued interest); and

f) caused 888 Holdings to pay the legal fees of $274,892 which the defendants say appear to have been related the prosecution of the 2014 Action on behalf of the plaintiffs in respect of which 888 Holdings derived little or no benefit

(collectively, the "Alleged Improprieties").

[30] The defendants say that none of the Alleged Improprieties were disclosed to or authorized by Joanne.

[31] The defendants say that, but for the Alleged Improprieties, 888 Holdings "should have been able to pay off the balance of the [Manulife Mortgage] within two or three years" after it matured in February 2016, which would have resulted in Joanne, as a 40% shareholder of 888 Holdings, being attributed income of at least $100,000 per year which she would have used to pay off the Note. She deposed in her Affidavit #1 sworn April 28, 2023:

> 34. Year over year, from 2013 forward, 888 appears to have generated rents in an amount between $200,000 and $300,000 annually. Because these are commercial tenants with "triple net leases", the expectation is that close to all of the building expenses are recovered from the tenants, except where there are vacancies.
>
> 35. Given that level of income, we should have been able to pay the balance of the mortgage off within two or three years after it matured in February 2016. Instead, the other co-owners, aided by the managers, have diverted and converted the co-ownership's rents in order to make massive interest payments between $150,000 to $200,000 per year to a company that they control.

[32] The defendants say that Joanne was not apprised of any of the actions that led to the Alleged Improprieties in breach of the provisions of the Co-Ownership Agreement requiring "the consent of all other Parties" (Clause 2.00), "a majority vote of the Parties" (Clause 4.00), notices in writing to the Parties (Clause 5.00), and a vote of the Parties (Clause 7.00).

[33] The Alleged Improprieties are the subject of Joanne's Action.

[34] It must be noted that Joanne is the only defendant seeking an equitable set-off in respect of her joint and several liability under the Note. None of the other defendants claim such relief. However, counsel for the defendants pointed out that, if Joanne's claim for equitable set-off is successful in an amount equal to or exceeding her liability under the Note, the liability of the other defendants will also be extinguished.

[35] Our Court of Appeal in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 20 D.L.R. (4th) 689, 1985 CanLII 144 (B.C.C.A.) [*Coba*] at para. 23 reviewed the jurisprudence regarding equitable set-off and derived the following principles:

> [23] […]
>
> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands […]
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed […]
> 3. A cross-claim must arise out of the same transaction and be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim […]
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract […]
> 5. Unliquidated claims are on the same footing as liquidated claims […]
>
> [Citations omitted.]

[36] In a later decision of this Court in *Coolbreeze Ranch Ltd. v. Morgan Creek Tropicals Ltd.*, 2009 BCSC 151, Justice Pitfield stated:

> [37] Equitable set-off is a defence. It finds its base in the principle that a claimant should not be granted judgment on a claim against another where that other asserts a claim in response that is so related to the original claim that the cross claim can be said to go to the root of the claim. In such a case, the cross claims are regarded as components of a single transaction, such that judgment should not be granted on one of the components without concurrent disposition of the other. The set-off is regarded as equitable rather than legal because the validity of the cross claim has not been confirmed or quantified, and in that sense, is an unliquidated claim.

[37] In *Jamieson v. Loureiro*, 2010 BCCA 52, the central issue to be decided was whether a payor spouse in the context of a protracted and acrimonious family law proceeding was entitled to equitable set-off of a costs award against orders for past and future child support. The Court of Appeal reviewed the jurisprudence since *Coba* and adopted what it described as a "simple two-step test" that had been articulated in the Ontario decision of *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd.* (2003), 43 B.L.R. (3d) 54 (Ont. S.C.J.) at para. 261 and previously

adopted by the Court of Appeal in *918339 Alberta Ltd. v. 569244 British Columbia Ltd.*, 2005 BCCA 371:

> [261] Obviously there is some difference in terminology in the applicable case law. *Telford v. Holt* [[1987] 2 S.C.R. 193], *PIA Investments* [*Inc. v. Deerhurst Ltd*. *Partnership* (2000), 20 C.B.R. (4th) 116 (Ont. C.A.)] and *Algoma Steel* [*Inc. v. Union Gas Limited* (2003), 63 O.R. (3d) 78 (C.A.)] both speak of a close connection as opposed to an inseparable connection as in [*Government of Newfoundland v.*] *Newfoundland Railway Co.,* [(1888), 13 A.C. 199 (P.C.)] and *Bim Kemi* [*AB v. Blackburn Chemicals Ltd*., [2001] 2 Lloyd's Rep 93] *Telford v. Holt* and Lord Justice Goth in *Federal Commerce* [and *Navigation Ltd. v. Molena Alpha Inc*., [1978] 1 Q.B. 927 (C.A.) aff'd [1979] A.C. 757 (H.L.)] speak of unfairness rather than manifest injustice as in *Algoma Steel*, Lord Denning in *Federal Commerce* and *Bim Kemi*. While an argument may be made that the manifestly unjust and inseparable connection language imports a higher standard than fairness and close connection, I do not believe that these linguistic nuances are materially different. On balance, it seems to me that the respective terms may be used interchangeably. In keeping with the most recent appellate Canadian case law, I propose to use the terms close connection and manifest injustice. I also conclude, based on the case law, that the test for equitable set-off involves two questions; one on the issue of close connection and the other on the issue of manifest injustice. Both components of the test should be addressed. One criterion does not prevail over the other.
>
> [Emphasis added.]

[38] The Court of Appeal in *Jamieson* concluded that:

> [60] In my opinion, the cross-claims in respect of costs and child support lack the necessary nexus to give rise to equitable set-off. The children's right to child support is, in my view, completely separate from the costs awarded, notwithstanding that the costs related to an application to vary child support.

[39] Like in *Jamieson*, the claims raised by Joanne in the Joanne's Action and in defence of this notice of application also lack the necessary nexus to give rise to equitable set-off. The evidence is uncontroverted that the plaintiffs, or one or more of them, invested $634,100 into 888 Holdings between mid-June 2013 and the end of 2016 as shareholders' loans in order to cover its expenses and operational shortfalls (the "Plaintiffs' Shareholders' Loans"). Joanne, as 40% beneficial owner, contributed nothing during that period. The evidence is equally uncontroverted that the monies the plaintiffs caused 888 Holdings to pay to them during the period 2019 to 2022, and which are the subject of the claims in the Joanne's Action, were paid for the purpose of reimbursing the Plaintiffs' Shareholder's Loans. The issue with respect to

these payments is whether the plaintiffs were entitled to be paid 8% interest on those amounts and on their previous shareholders' loans dating from and after 2011.

[40] Flaws in the defendants' arguments regarding the other Alleged Improprieties became apparent during the course of the hearing. The plaintiffs provided a full answer in respect of many of them. With respect to the others, the defendants' complaints were largely based on unsubstantiated speculation and/or misunderstanding as to what had occurred or miscalculation and misguided analysis of the alleged loss. For example, although the defendants take issue with the payment of the Plaintiffs' Management Fees, I find that those fees were recovered by 888 Holdings through the "triple net" lease obligations of its tenants.

[41] There is no question that there is "bad blood" between and among the parties to this action, but bad blood in and of itself does not equate to a cause of action.

[42] At the root of the claims in Joanne's Action is that the plaintiffs managed the financial affairs of 888 Holdings without her approval or involvement and contrary to the procedural provisions set out in the Co-Ownership Agreement. It is possible that the Alleged Improprieties and/or other alleged improper actions on the part of the plaintiffs (or one or more of them) will ultimately be proven to some extent at the trial of the Joanne's Action and, if so, a remedy may be available to her. However, entitlement to any such remedy has not been demonstrated.

[43] Regardless, the defendants have not persuaded me that there is any connection between the Alleged Improprieties and the plaintiffs' claims as set out in the 2014 Action that led to the execution of the Note. All of the actions of the plaintiffs that Joanne seeks to impugn allegedly took place after mid-June 2013. All of the claims alleged in the 2014 Action took place before mid-June 2013, with the exception of claims for addition rent owed by the Law Corp., none of which are raised in Joanne's Action. The fact that they both arise from the management of the Building does not give rise to an equitable set-off.

[44] It is telling that, although Joanne did not receive 888 Holdings' financial statements until 2021, she had full access to the company's banking records and was in receipt of sufficient general ledger disclosure such that she either was aware or ought to have been aware of the Alleged Improprieties before the Settlement, which strongly suggests that the claims were unconnected. Indeed, Joanne's position before the application arbitrator was that the issues in the 2014 Action were distinct from those she was raising in the Notice to Arbitrate.

[45] It is also telling that both Joanne's Petition and Joanne's Notice to Arbitrate raise generally the same issues she now raises in Joanne's Action, albeit without specificity as to amounts. Yet, the defendants settled the 2014 Action without those issues having been resolved. When questioned on this point by the Court, defendants' counsel responded that the issues raised in Joanne's Petition and Joanne's Notice to Arbitrate had "no link or bearing" to the settlement of the 2014 Action.

[46] I reject the defendants' submissions that the claims in Joanne's Action are sufficiently connected to the plaintiffs' claims that equitable set-off is warranted. The two claims are indeed distinct. They are not so "in-separately connected" that allowing the plaintiffs to enforce payment of the Note obligations without taking into consideration the issues raised in Joanne's Action would be manifestly unjust.

Suitability for Summary Trial

[47] Summary Trial is available to a litigant where, on the whole of the evidence before it, the court is able to find the facts necessary to decide the issues of fact and law and it is of the opinion that it would not be unfair to do so: *SCCR,* Rule 9-7(15*)*; *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 29 and 30.

[48] The factors to be considered when deciding whether it would be unjust to decide the case on summary trial include the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, credibility of the affiants, the

course of the proceedings and whether doing so would result in litigation in slices: *Gichuru* at paras. 30 and 31.

[49] Counsel for the defendants submits that the claims related to the Alleged Improprieties are complex, raise issues of credibility and that it would be unjust to allow the plaintiffs to "force repayment of the Note" when they have committed numerous breaches of contract and the duties owed to Joanne.

[50] There are factors that militate against a determination of this action by way of summary trial. There is no particular urgency given that the plaintiffs' claim is adequately secured by way of the equitable mortgage over Joanne's beneficial interest in the Building.

[51] However, there are several factors which favour a decision in this action by way of summary trial:

a) the facts and applicable law to be applied as related to the Note are straightforward and not complex.

b) there is no significant dispute on the facts and there are no credibility issues in respect of the plaintiffs' case on summary trial.

c) to the extent there is complexity and credibility concerns, they all relate to Joanne's Action.

[52] In effect, the defendants are seeking to delay judgment on their acknowledged debt until the issues related to the Alleged Improprieties have been decided.

[53] The decision as to the suitability of proceeding by way of summary trial is a discretionary one: *Gichuru* at para. 34. In my view, the interests of justice do not require a full trial of Joanne's Action prior to determination of this action.

[54] I have no difficulty concluding that I will be able, on the evidence before me, to decide the plaintiffs' claim by way of summary trial. I also have no difficulty concluding that it would not be unfair to allow the plaintiffs to proceed with their claim in debt on the Note without taking into consideration Joanne's Claims.

The Plaintiffs' Claim in Debt under the Note

[55] There is no dispute that the defendants are jointly and severally liable to pay the plaintiffs the sum of $297,737.90 plus interest on that amount from and after November 21, 2020 at the rate of RBC Royal Bank prime plus 5% compounded quarterly to the date of judgment. Counsel for the defendants concedes that, as of June 30, 2023, the amount of interest owning under the Note is $76,687.54.

[56] There is also no dispute that the defendants are jointly and severally liable to pay to the plaintiffs "all reasonable charges and expenses" incurred by the plaintiffs in order to enforce the terms of the Note and the joint and several obligations of the defendants. Counsel for the defendants concedes that, as of July 17, 2023, those charges and expenses total $44,923.76.

Plaintiffs' Entitlement to an Equitable Mortgage

[57] In *Stonewater Ventures (No. 185) Ltd. v. Stonewater Ventures (No. 168) Ltd.*, 2022 BCSC 114 at paras. 35 and 39, this court set out the indicia required to establish as well as the intention of an equitable mortgage:

> [35] As noted in *Bank of Montreal v. Orr,* (1986), 1986 CanLII 1088 (BC CA), 4 B.C.L.R. (2d) 1 (C.A.) ("*Orr*"), our Court of Appeal confirmed that there were various indicia required to establish an intended equitable mortgage, noting as follows at para. 25:
>
> > [25] A mortgage consists of two things: (a) a contract on the part of the mortgagor for the payment of a debt to the mortgagee; and (b) a disposition (in the case of an equitable mortgage a mere delivery or pledge) of an estate or interest of the mortgagor to the mortgagee as security for the repayment of the debt. Every mortgage implies a debt (quantified or ascertainable) and an obligation on the part of the mortgagor to pay it. A repayable mortgage debt is a vital element of a mortgage.
>
> […]
>
> [39] As noted by the authors in *Falconbridge*, [*The Law of Mortgages of Land*, 3rd ed. (1942)] the equitable mortgage is intended to allow parties to rely on the property as security where it is not possible to obtain a formal, or legal, mortgage because the proposed mortgagor's interest in the property has not yet crystallized, or there is a defect in the executed instruments that prevents it from being a registerable mortgage. There is an expectation in either scenario that there will be an agreement "in writing duly signed, however informal" by which the property will be pledged as security with

> evidence, which may be extrinsic, to show a common intention that the property would be so pledged.

[58] Here, the terms of the Note satisfy the criteria and the intention on the part of Joanne to grant an equitable mortgage over her beneficial interest in the Building. The plaintiffs are entitled to a declaration to that effect.

Plaintiffs' Application for Further Declaratory Relief

[59] The plaintiffs also seek a declaration that

> any monies payable to the Defendant Joanne Lynn Ross also known as Joanne Lynne Ross on account of her interest in [the Building] be paid first to the Plaintiffs until the judgment in this matter and any additional interest, charges, and expenses thereon are satisfied.

[60] I am not aware of authority (and plaintiffs' counsel was unable to provide any) for the granting of such a declaration. I decline to do so.

[61] It seems apparent to me that any monies payable to Joanne flowing from her beneficial interest in the Building would, by virtue of the declaration I have granted, be payable to the plaintiffs until such time as the obligations under the Note have been satisfied.

Conclusion

[62] The plaintiffs are entitled to judgment against the defendants and each of them, jointly and severally, in the following amounts:

a) Principal and interest under the Note up to June 30, 2023 totalling $374,425.44;

b) Interest as specified by the Note from July 1, 2023 to the date of judgment;

c) Charges and expenses incurred to enforce the Note to July 17, 2023 in the amount of $44,923.76;

d) Charges and expenses incurred to enforce the Note as specified by the Note from July 18, 2023 to the date of judgment;

e) If the parties are unable to agree on the quantum of the plaintiffs' claims for interest accruing after June 30, 2023 and charges and expenses

incurred after July 17, 2023, the matter be submitted to the Registrar for determination; and

f) The plaintiffs are entitled to a declaration that they hold an equitable mortgage over Joanne's beneficial interest in and to the Building in the principal amount of the unpaid obligations under the Note.

[63] The plaintiffs are entitled to any costs of this action not captured by the award set out in para. 62(c) above, at Scale B.

[64] The parties have liberty to schedule a further appearance in the event that I have failed to address an issue that was raised or clarification of these Reasons is required.

"G.C. Weatherill J."