IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Malik v. Eagle Mountain Farms Ltd.,*
2023 BCSC 2220

Date: 20231219
Docket: S208116
Registry: New Westminster

Between:

Raminder Kaur Malik

Plaintiff

And

Eagle Mountain Farms Ltd., Manmohan Singh Heer and Jasbir Singh Banwait

Defendants

And

Ripudaman Singh Malik and Satnam Education Society

Defendants by Way of Counterclaim

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Plaintiff:	J.S. Malik
Counsel for the Defendants:	K. Rejminiuk
Place and Date Hearing:	New Westminster, B.C. November 17, 2023
Place and Date of Judgment:	New Westminster B.C. December 19, 2023

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I. Introduction

[1] The plaintiff, Raminder Kaur Malik, seeks summary judgment for repayment of a $310,000 loan (the "Loan") she made to the defendant, Eagle Mountain Farms Ltd. ("Eagle") under a loan agreement made on December 1, 2013 (the "Loan Agreement"). The Loan was guaranteed personally by the defendants, Manmohan Singh Heer and Jasbir Singh Banwait, the only directors and only shareholders of Eagle.

[2] Eagle acknowledges that as of November 14, 2023, it owes $333,903.28 to the plaintiff, being the outstanding amount of the Loan, plus accrued interest. As such, there is no dispute between the parties that the funds advanced to Eagle by the plaintiff were not repaid in full.

[3] However, the defendants argue that the Court should not decide this matter as a summary trial because they assert that the resolution of the Loan repayment should wait to be determined at a trial currently scheduled to commence on November 18, 2024, in which Eagle, Mr. Heer and Mr. Banwait and Satnam Education Society ("Satnam") will litigate disputes arising from Eagle's lease of a property from Satnam on which Eagle was to develop a blueberry farm. The defendants say that to decide the Loan dispute now, in advance of the trial regarding the lease, will deprive the defendants of raising the defence of equitable set-off of the amounts it owes on the Loan against any damages it might receive if successful at the trial regarding the lease. The defendants assert that the Loan is intimately connected with the lease dispute and so must be heard together at the trial in November 2024.

[4] The plaintiff contends that the Loan Agreement and the lease are not sufficiently connected and, as such, the determination of the Loan dispute should not be delayed until the trial of the lease issues. The plaintiff points to the fact that she is not a party to the lease agreement and contends that although the Loan was to be used by Eagle for the blueberry farming business, they are separate agreements with distinct purposes. She asserts that it is unfair and unjust that she must wait until

at least November 2024, to collect an outstanding debt that, based on its terms, was to be repaid to her by 2021.

[5] In my view, the core issue before me on this application is whether the Loan, the lease, and the disputes arising therefrom are so clearly connected that they should be heard together at the trial in November 2024. In resolving this issue, I must determine whether the "very root" of Eagle's claim for a breach of the lease agreement it entered into with Satnam for the blueberry farm is so clearly connected to the Loan that the defendants could raise the defence of equitable set-off in defence of repaying the Loan.

[6] In these reasons for judgment, I will first provide background facts for context, including a description of the parties, the Loan, and the lease. I will then turn to my analysis and determination as to whether this matter is suitable for disposition by summary trial. If I find that the matter is suitable for summary trial, I will then move to my analysis and determination of whether the plaintiff is entitled to judgment. Although, I note that in this case, whether the matter is suitable for summary trial is largely, if not entirely based, on whether the defendants have any potential of advancing a defence of equitable set-off to defeat repayment of the Loan. As such, the merits of the defendants' defence of equitable set-off against repaying the Loan and the suitability are intrinsically tethered.

II. Background Facts

A. Relationships of the Parties

[7] Ms. Malik was married to Ripudaman Singh Malik until his death in July 2022. Mr. Malik was the former president of Satnam.

[8] Satnam is a British Columbian Society and registered charity which operates the Khalsa Schools, the largest private schools by enrolment in British Columbia. Satnam also owns a 160 acre property located at 14100 Stave Lake Road, Mission B.C., of which it leased 85.5 acres to Eagle (the "Farm") with the intent that Eagle develop the property and produce blueberries. Satnam and Eagle entered into a

lease agreement on October 12, 2013 (the “Lease Agreement”), in which Eagle agreed to lease the Farm (the “Lease”). I will describe the Lease Agreement in more detail below.

[9] Given Satnam is a society, it is unable to engage in commercial activities such as blueberry farming. It is my understanding that because of this restriction it leased the Farm to Eagle to develop the Farm for blueberry farming and eventually produce and sell blueberries. I accept that Mr. Malik was involved on behalf of Satnam in leasing the Farm to Eagle. He was the signatory for the Lease Agreement.

B. The Loan Agreement

[10] As set out above, Ms. Malik and Eagle entered into the Loan Agreement on December 1, 2013. I accept that on the evidence before me, Mr. Malik and Ms. Malik, being spouses, were both involved in determining whether Ms. Malik would make the Loan to Eagle. Based on the correspondence, Mr. Malik was involved in negotiating the terms of the Loan as well as in attempting to collect amounts owing under the Loan when Eagle stopped making its repayments. That said, Mr. Malik is not a party to the Loan Agreement and Ms. Malik has provided evidence that while she consulted with her husband about whether to make the Loan, it was ultimately her decision to enter into the agreement to lend the funds to Eagle.

[11] Under the Loan Agreement funds were advanced as needed and over time. Various terms of the Loan Agreement demonstrate that there is some connection between the Loan and the Farm. The following terms demonstrate that connection:

a) Recital A: Satnam is entering into a lease with Eagle for the farm...

b) Recital F: The Lender has agreed to loan the Borrower $500,000 in order to help Eagle purchase blueberry plants, poles and sawdust for use on the farm.

c) Clause 2: The Lender shall loan funds to Eagle after being provided with invoices for plants and other materials needed for the farm in Satnam's property.

d) Clause 6: The Lender has the option to buy out the Borrower's lease with Satnam at any time after September 1, 2029 …

[12] The Loan Agreement provides that the Loan shall bear interest at 5% annum compounded annually.

[13] As referenced above, Mr. Heer and Mr. Banwait entered into an agreement in which they guaranteed the money borrowed by Eagle (the "Guarantee"). The Guarantee appears to link the loan to the Farm by describing it as a guarantee "in respect of the loan being provided by Malik to EAGLE in respect of the farm".

[14] The Guarantee sets out that Mr. Heer and Mr. Banwait shall not deduct any amounts from their repayment obligations under the Loan in respect of claims for certain grounds including claims of setoff:

> … the Guarantor shall make payment to Malik of the amount payable hereunder forthwith upon receipt of a written demand for payment delivered to the undersigned by Malik without deduction by reason of setoff, defence or counterclaim, regards of and irrespective of the genuineness, validity, regularity or enforceability of the foregoing agreement and irrespective of any other fact, matter or circumstance.
>
> **...**
>
> The liability of the Guarantor hereunder is direct and may be enforced by Malik upon demand without first being required to pursue or exhaust any right or remedy against EAGLE or any other party.

[15] Funds were provided under the Loan Agreement from Ms. Malik to Eagle at various times. Specifically, the following amounts totalling $310,000 were provided by Ms. Malik to Eagle on the following dates:

a) $60,000 on December 12, 2013;

b) $100,000 on January 12, 2015;

c) $50,000 on March 5, 2015;

d) $50,000 on April 25, 2015; and

e) $50,000 on May 20, 2015.

[16] Eagle made some repayments on the Loan. I will provide some details of the correspondence between the parties and the payments to demonstrate that it was Mr. Malik that was communicating on behalf of Ms. Malik for the repayment of the Loan. The first payment on the Loan was due to be repaid on September 1, 2017. On August 11, 2017, Mr. Malik emailed the loan statement to Mr. Banwait and reminded him that payment was due on September 1, 2017. On October 1, 2017, Mr. Malik again emailed Mr. Banwait and reminded him that payment was due. On October 6, 2017, Mr. Malik emailed Mr. Banwait a letter from the Plaintiff demanding payment of $108,073.17.

[17] On October 8, 2017, Mr. Malik emailed Mr. Banwait with the subject heading "Bad Attitude." The email complains about the non-payment and asks for a cheque at their upcoming meeting.

[18] On October 12, 2017, Eagle repaid the Plaintiff $108,073.17, which included interest of $46,073.17. The same day, Mr. Banwait emailed Mr. Malik to advise of the payment and to set out his interest calculations.

[19] On August 10, 2018, at 11:57 a.m., Mr. Malik emailed Mr. Banwait and reminded him that the next payment was $73,111.82 and due on September 1, 2018, and attached the loan statement.

[20] On August 10, 2018, at 4:41 p.m., Mr. Banwait replied to the earlier email and, amongst the other matters, suggested the next payment would be $74,400.00. On August 30, 2018, Mr. Malik emailed Mr. Banwait asking when the next installment payment would be made.

[21] On September 6, 2018, Mr. Malik emailed Mr. Banwait advising that the next installment payment was due.

[22] Both Mr. Banwait and Mr. Heer acknowledge that, on behalf of Eagle, they entered into and signed the Loan Agreement. They also admit that under the Loan Agreement a total of $310,000 was advanced by Ms. Malik to Eagle. Eagle further acknowledges that other than $108,073.17, repaid in October 2017, no other amounts were repaid under the Loan Agreement.

[23] The plaintiff provided an affidavit of Gurpreet Singh, an accountant, who provided the current amount owing on the Loan Agreement including the calculation of compounding interest. The parties accept that Mr. Singh's determinations are accurate. Mr. Singh calculates that, as at November 14, 2023, there was $333,903.28 owing on the Loan with interest accruing at approximately $43.84 per day. I pause to note that as I understood from counsels' submissions that the parties accept that if summary judgment is awarded to the plaintiff the parties will be able to determine the outstanding amount of the Loan based on Mr. Singh's methodology for calculating the interest on the Loan.

C. The Lease Agreement

[24] Satnam and Eagle entered into the Lease Agreement on October 12, 2013. The terms of the Lease Agreement include that Eagle would lease the Farm for a fixed term of ten years, commencing on September 1, 2014, with five renewal options for five years each.

[25] The Lease Agreement sets out the payment of rent on a schedule that saw an increase in the rent per acre of the Farm over time. The Lease Agreement also provides a clause that the Lease Agreement "shall be deemed to constitute the entire agreement between the Landlord and the Tenant". The Lease Agreement makes no mention of the Loan Agreement or to the financing of the Farm.

[26] While I will not go into detail, it appears that there were significant problems in the suitability of the Farm for its intended purpose of blueberry farming. Specifically, there were drainage issues, the area was not level, and there was the problematic circumstance of the blueberry plants attracting bears combined with inadequate

fencing which allegedly resulted in damage to the blueberry crops and safety risks to the workers at the Farm.

[27] It appears that as a result of the alleged difficulties with developing the Farm for blueberry farming, Eagle stopped paying its rent. Satnam alleges that Eagle stopped paying its rent for the Farm on October 1, 2018. Eagle asserts that Satnam and Mr. Malik made material misrepresentations regarding the Farm property thus causing them to incur damages by leasing the Farm. The disputes between Eagle and Satnam as well as the plaintiff's assertion that Eagle has defaulted on the Loan Agreement resulted in legal actions which I will now describe.

D. The Litigation

[28] There are three actions that have resulted from the Loan and Lease Agreements:

a) Action #1 - *Malik v. Eagle* – S208116: Ms. Malik sues Eagle, Mr. Heer and Mr. Banwait on the Loan Agreement wherein she lent Eagle $310,000 (the "Loan Claim"). This is the action now before me, in which the plaintiff seeks summary judgment. I further note that in the responses to the Amended Notice of Civil Claim, the defendants raise no defence to the plaintiff's claim other than set-off;

b) Action #2 - *Satnam v. Eagle* – S207983: Satnam sues Eagle on the Lease Agreement for non-payment of rent; and

c) Action #3 - *Eagle v. Satnam* – S225968: Eagle sues Satnam in relation to the Lease Agreement and alleged misrepresentations made by Mr. Malik as an officer of Satnam. On September 14, 2023, Eagle filed an amended Notice of Civil Claim removing Mr. Malik as a defendant.

[29] Given Action #2 and Action #3 both relate to disputes over the Lease Agreement and Farm, I will refer to them collectively as the "Lease Claim".

[30] Action #1, regarding the Loan dispute has a somewhat convoluted history before now reaching the Court on this application for summary judgment. Action #1 was commenced on November 7, 2018, by the plaintiff against Mr. Banwait, Mr. Heer and Eagle Mountain Farms (A Partnership). On September 24, 2019, default judgment was granted against all three defendants.

[31] Eagle applied to set aside the default judgment on the basis it was improperly named in the action as "Eagle Mountain Farms (A Partnership)", instead of "Eagle Mountain Farms Ltd." The plaintiff cross-applied to correct the name to Eagle Mountain Farms Ltd. On July 17, 2020, Justice Armstrong granted the misnomer application and set aside the default judgment against the corporate defendant only. Justice Armstrong dismissed the application to set aside the default judgment against Mr. Heer and Mr. Banwait personally: *Malik v. Eagle Mountain Farms,* 2020 BCSC 1481 at paras. 40 and 57.

[32] The Amended Notice of Civil Claim was filed on August 13, 2020. Eagle's response was filed on August 25, 2020.

[33] The personal defendants (Mr. Banwait and Mr. Heer) appealed the decision of Armstrong J. The default judgment against Mr. Banwait and Mr. Heer was set aside by the Court of Appeal on October 12, 2021, in reasons indexed as *Malik v. Eagle Mountain Farms*, 2021 BCCA 379. Given the default judgments were set aside, Mr. Heer and Mr. Banwait filed Responses to Civil Claim on November 9, 2021.

[34] On April 20, 2022, at a Case Planning Conference, Master Robertson ordered that the Loan Claim (Action #1) and the Lease Claim (Actions #2 and #3) were to be heard together. As referenced above, the trial of these matters is currently scheduled for 10 juridical days commencing November 18, 2024.

III. Legal Analysis and Determination

[35] The plaintiff says that this matter is suitable for summary trial and that the Loan Claim should be decided on its merits. She argues that there is sufficient

evidence before the Court to decide the Loan Claim and, more importantly, that the defendants have failed to establish that the Loan Claim and the Lease Claim are sufficiently connected to justify delaying the disposition of the Loan until the trial scheduled to commence in November 2024. She argues it is not manifestly unjust to deal with the Loan Claim summarily and further asserts that waiting to resolve the Loan Claim does not enhance the administration of justice. She contends that delaying resolution until the trial will require her to wait to receive funds she is duly owed and also require her to participate in (and incur the expenses of) the Lease Claim despite her not being a party or being in a position to provide any evidentiary benefit to the proceedings. Accordingly, the plaintiff submits that the Loan Claim should be dealt with now on this summary trial application.

[36] The defendants argue that the Loan Claim and the Lease Claim ought to be heard at the same trial in November 2024 because the two matters are clearly connected. They argue that Ms. Malik's husband was the operating mind behind both the Lease Agreement and the Loan Agreement. They also assert that the Loan Agreement makes specific reference to the funds being used for the Farm leased by Eagle. The defendants say that the sole reason for the Loan was to fund the development of a blueberry business on the Farm which is at the heart of the Lease Agreement.

[37] In other words, the defendants contend that the Loan and the Lease, while separate agreements between separate parties, are so clearly connected that they must be heard together at trial to preserve the defendants' right to raise the defence of equitable set-off as between amounts owing on the Loan and any damages they may be entitled to if successful in the Lease Claim.

[38] I will first address the general suitability requirements for a summary trial and then turn to my analysis and determination of whether there is a sufficient nexus between the Loan Agreement and the Lease Agreement such that the two matters should be heard together to preserve the defendants' right to raise a claim of equitable set-off.

A. Suitability for Summary Trial

[39] While I must consider the suitability of this matter for summary trial, it is presented on a different basis than the usual considerations of a suitability hearing. Most often in determining if a matter is suitable for a summary trial, courts will consider several factors including whether the court is able to find the facts necessary to decide the issue: *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–31. In my view, the factors expressed by our Court of Appeal in *Gichuru* are not the primary considerations in this case. Although, I accept that the minimal complexity, the amount in issue, the prejudice of the delay, all favour this matter proceeding by summary trial. In my view, the focus of the suitability application in this matter is whether it is "unjust to proceed summarily." *Gichuru* at para. 30.

[40] The parties accept that the plaintiff made the Loan to the defendants. Further, the defendants acknowledge that they did not repay the Loan and that there is an amount outstanding on the Loan owed by the defendants to the plaintiff. The parties also agree as to the methodology used by Mr. Singh to calculate the amount owing including the interest accruing, and agree that, as at November 14, 2023, there was $333,903.28 owing on the Loan with interest accruing at $44.86 per day. The fact the Loan was made and that a specific amount of money remains unpaid under the Loan Agreement is not contested. As such, in terms of finding the necessary facts, the Loan Claim is suitable for disposition by summary trial.

[41] However, as set out above, the defendants object to the Court proceeding with the plaintiff's application for summary judgment because they argue that if the Loan Claim is decided now, they will be prevented from arguing the defence of equitable set-off at the trial regarding the Lease Agreement. They say their ability to argue for equitable set-off of the amounts owing on the Loan against any damages they may be awarded in the Lease Claim would be extinguished, thus making it unjust to decide this matter now on a summary trial.

[42] I accept that in this case, the determination of whether this matter should be decided now as a summary trial relates to whether the defendants can establish that

equitable set-off is available to them as between the Loan Agreement and Lease Agreement. This will require me to determine whether there is merit to the defendants' contention that equitable set-off is available.

[43] For clarity, I note that if I find that the defendants have not established that it enhances the administration of justice to delay the summary trial of the Loan Claim, I conclude that I have sufficient facts to determine the merits of the Loan Claim in a summary trial procedure. To reiterate, the facts regarding the terms of the Loan—with the exception of the defendants' assertion that Mr. Malik varied the terms by verbally stating that the repayment was flexible, which I will discuss below—are settled. The parties agree that funds were advanced, interest accrued and the total amount of the funds advanced have not been repaid by the defendants to the plaintiff.

[44] I understand that the defendants allege that, although the terms of the Loan Agreement are straightforward, Mr. Malik, before his death in July 2022, represented to them that repayment of the Loan could be flexible. It did not appear that the defendants stressed this argument in the application before me, but I will address it briefly.

[45] The defendants' argument that Mr. Malik made statements that altered the terms of the Loan Agreement engages the parole evidence rule in that the defendants are asking me to reinterpret a written contract based on alleged representations made outside of the written contract. In *1001790 BC Ltd. v. 0996530 BC Ltd.*, 2021 BCCA 321, Mr. Justice Grauer writing for our Court of Appeal provided guidance on the application of the parole evidence rule:

> [42] What the parties indicated to the outside world is to be determined within the four corners of the contract itself. What either party subjectively understood or misunderstood is irrelevant in the absence of fraud or misrepresentation (see, for instance, *Shaw Production Way Holdings Inc v Sunvault Energy, Inc*, 2018 BCSC 926 at paras 139 *et seq*, aff'd 2019 BCCA 72). Where there is some ambiguity in the terms, the court may have regard to the surrounding circumstances, but these must never be allowed to overwhelm the words of the agreement. The interpretation of a written contract "must always be grounded in the text and read in the light of the entire contract": see *Sattva* at para 57.

> [43] Here, there was no ambiguity in the terms. As the judge noted, if there was any ambiguity, it was in the terms discussed in the email between the parties. That ambiguity was resolved by the terms of the written agreement, which were perfectly clear. What the judge did, in effect, was use what she termed surrounding circumstances not to aid in interpretation, but to contradict the words of the written agreement altogether.
>
> [44] The parole evidence rule precludes the judge from doing precisely that: having regard to "evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing": *Sattva* at para 59.

[46] In my view, the Loan Agreement clearly expresses the intentions of the parties. While there are exceptions to the parole evidence rule, such as when the written agreement does not express the entirety of the agreement, those exceptions need to be pleaded and articulated: *Gallen v. Butterley* (1984), 53 B.C.L.R. 38 at 49-50, 1984 CanLII 752 (C.A.). Further, as set out above, the parties accept that the funds were advanced under the Loan Agreement and not repaid by the defendants. I am not persuaded that the Court needs to consider evidence of the defendants' understanding of representations made by Mr. Malik (who is not a party to the Loan Agreement) such that the summary trial procedure would not be suitable. I also note that the matter is complicated due to Mr. Malik's death in July 2022, in that any evidence about Mr. Malik's representations to the defendants would be hearsay.

[47] I will now turn to my consideration of whether equitable set-off is available to the defendants.

B. Is Equitable Set-Off Available to the Defendants?

[48] Given the foregoing, the issue before me is whether equitable set-off is available to the defendants as between the Loan Claim and the Lease Claim. Put another way, the issue is whether, in the trial set to be heard in November 2024, the defendants would be entitled to advance their defence of equitable set-off against their obligation to repay the Loan.

[49] The defendants contend that the entire purpose of obtaining the Loan was to finance the work on the Farm which was leased by Eagle under the Lease Agreement. They assert that the claims are linked because, not only are the two

agreements intimately related, but the parties are closely connected given Mr. Malik was president of Satnam and husband to Ms. Malik.

[50] The plaintiff argues that the Loan Agreement and the Lease Agreement are made between different parties and concern fundamentally different transactions. The plaintiff acknowledges that Mr. Malik was involved in the negotiation and operation of both transactions that resulted in the Loan and the Lease, but says it would be wrong for the Court to conflate Ms. Malik with either Satnam or Mr. Malik as they are distinct legal entities. The plaintiff says the Lease and the Loan must be considered separately and it is not appropriate to set off damages for the Lease claim against the amounts outstanding on the Loan.

[51] The plaintiff asserts that the Court should look at these transactions from the perspective that the Loan was made to Eagle from a third party, because Ms. Malik is a third party to the Lease Agreement. By analogy, the plaintiff says that if the Loan were made by a bank, it would be absurd to accede to the defendants' argument that the bank's ability to collect on a valid loan in default must wait until a lawsuit between the defendants and another party were settled. The plaintiff asserts that although Ms. Malik is not a financial institution, she is neither legally nor factually a party to the Lease Agreement. She advanced funds on conditions, was not repaid under the terms of the loan and wants to be repaid. As such, she should not have to wait until the Lease Claim is resolved to collect under the Loan Agreement.

[52] As noted, to come to a conclusion, I must assess whether the defendants have made out their claim that the defence of equitable set-off is available to them in the Lease Claim.

[53] Madam Justice Huddart of our Court of Appeal provided helpful guidance on the nature of equitable set-off in *Wilson v. Fotsch,* 2010 BCCA 226 at paras. 67–79. From Huddart J.A.'s analysis the following principles arise:

a) Equitable set-off arises where there are certain equitable circumstances which give a right to a person who sets them up against an opposing party

to an action. It is a doctrine based on fairness: at para. 70, citing *Irving Oil Ltd. v. Blanchard*, 2002 PESCTD 52 at para 9;

b) Equitable set-off is available provided there is a relationship between the cross-obligations such that it would be unfair or inequitable to permit one to proceed without taking the opposing claim into account: at para. 70, citing *Irving Oil* at para. 9; and

c) The authorities "are clear that a defendant's claim will not be viewed as an equitable set-off ... unless it is closely or intimately connected with, or directly impeaches, the plaintiff's claim": at para. 71, citing *Cam-Net Communications v. Vancouver Telephone Co.*, 1999 BCCA 751 at para. 44.

[54] At paras. 72–73, Huddart J.A. also cites arguably the leading case regarding equitable set-off, *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31, 1985 CanLII 144 (C.A.):

> [73] *Coba Industries* sets out the requirements for a claim of equitable set-off (at 38):
>
> > 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 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.]

See also *Holt v. Telford*, [1987] 2 S.C.R. 193, 1987 CanLII 18, and *Jamieson v. Loureiro*, 2010 BCCA 52 at para. 35.

[55] More recently, Justice Jenkins addressed the issue of equitable set-off in *Ohman v. Synq Access + Security Technology Limited,* 2018 BCSC 1078. In

Ohman, the plaintiff was seeking to recover on a promissory note and the defendant sought an equitable set-off from the claim on the promissory note on the basis that the defendant had brought its own claim against others for related, but separate, matters. In *Ohman,* the plaintiff was a defendant (among eight others) in the cross-claim brought by the defendant. I note that in the case at bar, unlike in *Ohman*, the plaintiff, Ms. Malik, is not a defendant to Eagle's claim against Satnam.

[56] After considering the requirements for equitable set-off set out in *Coba*, Jenkins J. declined to consider equitable set-off, on the basis that the defendant's claim did not go to the "very root of the plaintiff's claim" because the cross-claim did not rely on the promissory note that was the basis for the plaintiff's claim. Justice Jenkins held:

> [36] Considering the requirements set out in *Coba Industries,* the equitable ground as put forward by the defendant does not go to the "very root of the plaintiff's claim". If it were to be established, the cross-claim, based on the pleadings, would rely in part on the terms of the Term Sheet, not the promissory note and similarly, the cross-claim is not so clearly connected with the demand of the plaintiff so it would be manifestly unjust for the plaintiff's claim to proceed. Also, it would be unjust to the plaintiff to force him to be subject to a set-off which is being made not only against him, but first and foremost against a claim of damages also being pursued against another party (Mr. Watkin) and on other grounds against eight other persons.

[57] In considering whether the equitable ground raised by the defendants that the Loan Agreement goes to the "very root" of Eagle's claim on the Lease Claim, I accept that there is some connection between the Loan Agreement and Lease Agreement and the parties thereto. Mr. Malik and Ms. Malik were married and it is reasonable to presume that there is a nexus between them and the two agreements. Indeed, in her affidavit, Ms. Malik affirms the connection between her husband and her in terms of making the decision to enter into the Loan:

> 14. However, I disagree that my husband was my agent. My husband would from time to time find investments for me to make. Most of the time, I would accept by husband's recommendation, but he did not act as my agent. He could not make a deal on my behalf without my agreement.

[58] While there is some obvious familial connection between Ms. Malik and Mr. Malik, Mr. Malik is legally a separate entity and cannot bind Ms. Malik. Indeed,

the defendants concede that Ms. Malik cannot be bound by Mr. Malik, but they argue that there is such a close connection that the two agreements are intimately connected. I accept that Mr. Malik appears to be central to the genesis of both the Lease Agreement and the Loan Agreement. However, Ms. Malik remains a separate legal entity and a third party from both Mr. Malik and Satnam. It is trite law that generally, persons and corporate entities are distinct under the law: *Edgington v. Mulek Estate,* 2008 BCCA 505 at paras. 20–21.

[59] In respect of this argument, I also note that Ms. Malik is two steps removed from the parties to the Lease Agreement. I say this because it was Satnam, not Mr. Malik, who leased the Farm to Eagle. Mr. Malik was the president of Satnam, but he is legally distinct from Satnam in his own right. As such, for the defendants to argue that the parties are sufficiently connected, they must satisfy the Court that the connections between Satnam and Mr. Malik and between Mr. Malik and Ms. Malik are sufficiently close that the Loan Claim and the Lease Claim are sufficiently connected. In my view, the defendants need to persuade me that Ms. Malik and Satnam, across those two layers, are considered sufficiently connected such that the equitable set-off against the repayment of the Loan needs to be litigated as part of the Lease Claim. In my view, this would presume that Ms. Malik could exercise some level of control over Satnam in the lease relationship with Eagle, but there is no evidence to support that claim.

[60] While context is important in determining if equitable set-off is available, for the purpose of analysis, I find it helpful to consider Ms. Malik's connection to the Lease Claim by considering a hypothetical situation in which Satnam arranged the Lease Agreement and then Mr. Malik brokered a loan agreement for Eagle with a third party. If that were the case, it would seem unfair that the third-party lender be prevented from pursuing repayment of a loan until there is resolution of a lease dispute between parties that are unrelated to the lender. In my view, the legal distinction and separation between the parties to the Loan Agreement and Lease Agreement supports that the two claims are not so intimately connected as to provide the defendants with a claim of equitable set-off.

[61] In respect of a connection between the grounds of the Lease Claim and the Loan Claim, I have been provided with no specific evidence connecting Ms. Malik to the misrepresentations alleged by Eagle against Mr. Malik and Satnam advanced in the Lease Claim. The Amended Notice of Civil Claim filed by Eagle on September 14, 2023 in Action #3, does not mention Ms. Malik at all. In my view, without evidence of a link demonstrating that the "very root" of the basis of the Lease Claim is connected to the Loan or the Loan Claim, it does not strike me as "manifestly unjust" to uncouple the Loan Claim from the Lease Claim.

[62] The defendants also argue that the terms of the Loan Agreement and the Lease Agreement demonstrate sufficient connection such that the Loan Claim should be heard at the same time as the Lease Claim. As I referenced above, the Loan Agreement provides that the funds are to be advanced for the purpose of developing the Farm and that they will be advanced to Eagle "after being provided with invoices for plants, and other materials needed for the farm in Satnam's property."

[63] I acknowledge that the terms of the Loan Agreement show some connection between the funds being advanced and the development of the Farm. However, the Loan is still, in my view, not at the very root of the Lease Agreement, which relates to leasing the Farm. Put plainly, the Lease relates to Eagle leasing the Farm and the Loan Agreement relates to obtaining financing. The terms of the Lease Agreement set out what is at the very root of the Lease, without any reference to financing:

> The Tenant wishes to lease from the Landlord, the Landlord's excess lands….
>
> The excess lands shall be used for growing and harvesting the blueberries and shall be used for no other purpose or purposes whatsoever.

[64] While both agreements relate to developing a blueberry farming business, the Lease addresses the ability of Eagle to use the Farm and the Loan provides Eagle some level of financing to purchase the necessary materials to develop the business. To conflate the two agreements under the guise that they both relate to blueberry farming is artificial. In most business ventures a party requires both a

location in which to operate as well as finances to fund that operation. While the transactions are related from Eagle's perspective, because they both relate to Eagle's business venture, they are not sufficiently connected as between Satnam – who is providing the location - and Ms. Malik – who is providing financing. In short, Satnam and Ms. Malik provide a different, unrelated, element to Eagle's blueberry business activities.

[65] While I accept that a claim for equitable set-off need not arise out of the same contract, I find that the Lease is not 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 defendants' Lease Claim: *Coba* at 38. I come to this conclusion for the following reasons, viewed collectively:

a) While both transactions relate to blueberry farming, the Lease concerns the land and property for the farming, while the Loan agreement concerns financing. In my view, the root of each agreement is distinct;

b) The parties to the Lease Agreement and the Loan Agreement are not the same. While Eagle is a party to both agreements, Ms. Malik is not a party to the Lease Agreement and Satnam is not a party to the Loan Agreement;

c) The funds advanced and their repayment are not interconnected with the leasing of the Farm. In other words, whether or not the Lease continued or did not, the Loan would be repayable. As such, the legal obligations imposed upon the parties for each of the agreements are distinct; and

d) The grounds for the Lease Claim regarding allegations that Satnam and Mr. Malik made misrepresentations regarding the Farm to Eagle are not connected to Ms. Malik. There is no evidence that she played a role in the Lease Agreement or more generally in Eagle's lease of the Farm. Nor do the pleadings allege that Ms. Malik was involved in the misrepresentations or the Lease.

[66] The plaintiff also argues that another reason supporting disposing of this matter through summary trial is that the guarantors to the Loan Agreement, Mr. Banwait and Mr. Heer, waived their right to set-off. The plaintiff contends that where a party to a contract waives set-off, the court will not allow the party to then rely on the defence of set-off and cites *Royal Bank of Canada v. Parmar,* 2005 BCSC 1155 at paras. 28 and 29.

[67] Given my finding that the claims regarding the Loan Agreement and Lease Agreement are not sufficiently connected and, therefore, equitable set-off is not available to the defendants, I need not consider this argument in detail. However, I accept that there appears some merit to the plaintiff's argument, in that even if Eagle were entitled to raise the defence of set-off, Mr. Heer and Banwait have guaranteed the Loan and waived their right to claim set-off against the amounts owing on the Loan. Put another way, it appears to me inevitable that the plaintiff will receive judgment for the full amount owing on the Loan either against Eagle or the Guarantors. This is especially so because, as described above, the Guarantee provides that "the liability of the Guarantor hereunder is direct and may be enforced by Malik upon demand without first being required to pursue or exhaust any right or remedy against EAGLE."

[68] While I have found that equitable set-off would not be available to the defendants, the foregoing provides a further basis to support that it is not in the interests of justice to postpone the resolution of the Loan to a trial in November 2024.

IV. Determination

[69] Given the foregoing, I am persuaded that it is in the interests of justice that the application for summary trial be granted. I accept that the evidence before me is capable of founding a determination as to the merits of the summary trial. For the reasons set out above, I conclude that when assessing the merits, the defendants are not entitled to raise the defence of equitable set-off against the plaintiff.

[70] Accordingly, I grant the plaintiff's application and order that Eagle is to repay the amounts owing on the Loan to the plaintiff in the amount owing as set out in the affidavit of Mr. Gurpreet Singh or otherwise agreed to in writing by the parties. If the parties are unable to agree as to the amount owing under the Loan Agreement, they may make arrangements through Supreme Court Scheduling to appear before a Registrar for that purpose.

[71] Before concluding, I wish to comment that equitable set-off is a remedy aimed at achieving fairness. In terms of the overall fairness of the outcome of this proceeding, I note that my decision allowing summary judgment does not preclude Eagle from alleging in the Lease Claim it suffered damages arising from taking on the Loan from the plaintiff. In other words, in the trial scheduled to commence in November 2024, Eagle is at liberty to assert that as a result of Satnam's breach of the Lease, Eagle suffered damages that includes costs and expenses related to obtaining the Loan from Ms. Malik. In my view, this somewhat lessens the sting of allowing summary judgment related to the Loan, in that the decision regarding summary judgment does not prevent Eagle from making a claim for losses incurred associated with the Loan.

V. Costs

[72] Due to time constraints during the hearing of this application the parties agreed that they should defer arguments on costs pending the outcome of my decision. Accordingly, submissions on costs were not made before me. As I understand the parties' positions, the plaintiff seeks special costs of this application on the basis of several alleged unnecessary steps taken by the defendants to prolong, delay and complicate these proceedings. The defendants disagree that special costs are warranted.

[73] It is well settled that special costs are saved for circumstances where the court ought to demonstrate some form of rebuke of a party's or counsel's egregious behaviour. This conduct has been described as "reprehensible". Of course, milder forms of conduct that fall short of reprehensible can also attract special costs. In

West Van Holdings Ltd. v. Economical Mutual Insurance Co., 2019 BCCA 110, Justice Goepel summarized the general principles governing special costs awards:

> [68] Special costs are usually awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young*, [1993] 4 S.C.R. 3 at 134--135. While a special cost award, by its very nature, will provide a litigant with a greater degree of indemnity against its actual legal expenses, in the ordinary course "special costs are not compensatory; they are punitive": *Smithies Holdings Inc. v. RCV Holdings Ltd*., 2017 BCCA 177 at para. 56. They are typically awarded to address conduct in the course of the litigation that is deserving of censure and rebuke: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106, leave to appeal ref'd [2012] S.C.C.A. No. 120. Pre-litigation conduct is not to be considered in determining whether special costs should be ordered: *Smithies Holdings* at para. 134.
>
> [69] There are limited circumstances when special costs may be ordered where there has been no wrongdoing: *Gichuru* at para. 90. These situations include when the parties have made provision in a contract for special costs.

[74] I will grant the parties leave to seek to appear before me for the purpose of arguing for costs. While I have not had the benefit of the parties' submissions on the issue of special costs, I have reviewed the materials. Based on the materials before me, although it appears that the defendants took certain positions that required the plaintiff to take additional steps in the litigation—such as denying facts that were later admitted—at first blush, the defendants' conduct does not strike me to be so egregious or worthy of rebuke to attract special costs.

[75] To reiterate, the parties have leave to seek to appear before me for the purpose of arguing the issue of costs. However, in the absence of such an appearance, the plaintiff is awarded her costs at Scale B.

VI. Order

[76] To summarize, I order as follows:

a) The plaintiff is awarded judgment in this summary trial of any outstanding amounts under the loan entered into between the plaintiff and the defendant Eagle Mountain Farms Ltd. pursuant to the agreement of December 1, 2013, and any interest accrued thereon. If the parties are

unable to agree as to the amount owing on the loan, they shall appear before the Registrar to resolve that issue; and

b) The plaintiff is awarded her costs at Scale B, unless the plaintiff continues her application seeking special costs filed with the Court on October 3, 2023 and commenced before Justice Gibb-Carsley on November 17, 2023. If the plaintiff continues her application seeking special costs it shall be heard before Justice Gibb-Carsley and arrangements are to be made through Supreme Court Scheduling to set the matter down for an appearance by MS Teams at 9:00 a.m. on a day convenient to the parties and the Court.

VII. Conclusion

[77] I thank counsel for both parties for their well-prepared materials and well-argued submissions in this application.

"Gibb-Carsley J."