IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gill v. Asian Resources Corporation,* 2023 BCSC 2201

Date: 20231213
Docket: S227439
Registry: Vancouver

Between:

Harjinder Singh Gill and Canadian Majha Trading Inc.

Plaintiffs

And

Asian Resources Corporation, Central Asian Gold Corp., Alexander Antonov and Eugene Alexandrovich Antonov

Defendants

Before: The Honourable Justice Tammen

Reasons for Judgment

Counsel for the Plaintiffs:	D. Cayley
Counsel for the Defendants, Asian Resources Corporation, Central Asian Gold Corp. and Eugene Antonov:	J. Payne
No appearance on behalf of the Defendant, Alexander Antonov.	
Place and Dates of Hearing:	Port Coquitlam, B.C. August 3–4, 2023
Place and Date of Judgment:	Vancouver, B.C. December 13, 2023

Introduction and Overview

[1] On this application, the defendants seek to have the entirety of the plaintiffs' claims either struck or dismissed because they are barred by the provisions of the *Limitation Act*, S.B.C. 2012, c. 13. The backdrop to the litigation is a dispute among principals of corporate entities created to pursue mineral claims in the Republic of Kazakhstan. In broad strokes, the dispute involves some fundamental disagreements between the personal plaintiff, Harjinder Singh Gill and the personal defendant, Eugene Antonov, about how to distribute funds prior to the winding up of two companies with which they are both involved. Mr. Gill claims that he is entitled to various sums of money prior to the net proceeds derived from the sale of some mineral rights being equally divided between the two men.

[2] The fundamental disagreement between the parties crystallized at a shareholders meeting of Asian Resources Corporation ("ARC") on March 10, 2016. Neither party took any formal legal steps for some time thereafter, and in January 2020, Mr. Antonov initiated petition proceedings, seeking the court's assistance in breaking the corporate deadlock. That issue was ultimately decided by the Court of Appeal, in reasons indexed at 2022 BCCA 256. At para. 70 of that decision, Justice Butler directed that Mr. Gill should commence any legal proceeding he wished to pursue within 60 days. That order is what led to Mr. Gill filing his notice of civil claim on September 16, 2022 ("NOCC").

[3] Mr. Gill makes three discrete claims, as he did in the Court of Appeal. They may conveniently be summarized as follows:

a) A claim for unpaid wages and expenses, arising from his efforts on behalf of ARC in Kazakhstan, primarily in the period 2003-2006 (the "Unpaid Wages/Expenses Claim");

b) A claim based on a promissory note, valued at a maximum of US$1 million, which Mr. Gill purchased from a third party in the period 2007-2011 (the "Promissory Note Claim"); and

c) A claim, based on a contract between Mr. Gill and Mr. Antonov, that the former would receive an additional 4.5% of the net proceeds from the disposition of ARC after payment of expenses (the "4.5% Claim").

[4] For the reasons that follow, I am persuaded that the Unpaid Wages/Expenses Claim and the Promissory Note Claim are statute barred and must be dismissed pursuant to R. 9-6(4) of the *Supreme Court Civil Rules* [*SCCR*]. I reach a different conclusion with respect to the 4.5% Claim. That claim is not barred by the provisions of the *Limitation Act*, S.B.C. 2012, c. 13 and may proceed to trial.

Factual Background

[5] Because two of the key participants in the events at issue share the same surname, I will refer to them by first names. I mean no disrespect in so doing.

[6] Eugene Antonov is the son of Alexander Antonov.

[7] Eugene and Mr. Gill are the only shareholders of ARC, each owning 50% of the shares.

[8] ARC owns 100% of the shares of Central Asian Gold Corp. ("CAGC").

[9] Eugene and Mr. Gill are the only directors of ARC.

[10] Eugene, Alexander and Mr. Gill are the only directors of CAGC.

[11] Canadian Majha Trading Inc. ("CMT") is a holding company controlled by Mr. Gill.

[12] Mr. Gill met Alexander and Eugene in 1994. At the time, Mr. Gill was employed by Teck Cominco Limited ("Teck"). Teck incorporated CAGC as a holding company to hold its assets in Central Asia.

[13] In 1995, CAGC acquired an interest in a mineral license issued by the responsible ministry in Kazakhstan. The mineral license was issued to Akmola Gold

Closed Joint Stock Company (“Akmola Gold”), a company incorporated by CAGC and others for the purpose of holding the mineral license.

[14] In 2000, Teck commenced divesting itself of all of its interests in Central Asia.

[15] ARC was incorporated in December 2000, for the purpose of acquiring the shares of CAGC. Mr. Gill and Eugene became the directors and shareholders of ARC at that time.

[16] The important events which next occurred are set out at paras. 21, 23 and 25-26 of the NOCC. Those paragraphs are admitted in the response to civil claim (“RTCC”) filed by the defendants and I reproduce them here:

> 21. On November 13, 2001, Teck, ARC, Mr. Gill, and Eugene entered into an option agreement (the "Option Agreement") which, among other things:
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> (a) required ARC to immediately begin maintaining the Mineral License;
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> (b) gave ARC the option to purchase Teck's shares in CAGC;
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> (c) upon the exercise of that option, required Mr. Gill to resign from his· employment at Teck; and
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> (d) required ARC to provide Teck with a promissory note obliging ARC to pay Teck an amount based on the net proceeds earned by ARC, to a maximum of $1,000,000.00 USD, which Teck could only collect once those net proceeds, minus expenses, were calculable (the "Promissory Note").
>
> …
>
> 23. On June 25, 2002, ARC exercised its option under the Option Agreement and, on the same date, entered into an agreement with Teck whereby ARC acquired Teck's shares in CAGC (the "SPA”).
>
> …
>
> 25. In accordance with the Option Agreement, the SPA, among other things, required ARC to issue the Promissory Note, which ARC issued on the same date.
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> 26. Subsequently, Mr. Gill and Alexander became the directors of CAGC.

[17] Mr. Gill claims that in September 2004, pursuant to a management agreement, he was appointed as the general manager and was to be paid a monthly salary of US$3,300.00. The defendants dispute both the appointment and Mr. Gill’s

entitlement to a salary. The defendants do not dispute that Mr. Gill expended considerable effort in trying to make the venture a success, but plead that he did so based on expected profit from a sale of the shares or assets of ARC or CAGC.

[18] Mr. Gill claims that he was terminated as general manager in September 2009, by which time he was owed US$178,200.00 in unpaid salary. Mr. Gill also pleads that he is owed a sum of money as reimbursement for expenses he reasonably incurred on behalf of ARC and CAGC.

[19] Mr. Gill resigned as a director of both ARC and CAGC in December 2006.

[20] In January 2007, Mr. Gill entered into an agreement with Teck to acquire the promissory note for US$30,000.00. That agreement was completed on September 15, 2011.

[21] In January 2008, Mr. Gill and Eugene signed a handwritten note which forms the written part of Mr. Gill's 4.5% Claim. Mr. Gill pleads that the overall agreement was made in part orally and partly in writing (the "2008 Agreement").

[22] The defendants deny that there was a legally binding agreement reached in 2008, and also pled that any such agreement is invalid because it was induced by fraudulent misrepresentations made by Mr. Gill.

[23] Mr. Gill pleads that in March 2009 ARC learned of his agreement to acquire the promissory note, and as a result Mr. Gill was terminated as general manager of CAGC.

[24] In September 2010, Mr. Gill was reappointed as a director of ARC and CAGC.

[25] The defendants plead that Mr. Gill was in breach of a fiduciary duty owed to ARC, and that he usurped a corporate opportunity that properly belonged to ARC when he acquired the promissory note. That issue would be of central importance if the matter went to trial, and it is pled both as a defence to Mr. Gill's claim and as part of a counterclaim.

[26] In September 2015, CAGC sold its interest in Akmola Gold to a third-party buyer, and received sale proceeds of approximately US$3 million in two instalments, in October 2015 and September 2016. It is distribution of those funds which is at the core of the disagreement between the parties.

[27] On March 10, 2016, ARC convened a meeting of its directors (the "March 2016 Meeting"). In attendance were Mr. Gill, Eugene, Alexander and a lawyer, Brent Loewen, who acted as secretary and took minutes.

[28] The meeting minutes reflect that there was a general discussion about the contributions of the three men to the project, and what their expectations were in relation to remuneration. There was then a discussion related to winding up both CAGC and ARC and distributing proceeds of the sale of ARC assets. The main sticking point to those discussions centred on the promissory note. Mr. Gill took the position that it should be honoured, by payment to his company, CMT, prior to distribution of the sale proceeds. Eugene and Alexander took a contrary position, that the note should not be repaid.

[29] The minutes also reflect that Eugene stated that there were three possible ways to resolve the impasse: "(1) a solution; (2) court proceedings; or (3) nothing is done and the proceeds of sale are not dispersed."

[30] There is minimal evidence in the application record about subsequent events and efforts, if any, to reach a solution. Each of the parties in part alleges that the other was responsible for some of the other steps necessary to winding up not being taken, such as preparation of final financial statements. From the limited evidence I have, it appears that Mr. Gill was content to do nothing, and Eugene was slightly more proactive in attempting to break the logjam. Obviously, Eugene initiated the earlier proceedings which led to the direction from the Court of Appeal.

[31] There was an exchange of correspondence between lawyers, in February 2018, in which Eugene's counsel advised Mr. Gill that Eugene was no longer willing to remain idle and wished to take steps to wind up ARC. He raised the prospect of

derivative proceedings in which ARC would seek leave to commence an action against Mr. Gill for his actions in depriving ARC of the corporate opportunity to purchase the promissory note. Mr. Gill, through counsel, rejected any allegation of wrongdoing, and raised a limitation defence to any such action.

[32] Eugene filed the petition seeking directions concerning winding up of ARC in January 2020.

[33] As noted, pursuant to a direction from the Court of Appeal, Mr. Gill filed his NOCC on September 16, 2022.

[34] The defendants filed a RTCC on November 25, 2022, and a counterclaim that same day. In the counterclaim, the defendants seek declaratory relief and damages in relation to the promissory note, claiming that Mr. Gill breached his fiduciary duty and usurped a corporate opportunity. The defendants also seek a declaration that the 2008 Agreement was induced by fraudulent misrepresentations, an order for rescission of that agreement, plus costs and interest.

Discussion

[35] Before turning to the merits of the defendants' application, I should address a preliminary procedural issue. The primary relief sought in the notice of application is that all of the plaintiffs' claims be struck pursuant to R. 9-5(1)(a) of the *SCCR*. However, in the "Legal Basis" section of the application, the defendants also rely on Rules 9-6 and 9-7 of the *SCCR*, the rules governing summary judgment and summary trial.

[36] The written argument filed by the defendants is silent as to R. 9-5, and seeks that the claims be dismissed, not struck. In my view, that is the appropriate relief. It would be a rare case where the applicability of a limitation defence was sufficiently plain and obvious that it would justify striking a claim without reference to any evidence.

[37] The plaintiffs do not submit that they were in any way prejudiced by the reliance on striking their claims in the notice of application, and only secondary

reliance on the summary judgment/trial procedures. That being so, I will proceed to consider the summary trial procedures. In my view, the question of the applicability of the limitation defences advanced by the defendants is suitable for summary disposition. I can find the facts necessary to summarily address the limitation defence, and do justice between the parties.

The Unpaid Wages/Expenses Claim

[38] This claim is comparatively straightforward. Mr. Gill concedes that this claim is statute barred, unless he can make out a case for promissory estoppel.

[39] Issue was joined over the availability of promissory estoppel to relieve against statutory limitation periods, based on comments made in *Chan v. Lee (Estate)*, 2004 BCCA 644 at para. 29. I need not consider this interesting question. Assuming that promissory estoppel is available to Mr. Gill, his claim in that regard fails for want of proof.

[40] The only evidence on this score is at paras. 4–7 of Mr. Gill's affidavit filed on this application. There, he deposes that in 2010—prior to returning to ARC and CAGC—Mr. Gill and Eugene had several discussions about that topic. Mr. Gill says that Eugene assured him that ARC would not dispute Mr. Gill's entitlement to be paid on the promissory note. Regarding the Unpaid Wages/Expenses Claim, Mr. Gill deposes: "at no time did Eugene suggest or say that no amounts were owing to me on account of expenses and salary." Based on the totality of the discussions, Mr. Gill says that he:

> was left with the impression that the only issue related to the amount of the expenses and salary, not my entitlement to expenses and salary. I took these discussions as an assurance that I would be paid the expenses and salary owing to me.

[41] Mr. Gill also deposes that there was discussion of his claim for remuneration at a meeting in 2016, which I infer must be the March 2016 Meeting. Mr. Gill states that at that meeting, Eugene asked for a copy of the contract for remuneration, "which I provided later."

[42] The minutes reference a discussion on that topic, and state that Mr. Gill would "provide the email" which set out the agreement regarding remuneration.

[43] There is no agreement in evidence, nor does Mr. Gill provide any explanation for its absence.

[44] In order to make out a claim for promissory estoppel, Mr. Gill must establish the following:

a) The other party, by words or conduct, made a promise or assurance which was intended to affect the parties' legal relationship, and intended to be acted upon; and

b) In reliance on the representation, the party to whom it was made acted on it or in some way changed their position.

See *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57, 1991 CanLII 58.

[45] On the totality of the evidence, I cannot find a promise or assurance made by Eugene sufficient to satisfy the first requirement. Mr. Gill only deposes that it was his "impression" that Eugene did not dispute his entitlement to remuneration. Mr. Gill does not point to any clear admission of liability made by Eugene.

[46] Moreover, in order to waive or extend the limitation period, the admission of liability must be intended by the admitting party to affect the parties' legal relations (*Maracle* at 58–59).

[47] It seems clear from all the evidence that, in the course of a discussion about contributions to the project and entitlement to be compensated for same, Mr. Gill took the position that his right to remuneration was memorialized in writing, either in a contract or email. Eugene apparently wished to see written documentation. In those circumstances, I cannot infer a clear admission of liability, and certainly not one which was intended to extend a limitation period or waive a potential limitation defence.

[48] For those reasons, Mr. Gill's Unpaid Wages/Expenses Claim is statute barred, and must be dismissed.

The Promissory Note Claim

[49] The Promissory Note Claim is the most difficult to decide. Eugene submits that this claim is clearly statute barred, based on the provisions of the current *Limitation Act*, which came into force June 1, 2013. Section 6(1) of the *Limitation Act* sets out the basic limitation period of two years from the day on which the claim is discovered.

[50] Discoverability is addressed in s. 8 of the *Limitation Act*, which states:

> Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
>
> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[51] Eugene submits that during the March 2016 Meeting, Mr. Gill clearly discovered his claim. At that meeting, Eugene clearly advised Mr. Gill of his position that the note was not payable to Mr. Gill.

[52] Mr. Gill advances two arguments in relation to the Promissory Note Claim. First, he submits that the amount owing pursuant to the note is not yet due, because the amount is not "calculable." This argument is based on a term of the note which stipulates that: "in no event may Teck collect any amount owing under this Note until the amount owing under the Note is calculable under [clause] 1."

[53] Second, Mr. Gill submits that because this is a breach of contract claim, where in essence there has been an anticipatory breach by Eugene, the limitation clock has not yet begun to run. Mr. Gill submits that he has not accepted Eugene's

repudiation of the contract, and thus the contract remains a living legal entity. The cause of action has not crystallized.

[54] The first argument is without merit. The promissory note contained a term which stated that it bore no interest, and that payment of the principal amount would commence on the earlier occurrence of two potential triggering events. One of those was if CAGC sold its interest in Akmola. The parties agree that CAGC has done so.

[55] The note then had a method of calculating the division of sale proceeds, based on the "net proceeds", which is defined as the sale proceeds minus the actual costs of ARC for maintaining the mineral license. If the net proceeds exceed US $1,250,000, the note holder (Teck at that time) would be entitled to 50% of the net proceeds. If the net proceeds were less than US $500,000, Teck would receive 75%. If the net proceeds were between US $500,000 and US $1,250,000, Teck would receive 66%.

[56] The next term stipulated that the maximum to which Teck was entitled is US $1,000,000.

[57] Finally, the note contained the term which stated that Teck could not collect any amount due under the note until the amount owing was "calculable."

[58] "Calculable" simply means "able to be measured or assessed." Clearly, the amount owing to the note holder is capable of being assessed. The calculation requires ARC to account for its costs in maintaining the mineral license in order to arrive at the net proceeds. The terms of the note then require that the note holder receive a percentage of the net proceeds, to a maximum of US $1,000,000, according to the formula set out above.

[59] If Teck still held the note, it could insist on the calculation of net proceeds being done, and then funds could be distributed. It would be an absurd result if Mr. Gill, by insisting that he was owed an indeterminate amount for wages and expenses could prolong indefinitely the calculation of net proceeds, thereby forestalling the payment on the note. That is essentially what has occurred to date.

[60] Mr. Gill's second argument, which he pressed more forcefully, is that there has been no triggering event for the limitation period to run. This submission is based, in least in part, on discoverability principles.

[61] In essence, Mr. Gill submits that he did not suffer damage at the time of Eugene's refusal to honour the note, because Mr. Gill did not accept Eugene's repudiation of the contract. I do not agree with that submission.

[62] At its core, the note was a very simple contract. It contained a somewhat complex repayment structure, and multiple potential triggering events, but in essence it was straightforward. ARC would repay an amount of money to Teck once one of the triggering events occurred and, if the triggering event was a sale, as it was here, the net sale proceeds were "calculable."

[63] The parties agree that a triggering event occurred, and I have found that the sale proceeds were calculable. At the March 2016 Meeting, Mr. Gill demanded repayment on the note. The defendants refused. At that juncture, there was no contract to keep alive. Mr. Gill had suffered a loss, assuming he was entitled to repayment in law.

[64] In addition, Mr. Gill knew that court proceedings were an appropriate means to remedy his loss. Eugene made that clear during the March 2016 Meeting, as reflected in the minutes. I reiterate, Eugene noted three possible outcomes:

> "a solution" (I take that to mean negotiated resolution);
> "court proceedings";
> "nothing is done and the proceeds of sale are not dispersed."

[65] The next note in the minutes states: "Eugene expressed a desire to reach a solution and [Mr. Gill] agreed."

[66] It is very clear that Mr. Gill knew that if the parties did not reach a negotiated settlement, he would be required to sue to enforce the promissory note. His only other alternative was to do nothing, which is the option he apparently chose. In so doing, Mr. Gill risked his claim becoming stale and statute barred. The law is clear

that the primary rationale for limitation statutes is to prevent parties from "sleep[ing] on their rights": *M.(K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 30, 1992 CanLII 31.

[67] It is also clear that, at least as of February 2018, one month before the expiry of the two-year limitation period, Mr. Gill was aware of the basic law of limitations. The letter from his lawyer to Eugene's lawyer makes that plain. The letter notes that any action by ARC based on breach of fiduciary duty in Mr. Gill acquiring the note would be statute barred.

[68] The exchange of letters between lawyers in early 2018 would have clearly alerted Mr. Gill to Eugene's position that Mr. Gill was not entitled to repayment on the note, and that legal action would be required to enforce the note. Thus, February 2018 is the very latest date by which Mr. Gill could have discovered his claim.

[69] It is unclear why Mr. Gill chose to do nothing, until his hand was forced by the direction of the Court of Appeal, but in failing to commence an action in a timely way, Mr. Gill took a risk that his claim would be barred by the passage of time. That risk has now materialized, and I dismiss the Promissory Note Claim. The two-year limitation period commenced in March 2016, or at the latest, February 2018, and had long expired prior to Mr. Gill commencing this action.

The 4.5% Claim

[70] I reach a different conclusion in relation to the claim of Mr. Gill that he is entitled to an additional 4.5% of the net proceeds of the ARC disposition. For that claim, the limitation period has not yet commenced.

[71] Unlike the Promissory Note Claim, Mr. Gill had not, prior to this litigation, demanded payment of his claim under this agreement. It was not discussed at the March 2016 Meeting.

[72] Moreover, the only reasonable interpretation of this agreement is that it entitles Mr. Gill to an additional 4.5% of what would otherwise be a 50/50 split of net proceeds of ARC assets at time of final distribution. That calculation would occur after any other required calculations. Mr. Gill's claim would only crystallize once ARC

had done its final accounting, paid all third-party claims, and the sale proceeds were ready to be distributed among the shareholders. None of those events has yet occurred.

[73] In his NOCC, Mr. Gill seeks declaratory relief that he is entitled, pursuant to the 2008 Agreement, to an additional 4.5% of the ARC proceeds, at the time those funds are distributed to the shareholders. That is a claim based on a future event, and thus no limitation defence applies.

[74] Mr. Gill's 4.5% Claim may proceed to trial. That portion of the present application is dismissed.

Conclusion

[75] This judgment disposes of the majority of Mr. Gill's action, and almost all of the counterclaim. However, a small portion of the counterclaim remains, where it is alleged that if there was an agreement reached in 2008, it was induced by fraudulent misrepresentations made by Mr. Gill.

[76] Thus, if the remaining claim proceeds to trial, there will need to be amended pleadings.

[77] In summary, the Unpaid Wages/Expenses Claim is dismissed. The Promissory Note Claim is dismissed. The counterclaim related to the Promissory Note Claim is dismissed. What remains is the 4.5% Claim of Mr. Gill based on the 2008 Agreement that he is entitled to an additional 4.5% of the distribution of ARC proceeds, and the counterclaim of Eugene alleging fraudulent misrepresentation in relation to that agreement.

[78] Eugene has been substantially successful on this application, and he is entitled to costs of this application at Scale B.

"Tammen J."