IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Millgate Limited v. Plaza 500 Hotels Ltd.,* 2023 BCSC 1808

Date: 20231016
Docket: S193148
Registry: Vancouver

Between:

Millgate Limited, Penrose Properties Limited

Plaintiffs

And:

Plaza 500 Hotels Ltd.

Defendant

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiffs:	T. Louman-Gardiner M.K. Shergill
Representative for the Defendant Company, appearing in person:	A. Popat
Place and Dates of Hearing	Vancouver, B.C. April 12-14, 2023
Place and Date of Judgment:	Vancouver, B.C. October 16, 2023

Introduction

[1] The plaintiffs, Millgate Limited ("Millgate") and Penrose Properties Limited, ("Penrose") apply for judgment on a summary trial. They seek judgment in the amounts of $13,411,544.24 CAD and $324,952.04 USD and the payment of funds (the "Funds") out of court, which arose in a foreclosure proceeding. The key issue is whether the plaintiffs advanced the funds to the defendant, Plaza 500 Hotels Ltd. ("Plaza 500"), pursuant to loan agreements made in 2004 and amended in 2012 ("the Loan Agreements"), or whether the funds were agreed to be equity such that they are not repayable.

[2] The underlying context of this proceeding is a long-standing and global dispute primarily between two brothers, Azim Abdulkarim Chatur Popat ("Azim Popat"), one of the directors of Plaza 500, and his younger brother, Adil Abdulkarim

Chatur Popat ("Adil Popat"), over the estate of their father, Abdulkarim Chatur Popat's ("AKC Popat").

[3] The Funds arise from the sale of a mixed-use commercial and high-rise residential rental tower located at 500 West 12th Ave, Vancouver (the "Property") in a foreclosure proceeding commenced by Institutional Mortgage Capital Canada Inc. ("IMC") on March 22, 2019. Prior to IMC's foreclosure proceeding, the Property was owned by the defendant. After IMC's mortgage (the "First Mortgage") was paid in full as a result of the sale, the balance of $8,168,606.31 CAD was paid into court.

[4] On March 9, 2021, Master Cameron heard and rendered a decision on an application by Millgate and Penrose for an order that the Funds be paid out of court to their counsel. In oral reasons, indexed at 2021 BCSC 582, Master Cameron was not satisfied on the evidence before him whether the advances should be classified as debt or equity. As a result, he found that the petition should be converted into an action and noted as follows:

> [15] Counsel were agreed that the leading authority on the question as to whether or not a triable issue has been raised such that a petition should be converted to an action is *Boffo Developments v. Pinnacle*, 2009 BCSC 1701 at paras. 48 to 51:
>
> > [48] The dominant principle is that the Court should exercise its discretion under the rule to convert a petition into trial where there is a *bona fide* triable issue that cannot be determined by reference to the documents, and would affect the outcome of the proceeding. A *bona fide* triable issue arises where on the evidence before the Court there is a dispute as to facts or law which raises a reasonable doubt or suggests there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith*, [1991] B.C.J. No. 484 (C.A.). The threshold is, appropriately, a relatively low one.
> >
> > [49] The authorities indicate a tendency of the Court to convert a summary process to a full trial where serious and disputed questions of fact or law are raised. However, the mere existence of a *bona fide* triable issue may not, of itself, be enough to warrant conversion to the trial list. If lesser measures will suffice, such as ordering cross-examination on affidavits, or even more broadly, and allowing some document disclosure, then the Court may decide against exercising its discretion to order conversion even where a *bona fide* triable issue is present: *Woodward's Ltd. v. Montreal Trust Co.*, (1992) 69 B.C.L.R. (2d) 348 (S.C.); *Canada Trust Co. v. Ringrose*, [2008] B.C.J. No. 1790, 2008 BCSC 1268. That would be especially likely where

practical considerations such as costs and timeliness militate against ordering a conventional trial.

[50] On this point I would add that the Court ought to be cautious in making orders which have the objective of addressing the resolution of a *bona fide* triable issue through the creation of a hybrid proceeding that permits certain pre-trial and trial mechanisms to the parties, but denies them others. Where the driving underpinning for such an approach is largely one of practicality, it strikes me there is a very real risk of diminishing returns where the summary process is expanded to allow the filing of additional lengthy affidavits, cross-examination on affidavits and possibly a broader scope of cross-examination, selective document disclosure, and other features of the trial process. At some point, the process that looks like a trial, should be a trial.

[51] In *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, Dardi J. surveyed the leading authorities, including *Haagsman*, and conveniently summarized the well-settled factors the Court is to consider in determining whether to order conversion to an action. They are:

> (a) the undesirability of multiple proceedings;
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> (b) the desirability of avoiding unnecessary costs and delay;
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> (c) whether the particular issues involved require an assessment of the credibility of witnesses; and
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> (d) the need for the Court to have a full grasp of all the evidence; and
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> (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

[16] Based on the evidence before me and the submissions of counsel, I have concluded in this case that factors (c), (d) and (e) apply. Credibility will be central to the determination on the merits as M and P rely on clear loan and security documentation and Plaza 500 relies upon oral evidence to support a conclusion that the advances were to record equity contributions made by family through a closely held corporate structure including M and P.

[17] Factor (d) requires the court to have a full grasp of all of the evidence. I am not left with that complete and satisfactory grasp on all of the evidence to make a summary determination as to the validity of the mortgage.

[18] Factor (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve a dispute. In this case all of that process will ensure that all of the relevant evidence is tested and a determination can be made as to whether or not this is a debt or equity arrangement.

[5] Since July 2022, Azim Popat has been acting on behalf of Plaza 500 in this proceeding without the assistance of a lawyer. He claims that one of the reasons he has done so is that he has not been in a position to receive funds that are lawfully due to him.

[6] For the reasons below, some of which mirror the same concerns that Master Cameron had, I decline to grant the summary trial as requested by the plaintiffs.

Background

Parties and other individuals

[7] Millgate and Penrose are both companies incorporated under the laws of the British Virgin Islands.

[8] The companies are owned by offshore trusts (the "Guernsey Trusts"). Millgate, Penrose, and the Guernsey Trusts are part of a complex web of offshore structures that were established and settled by AKC Popat to hold wealth and manage the movement of capital and investments internationally. The Louvre Trust (Guernsey) Limited ("Louvre Trust") is the trustee of the Guersey Trusts.

[9] Plaza 500 is a company incorporated under the laws of British Columbia. Azim Popat and his wife, Yasmin Popat, are directors of Plaza 500. Both Millgate and Penrose are shareholders of Plaza 500.

[10] AKC Popat and Gulzaar Abdulkarim Chatur Popat ("Gulzar Popat") were married and had four sons. The three surviving sons are Azim Popat, the eldest son, Alnashir Abdulkarim Chatur Popat ("Alnashir Popat"), the middle son, and Adil Popat, the youngest son. The fourth son, Zulfikar Popat, was killed in a car crash in 1971.

[11] Jameel Popat is the son of Azim Popat and Yasmin Popat.

[12] AKC Popat made a will on May 15, 2008. He died on March 2, 2013.

[13] Aziz Harji was AKC Popat's financial advisor.

History of Alleged Loans

[14] Azim Popat claims that his father made advances to Plaza 500 from July 1995 to October 2011 either directly to Plaza 500 or to 406326 B.C. Ltd., a related company, or by routing though Penrose and Millgate.

[15] On October 22, 2004, the parties entered into a loan agreement (the "2004 Loan Agreement") which provided for a loan from Millgate to Plaza 500 in the principal amount of $6,391,544.24 CAD, and a loan from Penrose to Plaza 500 in the principal amount of $3,500,000 CAD. The plaintiffs claim that the 2004 Loan Agreement was to pay for operating expenses to run the Property as a hotel.

[16] Azim Popat says that he set up the 2004 Loan Agreement based on advice from two financial advisors for tax planning purposes to secure the capital contributions made by AKC Popat and repatriate profits as interest. Plaza 500 admits it received the funds; however, Azim Popat argues that the advances were not loans to pay for operating expenses, but rather, the advances were to "secure funds that had already been invested before October 22, 2004." Further, he says that the funds were advanced by his father, AKC Popat, and merely recorded as being from the plaintiffs.

[17] The 2004 Loan Agreement provided the following in para. 5 under the heading "Security":

> **5.1** General. As security for the Loans, the Borrower shall provide the Lenders with the following:
>
> > (a) a mortgage in the Borrower's fee simple interest in [the Property];
> >
> > (b) a general security agreement granting the Lenders a security interest in all the present and after-acquired personal property of the Borrower.
>
> **5.2** Subordination. The Lenders agree to execute priority agreements, subordination agreements, postponement agreements and any other similar agreement that may be requested by any third-party lender in connection with a financing being provided by such third-party lender to the Borrower.

[18] On October 22, 2004, Azim Popat, on behalf of Plaza 500, executed a mortgage to the plaintiffs securing the sum of $9,891,544.24 (the "Second Mortgage"). The Second Mortgage was registered against the Property. The Second Mortgage terms included:

> **4. REPRESENTATIONS AND COVENANTS**
>
> **4.1 General**. The Mortgagor represents and warrants to the Creditor that each statement made in this Mortgage is true, complete and accurate. No investigation by the Creditor will diminish its right to rely on such statements, all of which will survive until the Creditor has discharged this Mortgage. The Mortgagor will strictly observe and perform each of its agreements set out herein except to the extent that the Creditor, may from time to time in its absolute discretion, by prior written notice, consent otherwise or waive such compliance.
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> …
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> **8. INTERPRETATION**
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> …
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> **8.6 Entire Agreement.** The Creditor has not made any representation or agreement or undertaken any obligation in connection with the subject matter of this Mortgage other than as specifically set out herein and in any other document executed by the Creditor.

[19] Azim Popat says that in 2006, Mr. Harji advised AKC Popat not to pay profits out via interest as that could cause problems with the Canadian Revenue Agency, and so he created an addendum to remove interest from the 2004 Loan Agreement.

[20] Between 2004 and 2012, the plaintiffs allege that they advanced additional funds. On January 12, 2012, the plaintiffs confirmed the consolidation of all loans provided by the plaintiffs to the defendant between 2002 and 2011, including those provided under the 2004 Loan Agreement. The parties agreed that new loan agreements would supersede the 2004 Loan Agreement and consolidate all the loans.

[21] Azim Popat explains that the reason for this was to protect the funds from creditors since Plaza 500 Hotel was encountering problems during the renovations including the discovery of asbestos and mould.

[22] On February 6, 2012, the parties executed the new loan agreements consolidating the loans (the "2012 Loan Agreements"). The parties also entered into an agreement to modify the Second Mortgage.

[23] On January 27, 2017, Azim Popat wrote to Penrose and Millgate seeking a "pay out statement of loans". Another request for a pay out statement was made on June 9, 2017. The statements were requested due to the pending foreclosure proceeding. The statements were provided to him.

[24] On September 6, 2017, IMC (as senior lender), the plaintiffs (as Second Mortgage lender), and Plaza 500, Azim Popat and Yasmin Popat (as loan obligors), entered into a Subordination and Standstill Agreement (the "2017 Agreement"), in which the plaintiffs, Plaza 500, Azim Popat, and Yasmin Popat represented and warranted that:

> (iv) Full and complete copies of all documents and instruments comprising, evidencing and/or securing the Second Mortgage Loan, the Second Mortgage Obligations and the Second Mortgage Loan Security have been delivered and fully disclosed to the Senior Lender prior to the date hereof. There are not terms, agreements, understandings or other arrangements of any kind (written or oral) between any Loan Obligator and the Second Mortgage Lender relating to, amending or otherwise affecting all or any part of the Second Mortgage Loan, the Second Mortgage Loan Obligations and/or the Second Mortgage Loan Security except as otherwise expressly disclosed to the Senior Lender prior to the date hereof;

[25] In other words, Plaza 500, Azim Popat and Yasmin Popat warranted that there were no other agreements between themselves and Millgate and Penrose relating to the Second Mortgage.

[26] In total, the plaintiffs assert they advanced funds totalling $13,411,544.24 CAD and $324,952.04 USD (the "Advances"). In the financial statements of Plaza 500, the Advances were recorded as shareholder loans from the plaintiffs. Azim Popat says that the amounts were termed as loans on instructions from his father, for the purpose of shielding the equity from creditors.

Foreclosure Proceeding [S193148] (the "Foreclosure Proceeding")

Background

[27] On June 12, 2020, Justice Fitzpatrick issued reasons, indexed at 2020 BCSC 888, which are instructive on the background of the Foreclosure Proceeding.

[28] On July 7, 2017, IMC and Plaza 500 entered into a commitment letter by which IMC agreed to lend Plaza 500 $62 million CAD. On September 8, 2017, Plaza 500 granted the First Mortgage against the Property in favour of IMC.

[29] On November 1, 2018, Plaza 500 failed to pay the required monthly amount due under the First Mortgage. Plaza 500 made two payments in November and December 2018; however, those payments did not cure the default. Since then, Plaza 500 has made no payments to IMC.

[30] In the fall of 2018/spring 2019, Plaza 500 made efforts to refinance and sell the Property, without success.

[31] On March 22, 2019, IMC filed the foreclosure action.

Sale of the Property

[32] On June 3, 2019, Master Taylor granted an *Order Nisi* with a redemption period to expire on November 8, 2019. IMC's mortgage was not redeemed by this date.

[33] On December 4, 2019, IMC applied for a Conduct of Sale Order in respect to the Property which was granted, see reasons indexed at 2019 BCSC 2247.

[34] IMC applied to approve the sale of the Property. The sale was opposed by Plaza 500, Azim Popat, Yasmin Popat, Millgate, Penrose and Firefly Fine Wines & Ales Ltd. ("Firefly"). Firefly operated a beer and wine store on the Property pursuant to a commercial lease. Azim Popat is a director and officer of Firefly.

[35] There were a number of competing bids for the Property which were assessed by the Court. Justice Fitzpatrick approved of the sale of the Property for $82.5 million, in reasons indexed at 2020 BCSC 888.

[36] With respect to the amounts owing to the various parties as follows, Fitzpatrick J. characterized the financial landscape as follows:

> [30] The financial amounts owing to the various parties are somewhat (or in one case, very much) in flux; however, the parties, the respective amounts owing to them and their respective priority positions can be summarized as follows:
>
> a) First, the Crown: the parties agree that the Crowns' deemed trust claim of approximately $2.1 million presently has priority; however, this priority is subject to a possible reversal if a bankruptcy order is granted in respect of Plaza. Millgate/Penrose appear to be mulling over this potential strategy now;
>
> b) Second, IMC: owed over $70 million with respect to principal, interest, protective disbursements and legal fees. In addition, a sale will result in substantial real estate commissions. In the event of a sale, the total amount owing to IMC, including the present debt and associated costs of a sale, is in the range of $71-72 million;
>
> c) Third, Millgate/Penrose: given the uncertainty with respect to the issues raised by Plaza and the Popats, this amount could be Zero, $14 million or $22.2 million;
>
> d) Fourth, Leo Montis: owed approximately $3 million; and
>
> e) Fifth, the remainder of funds, if any, would flow to Plaza in respect of its equity position.
>
> [31] Accordingly, the agreed upon priority debt in the event of a sale – owing to the Crown and IMC – totals approximately $74 million. Assuming approval of the 124 Offer #3 or the Centurion Offer #2 ($82.5 or $81.5 million), that leaves approximately $7.5-8.5 million for the subordinate interests. Given the substantial uncertainty relating to the amount of the Millgate/Penrose debt, any of those interests – Millgate/Penrose, Leo Montis and Plaza – could be a potential beneficiary of those monies.

[37] Millgate and Penrose asserted that they were owed approximately $14 million CAD, plus interest, for a total claim of $22.6 million CAD. Plaza 500 denied that any monies were owing to Millgate and Penrose under the Second Mortgage.

[38] As a result of the sale, the First Mortgage was paid in full and the balance of $8,168,606.31 CAD was paid into court.

Dispute Over the Distribution of the Funds

[39] Millgate and Penrose, applied to pay the money out of court. On March 9, 2021, at the request of Plaza 500, Master Cameron ordered that the matter be converted into an action.

[40] On April 1, 2021, the plaintiffs filed the Notice of Civil Claim.

[41] On April 29, 2021, counsel for the plaintiffs wrote to the directors of a company called 535122 Ontario Limited (“535”) advising that there is litigation in British Columbia between Azim and Yasmin Popat and Penrose and Millgate. Millgate and Penrose, together, held all the Class “C” common shares in the issued and outstanding capital of KBK No. 85 Ventures Ltd. (“KBK No. 85”), which was the majority shareholder of 535. KBK No. 85 is a parent company of Plaza 500. Counsel requested that no distributions be made by 535 to any shareholders without notice to the plaintiffs.

[42] Azim Popat asserts that as a result of this letter he was prevented from receiving funds lawfully due to him which he could have used to retained lawyers and pursue his rights. At the hearing, counsel for the plaintiffs advised that the reference to litigation between Azim and Yasmin Popat was made with respect to their roles as directors of Plaza 500. I simply note that is not what the letter says and as of April 29, 2021 there was no existing litigation in British Columbia involving Azim and Yasmin Popat and Penrose and Millgate.

[43] On May 20, 2021, Plaza 500 filed its Response to Civil Claim. In the response, Plaza 500 asserts that:

> 22. The documents memorializing and securing these advances, including the 2nd Mortgage, were prepared by Plaza 500’s solicitors at the direction of Azim for the purpose of protecting and preserving the Popat family’s equity investment in Plaza 500.

> 25. At all material times Penrose and Millgate understood and agreed that the 2nd Mortgage did not secure any payment obligation and was prepared and executed in accordance within an overall wealth preservation and investment strategy and the use of the Offshore Entities for the benefit of AKC Popat and the Popat family.

[44] On July 26, 2021, the plaintiffs served a demand for particulars with respect to certain paragraphs of the Response to Civil Claim, including para. 25.

[45] On November 3, 2021, the plaintiffs filed a notice of application seeking better particulars with respect to the same paragraphs referred to in the July 26, 2021 demand for particulars. On November 19, 2021, the plaintiffs obtained an order that the further particulars be provided. The defendant did not appear at this application.

[46] On January 28, 2022, the parties appeared before Master Muir and a case plan order was made requiring the following:

- The defendant to answer the demand for particulars by 4:00 p.m. on January 31, 2022;
- The defendant to deliver a list of documents by February 22, 2022;
- The plaintiffs to deliver an amended List of Documents within 30 days of delivery of the particulars by the defendants;
- Examinations for discovery to be completed by August 30, 2022; and
- Any written discovery requests to be delivered with 45 days of written requests by the examining party.

[47] On January 31, 2022, the defendant provided its reply to the demand for particulars. In answer to the particulars sought of para. 25, the following response was provided:

> 3. Concerning the allegation at paragraph 25 of the Response to Civil Claim that Penrose and Millgate “agreed that the second mortgage did not secure any payment obligation”:

> (a) The agreement was made orally and in writing, as well as th[r]ough the parties conduct over a 16 year period between around 1998 and 2014.
>
> (b) The underlying dealings at issue comprise numerous advances made at the direction of A.K.C. Popat, which were later recorded through the execution of the 2004 mortgage documents, subsequently amended by the execution of the 2012 mortgage documents.
>
> (c) A.K.C. Popat entered into the agreement and made the underlying advances.

[48] On July 12, 2022, Azim Popat filed a notice of intention to act in person.

[49] On July 28, 2022, the plaintiffs filed a notice of application to compel Azim Popat to attend a discovery on August 22, 2022. The application was returnable on August 11, 2022. On August 11, 2022, Master Muir ordered Azim Popat to attend the discovery.

[50] On August 22, 2022, Azim Popat attended at an examination for discovery. The plaintiffs' counsel made requests for additional information or answers to questions he could not answer at the examination (the "Requests").

[51] On October 10, 2022, Azim Popat provided his responses to the Requests in an email to plaintiffs' counsel.

[52] On November 9, 2022, the plaintiffs filed a notice of application to compel the defendant to provide answers to the Requests, some of which remained outstanding. On November 24, 2022, Master Vos ordered the defendant, through Azim Popat, to respond to the outstanding requests by December 19, 2022 (the "Vos Order").

[53] On December 19, 2022, Mr. Popat responds to each of the itemized questions posed. In some responses he stated he was unable to locate the information requested, did not have the information requested, would not produce the information requested because it was not relevant, or the information requested should be sought from a third party. No documents were produced.

Consolidation and Summary Trial Applications

[54] On January 4, 2023, the plaintiffs filed this summary trial application. The hearing was set for February 3, 2023. On February 3, 2023, at 12:00 a.m., Azim Popat emailed his affidavit ("Affidavit #5") to counsel for the plaintiffs. The affidavit did not comply the *Supreme Court Civil Rules* [*Rules*] in form nor timing of service. The same day, he also filed an application response and provided the Court and counsel for the plaintiffs a copy at the start of the hearing. The parties appeared before Justice Blake who adjourned the plaintiffs' summary trial application on the following terms (the "Blake Order"):

> 1. The hearing of the Plaintiffs application filed January 4, 2020 is adjourned to April 12, 13 and 14, 2023.
> 2. Mr. Azim Popat ("Mr. Popat") is to re-swear his affidavit, sworn February 3, 2023 in the proper form required by our Rules of Court, including to have the exhibits to the affidavit properly sworn and exhibit pages numbered. Mr. Popat shall deliver a filed copy of his re-sworn affidavit to counsel for the Plaintiff[s] by February 13, 2023;
> 3. The Defendant shall provide a fulsome response to the documents required to be produced by Master Vos pursuant to the Order pronounced November 24, 2022, and shall provide a further List of Documents on or before February 13, 2023.
> 4. Mr. Popat shall file and serve an affidavit verifying the Defendant's List of Documents on or before February 13, 2023.
> 5. If the Defendant wishes to bring an application to have action numbers S-182964, S-193148 and S-222850 consolidated or in the alternative heard at the same time, the Defendant must file and serve no later than March 6, 2023, and the application must be heard no later than March 30, 2023;
> 6. The adjournment to April 12, 13 and 14, 2023 is peremptory upon the Defendant.
> 7. The Defendant must file any responding materials in this summary trial application no later than March 6, 2023, and the Plaintiffs must file any reply materials no later than March 27, 2023; and
> 8. Costs of today will be determined by the judge hearing the summary trial;
> 9. Mr. Popat's signature on this order is dispensed with. Counsel for the Plaintiff shall provide Mr. Popat with an entered copy of the order as soon as it is received.

[55] On February 22, 2023, counsel for the plaintiffs wrote to Azim Popat advising that he had failed to comply with certain terms of the Blake Order. Azim Popat says that he only received a copy of the Blake Order on February 22, 2022 when it was

filed on February 14, 2023. It is not clear to me why there was a delay between February 14, 2023, when the Blake Order was filed, and February 22, 2023, when it was provided to Mr. Popat. The Blake Order required that counsel for the plaintiffs provide Mr. Popat with an entered copy of the order as soon as it is received. That said, Azim Popat should understand that an order of the court speaks from the date of pronouncement and not the date the formal order is filed in court.

[56] On February 28, 2023, Azim Popat served counsel for the plaintiffs with a filed copy of Affidavit #5 by email, but did not serve any of the exhibits referenced in it. Azim Popat agrees that he swore and served Affidavit #5 late, but he made his best efforts after receiving a copy of the filed Blake Order on February 22, 2023.

[57] On March 1, 2023, Azim Popat emailed counsel for the plaintiffs a Dropbox link that contained 1,625 exhibit pages, but not the body of the Affidavit #5. The plaintiffs assert that the vast majority of the exhibits had not been previously listed on the defendant's List of Documents and no Amended List of Documents containing the exhibits has been served. Azim Popat claims that there was an Amended List of Documents provided with Affidavit #5.

[58] On March 7, 2023, the defendant filed a notice of application seeking to consolidate actions S182964, S222850, discussed later in these reasons, and the Foreclosure Proceeding (the "Consolidation Application"). This motion was returnable on March 30, 2023. In addition, the defendant sought to add the following individuals to the proceedings:

- Karima Popat, Alyana Popat, Alyssa Popat and Alykhan Popat, as beneficiaries of the Kalys Trust;
- Derek Baudains, CEO and Director of Louvre Trust and Ross Bachelet, Managing Director of Louvre Trust;
- John Miles, Adil Popat's personal lawyer and agent;
- Atiq Anjarwalla, lawyer for Adil Popat and the AKC Popat Trust;

- Hassan Popat and Nagib Popat, as representative beneficiaries of the Trusts that currently own Millgate; and

- Firefly.

[59] On March 14, 2023, Azim Popat sent counsel for the plaintiffs a Dropbox link containing some of the documents and information, relating to the plaintiffs' demand for better particulars, pursuant to the Vos Order.

[60] On March 20, 2023, the plaintiffs filed an application response to the Consolidation Application.

[61] On March 29, 2023, the plaintiffs filed a notice of application seeking an Order that Affidavit #5 is inadmissible and should be struck from the Court's record. In the alternative, that any exhibits to Affidavit #5 not previously listed in the defendant's List of Documents dated February 23, 2022 be declared inadmissible. This application was returnable on April 12, 2023. At the hearing, counsel for the plaintiffs advised that he was not going to deal with this application and would object to those parts of the Affidavit #5 as necessary.

[62] On March 30, 2023 the Consolidation Application was adjourned with the Court acknowledging that it would not be possible to hear it prior to the hearing of this summary trial application.

[63] The plaintiffs' summary trial application proceeded before me on April 12, 13, and 14, 2023. The Consolidation Application was not heard at the same time.

Other Related Legal Proceedings

Breach of Contract Proceeding [S182964] ("Action 964")

[64] On February 23, 2018, Plaza 500 commenced an action seeking damages for breach of contract against Millgate, Penrose, Louvre Trust, and Adil Popat. The allegation was that the defendants had refused to sign a priority agreement, and in doing so, failed to take all actions to facilitate refinancing. In this action, the

defendant expressly pleads that Penrose and Millgate "agreed to provide a loan". Plaza 500 sought to enforce the terms of the Loan Agreements.

[65] This claim further asserts a conspiracy, intimidation, and inducement of breach of contract by the defendants to damage Azim Popat.

[66] In May 2019, after IMC had commenced the Foreclosure Proceedings, Plaza 500 had found new financing through two loans – one from Kingsett in the amount of $66 million and the other through LMV for $10 million. Plaza 500 gave notice to the defendants that they would need subordination agreements from them in order to secure this financing. Ultimately, no subordination agreement was signed.

[67] An Amended Notice of Civil Claim was filed on July 23, 2019. Plaza 500 added the allegation that the defendants had refused to sign the subordination agreements to permit these loans to proceed in breach of the 2017 Agreement. Plaza 500 sought injunctions requiring the defendants to execute the subordination and any other similar agreements as requested by third party lenders.

[68] The injunction application was heard on July 25 and 26, 2019. On July 30, 2019, in reasons indexed at 2019 BCSC 1295, Justice Murray dismissed the mandatory injunction application and ordered costs to the defendants in any event of the cause payable forthwith.

[69] It appears that no further steps have been taken in this proceeding since July 2019.

Enforcement of Arbitral Award [S228550] ("Action 550")

[70] On October 21, 2022, Adil Popat, Gulzaar Popat and Karim Anajarwalla, a co-executor of AKC Popat's estate, filed a petition against Azim Popat, Yasmin Popat, and Jameel Popat, seeking to enforce an arbitral award against Azim Popat and other members of his family. Azim Popat and his family commenced a London Court of International Arbitration proceeding no. 183895 (the "LCIA Proceeding") in 2018. The LCIA Proceeding was dismissed in 2021 and costs were awarded against Azim

Popat and other members of his family. The costs award totalled $32,518.48 USD and £21,267.85 GBP, plus interest. The petition seeks to enforce that costs award.

[71] Azim Popat claims that in the arbitration, the petitioners filed a security for costs application after the LCIA Proceeding had commenced. He claims that the LCIA did not adjudicate the respondents' claims on the merits but due to the respondents' "financially weakened situation" which resulted in their inability to post $650,000 USD as security for costs.

Legal Principles

[72] Rule 9-7(15) of the *Rules* states:

> (15) On the hearing of a summary trial application, the court may
>
> > (a) grant judgment in favour of any party, either on an issue or generally, unless
> >
> > > (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
> > >
> > > (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
> >
> > (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
> >
> > (c) award costs.

[73] The principles governing the issue of suitability for summary trial were discussed in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30–31. These factors include:

a) the amount involved;

b) the complexity of the matter;

c) its urgency;

d) any prejudice likely to arise by reasons of delay;

e) the cost of taking the case forward to a conventional trial in relation to the amount involved;

f) the course of the proceedings;

g) the cost of the litigation and the time of the summary trial;

h) whether credibility is a critical factor in the determination of the dispute;

i) whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and

j) whether the application would result in litigating in slices.

[74] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada recognized that most Canadians cannot afford the cost of a conventional trial and that a culture shift was required in order to create an environment promoting timely and affordable access to the civil justice system: at paras. 1–2. The Court endorsed the use of summary trials in appropriate cases: at para. 3. The Court stated that the relevant rules of court must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: at para. 5. The Court of Appeal of this province has endorsed the principles discussed in *Hryniak* in the context of R. 9-7(15): *Universe v. Fraser Health Authority,* 2022 BCCA 201 at para. 21; *Knight v. British Columbia,* 2021 BCCA 251 at para. 25. This is all consistent with the object of the *Rules*, as set out in R. 1-3:

> **Object**
>
> (1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.
>
> Proportionality
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[75] Suitability for summary trial is a threshold issue and judgment ought not to be given if, on the evidence, the court is unable to find the necessary facts or it is unjust

to do so: *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 89; *Cepuran v. Carlton*, 2022 BCCA 76 at para. 149.

[76] In *Universe*, the Court of Appeal (per Newbury J.A.) approved the following propositions:

> [16] Beginning with the general principles relating to the resolution of conflicting evidence in a summary trial, the judge quoted a lengthy passage from *Brissette v. Cactus Club Cabaret Ltd.,* 2017 BCCA 200, where this court summarized the modern approach to summary trial applications under R. 9-7, previously Rule 18A. Tysoe J.A. for the Court referred to comments made by Chief Justice McEachern on behalf of the majority in *Inspiration Management Ltd. v. McDermid St. Lawrence Limited* (1989), 36 B.C.L.R. (2d) 202 (C.A.) that:
>
> > …it must be accepted that while every effort must be made to ensure a just result, the volumes of litigation presently before our courts, the urgency of some cases, and the cost of litigation do not always permit the luxury of full trial with all traditional safeguards in every case, particularly if a just result can be achieved by a less expensive and more expeditious procedure. ... [At 213.]
>
> The Court in *Brissette* continued:
>
> > [Chief Justice McEachern] … did caution that a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if the judge prefers one over the other, but he pointed out that other admissible evidence may assist the judge in resolving the conflicts.
> >
> > The summary trial procedure has served the British Columbia judicial system well over the past 34 years. Its use should continue to be encouraged, and trial judges should not be timid in considering its suitability to decide the action or issues within the action. This is particularly so in light of two developments in the past number of years relating to the concept of proportionality. [At paras. 20–22.]
>
> and further:
>
> > The two prerequisites under the previous Rule 18A continue under the current Rule 9-7. The court must be able to find the facts necessary to decide the issues of fact or law and the court must be of the opinion that it would not be unjust to decide the issues. Proportionality will primarily be of importance in considering the factors relevant to the issue of whether it would be unjust to decide the matter on a summary trial application, but there may be occasions when proportionality is relevant to the issue of whether the court is able to find the facts necessary to decide the issues of fact or law (for example, the court could in an appropriate case order cross-examination on key affidavits under Rule 9-7(12) rather than dismissing the summary trial application on the basis that a conventional trial is needed).

> As noted in *Inspiration Management*, the court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. This was recently reiterated in *Cory v. Cory*, 2016 BCCA 409 at para. 10: there must be documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another. [At paras. 26–7; emphasis added.]

[17] The Supreme Court's discretion to proceed on a summary basis was also dealt with in *Placer Development Ltd. v. Skyline Exploration* (1985), 67 B.C.L.R. 366 (C.A.). There Taggart J.A. specifically endorsed certain comments from *Bank of B.C. v. Anglo-American Cedar Products Ltd*. (1984), 57 B.C.L.R. 350 (S.C.), including this passage:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient *prima facie* plausibility to merit further investigation as to their truth. [At 356; emphasis added.]

Taggart J.A. went on to note that what is now R. 9-7(11) clothes the judge with a "broad discretion" to refuse to proceed where the judge is unable to find the facts necessary to decide the issues of fact or law or if it would be unjust to decide the issues.

[Newbury J.A.'s emphasis.]

Position of the Parties

The plaintiffs

[77] The plaintiffs' position is that the issues raised in this action are straightforward and appropriate to be resolved on a summary basis and that there are few material factual issues in dispute or issues of credibility.

[78] The plaintiffs' position is that the Advances were loans and the Second Mortgage secures a debt obligation. The plaintiffs rely on the language used in the Loan Agreements, correspondence between the parties referring to the Advances as loans, including discussions related to the interest to be paid, the recording of these

Advances as loans on the defendant's financial statements, and the treatment of the loans as debts by all parties at all times.

[79] The plaintiffs argue that even if the Advances were in the form of equity, the fact remains that the 2012 Loan Agreements and modified mortgage agreement were executed and the parties have agreed to be governed by its terms.

The defendant

[80] The defendant's position is that that the action is not suitable for summary trial and that the Foreclosure Proceeding, Action 694, and Action 500 should be heard together.

[81] The defendant's position is that the Advances were in the form of equity and that the agreement to treat them as loans was on paper only. It would be unjust to the defendant to permit judgment on the Loan Agreements in light of the conflicting evidence.

[82] The defendant does not dispute the existence of the 2004 and 2012 Loan Agreements and the Second Mortgage, but submits that the plaintiffs were never the lenders since the monies were advanced by AKC Popat. The defendant argues that the Second Mortgage was executed to secure an *inter vivos* gift from AKC Popat to Azim Popat and the defendant. Azim Popat says that AKC Popat arranged to advance the funds to assist Azim Popat to acquire and operate the Plaza 500 hotel.

[83] Azim Popat argues that the funds advanced to himself and his family are "in consonance with" advancements made to his brothers from the estate AKC Popat, according to his will. Azim Popat says they were described as loans at his option. He says that he was the one that instructed Fasken, the law firm, to prepared the updated mortgage documents at the request of AKC Popat.

[84] Azim Popat says that the Advances were regarded as equity and part of the tangible net worth by external lenders and were always subordinate to the funds advanced by the external lenders.

[85] Azim Popat argues that the plaintiffs are shell companies that are controlled by “their alter ego” Adil Popat.

Analysis

[86] I note that the plaintiffs reference the decision in *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation*, 2007 BCSC 286 in which the Court held it was appropriate to determine the nature of the funds advanced from one party to the next by way of summary trial. This was a case in which the parties agreed that the main issue was suitable for disposition under previous R. 18A, on the basis that it involved a relatively straightforward liquidated debt. The parties further agreed that the materials they filed enabled the court to find the facts necessary to decide the issues in dispute and that any credibility issues could be resolved by reference to affidavit and documentary evidence: at para. 4. This is not the scenario faced in this proceeding.

[87] In this case, the issue for determination is whether I am satisfied that the evidence as a whole supports that the Advances should be characterized as loans which are repayable to the plaintiffs. After considering all of the materials filed, I find that this issue is not suitable for summary determination. It is my view that the defendant raised a dispute of fact that warrants further investigation into the surrounding circumstances of why the Advances were made. I further find that summary determination would be unjust in the circumstances.

[88] The preponderance of evidence supports a finding that some, or potentially all, of the monies that were paid originated from AKC Popat. In some cases, he advanced funds directly to the defendant or a related company and, in other cases, he used the plaintiffs to funnel the funds to the defendant. There is some support for this in emails that were sent by Adil Popat. For example, in an email from Adil Popat to Azim Popat dated March 17, 2010 it states:

> I was told by Dad that you require an additional CAD 300,000. Please let me know account details and how you want funds to enter into Canada. I will recommend we use Penrose to give funds as a loan and if this is acceptable, I have to route funds through them (Louvre) which will take 8 days or so….

[89] According to the evidence of the plaintiffs, there was a $300,000 CAD loan made by Penrose on March 26, 2010. This appears to correlate to the $300,000 CAD referenced in the March 17, 2010 email. It appears that the recommendation made was that Penrose be used as the vehicle to get the funds from AKC Popat to Azim Popat in Canada.

[90] On July 12, 2011, there is a further email from Adil Popat confirming that AKC Popat was going to send Azim Popat USD equivalent to $500,000 CAD. It appears that this sum is also reflected in the Advances that the plaintiffs claim were loaned by them.

[91] On the materials before me, it is not clear to me whether these advances, nor the others, were intended to be loans or part of an arrangement to transfer capital from AKC Popat to Azim Popat.

[92] The majority of the documentary evidence supports such a finding that the monies were provided as loans. For example:

- In the audited financial statements of Plaza 500 the Advances are characterized as loans from shareholders;
- In January and September 2017, Azim Popat requested “pay out statements of loans” from Millgate and Penrose. In reply to the requests, Millgate and Penrose provided loan balance confirmation letters;
- In a priority agreement in 2019 by which the plaintiffs subordinated their position to IMC, Plaza 500, which was a signatory to that agreement, agreed and warranted the plaintiffs made the Advances, the Second Mortgage secured the Advances, and there were no other agreements related to the Second Mortgage or the related loan obligations;
- Plaza 500 commenced Action 964 against the plaintiffs on the basis the 2012 Loan Agreements are enforceable; and

- In various communications with Penrose, Millgate and the Louvre Trust, Azim Popat refers to the Advances as loans and discusses future repayment.

[93] However, for the purposes of a summary trial determination the issue is whether the defendant has raised a conflict of evidence that has "sufficient *prima facie* plausibility to merit further investigation as to their truth": *Universe* at para. 17, citing *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.) at 20, 1985 CanLII 147. I have found that he has done so on the following basis.

[94] There is evidence before me to support that the Advances were gifts.

[95] There is some indicia in the 2012 Loan Agreements that supports that they are not loans:

- There was no interest paid on the Loans;
- There was no maturity date;
- There were no repayment terms or schedule; and
- The parties agreed that the debt would be repaid behind any senior secured lender.

[96] In addition to the evidence proffered by Azim Popat, the most persuasive evidence of this comes from Adil Popat in two affidavits he swore in other proceedings.

[97] Adil Popat swore an affidavit in an estate proceeding in the High Court of Kenya at Mombasa on December 11, 2015 in which he states**:**

> 13. I am aware that the deceased was extremely disappointed with and on several occasions expressed utter disgust at the financial decisions of Azim Popat in regard to the business interests in Canada and that for over two decades, the deceased had funded Azim's lifestyle and businesses to the tune of millions of American dollars.

> …
>
> 17. I verily believe that the bequest to AZIM of a 25% of the deceased's shares in Simba Colt Motors Limited took into account the fact that the deceased did not desire to give AZIM any control of the company and also took into account the millions of dollars sent to AZIM in Canada over the years.

[98] Adil Popat swore a further affidavit in a proceeding commenced by Alnashir Popat against Adil Popat, Azim Popat, and the Louvre Trust in the Royal Court of Guernsey on January 24, 2019. At para. 46 he states:

> My father was very generous in making gifts to his sons during his lifetime. I do not have comprehensive documentary or other evidence but, from my conversations with my father, brothers and others I believe these gifts included the following:
>
> To the Second Defendant: [Azim Popat]
>
> (1) a house in Richmond, Vancouver;
>
> (2) a house in Burnaby, British Columbia;
>
> (3) a flat in Putney, London;
>
> (4) funds by way of loans for Plaza 500 and his Maple Ridge business in Canada;
>
> (5) a flat for the Second Defendant's son, Jamal (worth CAD289,000), in London;
>
> (6) The Second Defendant refused US$500,000 in cash offered to him by my father at some stage. …

[99] The plaintiffs assert that they advanced the funds to Plaza 500 as loans. Yet affidavit evidence of Adil Popat appears to support that at least some of the funds were gifted to the defendant by AKC Popat. If so, this has a significant impact on the merits of the plaintiffs' claims in the Foreclosure Proceeding. If the Advances were gifts by the father, it is not clear to me why the plaintiffs are entitled to the Funds when they did not advance the monies. In my view, this will have to be for a trial judge to decide.

[100] It is clear that this was not typical arms-length loan agreements made, but related to an arrangement made by a family to determine how the monies advanced by a father to his son should be treated. The approach set out in *Tudor Sales Ltd. (Re)*, 2017 BCSC 119 [*Tudor*] is helpful:

> [35] These purported loans having been a non-arm's-length transaction, I am guided by the description of the court's role in characterizing, or re-characterizing, such payments, as recently set out by Justice Wilton-Siegel in *U.S. Steel:*
>
> > [167] Where … the parties are not at arm's length, the issue is not what the parties say they intended regarding the substance of the transaction as a matter of contractual interpretation. The expressed intention of the parties is clear. However, given the absence of any arm's length relationship, there can be no certainty that the language of the agreements reflects the underlying substantive reality of the transaction. Accordingly, the issue for a court is whether, as actually implemented, the substance of the transaction is, in fact, different from what the parties expressed it be in the transaction documentation.
> >
> > [168] In other words, the task of a court is to determine whether the transaction in substance constituted a contribution to capital notwithstanding the expressed intentions of the parties that the transaction be treated as a loan. It is therefore not appropriate to limit the inquiry into the intentions of the parties to a review of the form of the transaction documentation. Such an exercise reduces to a "rubber stamping" of the determination of a single party to the transaction, i.e., the sole shareholder, and it does not address the substance of the transaction as it was actually implemented. In such circumstances, the determination of whether a particular claim is to be treated as debt or equity must address not just the expressed intentions of the parties as reflected in the transaction documentation but also the manner in which the transaction was implemented and the economic reality of the surrounding circumstances.

[101] The expressed intention of the parties as it is recorded in the Loan Agreements is clear; however, there is "no certainty that the language of the agreements reflects the underlying substantive reality of the transaction": *Tudor* at para. 167. Determining whether the Advances were, in substance, capital contributions made pursuant to an estate planning arrangement notwithstanding the transaction documentation, Loan Agreements and expressed intentions that they be treated as loans is an issue that a trial judge must decide with the benefit of viva voce evidence and cross-examination.

[102] The following factors set out in *Gichuru* are significant when deciding the suitability of this matter for summary disposition. The amount involved is high, with the plaintiffs seeking judgment close to $14 million and, much more, if there is an interest component granted. The plaintiffs argue that the issues are straightforward

and there are few material factual issues in dispute or issues of credibility. I disagree. The historical background of how and why AKC Popat made the Advances and the reasons for Advances being made in the fashion they were involves and understanding of the tax and financial advice that was received. It further involves a determination of what transpired at a family meeting in April 2010 and actions by Adil Popat after that date. To make the necessary findings, the credibility of Azim and Adil Popat will need to be assessed. I am unable to do so on the affidavit evidence before me.

[103] I further find that to grant the judgment and permit the payment of the Funds out of Court would be prejudicial and unjust to the defendant. To make the determination that the Advances are loans and to allow for payment out of the Funds would result in irreparable harm to Plaza 500 and Azim Popat since it is not clear to me that the plaintiffs have any assets in this jurisdiction to satisfy any potential judgment in Action 964.

[104] The plaintiffs suggest that there is no reason to delay a determination of this matter until the hearing of any other proceedings. They argue that if Azim Popat can establish an entitlement to the value of Penrose and Millgate in another proceeding, then that finding will be independent of the determination in this proceeding. The problem with that approach is that it is not clear, when dealing with companies registered in the British Virgin Islands and whom have no assets in British Columbia, how the value of Penrose and Millgate could be captured.

[105] On the other side, if the determination of this matter is delayed and the Funds remain in court, then the only prejudice to the plaintiffs, if they are ultimately successful, is a delay in the payment out of the Funds. The Funds are at no risk of being dissipated.

[106] Weighing all of these considerations, I am of the view that this matter cannot be determined summarily and it would be unjust to grant the summary trial.

Conclusion

[107] The plaintiffs' application for summary trial is dismissed with costs in the cause.

[108] I advise the parties that I am not seized with any further applications relating to this proceeding.

[109] The six volumes of application record, the plaintiffs' book of authorities, and the copy of the exhibits attached to Affidavit #5 of Azim Popat can be picked up by the parties at Scheduling, Counter 204. If they are not picked up within one week of these reasons being released the contents will be shredded.

"The Honourable Justice C. Forth"