COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Raiwal Holdings Ltd. v. Fraser Valley Packers Inc.,* 2024 BCCA 145

Date: 20240418
Docket: CA48617

Between:

Raiwal Holdings Ltd.

Appellant
(Defendant)

And

Fraser Valley Packers Inc.

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated September 26, 2022 (*Fraser Valley Packers Inc. v. Raiwal Holdings Ltd.*, 2022 BCSC 1678, Vancouver Docket H190670).

Counsel for the Appellant:	P.J. Reardon P.R. Senkpiel, K.C.
Counsel for the Respondent:	P. Roberts, K.C. D. Moonje
Place and Date of Hearing:	Vancouver, British Columbia October 17, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 18, 2024

Written Reasons by:
The Honourable Mr. Justice Butler

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Willcock

Summary:

The appellant appeals an order made in foreclosure proceedings. The appellant received funds from the respondent for the purchase and maintenance of a property to be used for blueberry farming. Starting in 2014, the appellant arranged for various forms of security for the debt to be provided to the respondent. In March 2017, the parties agreed on the terms of a mortgage, which the respondent subsequently registered when the appellant failed to make payment on the due date. At trial, the appellant's position was that it did not owe a debt to the respondent, and if it did, the claim was barred by the Limitation Act, S.B.C. 2012, c. 13. The judge rejected the appellant's position. The appellant argues that the judge erred by failing to distinguish between the limitation period applicable to the underlying debt and the limitation period applicable to the mortgage. Held: Appeal dismissed. Considering the reasons as a whole, having regard to the live issues at trial and submissions of the parties, the judge found that the mortgage was part of a new agreement. Given the judge's findings, he did not err in concluding that the limitation periods for the debt and mortgage obligations arose at the same time and that the respondent's debt claim was not statute-barred.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] The respondent, Fraser Valley Packers Inc. ("FVP"), advanced claims in a foreclosure proceeding involving a property (the "Property") in Surrey, British Columbia owned by the appellant, Raiwal Holdings Ltd. ("RHL"). A trial of the proceeding was ordered, by consent, pursuant to Rule 22-1(7) of the *Supreme Court Civil Rules*. The trial judge granted an order *nisi*, which declared that RHL was in default under the mortgage, and set the redemption amount due and owing to FVP as of the judgment date.

[2] At trial, RHL raised defences based on the complicated history of the dealings between the parties. On appeal, it raises a single issue: whether the judge erred by failing to distinguish between the limitation period applicable to the debt claim—arising from what it calls the "antecedent debt agreement" between the parties—and the limitation period applicable to the mortgage RHL granted on March 27, 2017 (the "Mortgage"). Emphasizing the dual nature of a mortgage, RHL submits that, although the limitation period applicable to the Mortgage had not expired when FVP commenced the foreclosure proceeding on September 20, 2019, the limitation period applicable to the debt claim had expired in March 2019. As the Mortgage was

collateral security for the debt agreement, it submits that the Mortgage was unenforceable because the claim in debt was no longer extant and that the trial judge erred in making the foreclosure order.

[3] For the reasons that follow, I would dismiss the appeal.

Background

[4] Mr. Balbir Singh Raiwal is the sole officer and director of RHL. Sukhminder Singh Gill, also known as Joe Gill, Malkit Singh Dhesi, and Girdip Singh Buttar are the officers and directors of FVP. Mr. Raiwal and Mr. Gill have a long history of business dealings. In early 2014, RHL, FVP, and JND Management Services Ltd. ("JND"), a company wholly owned by Mr. Buttar, entered into a joint venture agreement to acquire the Property for their joint use (the "Agreement"). The intention of the parties was to take advantage of an investment opportunity while assisting the owners of the Property, who were in financial trouble.

[5] The Property comprises more than 100 acres of land and was intended to be used for blueberry farming and processing. As part of the Agreement, FVP and JND advanced funds to RHL for the purchase of the Property with the understanding that each would receive an equity interest in the Property in the form of shares in RHL.

[6] Despite the Agreement, on March 27, 2014, RHL bought the Property for its sole benefit using the funds advanced by FVP and JND. For some time, FVP continued to advance funds to cover expenses for the Property under the understanding that Mr. Raiwal, on behalf of RHL, intended to honour the Agreement.

[7] When it became apparent that FVP and JND would not receive an equity interest in the Property, discussions between the parties centred on repayment of the funds that had been provided to RHL. The discussions continued for some time. Starting in 2014, Mr. Raiwal arranged for security for the underlying debt to be provided to FVP, and to JND, before the latter was paid out.

The 2014 mortgage

[8] On November 12, 2014, Mr. Raiwal advised Mr. Gill that he had registered a mortgage in favour of FVP and JND in the amount of $3,400,000, which was due in one year. However, no mortgage was granted to FVP. Instead, 639110 B.C. Ltd., a company owned by Sukhbinder Kaur Raiwal (Mr. Raiwal's spouse, Ms. Raiwal), executed a mortgage in favour of JND in the amount of $3,400,000. That mortgage did not purport to charge the Property; rather, it charged a property belonging to the numbered company.

[9] On March 9, 2015, RHL paid JND $1,700,000; an amount that JND had agreed to accept to discharge the 2014 mortgage. RHL did not pay any amount to FVP.

The Three Mortgages

[10] In March 2015, after continued inquiries from Mr. Gill about repayment, Mr. Raiwal arranged for his lawyers to prepare and provide three mortgages (the "Three Mortgages") in favour of FVP with principal amounts totalling $2,000,000. The mortgagors were Ms. Raiwal, RHL, and 639110 B.C. Ltd. The mortgage granted by RHL was stated to charge the Property in the principal amount of $800,000. The other two mortgages were granted on properties that were owned by Ms. Raiwal and 639110 B.C. Ltd. and were in the principal amounts of $400,000 and $800,000, respectively. All three mortgages bore interest at 10% per annum. Each mortgage was due on November 30, 2015. The Three Mortgages were prepared and executed unilaterally on Mr. Raiwal's instructions. There were no negotiations between the parties. The original signed copies of these mortgages were kept at Mr. Raiwal's lawyers' law firm and were not registered on title.

[11] From July to September 2015, Mr. Gill sent multiple requests seeking repayment of the funds advanced. He sent Mr. Raiwal a detailed spreadsheet (the "Spreadsheet") setting out all the funds FVP had advanced for the purchase and maintenance of the Property. He asked that Mr. Raiwal provide a promissory note, and that the Three Mortgages be registered. Mr. Raiwal assured Mr. Gill he would

repay FVP. However, no payment was forthcoming and the mortgages were never registered.

The promissory note

[12] On or about September 18, 2015, Mr. Raiwal signed a promissory note in favour of FVP in the amount of $2,316,585.38. It was due and payable, with 10% interest, on November 30, 2015. Nothing was paid before or after that date and no steps were taken by FVP to enforce the note.

The Mortgage

[13] Mr. Gill, on behalf of FVP, continued to seek payment of the outstanding amounts. On March 27, 2017, in the presence of his lawyer and Mr. Gill, Mr. Raiwal executed the Mortgage, which granted a mortgage interest in the Property to FVP. The Mortgage secured the sum of $2,7000,000, plus accrued interest at the rate of 7.5% per annum. The balance due date was March 31, 2019.

[14] FVP agreed not to register the Mortgage in order to enable Mr. Raiwal and RHL to seek refinancing at more favourable terms (the Mortgage did not require RHL to make periodic interest payments). When the Mortgage came due on March 31, 2019, RHL had not repaid any of the principal or interest owing. On August 6, 2019, FVP caused the Mortgage to be registered against the Property. On August 7, 2019, FVP made a demand for the amount due under the Mortgage. When no payment was forthcoming, FVP commenced the foreclosure proceedings.

Trial decision

[15] At trial, FVP sought relief typically claimed in mortgage proceedings, including orders declaring the Mortgage was a valid charge against the Property; the amounts secured under the Mortgage were due and owing to FVP; that RHL had defaulted under the Mortgage; the amount required to redeem the Mortgage; and a six-month redemption period.

[16] RHL’s position was that it did not owe anything to FVP, although it eventually conceded that it had received $212,000 from FVP. It argued that other entities

associated with RHL might have owed funds to FVP, but that was of no concern in relation to the Mortgage because RHL was not indebted to FVP. RHL also argued that the Mortgage was intended to cover future advances, none of which had been made. In the alternative, it argued that if it owed any debt to FVP, the claim was barred by application of the *Limitation Act*, S.B.C. 2012, c. 13.

[17] Pursuant to s. 6 of the *Limitation Act*, a court proceeding in respect of a claim must not be commenced more than two years after the day on which the claim is discovered. The *Limitation Act* establishes discovery rules applicable to particular claims. Sections 14 and 15 apply to the claims in this case:

> **Discovery rule for claims for demand obligations**
>
> 14 A claim for a demand obligation is discovered on the first day that there is a failure to perform the obligation after a demand for the performance has been made.
>
> **Discovery rule for claims to realize or redeem security**
>
> 15 A claim to realize or redeem security is discovered on the first day that the right to enforce the security arises.

[18] The Agreed Statement of Facts filed by the parties at the commencement of the trial described the "antecedent debt" issue:

> [17] [FVP] alleges the Mortgage was given by [RHL] to secure past payments/loans, etc. to or on behalf of Mr. Raiwal and/or his companies (the "Raiwal Group").
>
> [18] Amongst other things, [RHL] denies any antecedent debt is secured by the Mortgage.
>
> [19] Attached as Appendix "C" is a spreadsheet setting out all transactions [FVP] says are secured by the Mortgage.
>
> [20] [RHL] denies that it is indebted to [FVP] for any of the amounts set out in Appendix "C".
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> [Emphasis added.]

[19] Given the single issue raised on appeal, no purpose would be served by summarizing the reasons for judgment. As RHL's principal argument advanced at trial was that it did not owe any amount close to $2,700,000 to FVP, much of the decision deals with the evidence about the advance of funds to RHL and the shifting positions taken by Mr. Raiwal and RHL as to who would be responsible for repaying

the funds advanced, and if not repaid, what security would be provided and by whom. The judge's task was difficult not only because of the confusing history and the changing positions of Mr. Raiwal and RHL, but also because Mr. Raiwal did not testify. His position that the Mortgage was granted to secure future advances by FVP to RHL was presented through discovery and affidavit evidence, which required the judge to make credibility findings.

[20] The judge rejected RHL's arguments and found in favour of FVP. In doing so, he made key findings. He concluded that the payments documented on the Spreadsheet represented amounts that FVP had advanced to various parties associated with RHL for the purpose of acquiring, operating, and improving the Property. He found that those amounts all reflected a debt owed by RHL to FVP: at paras. 132–140. He found it significant that the Mortgage was signed by Mr. Raiwal in the presence of his legal counsel, who had prepared it on his instructions. He concluded that $2,700,000 had been agreed as the principal amount of the Mortgage because FVP had proved that, at the time, $2,631,704.46 was owing (with interest) to FVP: at para. 127. He also rejected Mr. Raiwal's evidence and the defence argument that the Mortgage was given to FVP to secure future loans, finding that it was not credible: at paras. 128, 143.

[21] The judge dealt with the limitation issue in two places in his reasons. At paras. 100–101, he found that RHL's obligation to pay the debt was not a demand obligation, and that it could be enforced only after the debt became due in 2019. He arrived at that conclusion based on the history of dealings between the parties, and found that "Mr. Raiwal's actions of having the Mortgage created and then executed was a declaration that he was satisfied that sum was owed". The judge concluded that the right to bring the action on the debt obligation arose at the same time as the right to enforce the Mortgage. Accordingly, he determined that FVP commenced the proceeding in time.

[22] At paras. 141–142, the judge found that the debt secured by the Mortgage was "due to be paid in full with interest in 2019". The judge accepted Mr. Gill's

testimony that he had agreed to delay registration of the Mortgage to allow Mr. Raiwal and RHL to seek financing "to payout the debt represented by the Mortgage". Finally, he concluded that the Mortgage had gone into default when no payment was made by RHL by the due date, and that no *Limitation Act* defence was available to RHL in the circumstances.

On appeal

Standard of review

[23] RHL identifies a single error in judgment:

> Did the trial judge err by failing to distinguish between the limitation period applicable to the antecedent debt agreement and the limitation period applicable to the Mortgage?

[24] The question of which limitation period is applicable to a claim is a pure question of law to which the standard of review of correctness applies: *Rooney v. Galloway*, 2024 BCCA 8 at para. 33; *British Columbia (Employment Standards) v. Kwok*, 2022 BCCA 196.

[25] However, the alleged error also requires consideration of the judge's findings about the terms the parties agreed upon when the Mortgage was granted. Contractual interpretation is a matter of mixed fact and law, to which a deferential standard of review applies: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50–52.

Position of RHL

[26] RHL stresses that mortgages have a dual nature, including both a debt and security element. It submits that the debt component of the Mortgage was the pre-existing debt obligation established through the parties' prior dealings and the advance of funds by FVP for the purchase and maintenance of the Property. The Mortgage gave FVP new security for that separate, antecedent debt obligation. As seen in *Leatherman v. 0969708 B.C. Ltd.*, 2018 BCCA 33, at paras. 47–48, the dual nature of mortgages means that there may be two separate and distinct limitation

periods applicable to the debt and the security obligations of a mortgage. RHL argues that the judge erred in law by failing to distinguish between the limitation periods applicable to the underlying debt and the Mortgage. It says the judge incorrectly relied on the Mortgage's maturity date—March 31, 2019—when he found the action was not statute-barred. RHL argues that the maturity date is unrelated to the underlying debt and the corresponding agreement respecting that obligation. Although FVP started its proceeding in November 2019—within the two-year limitation period applicable to the enforcement of the Mortgage—the limitation period for the underlying debt had run its course in March 2019. Therefore, RHL submits that FVP sought to enforce security for a debt that was no longer extant.

[27] RHL claims that the agreement for the antecedent debt and the Mortgage were standalone agreements, the latter being collateral security granted to FVP for the underlying debt agreement. Relying on that proposition, the appellant argues, with respect to the antecedent debt claim, that the Mortgage was an acknowledgment of liability for the existing debt and, like the two prior acknowledgements—the Three Mortgages (treated as a single acknowledgement) and the promissory note—it extended the two-year limitation period under s. 24 of the *Limitation Act*. Therefore, the limitation period for the underlying debt claim expired in March 2019, and FVP did not bring the proceeding in time.

Position of FVP

[28] FVP acknowledges that debt and security components of a mortgage may have different limitation periods, but says the judge was alive to that issue. It argues that the judge did not accept that the debt obligation secured by the Mortgage was separate from the debt component of the Mortgage. Instead, the judge made a finding of fact that the Mortgage was part of a new debt agreement, which established that: the amount owing was $2,700,000; the new interest rate was 7.5%; and the debt was not payable for two years. The judge then applied the law on limitation periods to the facts and found RHL had no *Limitation Act* defence.

[29] FVP concedes that while the judge could have been more explicit in his finding that the parties arrived at a new agreement for repayment of the debt, it is nevertheless evident that is what he did. First, FVP submits that several of the judge's findings demonstrate that there was ample evidence for a reasonable person to conclude that the parties formed a new debt agreement when the Mortgage was granted, including:

- Mr. Raiwal signed the Mortgage in the presence of his legal counsel, who had prepared it on his instructions.
- An original of the Mortgage document was provided to Mr. Gill.
- The principal amount was agreed to be $2,700,000, marginally more than $2,631,704.46, the amount determined that RHL owed to FVP.
- Mr. Raiwal was provided with the Spreadsheet, agreed that RHL would pay the amount set out therein, and granted the Mortgage to secure the amount RHL agreed it owed.
- Mr. Gill agreed not to register the Mortgage upon receipt, but allowed RHL time to seek refinancing.
- No periodic interest payments were required.
- The Mortgage was "a clear affirmation that [RHL] was to pay the sum set out in the Mortgage to [FVP]".

[30] Second, FVP submits it is apparent from the way the trial judge addressed RHL's *Limitation Act* defence that he found that the parties had made a new agreement for repayment of the debt which, for the first time, was acknowledged to be owed by RHL. While not stated directly, it is implicit in the judge's reasons that he did not consider that the Mortgage was security for the pre-existing debt agreement.

[31] FVP says the judge's factual finding is not only correct, but that it is entitled to deference. RHL baldly asserts that the Mortgage did not modify the existing debt agreement, and that there is no support for that position. FVP argues that RHL's assertion ignores the fact that the parties changed various terms of the repayment obligation, including the interest rate (7.5%, rather than 10%).

[32] In its factum, FVP makes two further arguments: (1) that RHL's theory runs contrary to this Court's analysis in *Rosas v. Toca*, 2018 BCCA 191; and (2) that the judge's finding at para. 79—that RHL's *Limitation Act* defence was "subject to an estoppel"—is a complete answer to this appeal. Counsel did not press these arguments at the hearing of the appeal and, given the conclusion I have reached, it is not necessary to address them.

Discussion

[33] RHL's assertion that the judge erred in law by applying the wrong limitation period relies on two related propositions: that the Mortgage secured what RHL calls the "antecedent debt agreement"; and that, as a collateral mortgage, it was security for that prior agreement. As set out below, when I consider the reasons as a whole, and having regard to the live issues at trial, I conclude that the judge found that the Mortgage was part of a new agreement that established terms for repayment of the funds owed by RHL for the purchase and maintenance of the Property. Pursuant to that agreement, the Mortgage constituted security for the debt obligation acknowledged by RHL at that time. Given the judge's findings, he did not err in concluding that the limitation periods for the debt and security obligations arose at the same time and that FVP's debt claim was not statute-barred.

[34] The application of the discovery rules in ss. 14 and 15 of the *Limitation Act* to the dual debt and security obligations in a mortgage was considered in *Leatherman*. Justice Savage explained that the discovery provisions in the *Limitation Act* may result in differing limitation periods when applied to the debt and security obligations under a single mortgage: at paras. 45–48. In *Leatherman*, the obligation to pay the principal was a demand obligation to which s. 14 applied, but s. 15 applied to the right to enforce the security provided by the mortgage. The application of the discovery provisions to the facts meant that the limitation periods to enforce the security and the debt began to run on different dates. As the mortgagors had defaulted on an interest payment long before demand was made to pay the principal, the limitation period to enforce the security had expired before the commencement of the foreclosure proceeding, absent postponement.

[35] In *Canfield v. Bronze Wines Ltd.*, 2022 BCSC 546, Justice Horsman, as she then was, applied *Leatherman* and succinctly explained the effect of the distinct limitation periods when applied to debt and security obligations in a mortgage:

> [118] …The different obligations under the mortgage may give rise to different limitation periods: *Leatherman* at paras. 45-48. The right to enforce security is subject to the discoverability rule in s. 15 of the *Limitation Act*—that is, a claim to realize or redeem security is discovered on the first day that the right to enforce security arises. The right to enforce repayment of the debt is subject to the discoverability rule in s. 14 of the *Limitation Act* for demand obligations: the claim is discovered on the first day there is a failure to perform the obligation after a demand for performance has been made. The date of a demand for repayment may differ from the date of default, giving rise to different limitation periods for the enforcement of security and enforcement of the debt.

[36] RHL relies on *Chan v. 0975713 B.C. Ltd.,* 2018 BCSC 872, and *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2020 BCSC 637, two decisions of Justice Fitzpatrick that applied these principles.

[37] In *Chan*, the judge concluded that the mortgage in question was collateral security in respect of the mortgagors' obligation under a lease to pay a security deposit. As such, it was not a true demand obligation for the purpose of determining the limitation period, and s. 14 of the *Limitation Act* was not engaged. As the mortgage was collateral security, the limitation period for enforcement of the mortgage commenced when the mortgagors, as tenants, had breached the lease, which was the underlying obligation. In the result, the discovery of the right to enforce the security under s. 15 of the *Limitation Act* meant that the claim was discovered when the right to enforce the security arose: at paras. 49–54.

[38] In *Forjay*, the judge applied the principles discussed in *Leatherman* to circumstances in which the mortgagor had defaulted on required interest payments before the principal amount was due. Accordingly, the limitation periods for the debt claim and enforcement of the security were different, subject to postponement. In the course of her reasons, the judge noted that it is open to a lender to enforce the debt without enforcing the security:

> [19] Accordingly, the dual aspects of the 625 Mortgage mean that there are two separate and distinct limitation periods potentially applicable with: firstly, the debt, and secondly, the security. It is always open to a lender to simply enforce the debt aspect of a mortgage without reference to the security. Conversely, an action to enforce the security will only be allowed if the debt remains extant.
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> [Emphasis added.]

[39] From these principles and authorities, RHL argues that the Mortgage was collateral to the antecedent debt agreement. It says that FVP could have commenced an action to enforce the debt claim under that agreement at any time. Further, it submits that in the circumstances, the limitation period for the debt claim began to run on March 27, 2017, when the Mortgage was granted, as that was the last acknowledgement by RHL of the debt owed to FVP.

[40] In its factum, RHL explains its position as follows:

> 58. The only effect of the [Mortgage] on the limitation period for the Antecedent Debt Agreement was to act as the third and final acknowledgement of the indebtedness, which the trial judge so found. Such acknowledgement extended the limitation period for two years pursuant to s. 24 of the *Limitation Act*, as found by the trial judge.
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> 59. The [Mortgage] was not a forbearance of the debt obligation.
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> …
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> 61. The Three Mortgages, Promissory Note, and [the Mortgage] were found by the trial judge to be acknowledgements of the underlying Antecedent Debt Agreement, the effect of which was to restart the two-year limitation period of an existing obligation only, not to create a new limitation period, or toll the old one. The acknowledgements restarted the existing clock; they did not create a new clock.

[41] RHL's argument depends on its assertion that there was an antecedent debt agreement and that the Mortgage was collateral to that existing agreement. In support of the argument, RHL points to a number of the judge's findings about the existence of a debt obligation and acknowledgements of an existing debt by Mr. Raiwal and RHL. In its factum, RHL argues that those findings support its position that the parties reached the antecedent debt agreement in March 2015:

> 52. In this case, the limitation period relating to the underlying Antecedent Debt Agreement started running in March 2015 and would have expired in 2017.

[42] RHL further submits that the Mortgage was the final acknowledgement of that existing debt, which had the effect of extending the limitation period for two years pursuant to s. 24 of the *Limitation Act*. Accordingly, it says that the Mortgage is properly characterized as a collateral mortgage granted in support of an existing debt obligation.

[43] RHL's argument does not challenge the sufficiency of the judge's reasons. Rather, it is based on the assertion that the judge made those findings. If the judge had done so, RHL's argument would have some merit. However, the judge did not make either of those findings. Instead, he concluded that the parties entered into a new agreement regarding the existing debt that included the grant of the Mortgage, and that the limitation period for both the debt obligation and enforcement of the Mortgage security commenced at the same time.

[44] An appellate court must adopt a functional approach when considering reasons for judgment, reading them as a whole, in the context of the evidence, the submissions of the parties and the live issues at trial: *R. v. G.F.,* 2021 SCC 20 at para. 69.

[45] In addition, an appellate court is not to intervene simply because the reasons for judgment might have been more clearly expressed, even where it might have been preferable for the judge to have provided a more comprehensive treatment of the allegations raised: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras. 101–102. Omissions in a judge's reasons will not warrant appellate review unless the omission gives rise to the reasoned belief that the judge "must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion": *Van de Perre v. Edwards*, 2001 SCC 60 at para. 15.

[46] RHL's submissions effectively invite this Court to disregard the functional approach. It asks us to ignore the context, including the judge's findings about RHL's and Mr. Raiwal's acknowledgements of a debt obligation. Importantly, the argument disregards the two principal positions taken by RHL at trial: that it did not owe a debt to FVP; and that the Mortgage was intended to cover only future advances.

[47] Both defences were denials by RHL of the existence of *any* debt obligation to FVP. An important part of the judge's task was to determine what sums, if any, had been advanced to RHL, Mr. Raiwal, or associated entities. In this context, the judge looked to the three acknowledgements of debt—the Three Mortgages, the promissory note, and the Mortgage—not as acknowledgments of an earlier *agreement* about repayment of the debt, but as acknowledgements that funds had been advanced by FVP for the purchase and maintenance of the Property. RHL's suggestion that the Three Mortgages, the promissory note, and the Mortgage "were found by the trial judge to be acknowledgements of the underlying Antecedent Debt Agreement" overstates what the judge decided and ignores the positions taken at trial.

[48] The fallacy of RHL's argument can be seen by considering its submission that "the limitation period relating to the underlying Antecedent Debt Agreement started running in March 2015". As of that date, there was no agreement about the terms of repayment, let alone the amount of any debt or who was responsible for repayment. It must be remembered that as late as July 2015, FVP was still seeking an equity interest in RHL in settlement of its claim: at para. 89. At the same time, it was seeking repayment as an alternative in the event it could not acquire an interest in the Property. However, as of March 2015, there was no agreement as to the amount of the debt owed by RHL or Mr. Raiwal. Indeed, there was no agreement as to which of the Raiwal entities was to be responsible for repayment of that debt. This can be seen by examining the dealings between the parties at that time.

[49] In March 2015, Mr. Raiwal arranged for his lawyers to prepare the Three Mortgages to be granted to FVP. This was done unilaterally, without consultation or agreement with Mr. Gill or FVP. Only one of the mortgages (in the principal amount of $800,000) was granted by RHL. The other two were granted by Ms. Raiwal and by her numbered company. The total amount secured by the mortgages was $2,000,000. The mortgages were said to secure three different properties, but were never registered. The judge's finding that these mortgages constituted a form of acknowledgement must be considered in relation to RHL's

position that it did not owe anything to FVP and the evidence about Mr. Raiwal's shifting positions regarding the debt. In this context, it is clear that the judge found that the Three Mortgages were acknowledgements only of the existence of a debt owed by the Raiwal entities, the amount of which (and the responsibility for which) was yet to be agreed.

[50] The Spreadsheet relied upon by the parties and the judge to establish the amount FVP had advanced for the Property was not created until July 2015. It was used as the basis for the promissory note Mr. Raiwal signed on September 18, 2015. While the Spreadsheet served to clarify the amount of FVP's contributions to the purchase and maintenance of the Property, there was still no agreement about who would be responsible to repay that sum. Mr. Raiwal signed the promissory note in his personal capacity, indicating that he was to be personally responsible for repayment.

[51] In short, RHL's position that the judge found that the parties had an antecedent debt agreement as of March 2015, has no support in the evidence or in the judge's reasons considered in the context of the issues, evidence, and submissions at trial. The judge found that Mr. Raiwal (and RHL) acknowledged the existence of a significant debt that had been incurred to acquire and maintain the Property. The judge did not find that the terms of the obligation to repay that debt had been agreed upon before March 2017. Indeed, as late as January 2016, Mr. Raiwal had personally acknowledged the amount owed, agreed to be responsible to repay it with interest accruing at 10%, and there was no due date or mortgage security.

[52] RHL's submission that the judge concluded that the Mortgage was collateral to an antecedent debt agreement is also without merit.

[53] RHL supports its argument with reference to FVP's pleadings. It suggests that FVP's notice of civil claim provides support for RHL's position as it alleges that, by means of the Mortgage, RHL "secured its antecedent debts" to FVP and that the parties "agreed" that the sum of $2,700,000 was due. RHL also relies on

submissions made by FVP's counsel at trial, who repeatedly emphasized that the Mortgage had been granted to secure existing debts. As an example, RHL highlighted the following excerpt from FVP's closing submissions in its factum:

> 21. … the execution of the subject mortgage in the amount of $2,700,000 confirms that it was expressly for the purposes of granting the Petitioner security for antecedent debts and that, notwithstanding the poorly drafted subject mortgage, its purpose was to function as a collateral mortgage, guarantee, and written reaffirmation of the outstanding debts documented in that spreadsheet…

[54] I note first that nothing in FVP's pleadings can be taken as an admission or concession that the Mortgage was provided as additional security for an existing loan agreement. Indeed, the allegation in the notice of civil claim is simply that in March 2017, the parties agreed to the terms of the Mortgage including: the amount owing to FVP by RHL ($2,700,000); that it could be registered against the Property; and the interest rate.

[55] FVP's submissions must be understood in the context of RHL's position at trial. RHL's argument—that it did not owe anything to FVP and that the Mortgage was to secure future advances—relied, in part, on the fact that no funds had been advanced by FVP concurrent with the granting of the Mortgage. Unsurprisingly, FVP's response was to emphasize the fact that the Mortgage was granted to secure past advances. It was collateral in the sense that it was given in respect of an existing debt, but not in the sense that it was collateral security granted in support of an existing agreement.

[56] Of more import, RHL cannot point to any finding by the judge that the Mortgage was collateral to an existing agreement for the repayment of FVP's advances. The judge only used the term "collateral" twice in his reasons. First, at para. 83, he noted that FVP argued that there was "no collateral contract to the Mortgage" and that no such additional contract was necessary as the Mortgage was part of a binding agreement between the parties with clear offer and acceptance. That is consistent with the judge's conclusions. Second, the judge used the term in responding to RHL's submission that the circumstances in *Chan* and *Forjay* were

analogous to those in the case at bar. The judge rejected that position. He noted that in *Forjay*, the mortgage went into default, not when the principal was due but when the mortgagor failed to pay interest. Referring to *Chan*, the judge noted that the mortgage in that case was granted as collateral security in support of obligations under a lease. As such, the right to enforce the mortgage occurred when the lease went into default. The judge stated:

> [106] In the case at bar, there is no provision for the payment of principal or interest on a periodic basis or for a default based thereon, nor was there a collateral lease agreement or for a default based on the breach of lease provisions. The sole provision in the Mortgage for repayment requires payment in full at the maturity date of the Mortgage.
>
> [Emphasis added.]

[57] When the judge's reasons are read as a whole, I see no support for RHL's position. The judge considered the evidence about the changing positions taken by RHL over the years. FVP intended to earn an equity interest in the Property through its initial investment. When that did not happen, FVP (and JND) sought repayment of the funds they had provided. As a result of the continuing discussions, Mr. Raiwal offered different forms of security, suggested that different entities would be responsible or partly responsible for the debt, suggested that a lesser amount was owing and offered changing terms for repayment, with interest being accrued at 10%. Those discussions culminated in the agreement reached when the Mortgage was granted and new terms for repayment of the debt were agreed upon. For the first time, RHL acknowledged liability for the whole of the debt, and the interest rate was set at 7.5%. In exchange, RHL was given two years to repay the debt without any requirement for periodic payments towards interest or principal, and FVP was given the mortgage security.

[58] I agree that the judge's reasons could be clearer. Some confusion could arise because the judge interspersed statements about his findings with the parties' positions. For example, under the heading, "Submissions of the Defendant", the judge notes that RHL invited the court to review ss. 14 and 15 of the *Limitation Act*. However, that observation is followed by the judge's findings, which are clear. The

judge found that s. 14 of the *Limitation Act* was not relevant because, as a result of the parties' agreement, the debt had a fixed due date and was no longer a demand obligation. He explained the rationale for his conclusion as follows:

> [100] With respect to the limitation periods, the defendant invited the court to review ss. 14 and 15 of the *Limitation Act*. Section 14 is the discovery rule for claims or demand obligations. The Mortgage in the case at bar was not a demand obligation, but enforcement could only commence after default after the first day when the right to enforce the discovery arises, in this case, in 2019. I am satisfied that the preparation of the Mortgage by the solicitors for the defendant in circumstances where Mr. Raiwal had been provided complete details of the sums claimed, which included balances due to Mr. Buttar, and the subsequent execution of that Mortgage in the presence of Mr. Raiwal and Mr. Gill both present with the defendant's lawyer was an acknowledgement of the amount due under the Mortgage. The proceeding to enforce the mortgage was commenced shortly thereafter clearly within the time limits set out in s. 15 of the *Limitation Act*. In response to the defence advanced, I am satisfied that Mr. Raiwal knew that the amounts listed on the spreadsheet were monies advanced for the purposes of improving, defending, or acquiring the [Property], and that occurred when Mr. Raiwal instructed his lawyer to prepare a mortgage in registerable form for the amount of $2,700,000 with interest at 7.5% per annum which he executed in the presence of the lawyer and Mr. Gill on March 31, 2017. The submission by the defendant that the quantum of the mortgage was not based on a debt owed by the defendant ignores the history of the attempts to acquire the [Property] by FVP on the one hand and Mr. Raiwal and his various related parties.
>
> [101] The initial plan of the parties did not create debt owing by the defendant to the plaintiff but rather a goal of acquiring the [Property] for their mutual benefit. That transaction was changed when Mr. Raiwal was determined to buy the property for his sole benefit at the same time using capital provided by FVP. Mr. Gill, driven by Mr. Buttar, demanded return of monies advanced and provided a spread sheet which detailed the entirety of the funds which would not be invested in the [Property], but funds to be returned with interest to FVP. Using that information, Mr. Raiwal had the Mortgage prepared by and executed in the presence of his legal counsel and by Mr. Gill. Mr. Raiwal's actions of having the Mortgage created and then executed was a declaration that he was satisfied that sum was owed.
>
> [Emphasis added.]

[59] RHL's submission that the judge did not conclude that a new agreement had been reached, ignores the judge's findings that when the Mortgage was granted, the parties arrived at new terms for repayment of the funds that had been used to purchase and maintain the Property. The agreed terms benefitted both parties. FVP obtained mortgage security and RHL's acknowledgement of its liability to repay the

full amount of the debt. RHL was given two years to pay the debt (and arrange alternative financing) without periodic payments, and interest was accruing at a lower rate than previously agreed to by Mr. Raiwal.

Conclusion

[60] Reading the reasons in context and as a whole, it is clear that the judge found that the parties had formed a new agreement in March 2017. There is no reason to believe that the judge forgot, ignored, or misconceived the evidence in any way. The factual finding is supported by the evidence and entitled to deference on appeal.

Disposition

[61] I would dismiss the appeal.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"