IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Xia v. Hummingbird Cove Lifestyles Ltd.,* 2024 BCSC 1290

Date: 20240717
Docket: S206273
Registry: Vancouver

Between:

Sun Guo Cai and Wang Xia

Plaintiffs

And

Hummingbird Cove Lifestyles Ltd., Trinity Agriculture Inc., and Pacific Aquaculture International Inc.

Defendants

- and -

Docket: S206183
Registry: Vancouver

Between:

Sun Guo Cai and Wang Xia

Plaintiffs

And

Ding Xi Ping and Chen Zhi Yi

Defendants

- and -

Docket: S230350
Registry: Vancouver

Between:

Sun Guo Cai

Petitioner

And

Trinity Agriculture Inc., Pacific Aquaculture International Inc., Hummingbird Cove Lifestyles Ltd., Miss Sunshine Oyster Ltd., Seagarden Shellfish Ltd., Coode Island Oyster Farms Ltd., Ding Xi Ping, and Chen Zhi Yi

Respondents

2024 BCSC 1290 (CanLII)

Before: The Honourable Justice Stephens

Reasons for Judgment

Counsel for the Plaintiffs:	F. Lamer G. Lo
Counsel for the Defendants Ding Xi Ping and Chen Zhi Yi:	K. Learn L. Jiang
Counsel for the defendants Hummingbird Cove Lifestyles Ltd., Pacific Aquaculture International Ltd., Trinity Agriculture Inc., Coode Island Oyster Farms Ltd., and Seagarden Shellfish Ltd.	N. Muirhead J. Gray
No other appearances	
Place and Dates of Hearing:	Vancouver, B.C. May 29-31, 2024
Place and Date of Judgment:	Vancouver, B.C. July 17, 2024

2024 BCSC 1290 (CanLII)

Table of Contents

2024 BCSC 1290 (CanLII)

2024 BCSC 1290 (CanLII)

Overview

[1] Sun Guo Cai (Mr. Sun) and Wang Xia (Ms. Wang, and collectively, the "Plaintiffs") apply by summary trial in two actions for judgment of a total amount of approximately $10 million from the personal defendants, Ding Xi Ping (Ms. Ding) and Chen Zhi Yi (Mr. Chen, and collectively, the "Personal Defendants") (S206183), and from Hummingbird Cove Lifestyles Ltd., Pacific Aquaculture International Inc. ("Pacific"), and Trinity Agriculture Inc. ("Trinity") (S206273) (collectively the "Corporate Defendants"). The Plaintiffs also seek related orders, including for liquidation and the winding up of the Corporate Defendants as well as Coode Island Oyster Farms Ltd., Seagarden Shellfish Ltd. and Miss Sunshine Oyster Ltd. (collectively the "Corporate Respondents") (among other relief), in a third petition proceeding (S230350).

[2] There is evidence that the Corporate Respondents have been, and seek to continue to be, engaged in business on the Sunshine Coast, British Columbia, related to shellfish farming. However, the Plaintiffs contend the business has been a failure. The Plaintiffs and Personal Defendants were at material times shareholders in Trinity and Pacific which are, in turn, parent companies of the other defendant and respondent corporations (though after January 29, 2021 the plaintiff Ms. Wang ceased to be a shareholder and Mr. Sun is the only plaintiff who is currently a shareholder).

[3] The approximately $10 million of alleged personal and corporate loans are said to have been advanced by the Plaintiffs through in excess of 20 tranches from 2014 to 2018 (at the hearing, the Plaintiffs withdrew a claim for $4,000 and asked to adjourn generally a claim for $1,344). The evidence is that the Plaintiffs' involvement with the Corporate Defendants commenced in 2014.

[4] The quantum of the advances made by the Plaintiffs is not much in dispute. Rather, what is contested is the characterization of those advances in fact and law – as loans or an "equalization payment", or as capital contributions – and whether any of the alleged loans are due, owing, and payable to the Plaintiffs.

[5] The Plaintiffs say that these advances are all loans that they made to the Personal Defendants and Corporate Defendants.

[6] They contend that these advances were loans, they were due and have not been paid as required, and judgment should be granted in their favour with interest (in the actions), together with an order to wind up and liquidate the Corporate Respondents so that the Plaintiffs can be paid (in the petition proceeding). One of the Corporate Respondents owns, mortgage-free, real property appraised at about $10 million in 2018.

[7] A main aspect of the Plaintiffs' case is that they loaned monies for the business of the Corporate Defendants since 2014; the business has failed; the substratum of it is gone; and that they should now receive judgment for the loans and orders for liquidation and winding up to realize on those claims.

[8] A central part of the defence to the action is the defendants' assertion that in January 18 and 19, 2018, the Plaintiffs and Personal Defendants reached a verbal agreement for these parties to "equalize" their contributions to the Corporate Defendants; that the equalization payment amount was to be determined at a later date, though initially assessed to be $6.2 million as of September 2017; and that the Plaintiffs' advances were actually equalization payments and not loans. However, the Plaintiffs dispute that any such verbal equalization agreement exists.

[9] While the parties signed some documents related to the Plaintiffs' multiple advances, there are not many. The signed documents are in Chinese, and translated copies are before me, and I will address some of these in my Reasons.

[10] For the reasons that follow, I conclude that the two summary trial applications are not suitable for summary trial, and that the petition should be referred to the trial list.

[11] That said, I make no factual findings binding on any other judge or presider hearing any of these proceedings.

2024 BCSC 1290 (CanLII)

2024 BCSC 1290 (CanLII)

Issues on this Summary Trial

[12] The summary trial applications give rise to the following issues:

a) Are the debt actions suitable for summary trial?

b) Should the petition be referred to the trial list?

c) If the debt actions are suitable for summary trial, should judgment be granted for all of the alleged loans, or some of them?

d) If the petition should be decided summarily, should the Corporate Respondents be ordered to be wound up and liquidated, and should the other petition relief be granted?

Legal Principles on the Suitability for Summary Trial

[13] I recently discussed the principles of the suitability of summary trials in *Hallat v. Couturier*, 2024 BCSC 901, which I adopt for the purposes of these reasons:

> [8] Determination of the suitability of an application for summary trial is a discretionary exercise that turns on the particular circumstances of an application; *Gill v. Gill*, 2022 BCCA 264, at para. 56, citing *Gichuru v. Pallai,* 2013 BCCA 60, at para. 34.
>
> [9] The law with respect to suitability has been canvassed in prior cases, including the leading case of *Inspiration Mgmt. Ltd v. McDermid St Lawrence Ltd.*, 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (BC CA.), a decision of the Court of Appeal. There the court at para. 40 of that case held that a chambers judge can decide a case summarily if the court is able to find the facts necessary for that purpose and finds it would be just to decide the issues in such a way.
>
> [10] The court retains the discretion in the determination of suitability. The exercise of discretion is guided by two lines of inquiry: (1) whether the court finds the facts necessary to decide the issues of fact or law; and (2) whether it is just in the circumstances to decide the issue summarily.
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> [11] Proportionality is relevant to this determination; see *Brissette v. Cactus Club Cabaret Ltd.,* 2017 BCCA 200, at para. 26. ... That the amount at issue in an action is significant is not fatal to a summary trial application, see *Gichuru*, at paras. 30-31, but it is nevertheless a factor in my consideration weighing in favour of a trial process commensurate with the amount involved. And I cite too *Greenleaf Brewing Corp. v. Lonsdale Quay Market*, 2023 BCSC 2005.

[12] Conflict in the evidence *per se* is not necessarily always a reason to render a summary trial application unsuitable. As the Court of Appeal stated in *MacMillan v. Kaiser Equipment Ltd.,* 2004 BCCA 270, at para. 22:

> [22] …the mere fact that there is a conflict in the evidence does not in and of itself preclude a chambers judge from proceeding under Rule 18A. A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

[13] However, a court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. 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; see *Brissette*, at para. 27, citing *Cory v. Cory,* 2016 BCCA 409, at para. 10.

[14] In addition, as a prerequisite to deciding a case on a summary trial, the court must be able to find the facts necessary to decide the issues of fact or law and must be of the opinion it would not be unjust to decide the issues.

[15] When determining suitability, the court may also consider the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of proceedings, and any other matters which arise for consideration on this question, such as the cost of litigation and the time of the summary trial; whether credibility is a critical factor in the determination of the dispute; whether the summary trial may create unnecessary complexity in the resolution of the dispute; and whether the application would result in litigating in slices: *Inspiration Mgmt.,* at para. 49.

[16] The summary trial rule makes the judge a gatekeeper. It is a crucial role. Notwithstanding the wishes or submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so; see *Main Acquisitions Consultants v. Yuen,* 2022 BCCA 249, at para. 89.

[17] Documents which are simply attached to affidavits listed on a list of documents is not a good basis on which to decide a summary trial; see *Main Acquisitions*, at para. 97.

[18] Where there exists “uncertainties in the evidence”, see *Main Acquisitions*, at para. 100; and the determination of legal issues are largely fact dependent and require a close examination of the facts, these circumstances can militate against a summary trial determination since it may not be possible to find the facts necessary to decide those issues: *Main Acquisitions*, at paras. 100-101 and 106.

…

[19] A respondent to a summary trial application cannot veto it by inaction or otherwise. A defendant is required to put their best foot forward in defence of the plaintiff's claim; *Bajwa v. Habib*, 2018 BCSC 1822, at para. 95. That is, a respondent to a summary trial cannot fail to take pre-trial steps or provide

2024 BCSC 1290 (CanLII)

> their best foot forward, and claim that a trial is necessary to fairly adjudicate a proceeding and frustrate the benefits of the summary trial process; see *Hudema v. Moore*, 2021 BCSC 587, aff'd 2021 BCCA 482; and *Bajwa v. Habib* at para. 99, aff'd 2020 BCCA 230.
>
> [20] As Justice Horsman of this court, as she then was, stated: "Robustly applied, the summary trial procedure can be an important tool in achieving the objectives of proportionality and efficiency in our system of civil justice.": see *Hudema*, at para. 58.
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> [21] A court should not refuse to grant judgment on a summary trial simply because a party contends that a full trial would "turn something up"; see *Hudema,* at para. 57.
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> [22] A summary trial procedure cannot be open to frustration by one of the parties delaying pretrial procedures: see *Kok v. Adera Natural Stone Supply Co. Ltd.*, 2018 BCSC 1542, at para. 9.
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> …
>
> [25] But I return to the main premise of the role of the court on a summary trial application: judgment on summary trial should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so: *Main Acquisitions*.
>
> [26] My role is to decide a case on summary trial if I can do so justly, and find the necessary facts.
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> …
>
> [28] I must also consider the principles of proportionality at the suitability stage: *Greenleaf* at para. 22. …

Discussion – Summary Trial Applications (Debt Actions)

[14] The debt actions are not suitable for determination as summary trials.

[15] First, there is no affidavit evidence from Ms. Wang, one of the two plaintiff creditors, on these applications. This itself is problematic from a suitability perspective, since Ms. Wang is a co-plaintiff and there is evidence she was present for discussions referred to in the affidavits, including a conversation with MNP LLP ("MNP") which is relevant to the defendants' version of events and defence, and is also referred to as a "lender" in the IOU notes. Her evidence is also likely relevant to events which could reasonably bear on the factual matrix, a relevant consideration in contractual interpretation: *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20 at paras. 28, 48, 65 [*Earthco*]. Indeed, not having a central witness, who is a plaintiff, give evidence in support of a $10 million debt claim gives me

2024 BCSC 1290 (CanLII)

pause in considering whether I can decide these debt actions justly: *Hallat* at para. 40; *Supreme Court Civil Rules* [*Rules*], R. 9-7(15)(a)(ii).

[16] Second, on a key issue that divides the parties about the merits of the debt actions with respect to what occurred on January 18 and 19, 2018, there is a conflict in the evidence between the Personal Defendants and the plaintiff, Mr. Sun.

[17] In her affidavit, Ms. Ding deposes that there was a verbal agreement made on January 18 and 19, 2018, which the defendants refer to as a "verbal equalization agreement." She deposes that the Personal Defendants met at the Plaintiffs' home on January 18, 2018, and discussed the terms and conditions for the plaintiffs to rejoin the project. She deposes as to the events occurring on January 18, 2018, as well as to a meeting at MNP on January 19, 2018, where an alleged equalization agreement was reached:

> 76. We then agreed that the plaintiffs and I would go to the companies' accounting firm – MNP LLP the following day (January 19, 2018), use that date as the cutoff date to calculate the investment amount that my husband and I had made to the companies so far. Based on that amount, the plaintiffs would reimburse our investments by paying half the amount as an equalization payment (the "Verbal Equalization Payment Agreement"). However, at that time, we did not discuss how the plaintiffs' equalization payment should be paid, and whether to me or to the Aquaculture Companies. I did not know or realize the different consequences of the equalization payment made to me personally and to the Aquaculture Companies.
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> 77. I drafted the agreement that we verbally agreed on and everyone signed it to confirm our agreement.
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> 78. When my husband and I left the plaintiffs' house, Mr. Sun kept that handwritten agreement and said to me that he would have a formal agreement prepared based on this handwritten agreement.
>
> 79. On January 19, 2018, the following day, Ms. Wang and I went to MNP LLP.
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> [Emphasis added.]

[18] Ms. Ding deposes that when she and Ms. Wang were at MNP, she was told that the accountant had only finished recording a reconciliation up to September

2024 BCSC 1290 (CanLII)

2017, and that the amount of expenses paid for by the Personal Defendants was "roughly $12.4 million." She further deposes in this regard:

> 90. Because the accountant from MNP LLP only finished the reconciliation until September 2017, Ms. Wang and I agreed to use the amount as of September 2017 as the basis to calculate the amount of the plaintiffs' equalization agreement, i.e., $6.2 million (the "Equalization Payment"). Ms. Wang and I further agreed that we would adjust the Equalization Payment amount after the MNP LLP accountant completed the reconciliation until January 19, 2018, the cutoff date.
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> …
>
> 95. After January 19, 2018, the plaintiffs said to me that because the amount of our previous payments were not accurately recorded and reflected in the financial statements of Trinity and Hummingbird, the Equalization Payment shall be paid and recorded initially in the form of shareholders' loans by the plaintiffs to the companies. The plaintiffs' payments would only be updated, recorded, and renamed as the Equalization Payment after the financial statements were rectified and approved by the plaintiffs (the "Plaintiffs' Equalization Payment Representations").

[19] In his third affidavit, Mr. Sun acknowledges that the parties discussed the topic of equalizing advances, but denies that any agreement was reached during the January 18, 2018 discussion:

> 3. On January 18, 2018, my wife and I did have discussions with the Defendants about equalizing advances to Hummingbird Cove Lifestyles Ltd. or Trinity Agriculture Inc. However, my wife and I did not sign a handwritten agreement about equalization of advances as alleged by Ms. Ding. The only agreements between the parties are the agreements that were signed and referred to in my affidavits.
>
> 4. After discussions with the Defendants on January 18, 2018, my wife and I signed the January 24, 2018 Agreement, attached as Exhibit F in my 1st affidavit in the Plaintiffs' proceedings against Hummingbird, Trinity and Pacific Aquaculture, Supreme Court Action No.: VLC-S-S-206273. [emphasis added]

[20] On these summary trial applications, I have considered how to interpret this evidence from Ms. Ding and Mr. Sun about the equalization of advances to determine if a conflict in the evidence exists.

[21] The Plaintiffs submit that Ms. Ding's evidence includes some inadmissible argument and is conclusory in nature, and that her references to there being an agreement should be disregarded. The Plaintiffs submit that the Court should

2024 BCSC 1290 (CanLII)

disregard the inadmissible portions of Ms. Ding's affidavit evidence and consider what remains, and that the Court should conclude that Ms. Ding's evidence does not rebut Mr. Sun's evidence of debt claims and does not establish a defence. The Plaintiffs' written submissions contend:

> …this defense does not raise any issue of fact because much of the affidavit adduced by the Personal Defendants is inadmissible argument and conclusory in nature and because, even if one were to take the facts (as distinguished from their arguments) asserted by the Personal Defendants at their face value, those facts do not establish the existence of the alleged "equalization" agreement.

[22] However, I note that in his affidavit, Mr. Sun also refers to there not being a handwritten "agreement," and his use of the word "agreement" is similar to the manner in which Ms. Ding at times describes the parties' discussions.

[23] To determine the suitability of these summary trial applications, I must read the affidavits to determine if a material conflict in the evidence exists: see *Hallat* at paras. 44–45.

[24] I do not find that portions of Ms. Ding's affidavit are inadmissible for purposes of determining suitability, and I instead deal with her evidence as a whole for the purposes of determining whether the debt actions are suitable for summary trial and consider the impugned portions of her affidavit as matters going to weight. (In addition, the Plaintiffs argue that the Personal Defendants made admissions in their prior response to civil claim, but the Plaintiffs did not give notice that they would rely on any asserted admissions pursuant to R. 9-7(9)(c), and I decline to consider it.)

[25] Read holistically, I read Ms. Ding's affidavit as deposing that discussions occurred with one or both plaintiffs on January 18 and 19, 2018, and, during these discussions, the parties had communicated to each other that there was an equalization agreement.

[26] I read Mr. Sun's affidavit as deposing that, while there was a discussion about equalization, the parties did not objectively communicate to each other that an agreement had been reached. That is what I take Mr. Sun to mean when he

2024 BCSC 1290 (CanLII)

deposes that, after discussions, “I did not sign a handwritten agreement about equalization of advances.”

[27] This is a conflict in the evidence on an important issue relating to the defence of the actions – concerning the January 18 and 19, 2018 discussions – that I cannot resolve on these summary trials. Specifically, I am unable to and cannot justly determine what words were exchanged between the parties on January 18 and 19, 2018 to conclude if a valid and enforceable equalization agreement was reached. Further, there are some material gaps in the evidence: the plaintiff, Ms. Wang, who was present during some or all of these conversations in question, has not given any evidence in these actions. Mr. Sun, for his part, provides little specific evidence about what was said on January 18, 2018.

[28] Addressing this conflict in the evidence likely gives rise to credibility assessments of witnesses, which are not amenable to resolution based on the affidavit evidence before me: *Hallat* at para. 49; *Saran v. Cartonio, Inc*., 2020 BCCA 252 at para. 43.

[29] Third, and related to the second point, there is a conflict in the evidence about whether the Plaintiffs and Personal Defendants signed a document after the January 18, 2018 discussions recording the product or result of their discussions. Ms. Ding deposes that they did sign a document, and Mr. Sun kept it to prepare something more formal. But Mr. Sun denies that the parties did so, since he denies signing a handwritten agreement. However, if there is, in fact, a document recording what was discussed between the Plaintiffs and Personal Defendants that could be relevant to a just determination of the Plaintiffs’ claims, it would be unjust to decide the summary trials without at least considering such a document.

[30] Fourth, the plaintiffs and personal defendants did later sign a document (written in Chinese) dated January 24, 2018 that is entitled the “Compensation Agreement” (which is referred to as the “January 24, 2018 Agreement” in Mr. Sun’s affidavit quoted above). Among other things, it begins as follows:

2024 BCSC 1290 (CanLII)

> 1. The personal company agreement between GUOCAI SUN and XIPING DING is revised.

[31] However, I am unable, and it would be unjust, on the summary trial record before me, to find what "personal company agreement" refers to in this Compensation Agreement.

[32] The parties' positions differ with respect to what "personal company agreement" refers to in the Compensation Agreement: the Plaintiffs contend that this is a compendium of informal arrangements that had existed up to January 24, 2018; and that even if a verbal agreement was reached on January 18, 2018 (which is denied), that alleged agreement was superseded by the January 24, 2018 Compensation Agreement.

[33] By contrast, the Personal Defendants argue, as I understand it, that the "personal company agreement" refers to the handwritten note documenting the verbal equalization agreement on January 18, 2018.

[34] The Corporate Defendants submit that they could not say what "personal company agreement" referred to (since the summary trials were not suitable), but a reasonable way to interpret this would be to refer to the agreement made verbally on January 18 (and January 19), 2018.

[35] Determining the parties' legal rights and obligations on these summary trials would likely require me to first determine what the words "personal company agreement" refers to in order to find how the Compensation Agreement "revised" that prior agreement (assuming any prior agreement in law is found to exist). The words "personal company agreement" and "revised" would further require interpretation in the context of factual findings about what had previously occurred. But I cannot justly make the necessary findings to decide this issue on the record before me.

[36] The Plaintiffs argue that a further document dated October 3, 2018, entitled "Decisions Made Below Regarding Company Funds," signed by the Plaintiffs and

2024 BCSC 1290 (CanLII)

Personal Defendants, is not consistent with the existence of a verbal equalization agreement—but, again, I am unable to find the necessary facts to decide whether this may be so.

[37] The Plaintiffs also argue that the asserted equalization agreement does not exist because all essential terms have not been demonstrated to have been agreed to—but, again, I am unable to find the facts necessary to decide that question.

[38] Notably, the conflicts and gaps in the evidence occur in a context where the size of the claim – approximately $10 million – is substantial. While the size of a claim is not fatal to the suitability of a summary trial, on balance, it does weigh in favour of it being unsuitable in light of the conflicts I have identified. Further, the monetary claim in the actions is related to the drastic relief sought in the petition: a liquidation and winding up of the corporate defendants, among other things.

[39] Nor do I consider there to be urgency to the determination of the debt actions.

[40] I note that the defendants have not been robust in certain aspects of their response to the summary trial applications. Neither the Corporate Defendants nor the Personal Defendants have conducted an examination for discovery of the Plaintiffs. Nor is there evidence that the defendants have issued document demands to the Plaintiffs seeking production of the written document allegedly signed on January 18, 2018, and which Ms. Ding deposes was kept by Mr. Sun.

[41] A “respondent to a summary trial cannot fail to take pre-trial steps or put their best foot forward, and claim that a trial is necessary to fairly adjudicate a proceeding and frustrate the benefits of the summary trial process”; and the summary trial procedure “cannot be open to frustration by one of the parties delaying pretrial procedures”: *Hallat* at paras. 19, 22.

[42] However, despite this, the “main premise of the role of the court on a summary trial application” is that “judgment on summary trial should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be

2024 BCSC 1290 (CanLII)

unjust to do so": *Hallat* at para. 25, citing *Main Acquisitions v. Yuen*, 2022 BCCA 249, at para. 89.

[43] Despite the defendants' failure to conduct oral discoveries before the summary trial applications were heard, or to seek production of the January 18, 2018 document they say exists, I nevertheless find that these summary trial applications are not suitable.

[44] In addition, there is some merit to the Corporate Defendants' submission that the Plaintiffs have not adduced adequate evidence on these summary trials for the Court to determine the issues raised in the actions. In my view, while not determinative, this factor tends to militate against the Court being able to make a just determination of the summary trial applications on their merits.

[45] Overall, the summary trial applications give rise to various issues, including, among others:

- were the Plaintiffs' advances loans or capital contributions?;
- if the advances were loans, what were the terms?;
- did the parties enter into a valid and binding agreement regarding the equalization of each party's contributions and, if so, what were the terms?; and
- if so, what amount has been advanced by the plaintiffs pursuant to the equalization agreement, and what amounts remain owing (if any)?

[46] Having found that I am unable, and that it would be unjust, on the evidence, to make findings related to the existence of any equalization agreement and its terms; whether the advances were loans or capital contributions; or what is the "personal company agreement" referenced in the Compensation Agreement, any attempt to resolve the other issues in the actions would be an attempt to litigate in slices which would also be unjust.

2024 BCSC 1290 (CanLII)

[47] The Plaintiffs rely on evidence that at least some of their advances to the personal defendants were documented, including through some IOUs, and so they should be enforced. However, in the context of the dispute over the existence of an equalization agreement being a central part of the defendants' defence to the actions and related uncertainty as to the parties' respective contractual and legal obligations and the related factual context, I find that it would be unjust to decide whether those documents are enforceable as loans in the actions.

2024 BCSC 1290 (CanLII)

Discussion – Petition

[48] In his petition, Mr. Sun seeks orders liquidating and dissolving the Corporate Respondents; appointing a liquidator or an equitable receiver under s. 324 (or, alternatively, s. 227) of the *Business Corporations Act*, S.B.C. 2002, c. 57; and a declaration that the affairs of Trinity and Pacific, as well as the powers of the Personal Defendants, are being, or have been, exercised in a manner oppressive and/or unfairly prejudicial to Mr. Sun. The respondents contend, among other things, that the petition should be referred to the trial list.

[49] The court has discretion to "order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding": *Rules*, R. 22-1(7)(d).

[50] In this regard, the court "has the discretion to refer a petition proceeding which raises a triable issue to the trial list if the circumstances do not sufficiently allow the matter to be fairly determined by the court within the petition proceeding": *Shergill v. Bains*, 2022 BCSC 1363 at para. 30, citing *Cepuran v. Carlton*, 2022 BCCA 76 at para. 160.

[51] The question of whether to refer a petition to the trial list is subject to discretion, and the court should take into account a number of factors, including the statutory context and proportionality. The Court of Appeal has commended "the reasoning of Justice Ballance in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701, and Justice Dardi in *Terasen*

Gas Inc. v. Surrey (City), 2009 BCSC 627, as setting out some factors that may be relevant in deciding whether to convert a petition proceeding to an action": *Cepuran* at para 165.

[52] The court's considerations should include the "object of the *Rules* set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding": *Cepuran* at paras. 162–163, 165–166.

[53] I find that the evidence and factual issues in the petition are intertwined with those in the two debt actions. The conflict in the evidence in those actions (summary trial applications) also translates into conflicts in the evidence relevant to the disposition of the petition.

[54] The Plaintiffs seek to liquidate and wind up the Corporate Respondents to collect on judgments sought in the two debt actions.

[55] I have considered the Plaintiffs' argument that the business to which the Corporate Respondents relate has failed and has no future, but I am not able to make findings on the evidence before me in that regard.

[56] In my view, the petition should be referred to the trial list. I am of the view that the overlapping facts between the debt actions (which are not suitable for summary trial) and the petition, as well as the likely credibility assessments which will be required, are such that it is appropriate to have the petition determined with the procedures of an action. Further, a full grasp of the evidence is required to decide the petition issues, which calls for determination by way of trial procedures. It is therefore in the interests of justice that the petition be referred to the trial list, including when considering that what is at stake is the future of the respondent companies.

[57] I further decline to order a hybrid trial: *Cepuran* at paras. 160, 162, 166. Rather, given the state of the affidavits before me and the nature of the defence

2024 BCSC 1290 (CanLII)

advanced, I find that this would not be an efficient or just way to decide this petition and for the respondents to furnish evidence about their version of the relevant events: *Capital Now Inc. v Munro*, 2023 BCSC 197 at para 98.

[58] For all these reasons, I decline to proceed in such a hybrid fashion and instead refer the petition to the trial list.

Amendment to Notice of Civil Claim (Corporate Loan Action - S206273)

[59] In their notice of application, the Plaintiffs seek to amend their amended notice of civil claim to update the loans asserted to be outstanding. The threshold on applications for leave to amend pleadings is low and amendments are generally granted as necessary to enable the real issues between the parties to be determined and tried. I find it is just and convenient to allow the proposed amendments to be made.

Conclusion and Orders Made

[60] Rule 9-7(15)(a), which is the summary trial rule, provides (in part):

> (15) On the hearing of a summary trial application, the court may
>
> (a) grant judgment…, 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…

[61] I find that I do not have the necessary evidence, and I am unable to find the facts necessary, to decide the factual and legal issues, and it would be unjust to do so in the circumstances. I am therefore unable to, and do not, grant judgment on these summary trials for the reasons set out in Rules 9-7(15)(a)(i) and (a)(ii).

2024 BCSC 1290 (CanLII)

[62] In summary, I find that:

1. the Plaintiffs' January 17, 2023 notice of application for summary trial (S206183) is dismissed as not suitable pursuant to R. 9-7(15)(a);

2. the relief sought in the Plaintiffs' January 17, 2023 notice of application for summary trial (S206273) is dismissed as not suitable pursuant to R. 9-7(15)(a);

3. the petition (S230350) is referred to the trial list pursuant to R. 22-1(7)(d); the petition is converted to an action; the parties shall exchange pleadings; and the matter should proceed in the usual course as an action; and

4. with respect to paragraph 1 of the relief sought in the January 17, 2023 notice of application (S206273), the Plaintiffs in S206273 are granted leave to amend their amended notice of civil claim in the form attached as Schedule B to their written submissions at this hearing.

[63] I grant costs of these applications to the Personal Defendants and Corporate Defendants in the actions, and to the responding Corporate Respondents in the petition proceeding, in the cause.

"Stephens J."

2024 BCSC 1290 (CanLII)