IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20211022
Docket: S2012988
Registry: Vancouver

Between:

Andrew Beishuizen, Terry Yoshikawa and Bratan Parameswaran

Plaintiffs

And:

Jag Dilon and Service Air Group Inc.

Defendants

Before: The Honourable Mr. Justice G.R.J. Gaul

Oral Reasons for Judgment: Summary Trial

In Chambers

Counsel for the Plaintiffs, appearing by videoconference:	C. Schuld B.A. Fortugno
Counsel for the Defendants, appearing by videoconference:	B. Carpenter
Place and Date of Hearing:	Vancouver, B.C. October 15, 2021
Place and Date of Ruling:	Vancouver, B.C. October 22, 2021

[1] **THE COURT:** The defendant Mr. Dilon is the director and principal of the corporate defendant Service Air Group Inc., which I will call "SAGI".

[2] The plaintiffs Mr. Beishuizen, Mr. Yoshikawa and Mr. Parameswaran are three individuals who, at various times over the past eight years, have loaned money to Mr. Dilon or SAGI. None of the loans have been repaid.

[3] In this action, started in December 2020, each plaintiff seeks judgment against Mr. Dilon or SAGI for the amounts outstanding in their respective loans.

[4] By notice of application filed July 13, 2021, the plaintiffs seek to have their claims determined by summary trial pursuant to Rule 9-7 of the *Supreme Court Civil Rules*.

[5] At the outset of the hearing, counsel advised me of a pending resolution of Mr. Parameswaran's claim. In light of that development and at the request of both counsel, that portion of this action has been adjourned generally by consent. This means only Mr. Beishuizen's and Mr. Yoshikawa's claims are before me.

[6] There is no dispute that the loans in questions were made and that they have not been repaid. The question to be determined is whether, given the passage of time and the specific circumstances surrounding each loan, Mr. Dilon or SAGI are liable to repay the loans, in whole or in part.

Background

The Beishuizen Loan

[7] Mr. Dilon and Mr. Beishuizen met and became friends in or around 2006 through their mutual interest in aviation.

[8] In early 2013, Mr. Dilon asked Mr. Beishuizen to loan him money so that he could continue to promote SAGI as a viable business enterprise. Mr. Beishuizen indicated that he was prepared to make the loan on the condition that it was secured by a promissory note.

[9] On 3 April 2013, Mr. Beishuizen and Mr. Dilon met at a Tim Hortons's restaurant in Richmond, B.C. At this meeting, Mr. Beishuizen provided Mr. Dilon with a $50,000 bank draft. In return for this loan, which I will call the "Beishuizen loan", Mr. Dilon executed a promissory note, which I will call the "Promissory Note".

[10] The Promissory Note includes the following terms:

(a) Mr. Dilon was the borrower and Mr. Beishuizen was the lender.

(b) The principal amount was $50,000 Canadian dollars.

(c) Interest on the loan would accrue at the rate of 5 percent per annum calculated half-yearly, not in advance.

(d) The loan was to be repaid in full within six months of the date of the Promissory Note.

[11] There is no dispute between Mr. Beishuizen and Mr. Dilon that the Beishuizen loan has not been repaid. In his affidavit sworn July 13, 2021, and filed in support of this application, Mr. Beishuizen explains:

> [11] Over the subsequent six years, I kept in contact with Jag Dilon. I did not specifically request the repayment of my loan to him, but was assured by him on various occasions that the loan was valuable to me because interest was accruing and because Service Air was being developed as a viable company, with investment capital being paid into the company.

[12] A text Mr. Beishuizen sent to Mr. Dilon on June 21, 2018, reads as follows:

> Hey, Jag.
>
> Too bad I missed you at wing night a few days back, as I wanted to chat with you regarding the money that you borrowed back in 2013. I'm thinking it's time that we try and settle out the loan ... as I have some financial obligations that I must attend with, I could use the money now.
>
> I have tried to make do and let you hang on to it.
>
> I do need the money but would like to give you a little time to set it up ... how about by say … September 3, 2016? That will coincide with the 6 month calculation of interest and should give you time to organize the transaction.
>
> I hope that the money helped with you're (sic) drive for funding, and fingers crossed it happens soon for you, as you did briefly mention a while ago that it may be soon!
>
> Exciting times ahead for you my friend, but as I mentioned earlier, that I do need my money back as I have financial obligations myself.

> Let me know when we can get together sometime over coffee or drinks if there's anything I have missed ... sound good?
>
> Let me know! [smiley emoji]
>
> Sincerely,
>
> Andrew.

[13] Shortly after that text was sent, Mr. Beishuizen received the following response from Mr. Dilon:

> Not a problem Sir, we will sort it out very soon! It's been there for the asking. [smiley emoji].
>
> Chat soon, cheers!

[14] Clearly, the tone of the communications between Mr. Dilon and Mr. Beishuizen was very friendly.

[15] On 23 August 2019, Mr. Beishuizen sent Mr. Dilon another text suggesting they meet on 3 or 4 September so that he could pick up the loan repayment from Mr. Dilon. Mr. Dilon responded the same day by indicating that he had been away and was just returning, that he would contact Mr. Beishuizen to set up a meeting.

[16] On 29 August 2019, a few days later, Mr. Dilon sent Mr. Beishuizen the following text:

> Good evening Sir, I got advised earlier today that it will be at least till mid September before funds are released for disbursements, I hope that's not an inconvenience, we will cover the additional interest.
>
> If it is please let me know, I will make alternate arrangements.
>
> Cheers!

[17] Mr. Beishuizen replied to Mr. Dilon the next day saying waiting until mid-September to receive repayment of the loan would not create a problem for him.

[18] On 23 September 2019, Mr. Dilon sent the following text to Mr. Beishuizen:

> Hello, Sir, several emails rcvd
>
> Oct 3 is the first deposit / disbursement.
>
> I will be talking to our local bank after I talk with the lawyers in the morning (they are in Orlando) to confirm full documents to bank.

> Keep you posted.
>
> Cheers!

[19] A couple of hours later, Mr. Beishuizen responded to Mr. Dilon. The note included:

> Okay … thanks Jag, can I plan on the 3rd of October then?

[20] Mr. Dilon replied with:

> I will be confirming with the receiving bank, just to make sure everybody is working for the 3rd, keep you updated.

[21] Notwithstanding his indications to the contrary, Mr. Dilon did not repay the Beishuizen Loan or any portion of it on 3 October 2019.

[22] Mr. Beishuizen's lawyer sent a demand letter to Mr. Dilon on 3 January 2020, seeking repayment of the loan in question. That correspondence yielded no results and to this day the principal amount of the Beishuizen Loan, including the accrued interest, remains outstanding.

[23] As I have already noted in these reasons, Mr. Dilon acknowledges that he has not repaid the Beishuizen Loan. In his affidavit sworn on 25 July 2021, Mr. Dilon explains:

> [3] Mr. Beishuizen advanced $50,000.00 to me back in 2013. The funds were supposed to be returned in 6 months, but he didn't ask to have those funds returns for years. During that time, we were in regular contact. I thought he had forgiven the amount advanced. I didn't expect him to demand payment suddenly in 2019. I had never agreed to extend the limitation period, and he never asked.
>
> [4] In May of 2019, Mr. Beishuizen and I had a verbal altercation where he screamed profanities at me, at which time I determined that our professional relationship was over, and began to limit my contact with him.

[24] I note that the date of the alleged verbal alteration is May of 2019. The texts between Mr. Dilon and Mr. Beishuizen that I have already referred to earlier in these reasons, postdate May 2019, and as I have said, the tone of those communications indicate to me that there was still a friendly relationship between the two.

[25] In his supplemental affidavit sworn 12 October 2021, and filed in response to Mr. Dilon's affidavit, Mr. Beishuizen says:

> [5] On or about October 2013, I asked Jag Dilon if he was going to repay the loan on time. He told me he wanted to hold onto the loan funds for longer as this would benefit Service Air Group Inc. ("SAGI"). He assured me that the funds were there when I needed them. I agreed to let him delay repayment.
>
> [6] Between 10 and 15 times over the course of the next 6 years, I had similar conversations with Jag Dilon in which I would ask about the loan and he would ask to delay repayment. He always reasoned that SAGI would benefit from holding onto the loan for longer but that he would return it whenever I really needed it. I agreed each time, as Jag Dilon was a friend and I wanted to help him develop SAGI.

The Yoshikawa Loan

[26] Mr. Yoshikawa and Mr. Dilon attended the same local gym in Richmond, B.C. That is where they met. Over time a friendship developed, and the two men began socializing.

[27] In August 2019, Mr. Dilon reached out to Mr. Yoshikawa and requested that he loan SAGI $20,000 US dollars.

[28] Mr. Yoshikawa and Mr. Dilon agreed to meet on 30 October 2019 so that Mr. Dilon could obtain the funds SAGI needed from Mr. Yoshikawa. Prior to meeting that day, Mr. Yoshikawa sent Mr. Dilon the following text:

> Hi, Jag.
>
> My bank manager will release the funds BUT he is just watching out for my interests.
>
> The 20 K US draft is ready. Can we do 2k at the end of 30 days and $65 per day after the 30 day period.
>
> The 2k stems from lending rate at financial institutions.
>
> Let me know if this is okay

[29] Within a few minutes of that being sent, Mr. Dilon replied:

> That will be fine. I will meet you at the bank, I'm about f5 minutes away.
>
> Are you there yet?

[30] There is no dispute that 30 August 2019 Mr. Dilon received from Mr. Yoshikawa a $20,000 US dollar bank draft made payable to SAGI. I will call this the "Yoshikawa Loan". In his affidavit sworn July 13, 2021, Mr. Yoshikawa explains:

> [10] My investment was made on 30 August 2019. I expected payment of USD $2,000 on 30 September 2019, but that amount was not paid to me. I was not concerned because under the terms of my investment, that sum was repayable to me, and I knew that I would continue to earn USD $65 per day until the principal was repaid.

[31] On 10 December 2020, Mr. Dilon sent an email to Mr. Yoshikawa's banker regarding the Yoshikawa Loan. In his email Mr. Dilon noted:

> We received word yesterday that all is in order and we are back on track with direction in a matter of days, at that point we will have a timeframe as to the availability of our funds and will be in a position to fulfill our commitment to Terry.
>
> As you are aware, Terry is to receive 10% on the initial 20K, USD for the month and xx amount of dollars USD each day thereafter (which I have verbally agreed with Terry).
>
> Please keep in mind that the delay was caused by a third party and our lender has agreed to cover any costs that we have incurred, so this will not have any effect on our arrangement with Terry.

[32] In his affidavit sworn and filed in response to this application, Mr. Dilon explains:

> [5] Mr. Yoshikawa advanced $20,000 USD to SAGI in 2019. At the time, he was being brought onto SAGI in a management position. SAGI was also in need of funds at the time, as its other source of financing, Mr. Parameswaran, had failed to advance $100,000 to SAGI, as he had agreed ... We were scrambling to try to get funding from any source, so that we could pay legal fees to our lawyers in the United States, and so that we could apply for relicensing from Transport Canada to start generating revenue.
>
> …
>
> [7] On August 30, 2019, I was driving to meet Mr. Yoshikawa to pick up the $20,000 USD bank draft, when I received a text from him indicating that SAGI would have to pay $2,000 in interest and make $65.00 payments after that. He mentioned that the 10% was the amount of interest he is receiving from his bank, RBC, to justify why the amount was fair.
>
> [8] Although this had not originally been agreed to, I thought it was fine that SAGI pay $2,000 in interest. I believed that we would be repaying the amounts owed at a rate of $65.00 per day, starting after one month. I never intended or agreed to SAGI paying $65.00 per day in interest, as that interest

> rate is much higher than the rate of financing we could have obtained elsewhere.

Issues

[33] The first issue to address is the suitability of the claims for resolution by summary trial. If satisfied that a summary trial is, in fact, the appropriate means of adjudicating one or both of the claims before me, then the questions to be determined are:

1. Is Mr. Beishuizen's claim statute barred or has there been forbearance, thus alleviating any *Limitation Act* deadline?
2. Should the rate of interest sought with respect to the Yoshikawa Loan be read down or severed because it is contrary to the *Criminal Code* of Canada?
3. Is SAGI entitled to a setoff for monetary damages it claims it has suffered as a result of Mr. Yoshikawa's actions, against its financial debt to him?

Discussion

Suitability for Summary Trial

[34] The applicable framework when deciding whether a matter is suitable for resolution by a summary trial begins with Rule 9-7(11) and (15), which read as follows. Rule 9-7(11):

> (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
>
> (a) adjourn the summary trial application, or
>
> (b) dismiss the summary trial application on the ground that
>
> (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
>
> (ii)the summary trial application will not assist the efficient resolution of the proceeding.
>
> …
>
> (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.

[35] Quite understandably, in my view, the defence did not vigorously oppose having Mr. Yoshikawa's claim resolved by summary trial. The same cannot be said of Mr. Beishuizen's claim. With respect to that claim, Mr. Dilon argues it cannot and should not be tried summarily. He says so for three reasons. First, he submits that Mr. Beishuizen's claim is improperly before the court because his originating pleading, his notice of application, does not include an assertion of forbearance. Second, he contends that Mr. Beishuizen's second affidavit is deficient and inadmissible because it was filed late and is not a proper reply affidavit. Finally, Mr. Dilon asserts there is a significant clash between his evidence and that of Mr. Beishuizen, especially on the issue of forbearance and the nature of the Beishuizen Loan. Because of this conflict, Mr. Dilon argues that the court is not in a position to find the necessary facts that will allow it to render a judgment on the summary trial.

[36] The jurisprudence is clear that the court should endeavour to determine a case on summary trial, even if the evidence may not be perfect or there may be competing versions of important events or facts. In other words, as long as the court can determine the facts necessary to reach a judgment, then it should, unless it would be unjust to do so (see: *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence*

Ltd., (1989) 36 B.C.L.R. (2d) 202 (C.A.); and *Hewson v. British Columbia*, 2016 BCSC 803).

[37] The factors to be considered were articulated at paragraph 48 in *Inspiration Management*, and I will repeat them here:

> In deciding whether it would be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this question.

[38] The fact that a chambers judge hearing a Rule 9-7 summary trial may have to make findings of fact on issues of credibility does not, in my respectful view, necessarily prohibit the application from proceeding. It is only where there are serious or significant credibility issues that can only be resolved by a conventional trial that an application for judgment under Rule 9-7 ought to be disallowed.

[39] In my view, the argument raised by the defence do not justify declining to proceed to adjudicate the claims of Mr. Beishuizen and Mr. Yoshikawa by summary trial.

[40] To begin with, I find Mr. Dilon's complaint about the state of the pleadings and Mr. Beishuizen's alleged failure to plead forbearance to be unfounded. In my opinion, the issue is raised and pleaded in Part 1, paragraph 6 of the "Statement of Facts" in the notice of civil claim, where Mr. Beishuizen says:

> Following the Borrower's failure to pay the Beishuizen Promissory Note, Mr. Beishuizen refrained from demanding repayment immediately by exercising forbearance towards the Borrower and granting an extension for repayment.

[41] The fact that Mr. Dilon specifically references Mr. Beishuizen's plea of a forbearance agreement in his response to the civil claim and then denies the existence of such an agreement undermines his assertion that the plaintiffs' pleadings are deficient.

[42] Additionally, in my opinion, the reply affidavit filed by Mr. Beishuizen on 12 October 2021, is not an inappropriate reply affidavit nor is it defective in any way. The fact it was only filed a few days before the hearing does not trouble me. Nor do I find that it prejudiced Mr. Dilon in any material way.

[43] Finally, I do not see the significant clash between Mr. Beishuizen's evidence and that of Mr. Dilon that the latter asserts. Mr. Beishuizen claims that for many years after he had made the loan in question to Mr. Dilon, he did not "specifically" request repayment. However, he says he did not do so because Mr. Dilon assured him on various occasions that the loan was valuable to him, Mr. Beishuizen, as it continued to accrue interest. Mr. Dilon also said he wanted to retain the funds as they were assisting SAGI. It was for these reasons, says Mr. Beishuizen, that he agreed to delay seeking repayment of the loan.

[44] Mr. Dilon says Mr. Beishuizen delayed asking for the repayment of the loan. There is no evidentiary clash there, as Mr. Beishuizen acknowledges this. However, Mr. Dilon is silent on Mr. Beishuizen’s claim that he told Mr. Beishuizen that he wanted to keep the funds in SAGI and Mr. Beishuizen agreed to that request.

[45] In my opinion, the claims being advanced are not of such a magnitude that they militate against proceeding with a summary trial. On the contrary, they relate to a reasonably modest sum. The issues are not complex, and there is no significant issue of credibility as between the evidence of Mr. Dilon and that of Mr. Beishuizen and Mr. Yoshikawa so as to render a determination of the parties' dispute by summary trial unfair.

[46] In my opinion, the disputes in questions are appropriate for resolution by a summary trial. Moreover, I am satisfied on the evidence before me that I can find the necessary facts to decide the issues in dispute and it would not be unjust to do so.

Is Mr. Beishuizen’s claim statute barred?

[47] Mr. Dilon says Mr. Beishuizen's legal action for repayment of the loan is out of time. Pointing to ss. 6 and 15 of the *Limitation Act*, S.B.C. 2012, c. 13, Mr. Dilon

says Mr. Beishuizen needed to start his action for breach of the Promissory Note within two years of that cause of action becoming known. Mr. Dilon further assert that the cause of action became known to Mr. Beishuizen 3 October 2013 when Mr. Dilon failed to repay the loan in question.

[48] Mr. Dilon is correct that a court proceeding must be commenced within two years of the date upon which the cause of action is discovered, and with respect to a claim founded upon security, like the Promissory Note, the action is discoverable on the first day that the right to enforce the security arises. In this case that would be 3 October 2013, six months after the Promissory Note was executed.

[49] However, I say with respect, the issue does not stop there. Mr. Beishuizen's action as set out in his notice of civil claim includes the assertion that he agreed not to enforce the loan when it came due and allowed it to remain unpaid because of what Mr. Dilon asked of him and what he agreed to. In making that assertion, he points to the text and oral conversations he had with Mr. Dilon. Mr. Bershuizen says Mr. Dilon assured him that it would be to his benefit and that of SAGI if the funds were to stay in the company. Mr. Bershuizen says he believed Mr. Dilon. It was for this reason that he delayed seeking repayment of the loan and did not take steps to enforce the Promissory Note.

[50] In *Canada v. Stasiuk*, 2018 ONSC 1226, Mr. Justice Shaw observed at paragraph 52:

> [52] At common law, a creditor and debtor can agree to forbear (agree not to do something) enforcement of a debt and such agreement suspends the limitation period during that period of forbearance: *City of Hamilton v. Metcalfe & Mansfield Capital Corp* 2012 ONCA 156, 347 D.L.R. (4th) 657, at para. 73. If a creditor and debtor agree to change the repayment terms of a debt obligation, they have essentially renegotiated their debt agreement. So the limitation period for the creditor's action to collect on the debt would not run because — due to the agreement to change the repayment terms — the debtor is not effectively in default. (*City of Hamilton*, at para. 75.).

[51] This statement of law was adopted in *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2020 BCSC 637, aff'd 2021 BCCA 171, where Madam Justice Fitzpatrick explained at paragraphs 63 and 64:

> [63] As discussed in *Hamilton* at para. 75, a forbearance agreement can result in a renegotiation of a debt agreement as it relates to the timing of payments. As the court notes, this in essence results in a "resetting" of the terms of the loan such that the defaults no longer exist and the running of the limitation period is delayed.
>
> [64] This understanding of the effect of forbearance agreements has been accepted in BC with some clarification. As discussed in *Grimsley* at para. 70, citing *Rosas v. Toca*, 2018 BCCA 191, by such terms, the parties may extend the date for repayment of a loan and delay the running of the limitation period without fresh consideration.

[52] Mr. Dilon argues that if there was forbearance, Mr. Beishuizen did so unilaterally and to own detriment. I am not convinced that is the case. My view of the evidence leads me to conclude that over the years since the Beishuizen Loan was made, Mr. Beishuizen and Mr. Dilon discussed the status of the loan and its repayment on multiple occasions. While Mr. Beishuizen made no specific request for repayment of the loan, that was because Mr. Dilon encouraged him not to do so but to instead leave the money with him and SAGI. I further find that Mr. Beishuizen honoured and complied with Mr. Dilon's request.

[53] In my opinion, the parties' actions and words constitute a valid forbearance agreement. I reach this conclusion keeping in mind the length and nature of the parties' relationship. They were friends, and this fact is clearly borne out in the text messages. The scenario was pretty simple: Mr. Dilon was seeking Mr. Beishuizen's assistance in financing his company, SAGI, and Mr. Beishuizen was prepared to assist his friend in this regard.

[54] Although s. 24 of the *Limitation Act* provides specific ways a limitation period can be extended or renewed, nothing in that section or elsewhere in the Act prohibits contracting parties from agreeing to vary a limitation period. This principle of law was

explained in *Rosas v. Toca*, 2018 BCCA 191, at paragraph 69 where the court noted:

> [69] I would note first that the former *Limitation Act* is silent as to whether an agreement can vary or extend the statutory limitation period. While s. 5 states that a limitation period can be renewed by way of an acknowledgment in writing or part payment, that does not necessarily speak to whether the parties can agree to vary the limitation period. However, the Supreme Court of Canada in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1073, a case involving choice of law and whether the limitation period in Saskatchewan or British Columbia governed the claim in that case, wrote that "a substantive limitation defence, such as the one in the case at bar may be waived either by failure to plead it, if this is required, or by agreement."

[55] My assessment of the evidence leads me to conclude that Mr. Beishuizen's position on this question is the correct one. That is, given his forbearance over the years since the loan was made, the limitation period for starting an action to enforce the Promissory Note did not commence until September 2019 when Mr. Dilon last indicated that he would repay the Beishuizen Loan. When he did not, the cause of action arose.

[56] To put it somewhat differently, I am not persuaded on the evidence before me that Mr. Beishuizen's claim against Mr. Dilon is out of time and statute barred by the *Limitation Act*. That being the case, I am satisfied that Mr. Beishuizen has made out his claim against Mr. Dilon.

Should the rate of interest claimed for the Yoshikawa Loan be read-down or severed because it is contrary to the Criminal Code of Canada?

[57] Mr. Yoshikawa asserts that he and Mr. Dilon, acting on behalf of SAGI, reached the following binding agreement:

(a) Mr. Yoshikawa would loan SAGI $20,000 US dollars;

(b) SAGI would service the loan by paying Mr. Yoshikawa $2,000 by September 30, 2019, and

(c) SAGI would pay $65 US dollars per day in interest after September 30, 2019, until the principal amount had been repaid.

[58] The evidence originating from Mr. Dilon satisfies me that he was fully aware that he, acting on behalf of his company SAGI, was borrowing from Mr. Yoshikawa on the terms that I have just set out.

[59] I accept that Mr. Dilon and SAGI were in a financial bind at the time he and Mr. Yoshikawa reached the agreement that resulted in the Yoshikawa Loan. Nevertheless, I find Mr. Dilon understood the terms of the loan, including the servicing charges that were payable at the end of the month and then the *per diem* interest charge thereafter.

[60] The question with respect to the Yoshikawa Loan is not whether the principal needs to be repaid. It is the $2,000 service charge and the interest charges payable after the 30 days that are in dispute.

[61] Section 347 of the *Criminal Code* provides that a “criminal rate of interest”:

> Means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceed sixty percent on the credit advanced under the agreement or arrangement.

[62] Mr. Yoshikawa accepts that given the passage of time since he made the loan to SAGI, the accumulation of the $65 per day interest fee has moved the rate of interest being charged on the loan into the category prohibited by the *Criminal Code*. The question then becomes: what to do about it? The jurisprudence suggests there are three options:

> (a) voiding the contract *ab initio*;
>
> (b) striking out a term or terms of the contract; or
>
> (c) reading down the interest rate to 60 percent.
>
> (see: *Forjay Management Ltd. v 0981478 B.C. Ltd.*, 2020 BCCA 70 at para. 52)

[63] Mr. Dilon says that both the $2,000 charge at the end of the first month of the loan and the $65 per day interest charges thereafter should struck from the loan agreement he and SAGI reached with Mr. Yoshikawa. He supports this position by claiming his and SAGI's bargaining powers and positions were nowhere near as

strong as those of Mr. Yoshikawa. SAGI needed the money, and Mr. Yoshikawa knew that. Mr. Dilon alleges Mr. Yoshikawa took advantage of that power imbalance and raised the topic of the service or interest charges for the loan only minutes before Mr. Dilon was going to meet him to obtain the funds, knowing that Mr. Dilon would have no option but to accept those terms.

[64] Mr. Dilon says that the rate of interest being charged on the Yoshikawa Loan is far greater than what he could have obtained from another lender. He point to this assertion in support of his submission that he would never have agreed to the loan had he known that the $65 per day was an interest charge and not the monthly amount he would be required to pay towards the principal amount that he thought it was. All of this may be true, especially the relative negotiating position of the parties. However, the assertion that Mr. Dilon and SAGI had other viable options in financing rings hollow in my view and is not supported by the evidence. Moreover, I am satisfied that Mr. Dilon knew exactly what he was getting into when he reached the loan agreement with Mr. Yoshikawa. In my view, Mr. Dilon and his company SAGI were reaching the end of their options and only had an individual like Mr. Yoshikawa to turn to for assistance, if not to save SAGI. That assistance came at a cost and this included the terms that Mr. Yoshikawa sought and Mr. Dilon and SAGI agree to.

[65] In my opinion, at Mr. Dilon’s request, Mr. Yoshikawa agreed to loan $20,000 US dollars to SAGI. He, Mr. Yoshikawa, suggested a service fee of $2,000 for the first month and what amounted to an interest fee of $65 per day thereafter. He did not demand this. He inquired of Mr. Dilon and asked, “would that be okay?” Mr. Dilon responded that it would be fine.

[66] Reading down an illegal interest rate to 60 percent can have the advantage of respecting the parties' contractual intentions by giving the greatest possible effect to the rate of interest the parties agreed to.

[67] In my opinion, the $2,000 was a justifiable service financing charge and does not constitute a criminal rate of interest. However, the same cannot be said about the second level of carrying costs for the Yoshikawa Loan. I do not accept

Mr. Dilon's evidence that the $65 per day was what the parties agreed SAGI would pay on a monthly basis on the principal amount of the loan and not an interest charge. Adopting Mr. Dilon's argument would in practical terms convert the Yoshikawa Loan into one that was practically interest free. This makes no business sense and runs contrary to the bulk of the evidence relating to the parties' true intentions and understanding.

[68] As I have mentioned, SAGI was in financial distress and needed funding on an urgent basis. Mr. Yoshikawa was prepared to take the risk. However, there needed to be a rate of return commensurate with that level of risk. In my opinion, reading down the $65 per day interest charge to one that is simply 60 percent per annum will most fairly and effectively reflect the parties' contractual intentions while not running afoul of the *Criminal Code* provisions regarding illegally high interest rates.

Equitable Setoff

[69] SAGI claims that Mr. Yoshikawa has made defamatory statements about Mr. Dilon and that these statements have negatively impacted SAGI's ability to operate. Mr. Dilon estimates that the quantum of damages is equivalent to the amount SAGI owes on the Yoshikawa Loan. Consequently, he argues that both amounts should be set off against each other resulting in SAGI and Mr. Dilon owing Mr. Yoshikawa nothing.

[70] This claim is not supported by any convincing evidence and I am not persuaded that Mr. Yoshikawa defamed Mr. Dilon or SAGI, or that any such defamation caused SAGI identifiable and quantifiable damages.

Conclusion

[71] In conclusion, I am satisfied that the plaintiff's claims are suitable for adjudication by summary trial and that I am able, based on the evidence before me, to find the facts necessary to render judgment.

[72] I also find that it would not be unfair to the defendants to proceed in this manner. On the contrary, given the relatively simple nature of the claims being advanced and the reasonably small amounts in question, I find justice can be done by proceeding to resolve the parties' disputes by a summary trial.

[73] Having considered all the evidence, the submissions of counsel and the case authorities that were brought to my attention, I am satisfied that Mr. Beishuizen's action against Mr. Dilon is justified and made out. Mr. Dilon is indebted to Mr. Beishuizen pursuant to the Promissory Note. Mr. Dilon has not repaid the loan, notwithstanding Mr. Beishuizen requests that he do so.

[74] The same can be said about Mr. Yoshikawa's action against SAGI. That too has been made out. SAGI is indebted to Mr. Yoshikawa, Mr. Yoshikawa has sought repayment but SAGI has failed to comply.

[75] In my opinion, Mr. Beishuizen is entitled to judgment against Mr. Dilon in the principal amount of the Beishuizen Loan plus interest calculated at a contractual rate to today's date. From today, interest will accrue pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[76] Mr. Yoshikawa is also entitled to judgment against SAGI in the principal amount of the Yoshikawa Loan plus interest calculated at 60 percent per annum to today's date. From today, interest on judgment will be calculated pursuant to the *Court Order Interest Act*.

[77] SAGI's claim for an equitable setoff based upon alleged defamatory statements or actions made by Mr. Yoshikawa that resulted in financial harm to SAGI is unsupported in the evidence and is therefore dismissed.

[78] The plaintiffs have been successful on this summary trial. Unless there is a need to make submissions, they are entitled to ordinary costs on Scale B. In that regard, they have leave to apply.

"G.R.J. Gaul, J."