



No. S1910892
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ALL CANADIAN INVESTMENT CORPORATION

PLAINTIFF

AND:

RONALD WENINGER, also known as RON WENINGER and
ELFRIEDA WENINGER

DEFENDANTS

NOTICE OF APPLICATION

Name of applicant: All Canadian Investment Corporation

To: the defendants

TAKE NOTICE that an application will be made by the applicant to the Honourable Justice Walker at the courthouse at 800 Smithe Street, Vancouver, British Columbia, on the 15th day of July, 2022, at 10:00 a.m., for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. Judgment for the sum of \$206,299.30 or such other amount as the court deems just.
2. Post-judgment contractual interest from the date of judgment to the date of payment at a rate of 6% per annum (\$24.93 per day).
3. In the alternative, post-judgment interest pursuant to the *Court Orders Interest Act*, RSBC 1996, c 79.
4. Costs; and
5. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

Parties

1. The plaintiff, All Canadian Investment Corporation, is a company duly incorporated pursuant to the laws of British Columbia with an address for service in these proceedings of 1200 – 1075 West Georgia Street, Vancouver, British Columbia (“ACIC”).
2. ACIC is a mortgage investment corporation. Its business was to provide loans to borrowers which are secured by, amongst other things, registered, unregistered and equitable mortgages on real properties.
3. On November 20, 2017, ACIC was granted protection pursuant to the *Companies Creditors Arrangement Act* R.S.C., 1985, C-36 (the “CCAA Proceedings”).
4. As a result of an Order made November 22, 2018 in the CCAA Proceedings, the monitor is managing the wind down of operations of ACIC in accordance with the Plan of Arrangement approved by Sanction Order made February 5, 2021.
5. The defendants, Ronald Weninger also known as Ron Weninger (“Mr. Weninger”) and Elfrieda Weninger (“Mrs. Weninger”) are preferred shareholders of, and borrowers from, ACIC.

Investment

6. Mr. and Mrs. Weninger acquired preferred shares in ACIC as follows:
 - a. \$100,000 of preferred shares on June 11, 2008; and
 - b. \$100,000 of preferred shares on February 5, 2009.
 (the “Investment”)
7. From time to time the defendants received dividend payments on the Investment from ACIC including in 2015 and 2016.

Loan Agreements

8. Between September 4, 2012 and March 25, 2016 ACIC (as lender) and Mr. Weninger and Mrs. Weninger (as borrowers) entered into various loan agreements (together referred to hereinafter as the “Loan Agreements”) as described in the Affidavit #1 of John McEown filed herein. The advances under the Loan Agreements were as follows:
 - a. September 4, 2012 in the amount of \$300,000 (the “First Loan Agreement”);
 - b. September 18, 2013 in the amount of \$200,000 (the “Second Loan Agreement”);

- c. October 10, 2014 in the amount of \$100,000 (the “Third Loan Agreement”);
 - d. October 1, 2015 in the amount of \$130,000 (the “Fourth Loan Agreement”);
 - e. November 12, 2015 in the amount of \$10,000 (the “Fifth Loan Agreement”);
 - f. February 25, 2016 in the amount of \$20,000 (the “Sixth Loan Agreement”); and
 - g. March 25, 2016 in the amount of \$20,000 (the “Seventh Loan Agreement”).
9. The terms of the Loan Agreements were recorded documents executed by the defendants and as of March 25, 2016:
- a. the outstanding principal was \$150,000;
 - b. interest was accruing at a rate of 6% per annum;
 - c. interest was repayable on a monthly basis; and
 - d. the outstanding principal was due and owing August 26, 2016.
(the “Outstanding Loan”)
10. Consistent with the terms of the Loan Agreements:
- a. ACIC periodically sent reminder letters to Mr. and Mrs. Weninger requesting payment of the interest due and owing under the Loan Agreements; and
 - b. the Weningers made interest payments to ACIC up to April 30, 2016.
11. Contemporaneous correspondence suggests that at least some of the funds advanced to the defendants may have been utilized by them for the purposes of construction projects where the interest being charged (and paid) was being passed on to their clients.

Breach of the Outstanding Loan Agreements

12. ACIC has demanded repayment of the monies due and owing under the Outstanding Loan but the Weningers have refused or neglected to repay the monies due and owing.

CCAA Proceedings and Redeeming Shareholders

13. On June 18 – 20, 2020, ACIC brought an application in the CCAA Proceedings to determine the status of preferred shareholders for distribution purposes (the “Preferred Shareholders Application”).

14. On September 4, 2019, Justice Walker issued Reasons for Judgment in the Preferred Shareholders Application ruling that the Redeeming Shareholders' claims must be treated as "equity claims" for the purposes of the *Companies' Creditors Arrangement Act*.

Proceedings in this Action

15. By Notice of Civil Claim filed September 27, 2019 ACIC commenced these proceedings.
16. On November 1, 2019, Ron and Elfrieda Weninger filed their Response to Civil Claim and they have subsequently served an Amended Response to Civil Claim filed June 27, 2022. (the "**Response**").
17. The defendants acknowledge receiving monies from ACIC and the documentary evidence supporting such finding is incontrovertible.

Response, Part 1, Division 2, paragraphs 2 and 4.

18. In the Response the defendants allege that:
- a. after making the Investment in 2008 and 2009 they made a redemption request for \$100,000.00 of their preferred shares on or about September 17, 2013 (the "**Alleged Redemption Request**");
 - b. after making the Alleged Redemption Request they were advised by ACIC at that it was unable to redeem the preferred shares due to financial constraints; and
 - c. ACIC instead agreed to provide \$100,000.00 in funding structured as a secured loan.
19. Contrary to those allegations, no written redemption requests were ever delivered by the defendants to ACIC. The Loan Agreements are entirely consistent with loan advances. The fact that the defendants (with or without the agreement of ACIC) anticipated paying the Outstanding Loan from funds realized from the preferred shares does not change the fact that they received monies from ACIC and executed loan agreements.
20. The admissions contained in the Response confirm that the defendants were fully aware that ACIC was unable to redeem their preferred shares as a result of financial constraints, a position which many other preferred shareholders found themselves in.
21. The defendants further allege that they would not have entered into the Loan Agreements at a time when they had money invested by way of preferred shares. However as they well knew, the Investment was not available to them as ACIC was not financially able to redeem the preferred shares.

22. The position advanced by the defendants essentially appears to be that they should be entitled to retain the funds advanced to them in the preference to the claims of other preferred shareholders.

Part 3: LEGAL BASIS

23. ACIC relies on the *Supreme Court Civil Rules* including Rules 9-7 and 14-1.

Summary Trial

24. Rule 9-7 must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of all claims. Proportionality includes taking account of:
- a. the appropriateness of the procedure;
 - b. its cost and impact on the litigation; and
 - c. its timeliness given the complexity of the litigation.

Hryniak v Mauldin, 2014 SCC 7

25. The purpose of Rule 9-7 is to promote the early resolution of proceeding by authorizing a chambers judge to decide disputed questions of fact on affidavits unless it would be unjust to decide the issues in such a way. Chambers judges should be careful but not timid in using the rule for this intended purpose.

Inspiration Management Ltd. v McDermid St. Lawrence Ltd. [1989] B.C.J. No. 1003

26. In deciding whether to proceed under Rule 9-7, the court should consider, *inter alia*:
- a. the amount involved;
 - b. the complexity of the matter;
 - c. its urgency;
 - d. any prejudice likely to arise by reason of delay;
 - e. the cost of taking the case forward to a conventional trial in relation to the amount involved;
 - f. the course of the proceedings;
 - g. the cost of the litigation;
 - h. the time of the summary trial;

- i. whether credibility is a critical factor in the determination of the dispute;
- j. whether the summary trial will create unnecessary complexity in the resolution of the dispute;
- k. whether the application would result in litigation in slices; and
- l. any other matters that arise for consideration.

Inspiration Management

Gichuru v Pallai, 2013 BCCA 60

The Loan Agreements

27. The evidence and admissions make it clear that funds were advanced to the defendants. The documents which they executed are entirely consistent with the normal and usual terms of a loan agreement and significantly, over a period of approximately four years interest payments were made by the defendants.

Defences

28. Rather than expressly denying the existence of the Loan Agreements (which would be impossible given the documents which they executed), the defendants rely on the following defences:
- a. misrepresentation/fraud;
 - b. unconscionability;
 - c. breach of the duty good faith and fair dealing; and
 - d. promissory estoppel.

Fraudulent misrepresentation

29. A party seeking to rely on a defence of fraudulent misrepresentation must establish that:
- a. a representation of fact was made;
 - b. the representation was false in fact;
 - c. the party making the representation was aware that the representation was false at the time it was made and intended that it be acted on;

- d. the party to whom the representation was made must have acted on it; and
- e. they relied on the representation to their detriment as a result of which they suffered loss.

Wang v Shao, 2019 BCCA 130

LeRoy v TimberWest Forest Corp., 2021 BCCA 326

Unconscionability

30. To set aside a bargain for unconscionability, a party must establish that there was:
- a. inequality of bargaining power; and
 - b. a resulting improvident bargain.

Uber Technologies Inc. v Heller, 2020 SCC 16.

31. Inequality of bargaining power arises where one party cannot adequately protect their interests in the contracting process and typically arises in:
- a. “necessity” cases: where the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing; or
 - b. “cognitive asymmetry” cases: where only one party could appreciate and understand the full import of the contractual terms.

Uber at paragraphs 66 and 69-71.

32. Improvident bargains unduly advantage a stronger party or unduly disadvantage a weaker party.

Uber, at para 74.

33. Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to escape from a contract when their circumstances are such that the agreement now works a hardship upon them.

A Speedy Solutions Oil Tank Removal Inc. v Garraway, 2021 BCCA 220 at paragraph 128.

34. Freedom of contract is underpinned by the assumption that a “contract is the ‘freely negotiated bargain or exchange’ between ‘autonomous and self-interested parties.’”

Uber, at para 56.

Breach of the duty good faith and fair dealing

35. The ‘organizing principle’, requires parties to perform their contractual duties honestly, reasonably and not arbitrarily.

Bhasin v Hrynew, 2014 SCC 71 (CanLII), at para 63.

36. The organizing principle is not a free-standing rule, rather it serves to underpin and inform the application of more specific doctrines. It is contextual and may be weighted differently in different situations.

Bhasin, at para 64.

Promissory estoppel

37. The equitable defence of promissory estoppel requires a defendant to establish that:

- a. they were in a legal relationship at the time of the promise or assurance;
- b. the promise or assurance was intended to affect that relationship and to be acted on; and
- c. the other party relied on the promise or assurance their detriment.

Trial Lawyers Association of British Columbia v Royal Sun Alliance Insurance Company of Canada, 2021 SCC 47, citing

Maracle v Travellers Indemnity Co. of Canada, 1991 CanLII 58 (SCC)

38. Promissory estoppel seeks to protect against the inequity of allowing the other party to renege from their statement where it has been relied upon to the detriment of the person to whom it was directed.

Trial Lawyers Association of British Columbia at para 16,

Application

39. The defendants are unable to establish the elements for fraudulent misrepresentation. Even if the alleged representations were made the defendants did not act to their detriment thereby suffering a loss. Indeed, they received the benefit of the \$150,000.00 advance which they were well aware was not available to them as the preferred shares were unable to be redeemed.
40. Further, even if the defence of fraudulent misrepresentation could be established the relief afforded by the defence (and sought in this case) is a declaration that the Loan Agreements be declared *void ab initio*. An order of rescission would require the parties to be returned to the position they would have been in but for the

alleged misrepresentation which would require the defendants to return the \$150,000 to ACIC.

Response, Part 3, paragraph 1.

41. Similarly, unconscionability is not supported by the facts of this case. The defendants were not unduly disadvantaged as a result of the loan agreements. To the contrary, they benefitted from \$150,000.00 in loans and have suffered no loss as a result of entering into the Loan Agreements. Granting judgment in favour of ACIC will simply put them in the same position as all of the other preferred shareholders.
42. Even if the Defendants were able to establish their allegations of misrepresentation, unconscionability and breach of good faith and fair dealing, there is fundamental distinction between what they allege and what they seek.
43. Putting to one side their claim for rescission (which does not assist them for the reasons mentioned above), what the defendants appear to be seeking is specific performance by ACIC of representations allegedly made and the contractual arrangement that they allege exists.
44. They seek to retain the \$150,000.00 in loans, while also pleading rescission of the loan agreements which would restore the parties to their positions prior to entering into the Loan Agreements.

Rainbow Industrial Caterers Ltd. v Canadian national Railway Company, (1990), 43 BCLR (2d) 1 (CA), affirmed [1991] 3 SCR 3).

45. Absent entering into the Loan Agreements the defendants would have never received the \$150,000.00.

Interest

46. Absent exceptional circumstances, the interest rate which had governed the loan prior to breach would be the appropriate rate to govern the post-breach loan. The application of a lower interest rate would be unjust to the lender.

Bank of America Canada v Mutual Trust Co., 2002 SCC 43

47. Where an interest rate is set by contract, and in the absence of exceptional circumstances, it is an error of law to decline to award post-judgment interest at the contractual rate.

Capital One Bank v. Carroll, 2019 ONSC 6261

Part 4: MATERIAL TO BE RELIED ON

- 48. Affidavit #1 of John McEown, made on the 30th day of June, 2022.
- 49. Affidavit #1 of Annika Youn made on the 30th day of June, 2022
- 50. Such further and other materials as counsel may advise.

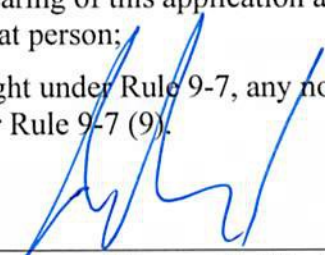
The Applicant estimates that the Application will take 1 day.

- This matter is within the jurisdiction of a master.
- This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application:

- (a) file an application response in Form 33;
- (b) file the original of every affidavit, and of every other document, that:
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: June 30, 2022



Signature of Jeremy D. West
Counsel for the Plaintiff

To be completed by the court only:

Order made
 in the terms requested in paragraphs _____. of Part 1 of this notice of application

with the following variations and additional terms:

Date: _____

_____ Signature of Judge Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts