IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jawanda v. Ismail,* 2025 BCSC 1009

Date: 20250501
Docket: S03522
Registry: Abbotsford

Between:

Parman Singh Jawanda

Plaintiff

And:

Nazmin Hasanali Ismail, Christina Frini Pantelakis and Heliane Jacqueline Pantelakis

Defendants

Before: The Honourable Justice Marzari

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	R.S. Arora, as agent for V. Verma
Counsel for the Defendants:	M. Nied
Place and Date of Hearing:	Port Coquitlam, B.C. May 1, 2025
Place and Date of Judgment:	Port Coquitlam, B.C. May 1, 2025

[1] **THE COURT:** These are my reasons on the plaintiff's application to amend its pleadings. As usual, if a transcript is requested, I reserve the right to edit for clarity, citations, etc. but the substance will not change.

[2] The plaintiff seeks to amend its notice of civil claim, which was originally filed in February of 2023, and then amended in March of 2023. This amendment

application comes after a notice of trial has been set for a ten-day trial later this year in November 2025, and leave to amend is required in these circumstances.

[3] The original claim is primarily in contract as I read it, for repayment of a $1.2 million loan said to have been provided by the plaintiff realtor to his client (who is one of the defendants) to assist in the completion of the purchase of a property by the client in Aldergrove in October 2021, with a repayment period of one year. The extant pleading includes a claim for an interest in the Aldergrove property in the alternative, primarily on the basis of a loosely articulated unjust enrichment claim. I understand that a CPL has already been successfully filed on title to the Aldergrove property on the basis of this alternative trust claim.

[4] In the original claim, the funds were pled to have been spent on another property in Powell River, and an interest in land claimed over that property was also pled, but that claim is to be abandoned in the proposed amended notice of civil claim, and a more clearly articulated unjust enrichment claim is proposed over the Aldergrove property. As I understand it, there is no objection to the abandonment of the Powell River property claim, and the greater clarity of the pleading with respect to the unjust enrichment claim over the Aldergrove property.

[5] The filed response to the notice of civil claim does not deny the advance of the plaintiff to one of the defendants of $1.2 million in relation to the completion of the sale of the Aldergrove property, but it does plead that this was a gift, and that it has been substantially paid back in any event.

[6] Discoveries were conducted in October 2024, at which time further particulars of the alleged loan agreement were provided by the plaintiff in his discovery evidence, including that it was an oral agreement. I understand from counsel that a reference to text messages was also made by the plaintiff at that discovery, which is the subject of an outstanding request arising from the discovery and which outstanding request remains outstanding to date.

[7] The key issues of contention in this application are a series of proposed amendments to the notice of civil claim that include:

1. First, adding an alternative claim that the alleged contract creating that loan that is central to this claim was not necessarily oral, but "alternatively was made partly orally and partly in writing." That is at the new paragraph 13.

2. Second, adding broader language to the terms of the alleged loan agreement to state that the terms of the loan were express or implied, and include, without limitation, the various original terms pled. That is the new pleading at paragraph 14.

3. Third, that an additional express or implied term of the loan agreement was that the defendants would pledge the Aldergrove property as security for the loan, that they would execute a written mortgage agreement and register it against the Aldergrove property, and that this mortgage was not registered by the defendant but the intention to do so remains. There I am referencing the new proposed paragraphs 16, 18, and 24.

4. Fourth, an alternative pleading, that the Aldergrove property was pledged as security for the loan to be repaid upon resale of the Aldergrove property.

5. Finally, fifth, additional relief sought for a declaration of equitable mortgage in favour of the plaintiff over the Aldergrove property as security for the loan.

[8] The test that I have to consider in considering an application to amend pleadings is not at issue. It is generally a low bar, as set out at paras. 31–37 of Justice Warren's decision in *Taylor v. Blenz The Canadian Coffee Company Ltd.*, 2019 BCSC 906:

> **Applicable legal principles**
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> [31] Rule 6-1 of the *Civil Rules* allows parties to amend pleadings with leave of the court. The old Limitation Act, R.S.B.C. 1996, c. 266, and the new Limitation Act, S.B.C. 2012, c.13 (s. 22(5)), expressly confer upon the court the discretion to grant amendments that raise "fresh causes of action", as stated in s. 4(4) of the old *Limitation Act*, or "new claims", as stated in s. 22(5) of the new Limitation Act, which would otherwise be time-barred.
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> [32] The general approach to applications to amend pleadings is generous and non-technical so as to permit amendments that are necessary to determine the real questions between the parties, considering always the interests of justice: *Century Services Inc. v. LeRoy*, 2015 BCCA 120, at para. 10. In *Preferred Steel Construction Inc. v. M3 Steel (Kamloops) Ltd.*, 2015 BCCA 16, at para. 47, the Court of Appeal emphasized the need for flexibility in dealing with applications to amend pleadings given the evolutionary quality of litigation and the resulting requirement to ensure that pleadings adapt to changing circumstances. These foundational principles were recently reiterated in *Swiss Reinsurance Co. v. Camarin Ltd.*, 2018 BCCA 122, at paras. 22 and 23.

> [33] Granting leave to amend pleadings is a highly discretionary decision. Ultimately, the question is whether it is just and convenient to allow the amendments: *Swiss* at para. 21; *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 1996 CanLII 3033 (BC CA), 19 B.C.L.R. (3d) 282 (C.A.), at paras. 36–38.
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> [34] The objective is to balance the interests of justice and convenience in relation to all the parties. Delay, the reasons for delay, the expiry of a limitation period, the presence or absence of prejudice, and the extent of the connection between the proposed amendments and the existing claims are all factors to be considered and none, on their own, are decisive: *Teal Cedar Products* at paras. 41 and 67.
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> [35] Where the proposed amendments do not raise a new cause of action, there will be no issue as to the potential expiry of a limitation period. Thus, it makes sense to first determine whether the proposed amendments raise a new cause of action because the determination of that question, due to the potential expiry of the associated limitation period, is a component in the ultimate assessment of whether it is just and convenient to allow the proposed amendments: *Swiss* at para. 21.
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> [36] In *Swiss*, the Court of Appeal cited with approval the definitions of cause of action found in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, and in *Letang v. Cooper*, [1965] 1 Q.B. 232. In the former case, the Supreme Court of Canada said that "[a] cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court" (at para. 54). In the latter case, Lord Diplock defined cause of action as "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person" (at 242-43). Justice Garson for the Court in *Swiss* said, that she saw little difference between these two descriptions (at para. 28).
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> [37] Where proposed amendments do raise a new cause of action and it is possible that the limitation period applicable to the new cause of action has expired, the court should first determine whether it is just and convenient to allow the amendments assuming that the limitation period has expired: *KPMG Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, at paras. 47–49. If so, the proposed amendments should be allowed unconditionally. If not (i.e., if the loss of a limitation defence would cause such prejudice as would not permit the exercise of the court's discretion in favour of the amendments), then the amendments should be allowed without prejudice to the defendant raising the limitation defence at trial.

[9] Although it is a low bar, there are exceptions where the lateness of the pleading gives rise to prejudice to the other party, where the amended pleadings are vexatious, and where the pleadings give rise to a new cause of action that is barred by the Limitation Act, R.S.B.C. 1996, c. 266 in certain circumstances. If the pleadings do not disclose a reasonable cause of action, or if the pleading should be struck on its face under the Rules, the court will generally not allow it to be filed as an amended pleading.

[10] In this case, the defendants raise several objections to the proposed amendments. One is on the basis of prejudice, and specifically the lateness of the pleading given the completion of the examination for discovery on the terms of the alleged loan agreement. There is also objection on the basis of the contradictory nature of the proposed pleadings. Finally, there is an argument that the proposed pleading, particularly in equitable mortgage, does not disclose a reasonable cause of action, and that it is statute barred by the limitation period.

[11] The plaintiff says all of these objections are unfounded.

[12] The plaintiff concedes that the pleadings add new material facts regarding promises of security and the registration of a mortgage, and add a new form of relief in the form of equitable mortgage to the existing claim.

[13] The plaintiff agrees that this claim is in addition to the previous claims, but says that it is still fundamentally about the advance of $1.2 million by the plaintiff to the defendants, and the terms of that advance. The plaintiff relies in particular on *Taylor*, where the plaintiff in that case sought to make a series of amendments to their pleadings, including adding an allegation of breach of a pre-contractual duty to disclose where the previous pleading had included negligent and fraudulent misrepresentation and breach of fiduciary duty against a realtor, for example.

[14] In that case, Warren J. found that the new causes of action as pled were not fresh causes of action, and that they essentially arose out of the same course of dealings. She allowed the amendment without preserving any kind of limitation defence with respect to those changes.

[15] I do not think it is controversial in this case that new remedies can be pled if they arise from the same essential facts. The question in this case is whether the new material facts pled (and in this case new material facts are required to be pled for this new remedy) crossed the line into something in the nature of brand-new claim, or whether they are still within what Warren J. found in *Taylor,* as arising from the same course of dealings. I also have to consider what the prejudicial impact of that change is.

[16] The defendants argue that the new factual pleadings are not just part and parcel of what was previously pled, but that what is proposed to be pled is substantially different from what was previously pled and what was examined upon

in October 2024. The pledge of security is an entirely new material fact giving rise to an entirely new form of relief in the form of a declaration of equitable mortgage, and it requires a new examination for discovery on those facts, which the defendant says illustrates the nature of the difference. The defendant also says that there is a limitation defence to that declaration of equitable mortgage, and that should also bar the addition of the pleading.

[17] In my view, there is a valid concern here about the strength of the new pleading, and the strength of the proposed claim in equitable mortgage. This is so particularly where there is no document that is produced or identified as being that mortgage, and where there is a discovery that has already occurred on an existing pleading that does not plead any mortgage, and that pleads an oral agreement.

[18] On the other hand, the transfer of $1.2 million by the plaintiff to the defendants, or at least one of the defendants, to complete the purchase of the Aldergrove property does not seem to be an issue in the existing pleadings. On the existing pleadings, the question is whether this transfer is a loan versus a gift, but the purpose of the advance to complete the purchase of the Aldergrove property in lieu of conventional financing does not seem to be an issue, and the defendants even plead that there had been anticipated financing that was supposed to have been arranged by the plaintiff.

[19] In all of the circumstances, adding a claim that the advance was a loan that was secured by the Aldergrove property (as opposed to loan, with possible trust obligations over the Aldergrove property but without mentioning security), is not so different as to cross the line such that I would prevent the plaintiff from being able to pursue that line of argument and claim at trial. Where there is an issue as to whether a remedy arises from the same course of dealings, it is important to allow a full claim to be heard, and it is better that the pleadings be amended now than that they be amended later as consequential amendments if further evidence arises at trial in this regard.

[20] With respect to the availability of the equitable mortgage pleading arising from the same course of action, I am prepared to allow the amendment, though I am not prepared, at this point, to disallow the limitations defence. So that issue could remain live.

[21] I come then to the more fundamental question raised by the defendants about whether or not the pleading of an oral equitable mortgage is available, and whether or not the pleadings with respect to the agreement as amended are sufficient generally. The defendants' primary argument is that the pleadings are deficient in particulars of the agreement, add greater vagueness rather than clarity to that agreement, (i.e., change it from being an oral agreement to an oral but in the alternative oral and written agreement), and that the terms of the alleged agreement are no longer set out clearly, but more broadly. The defendants say this is particularly problematic in that the claim for the equitable mortgage requires a written instrument.

[22] The defendants rely on *Stonewater Ventures (No. 185) Ltd. v. Stonewater Ventures (No. 168) Ltd.*, 2022 BCSC 114 [*Stonewater*], which is a decision of Associate Judge Robertson in 2022, with respect to whether or not to cancel a CPL in which Robertson A.J. reviewed the law as set out in *Falconbridge, The Law of Mortgages of Land*, 3rd ed. (1942). *Falconbridge* is cited frequently in other cases as well.

[23] For the most part, *Stonewater,* and *Falconbridge* establish quite clearly that equitable mortgages require as a key element a future intention that the property be charged to security for a debt. Associate Judge Robertson also notes that there is an expectation that the agreement for such a security will be in writing "duly signed, however informal."

[24] The defendants say that the pleadings as proposed plead primarily an oral agreement, and only in the alternative a partial written agreement, without saying what that written agreement is or what it provides for, and that this on its face is not sufficient to plead a remedy of equitable mortgage.

[25] In response, the plaintiffs say that the only essential component of equitable mortgage that you can take from *Stonewater,* is the mutuality of intention to offer property as security for a debt obligation, and that the requirement for a written agreement is not part of the ratio of that decision.

[26] The plaintiff says that although the law may "expect" a written agreement or something in writing, it does not necessarily require such a written instrument. The plaintiff relies on a decision of Justice Burnyeat in a *BIA* matter where a duplicate

title was provided as security for a loan. In that case, Burnyeat J. did not find that the mutual intention to charge the property was made out.

[27] On my reading of Burnyeat J.'s decision, he did not say that an equitable mortgage was not made out because it was only an oral agreement, but like *Stonewater,* this decision does not turn on whether the agreement was written or not. At best, in both these cases the question of whether a written agreement was required was not essential to the determination, and not properly part of the ratio.

[28] In any event, the plaintiff concedes that the law to date, and the case law that the plaintiff could find, has generally considered the adequacy of an instrument in claims of equitable mortgage. The plaintiff could find no case where an equitable mortgage was made out without such an instrument, and I note that even in Burnyeat J.'s case, there was the delivery of a written document, in the form of a duplicate title, that would prevent dealings with the land.

[29] The plaintiff says that the statement in *Stonewater* that there is an "expectation" of a written instrument is not enough to strike a claim on the basis that a written instrument is essential. He says that while it may be novel to assert an equitable mortgage without any kind of written instrument, the plaintiff should be allowed to advance that claim.

[30] In response, the defendants say that it would be better for both parties if I made this determination based on the pleadings, rather than allowing further discoveries on so tenuous and novel a claim. They argue that I should therefore strike the claim as inadequate rather than allowing for an amendment. Further, they argue that with respect to the pleadings of the agreement itself, that those need to be particularized, and that the lack of particularizing is also a basis for striking the claim entirely. The defendants also argue other related deficiencies in the proposed pleading, including that the plaintiff should not be able to plead that an agreement is oral, or alternatively oral and in writing, and then not provide all of the terms of the agreement.

[31] Having considered all of these arguments, I find that advancing a claim for equitable mortgage on the base of an oral agreement, or at best the combination of oral exchanges and exchanges of text messages, is novel, but I am not prepared to find, without an evidentiary foundation that would allow me or the trial

judge to consider the actual substance of the text messages or words that are said to have formed that mutual intention, that it is not available to argue at all. I am not prepared to deal that issue at the pleading stage in the absence of the evidence said to establish the mutual intention, given the very low threshold to allow pleadings.

[32] In my view, the weakness of this claim as argued by the defendant is best addressed on the merits, even if by summary trial after disclosure of the alleged text messages.

[33] I do agree with the defendants, however, that particulars are required of the oral agreement. Further, if an alternative written agreement is being relied upon, then particulars of that written agreement must also be provided.

[34] In this regard, I have choice. I can either disallow the amendment and require the plaintiff to come back with new pleadings that have those particulars clearly stated, or I can allow the plaintiff the opportunity to provide particulars. I prefer giving the plaintiff the opportunity to provide particulars of the terms of the agreement, and I will set out what specific particulars I require when I get to the orders I am making.

[35] The plaintiff also concedes that having this amendment come after the discoveries have already occurred may give rise to some prejudice, although they say that prejudice is certainly manageable in the 9 to 10 months that we have before trial. I agree, but there are timelines and consequences for the lateness of this amendment that I am going to be imposing.

[36] In conclusion, I am going to allow the plaintiff's application to amend. I am going to review those amendments now, some of which have been altered slightly through oral argument, just to make sure that we have got clarity on each of them. So, I am looking at the plaintiff's application to amend and the schedule attached to it and I will refer to the amended pleading in that schedule by page or paragraph:

a) Paragraph 11: I am allowing that amendment but with the addition of the name of the specific defendant, which is Christina Pantelakis. So it will read:

> The plaintiff and the defendant, Christina Pantelakis, were involved in previous dealings ...

b) Paragraph 12 is allowed.

c) Paragraph 13 is allowed, subject to the provision of particulars of the alleged oral or partly oral and partly written agreement, which I will detail shortly.

d) Paragraph 14, the words with the amendment are allowed, except for the words "without limitation." Those words are not included.

e) The amendments on page 4 are allowed.

f) The amendments on page 5 are allowed with the change to paragraph 22 to provide the correct date of October 1, 2022. The remaining changes on page 5 are allowed.

g) On page 6, the amendments are allowed except that the words on the third line of paragraph 27 "and/or any other cause of action" are struck. That is by consent.

h) Turning to page 7. By consent, subparagraphs K and L are not to be included, and I am going to allow paragraph O to remain, with the condition that particulars of the special damages are provided as part of the particulars that I will be ordering.

i) The remaining changes are permitted.

[37] Particulars are to be provided within 30 days of this order, and they shall include particulars of any special damages. They will also include the following particulars of the pled agreement to the extent a written agreement is relied upon in whole or in part:

a) Whether there is any written document in which the agreement is contained;

b) The date of those documents;

c) Who prepared them;

d) If they were exchanged, when they were exchanged and between whom.

[38] With respect to any oral agreement alleged, the particulars shall include:

a) the words that were stated to the best of the plaintiff's recollection,

b) when they were stated, and by whom; and

c) if there are any terms of the alleged agreement not already pled, they will include those terms.

[39] Those particulars should be produced within 30 days. So, May 30, does that work? Okay, by May 30.

[40] In addition, the plaintiff will prepare a new list of documents by May 30 that includes all documents pertaining to these amended pleadings, as well as all documents relating to any outstanding requests.

[41] In addition, the plaintiff will produce himself for further discovery, on or before July 31, 2025. The defendants will be entitled to an additional two hours of discovery beyond the several hours that I think remain under the Rules, if needed, to deal with the fact that the initial four hours of discovery were not capable of addressing these new pleadings.

[42] If this additional time is required for the discoveries (beyond the time still left to the defendants), then I award costs of one-half day of discovery to the defendant to be paid in any event of the cause, but not forthwith. So, if the plaintiff is successful, those can be set off, but they will be in the cause in any event of the cause. If these additional two hours are not required, there is no costs consequence.

[43] The Abbotsford pleading, which is duplicative of this notice of claim, will be discontinued within 15 days.

[44] Mr. Nied, I think you will have a right to file an amended response under the Rules. Do you need any additional time, or are you content with the time that is provided?

[45] NIED: If we could have three weeks, that would be appreciated. I do not think my friend would object to that.

[46] ARORA: No objection.

[47] THE COURT: All right. I will give you until May 30 as well, and we will just have an exchange on that time.

[48] NIED: Thank you, Justice.

[49] THE COURT: All right. So, the defendants shall have until May 30 to file their response, so a little bit of additional time.

[50] I think I have addressed all of the substantive issues. Is there anything outstanding on the substance of the application?

[51] ARORA: Justice, I just have one clarification question. On the question of whether the addition of that security terms, is the Court's ruling that that amounts to a fresh cause of action, or it does not?

[52] THE COURT: I do not think I have to determine that, and I think that may go to the limitation question. I would rather allow the trial judge who will have the full context to make that determination. I am allowing it regardless of whether it does or not because I do not see a significant prejudice, including with respect to the limitation defence, for the purpose of allowing the pleading to change.

[53] ARORA: Very well, Justice. I think from my perspective that addresses all any substantive issues. Nothing further from my perspective.

[54] THE COURT: All right. So the only issue remaining is costs. On its face, the plaintiff has been successful in its application to amend. However, it has been successful on its application in part because I have found that it is more appropriate to allow those amendments with further particulars rather than deny the application with leave to bring a further application with the detailed particulars, particularly around the nature of the agreement. The plaintiff has also put itself and the Court in a difficult position, in that it is very late in providing responses to discovery requests which would have, in my view, greatly clarified the nature of the pleading change that was requested.

[55] As a result, I will be ordering costs to the defendants of this application in any event of the cause.

"Marzari J."