CITATION: Phuong Do v. Sinclair, 2026, ONSC 1285
COURT FILE NO.: CV-23-00707988-0000
DATE: 20260303

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
PAUL PHUONG DO Plaintiff	*Alastair McNish,* for the Plaintiff
– and –	
JOHN TIMOTHY SINCLAIR, AKA Sinclair Defendant	*Alessia De Gasperis, Nadia Condotta*, for the Defendant
	HEARD: February 17, 2026

MATHEN J.

REASONS FOR JUDGMENT

OVERVIEW

[1] This is a motion for summary judgment in relation to breach of contract, brought by the Plaintiff, Mr. Do, against the Defendant, Mr. Sinclair.

[2] The parties are former business partners who were equal shareholders in a health food business, which I refer to as 'UBLS' and is not a party to this proceeding.

[3] After Mr. Do decided that he wanted to exit the business, the parties began discussing a buyout of his shares sometime around 2017. In January 2018, Mr. Do resigned from his roles as director and officer.

[4] On December 15, 2020, Mr. Do transferred his shares and shareholder loans to Mr. Sinclair under a Share Purchase Agreement and Promissory Note. The Note required repayment on the earlier of December 15, 2022, or within 45 days of UBLS completing a "Significant Financing" which the Note defined as financing of at least $12.5 million CAD. At the time, the Significant Financing in question was a $17 million CAD loan to UBLS by an entity in Utah. Mr. Sinclair forwarded a deposit of $2.5 million USD ($3.45 million CAD) to that entity to secure the loan.

[5] Under the Note, after the first 6 months the interest rate would double every 90 days to a maximum of 60% per annum.

[6] The expected financing from Utah did not materialize. Mr. Sinclair lost his deposit. UBLS has since obtained a default judgment, in Utah, that it was defrauded.

[7] Mr. Sinclair did not repay the amounts owing under the Promissory Note.

[8] Mr. Do now seeks summary judgment for:

a. damages of:

   i. $1,146.188.87 for the total owing in principal and interest as of the Note's maturity date of December 15, 2022;

   ii. $2,481,809.88 for the total owing from the maturity date to December 31, 2024 (for a total amount owing of $3,627,998.75);

   iii. Interest calculated at a rate of 60%, simple, from January 1, 2025, to the date of judgment – or $1,884.87 per day;

   iv. Post-judgment interest at the same per diem rate; or

   v. In the alternative, pre- and/or post-judgment interest on the above amounts under the *Courts of Justice Act.*

b. a declaration that Mr. Sinclair engaged in fraudulent misrepresentation;

c. a declaration that, pursuant to section 178(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (*BIA*), any judgment of this Court will survive a future assignment in bankruptcy;

d. punitive damages as the Court finds appropriate; and

e. costs.

[9] Mr. Sinclair concedes that principal and interest is owing from UBLS as prescribed under the Promissory Note. However, he argues that:

a. He should not be held personally liable for any amounts.

b. His contract with Mr. Do was frustrated by the fraud perpetrated on UBLS, and that issue is not appropriate for summary judgment;

c. He did not engage in fraudulent misrepresentation, and in any event that issue is not appropriate for summary judgment;

d. Any interest as of the maturity date should be at the rate prescribed by the *Courts of Justice Act*;

e. On a summary judgment motion, the Court lacks jurisdiction to make a declaration under the *BIA.*

f. Even if amounts owing under the Promissory Note can be decided via summary judgment, partial summary judgment is not appropriate.

[10] Therefore, the issues to be decided are:

a. Is there a genuine issue for trial on frustration?

b. Is there a genuine issue for trial on fraudulent misrepresentation?

c. Should the Court make a declaration under section 178(e) of the *BIA*?

d. What is the amount owing under the Promissory Note?

e. If necessary, is partial summary judgment appropriate?

f. What if anything is owed as punitive damages?

g. Are any amounts owing under the Promissory Note payable by UBLS as opposed to Mr. Sinclair?

[11] Briefly, Mr. Do's motion is granted in part. Mr. Sinclair has not properly pleaded frustration. In the alternative, there is no genuine issue for trial on frustration; and frustration is not proved. There is no genuine issue for trial on fraudulent misrepresentation. Having considered the evidence, I find that Mr. Do has not proved fraudulent misrepresentation. It is not appropriate to make a declaration under the *Bankruptcy and Insolvency Act*. Mr. Do is owed $3,627,998.75 to December 31, 2024. Pre-judgment interest from December 31, 2024, is owing at a rate of $1,884.87 per day. Post-judgment interest shall be calculated as prescribed under section 129(1) of the *Courts of Justice Act.* In view of all of the above, partial summary judgment does not arise. I decline to award punitive damages. Mr. Sinclair, not UBLS, is liable to pay all amounts owing or awarded. As they requested, the parties may make further submissions on costs.

BACKGROUND

[12] As set out above, the parties are former business partners. Their relationship soured in or around 2017, so they started discussing ways to buy out Do's shares in UBLS and affiliated entities.

[13] Mr. Do resigned from the business on January 25, 2018.

[14] Flowing from their discussions, the parties entered into a Share Purchase Agreement and Promissory Note on December 15, 2020.

[15] Both parties' submissions discuss the role played by another shareholder, Jim Greenwood, who acted as a mediator. In particular, Mr. Do argues that Mr. Sinclair deliberately hid the fact that Mr. Greenwood was also a UBLS shareholder. Mr. Greenwood did not file an affidavit and was not cross-examined. Because of the way I have decided the issues, Mr. Greenwood's role in the disputed events is not relevant.

[16] The Promissory Note was negotiated pursuant to a share purchase transaction. In that transaction, Mr. Do assigned his intellectual property rights to UBLS and sold his entire 50% interest in UBLS and outstanding shareholder loans for $931,000.00.

[17] Among other things, the Note states that:

a. The Date of Issuance is December 15, 2020.

b. The Interest Rate shall not exceed the maximum allowable interest under the federal *Criminal Code*.

c. The Promissory Note *"*shall not be changed, modified, discharged or cancelled orally or in any manner other than by agreement in writing signed by the Holder or its successors or assigns.".

d. The Promissory Note *"*shall become due and payable in full, with interest, on that date that is the earlier of 24 months from the Date of Issuance or the date on which U-Be-Livin-Smart Inc. or any of its associated or affiliated entities ("UBLS") completes a 'Significant Financing'".

e. The defined term "Significant Financing" means any financing of debt or equity in excess of $12,500,000 CAD.

[18] Earlier drafts of the Promissory Note provide for different interest arrangements. Between November 18 and December 15, 2020, Mr. Do proposed some version of an escalatory rate. The escalatory rate would reassure Mr. Do of repayment within a short period of time.

[19] The interest provisions in the Note provide that:

a. In the first 6 months after the Date of Issuance (the "Original Period") the interest rate shall be a rate per annum equal to the Prime Rate plus 1 % which for the purpose hereof is 3 .45% (the "Base Rate").

b. For the next 90 days after the expiry of the Original Period, the interest rate per annum shall be 2 times the Base Rate and will apply to any amount then outstanding and remaining unpaid from the Date of Issuance.

c. Thereafter for each subsequent 90 day period, the interest rate per annum shall be 2 times the Base Rate in the immediately preceding 90 day period and will apply to any amount then outstanding and remaining unpaid from the Date of Issuance until payment in full.

[20] The Note includes the following chart for illustrative purposes:

Paul Do Payout Interest Escalation								
				6 Months	9 Months	12 Months	15 Months	18 Months
	Principal	Bank Rate	Plus 1%	2%	X2 or 4%			
			Interest Rate	2%	4%	8%	16%	32%
Calculations of Concept	$546,000	1%	1%	$5,460	$13,680	$43,600	$109,200	$262,080

[21] On the date the Promissory Note was signed, section 347(1) of the *Criminal Code* R.S.C., 1985, c.C-46 provided that the maximum interest rate allowed by law was 60%.

[22] At the hearing, Mr. Sinclair pointed out that, on January 1, 2025, the maximum allowable rate under the *Criminal Code* decreased from 60% to 35%. That reduction was achieved by virtue of section 610 (1) of the *Budget Implementation Act, 2023*, No. 1, SC 2023, c 26. The Act included the following Transitional Provision:

> **614** For the purposes of subsection 347(1) of the *Criminal Code*, the definition *criminal rate* in subsection 347(2) of that *Act*, as it reads on the day on which subsection 610(1) comes into force, does not apply in respect of any receipt of a payment or partial payment of interest that, on or after that day, is interest at a criminal rate, if the payment arises from an agreement or arrangement to receive interest that was entered into before that day and the interest that arises from that agreement or arrangement would not have been at a criminal rate, as defined in subsection 347(2) of the *Criminal Code*, as that subsection 347(2) read before that day.

[23] On December 15, 2020, Mr. Do received from Mr. Sinclair $380,000 in cash and a steam kettle valued at $5,000. The remaining $546,000 was the outstanding principal. In July 2023, Mr. Sinclair sold Mr. Do another piece of equipment valued at $10,000.

[24] Therefore, the principal owing on the loan itself is $536,000.

[25] Mr. Sinclair deposed that $3.45 million CAD was raised in 2019 through a Preferred Shareholder Offering Term Sheet. According to the Term Sheet dated October 31, 2019, the $3.45 million CAD was to be sent as a deposit to obtain mezzanine financing in the amount of $17 million CAD ($10 million USD) "to retire existing debt, fund the building of new production facilities, and for general working capital and general business purposes."

[26] On February 12, 2020, UBLS sent the above-noted Deposit to a loan program in Utah, USA.

[27] Under cross-examination, Mr. Sinclair acknowledged that the $17 million CAD ($10 million USD) was intended to be used as a "loan loss reserve" to repay outstanding loans to secured creditors and also to Do through repayment of Sinclair's shareholder loans.

[28] As a result of the Share Purchase Agreement and Promissory Note, Mr. Do's prior loan to UBLS became a loan from Mr. Sinclair to UBLS. Mr. Sinclair's loan remains on UBLS's books as a Shareholder Loan credited to him.

[29] Mr. Sinclair says that the Utah Loan Program "turned out to be one big fraudulent scheme", leading to the loss of his $3.45 million CAD deposit.

[30] In January 2021, UBLS commenced legal action against the Utah lenders and their attorneys. On March 10, 2023, the District Court of Utah found that UBLS suffered damages of $2.5 million USD. It is unclear whether this amount will ever be collected.

[31] The Plaintiff retained Michael Kavanagh, an actuary, to calculate the interest owing under the Promissory Note's escalatory rate. Mr. Kavanagh provided a *curriculum vitae* and signed an Acknowledgment of Expert's Duty. His qualifications to produce the report were not challenged. Mr. Kavanagh concluded that, applying the interest rate as prescribed in the Promissory Note, the total amount owing to December 31, 2024, is $3,627,998.75.

ANALYSIS

[32] The facts as I find them are contained in the following analysis.

[33] Rule 20.04(2)(a) provides: "The court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence".

[34] Therefore, to obtain summary judgment, the Plaintiff must first establish that there is no genuine issue for trial on enforcement of the Promissory Note's terms and associated relief. The onus then shifts to Defendant to prove that his defence has a real chance of success: *Sanzone v. Schechter*, 2016 ONCA 566, 402 DLR (4th) 135, at para. 30. The court must take a hard look at the evidence. While the onus is on the moving party to establish there is no issue requiring a trial, the responding party must "lead trump or risk losing": *1061590 Ontario Ltd. v. Ontario Jockey Club*, 1995 CanLII 1686 (ON CA), 1995 CarswellOnt 63 (Ont. C.A.), at para. 36.

[35] There will be no genuine issue for trial if the court through summary judgment can reach "a fair and just determination on the merits": *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 49. Such a determination is warranted if the process (a) allows the court to make the necessary findings of fact, and to apply the law to the facts and (b) is a proportionate, more expeditious and less expensive means to achieve a just result.

[36] In determining whether there is a genuine issue for trial, a court may evaluate credibility, weigh the evidence, and draw reasonable inferences from that evidence: Rule 20.04 (2.1). The court can assume that the record contains all the evidence the parties would present if the matter proceeded to trial.

[37] The court should use its enhanced powers to decide a motion for summary judgment only where it leads to "a fair process and just adjudication": *Ang v. Lin*, 2023 ONSC 4446, at para. 15, citing *Mason v. Perras Mongenais*, 2018 ONCA 978, at para. 44, and *Eastwood Square Kitchener Inc. v. Value Village Stores, Inc*., 2017 ONSC 832, at paras. 3-6 (and cases cited therein).

[38] Partial summary judgment should only be granted in the clearest of cases where there are issues that can be readily bifurcated, and which do not risk delay, expense, inefficiency, and inconsistent findings: *Truscott v. Co-Operators General Insurance Company*, 2023 ONCA 267, 482 D.L.R. (4th) 113, at para. 54. and *Malik v. Attia*, 2020 ONCA 787 at para 62. The court must consider whether (i) there is a risk of duplicative or inconsistent findings at trial; and (ii) whether granting partial summary judgment is advisable in the context of the litigation as a whole: *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at paras. 27-28.

Is there a genuine issue for trial on frustration?

[39] In his factum, Mr. Sinclair raises the doctrine of frustration. His principal argument appears to be that:

> The change caused by the fraud completely affected the nature and consequence of the contract. The purpose of the Promissory Note between Tim and Paul was for the purchase of his shares in the Business. However, the fraudulent event made this impossible, as Tim lost the money that was intended to fulfill that debt.
>
> Factum of the Responding Party, para. 88.

[40] That is to say, the fraud perpetrated on UBLS by the Utah lender frustrated the contract between Mr. Do and Mr. Sinclair.

[41] Mr. Do argues that, first, Mr. Sinclair cannot raise frustration for the first time in his factum; and second, the fraud perpetrated on UBLS did not, and could not, 'frustrate' the contract between the parties.

(a) Can Mr. Sinclair raise the doctrine of frustration on this motion?

The Law

[42] Parties are required to set out their pleadings with sufficient particularity so that the opposing side knows the case they have to meet.

[43] Justice Low summarized the importance of drafting accurate and timely pleadings in *Lysko v Braley*:

> The purpose of pleadings is to define the issues for the parties and for the Court. The pleadings govern the trial and the interlocutory proceedings. A case properly pleaded permits an efficient use of judicial resources and the parties' resources. Bad pleadings do the opposite and more. They are instruments of potential mischief in the litigation process. One of the functions of pleadings is to govern discovery. If a matter is pleaded, it may be discovered upon. Where a pleading is replete with evidence or irrelevant material, … it is calculated to open the door to prolonged and potentially abusive discoveries which do not address the real issues between the parties. For that reason, offensive portions of the pleading tend to prejudice or delay the fair trial of the action and are thus an abuse of process. …
>
> 2004 CanLII 40666 (ON SC), [2004] O.J. No. 4727 (ONSC), aff'd 2006 CanLII 11846 (ON CA), 79 OR (3d) 721 (Ont CA) at para 64.

[44] On a motion for summary judgment, proper pleadings are even more critical. It is "fundamentally unfair to permit a defendant to raise new defences at the eleventh hour without pleading same.": *MCAP v Bak*, 2011 ONSC 2142 at para 22.

Application

[45] I am satisfied that, prior to Mr. Sinclair's factum, he did not raise the issue of frustration as a defence and, therefore, it is inappropriate for him to argue it on this motion.

[46] Mr. Sinclair argues that he has not raised frustration for the first time in his factum, because of paragraph 7 of his Statement of Defence which reads:

> Tim and the Plaintiff agreed that the Promissory Note would be paid upon the Business reaching a certain financial threshold. Legal matters that arose between the execution of the share purchase agreement and the issuance of the Statement of Claim have derailed the original expected timeline for the Business to reach that threshold.

[47] According to Mr. Sinclair, the above paragraph is expansive enough to cover a frustration argument.

[48] I do not agree. Frustration is a specific, rarified legal argument. A reference to "legal matters" that "derailed" an "original expected timeline" is not precise enough to alert the plaintiff to the fact that the defendant intends to argue frustration.

[49] The fraud committed against UBLS was known long before Mr. Do commenced this action. Frustration is an issue that could and should have been clearly averted to in the Statement of Defence.

[50] Therefore, it would be inappropriate to consider frustration now. In addition, as explained below, I find that frustration would not be available in any event.

(b) If the issue was properly before the court, would the doctrine of frustration apply to this situation?

The Law

[51] Frustration arises when an event occurs that was not anticipated by the parties and that makes the performance of the contract "a thing radically different from that which was undertaken by the contract": *Peter Kiewit Sons Co. of Canada v. Eakins Construction Ltd.*, [1960] S.C.R. 361, at p. 368.

[52] The test for frustration has five elements:

a. The event in question must have occurred after the formation of the contract and cannot be self-induced;

b. The contract must, as a result, be totally different from what the parties had intended;

c. The disruption must be permanent and not temporary or transient;

d. The change must totally affect the nature, meaning, purpose, effect, and consequences of the contract so far as concerns either or both parties; and

e. The act or event that brought about such radical change must not have been foreseeable.

Paradise Homes North West Inc. v. Sidhu, 2019 ONSC 1600 at para 21.

[53] The above elements must all be present.

[54] For the following reasons, I find that frustration is not apposite to this situation.

[55] First of all, it is not clear that the "event in question" – which is the fraud on UBLS – occurred after the execution of the Promissory Note. Recall that the "fraud" here relates to the misappropriation of Mr. Sinclair's $3.45 million deposit. The deposit was forwarded to Utah many months before the Note was signed. It is not disputed that, in November 2020, Mr. Sinclair asked for his deposit back. This indicates, if not awareness of fraud, at least some awareness that the Significant Financing would not occur as planned. However, Mr. Sinclair bears the burden of proof to show on a balance of probabilities when the misappropriation occurred. He cannot. Therefore, the evidence does not satisfy the first element for frustration.

[56] Second, I am not persuaded that the change arising from the fraud "totally affect[ed] the nature, meaning, purpose, effect, and consequences of the contract". Mr. Sinclair relies on the frustration doctrine selectively. He does not argue that entire contract was frustrated – only the escalatory interest rate. He does not explain how frustration could apply in such a manner. In addition, the contract between the parties does not tie the interest rate to any external event like the Significant Financing. The Significant Financing affects the due date for the loan – nothing more. The escalatory interest rate applies regardless of whether such financing was obtained.

[57] Given that two of the required elements of frustration are not proved, it is not necessary to consider the remaining ones. More generally, I find the frustration argument to be an overreach. Mr. Sinclair's argument suggests that a contract can be frustrated entirely because of the wrongful act of a third party on one of the contractors. For example, if Mr. Sinclair was swindled out of all of his savings, he could plead frustration in satisfying a separate debt so long as he could prove that the lender for that debt knew he was relying on his savings to satisfy it. I was not referred to any precedent for such a broad reading of frustration, and I decline to adopt it here.

[58] I am satisfied that no issues going to the frustration argument would be aided by a trial.

[59] Therefore, had it been appropriate for the court were to consider frustration, it is not proved on the facts before the court.

[60] Consequently, the Defendant's argument is dismissed.

Is there a genuine issue for trial on fraudulent misrepresentation?

[61] Mr. Do argues that Mr. Sinclair committed the tort of fraudulent misrepresentation when he failed to advise Mr. Do of the true status of the Utah financing in December 2020. Mr. Do argues that Mr. Sinclair deliberately and dishonestly hid the fact that Mr. Sinclair had already asked for his deposit back indicating that Mr. Sinclair knew that the financing would not come through.

[62] Mr. Sinclair denies that he behaved fraudulently. In the alternative, he says, this issue requires a trial.

The Law

[63] Fraudulent misrepresentation requires the following:

a. The defendant made a false representation of fact;

b. The defendant knew the statement was false or was reckless as to its truth;

c. The defendant made the representation with the intention that it would be acted upon by the plaintiff;

d. The plaintiff relied upon the statement; and

e. The plaintiff suffered damages as a result.

1000425140 Ontario Inc. v. 1000176653 Ontario Inc., 2024 ONCA 610 at para 24.

[64] The party alleging the tort, Mr. Do, must prove all of the above elements on a balance of probabilities. At the hearing, Mr. Do acknowledged that the reliance component in (d), above, is assessed on a 'but-for' standard, meaning that the court must be satisfied that Mr. Do would not have agreed to the Promissory Note but for the misrepresentation.

Application

[65] As explained below, I find no genuine issue for trial, as the record provides a sufficient basis to determine the question of fraudulent misrepresentation. Furthermore, considering all the evidence, I find that Mr. Do has not made out fraudulent misrepresentation on a balance of probabilities.

[66] First of all, I am not persuaded that Mr. Sinclair's failure to tell Mr. Do that he had asked for the $3.45 million CAD deposit back was equivalent to a false statement. Earlier, I found the evidence lacking about whether Mr. Sinclair was aware that the Utah scheme *was* a fraud before he signed the Promissory Note. In a similar way, I am not persuaded that the fact that Mr. Sinclair asked for his deposit back in November 2020, and did not tell Mr. Do, is a fraudulent omission or,

as counsel for Mr. Do put it, a dishonest half-truth: *Midland Resources Holding Limited v. Shtaif*, 2017 ONCA 320 at para 163; leave to appeal refused 2019 CanLII 37485 (SCC), [2018] S.C.C.A. No. 541. In order to find that Mr. Sinclar had behaved fraudulently, I must be satisfied that, when he requested to have his deposit returned, Mr. Sinclar anticipated he would not get it back. The fact that Mr. Sinclair may already have had doubts about the Utah Financing itself is not relevant to that question, because the deposit was more than enough to satisfy the Promissory Note. While obtaining the financing would have affected the timeline for repayment deposit back, the absence of that financing did not necessarily affect whether Mr. Sinclair could satisfy the debt to Mr. Do.

[67] Second, I am not convinced on a balance of probabilities that Mr. Sinclair's failure to mention that he had asked for his deposit back affected Mr. Do's decision on December 15 2020 to sign the Promissory Note. For clarity, I am not persuaded that the omission was a 'but for' cause of Mr. Do's decision. Mr. Do does not say that the existence of the deposit was material to his decision. Under cross-examination, Mr. Do acknowledged that he had doubts about whether Mr. Sinclair would ever be able to pay him back. When asked why he signed the Promissory note anyway, Mr. Do said "we never executed until he had the funds – until his lawyers basically confirmed that they got the funds." It is not clear what this is referring to. It could not have been about the deposit, since Mr. Do did not know that its return had been requested. It is true that Mr. Sinclair's lawyers wrote to Mr. Do, on January 24, 2020, that $930,000 was being held in trust for UBLS. But that fact has nothing to do with the deposit and, in any event, is too far in advance of December 15, 2020 to realistically have been a 'but for' cause of Mr. Do signing the Promissory Note.

[68] In short, Mr. Do's evidence does not show the required link between Mr. Sinclair's failure to talk about the deposit or, for that matter, the financing, and Mr. Do's decision to enter into the contract.

[69] Mr. Do amended his Statement of Claim to include the fraudulent misrepresentation claim. At the hearing, Mr. Do's counsel acknowledged that he did so to safeguard any award from a future bankruptcy application by Mr. Sinclair. I do not fault Mr. Do for trying to protect any award he might get. But that later, strategic decision helps explain why the record before the court does not clearly establish the link between Mr. Do's decision to sign the Promissory note and Mr. Sinclair's purported fraud.

[70] This is Mr. Do's motion for summary judgment. The record is insufficient to establish the tort of fraudulent misrepresentation. The great majority of Mr. Do's responses under cross-examination are that he does not remember much of anything about what happened. In the circumstances, I find, there is no genuine issue for trial.

[71] Accordingly, this claim is dismissed.

Should the Court make a declaration under section 178(e) of the *BIA*?

[72] Because Mr. Do believes that Mr. Sinclair will file for personal bankruptcy, Mr. Do asks this Court to declare that any judgment on this motion shall survive a future assignment in bankruptcy.

The Law

[73] Section 178(1)(e) of the *Bankruptcy and Insolvency Ac*t provides that:

> An order of discharge does not release the bankrupt from…
>
> (e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim [.]

[74] Under section 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43:

> The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed.

[75] A declaratory order confirms the existence of a legal right: Lazar Sarna, *The Law of Declaratory Judgments*, 3d. ed. (Toronto: Thomson Carswell, 2007), at p. 1.

[76] The court will generally not make declaratory orders when a dispute is hypothetical or abstract and may never arise: P. Perrell and J. Morden, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis, 2014), at p. 368. The declaratory power "should be carefully exercised and used only when a present right depends on the decision or there are some other special circumstances that will make the declaration definite and useful.": Perrell and Morden, at p. 369; *Curtis v. Sheffield* (1882), 21 Ch. D. 1, at p. 4.

Application

[77] The declaration sought by Mr. Do depends upon a finding of fraudulent misrepresentation. As I have dismissed that claim, the request is moot.

[78] For clarity, I would not have issued such a declaration in any event, because it is for a hypothetical situation. I adopt this Court's reasoning in *B2B Bank v. Batson*, 2014 ONSC 6105, para. 6 that declaratory relief is not available to protect claims from future bankruptcy because:

> [t]he time for determination whether a claim does or does not survive a bankruptcy discharge is at the time of the discharge, based on the legal regime that will be in force at that time. Such regime may or may not be the same as what exists now and thus such a declaration is premature.

[79] Therefore, had it been necessary to reach this issue, I would have dismissed the claim.

What is owing under the Promissory Note?

[80] This issue involves three interrelated questions:

a. What is owing to the Maturity Date which is December 15, 2022?

b. What else is owing in pre-judgment interest?

c. What is owing in post-judgment interest?

Interest owing to maturity

[81] At the hearing, the Defendant conceded that:

a. Principal and interest is owing under the plain terms of the Promissory Note.

b. Interest is owing under the escalatory formula, to a maximum of 60%.

[82] During the hearing, a question arose about the conclusions of the Plaintiff's actuary, Mr. Kavanagh. In his report Mr. Kavanagh stated that the principal and interest owing to December 15, 2022, is $1,146,188.87. His calculations rely on the following interest rates as governed by the escalatory formula:

a. Dec. 15, 2020 – June 15, 2021: 3.45%

b. June 15, 2021 – Sept. 13, 2021: 6.9%

c. Sept. 13, 2021 – Dec. 12, 2021: 13.8%

d. Dec. 12, 2021 – Mar. 12, 2022: 27.60%

e. March 12, 2022 – June 10, 2022: 55.20%

f. June 10, 2022 – Sept. 8, 2022: 110.40%

g. Sept. 8, 2022 – Dec 7, 2022: 220.80%

h. Dec. 7, 2022 – Dec. 15, 2022: 441.60%

[83] Some of the above interest rates are above 60%. However, according to the report, when the rates are averaged out over a year, the effective interest rate is 44.89%.

[84] The Defendant argues that the actuary should not have used interest rates above 60% percent. Defendant's counsel stated that when she did a recalculation, it resulted in an amount approximately $100,000.00 less than what the Mr. Kavanagh concluded.

[85] The court must be satisfied, on a balance of probabilities, that Mr. Kavanagh's calculations are correct.

[86] Despite the fact that the escalatory formula changes the interest rate every 90 days, the Promissory Note refers to interest on a "per annum" basis. I am satisfied that the maximum of 60% set out in the Note limits the rate of interest paid on an annual basis.

[87] Having reviewed the report, I am satisfied that (a) Mr. Kavanagh's calculations are consistent with accepted actuarial practice and (b) the interest rates applied in the report do not exceed 60% per annum.

[88] Accordingly, this issue does not require a trial. Mr. Do is owed $1,146,188,97 to the Maturity Date.

Pre- and post-judgment interest

[89] Having found that Mr. Do is owed $1,146,188,97 in principal and interest to the Maturity Date of December 15, 2022, the remaining questions relate to:

a. interest owing from December 15, 2022 to the judgment date; and

b. interest owing as of the the judgment date.

[90] The Plaintiff argues that the maximum allowable interest rate under the law at the time of the Promissory Note – 60% – is the proper rate for everything. Recall that Mr. Kavanagh calculated that $3,627,998.75 is owing to December 31, 2024.

[91] At the hearing, however, the Plaintiff stated that he is seeking interest owing after December 31, 2024 on a simple and not compounded rate. This is because Mr. Kavanagh's report only goes to that date. Therefore, as a matter of expediency and costs, after the motion was scheduled for a date after December 31, 2024, the Plaintiff did not ask Mr. Kavanagh to update his report. So that the court can make an updated calculation on interest without the benefit of expert evidence, the Plaintiff suggests a per diem rate based on 60% simple interest, namely, $1,884.87 per day.

[92] The Defendant does not challenge the above mathematical calculations. Rather, he argues that:

a. because he reasonably believed he would receive the financing and did not engage in fraud, a pre-judgment rate of 60% is excessive; and

b. because on January 1, 2025, Parliament lowered the maximum allowable interest rate under section 347(1) of the *Criminal Code* to 35%, as of that date Mr. Sinclair is not liable to pay any interest over 35%;

c. therefore, pre- and post-judgment interest should accord with the *Courts of Justice Act*, R.S.O., 1990, c.C-43 (*CJA*).

The Law

[93] The *CJA* mandates a formula to calculate pre- and post-judgment interest: ss. 128-129. In this case, that formula results in an interest rate of between 2-5%. Section 130 grants a court the discretion to modify an interest rate when it is just to do so – including adjusting the rate higher than what the Act prescribes: s.130(1)(b).

[94] In *Perlman v Lehner*, 2021 ONSC 612 (CanLII), the Ontario Superior Court permitted a rate of 60% interest, as provided for in the parties' agreement. The Court did not accept that there was an inequality of bargaining power, or that the defendant made an improvident bargain. Mr. Sinclair argues that the current case is not comparable since in *Perlman* the defendant engaged in fraudulent misrepresentation. However, the court did not explicitly link the question of fraudulent misrepresentation to the interest rate.

[95] In *Bank of America Canada v. Mutual Trust Co*., 2002 SCC 43 (CanLII), [2002] 2 SCR 601, the Supreme Court of Canada held that courts may enforce compounding interest rate in a loan agreement. The Court found that to not do so for would "lead to inequity and provide incentives to breach contracts." The Court noted at para. 46 that: "Contract law is not the enemy of parties to an agreement but, rather, their servant. It should not frustrate their mutually agreed intentions but, instead, absent overriding policy concerns, should permit those parties to obtain the benefit of their intended agreement."

Application

[96] First, with respect to the effect of the change in interest rate in section 347(1) of the *Criminal Code*, the Defendant did not account for the Transitional Provision (section 614) in the *Budget Implementation Act* reproduced earlier in these reasons. The Provision states that any agreements in force before January 1, 2025, are not covered by the new, lower rate of interest. Based on the text of section 614, I find that the current maximum rate of 35% in the *Code* does not supersede the prior rate of 60% in effect when the Promissory Note was signed.

[97] Second, with respect to the appropriate interest rate, I find that Mr. Sinclair has not demonstrated why pre-judgment interest should be different from the Promissory Note because:

a. I am not persuaded that Mr. Sinclair made an improvident bargain. Mr. Sinclair was a sophisticated party. He was not vulnerable to Mr. Do. He proposed the escalatory rate as a tradeoff to receive all of Mr. Do's shares immediately. He made a calculated decision that carried some risk. The fact that Mr. Sinclair made that

decision based on faith in a financing scheme that turned out to be a mirage, does not make the Promissory Note an improvident bargain.

b. The Promissory Note states that interest shall continue to accrue until the debt is paid.

c. A 60% interest rate is very high. A compounded rate is higher still. In this case it leads to a total amount owing in excess of $3 million CAD. However, in view of all the evidence, I am not persuaded that the rate or the amount is so excessive as to warrant an adjustment. The parties knew that the rate might escalate to 60% when they negotiated the Note. The Note includes a chart that shows the dire consequences of failing to pay the loan back for even a short period.

d. With respect to pre-judgment interest, I was not provided with either precedent or a framework for how to select an interest rate between what the parties bargained for and the much lower rate in the *CJA*. Mr. Sinclair has not established that applying the *CJA* rate would be just.

e. I find that post-judgment interest should run at the ordinary rate prescribed by the *CJA*. In view of all the circumstances, including the total amounts owing and the time it has taken for this matter to be heard, I am satisfied that it is appropriate to impose the ordinary rate and not a rate of 60%.

[98] Therefore, I find that interest runs at 60% compounded to December 31, 2024. I accept the actuary's calculations, which were not contested, that this amounts to $3,627,998.75. After December 31, 2024, the 60% interest shall be calculated at a simple rather than compounded rate. Relying on the Plaintiff's calculations which also were not contested, I find that from January 1, 2025 to the date of judgment, interest accrues at the rate of $1,884.87 per day. Post-judgment interest shall accrue as prescribed under section 129(1) of the *CJA*.

If applicable, is partial summary judgment appropriate?

[99] Given all my findings above, the case can be dealt with in its entirety on this motion. No issue of partial summary judgment arises.

What if anything is owed as punitive damages?

[100] The Plaintiff seeks punitive damages in the discretion of the court. He did not seek a specific amount. Neither at the hearing nor in the factum did he argue punitive damages in any depth.

[101] An award of punitive damages requires an independent actionable wrong and conduct that is so reprehensible, malicious, or high-handed that it offends the Court's sense of decency. The defendant's conduct must be so outrageous that punitive damages are rationally required to serve

the purposes of punishment, deterrence, and denunciation: *Whiten v. Pilot Insurance Co*., 2002 SCC 18 (CanLII), [2002] 1 SCR 595.

[102] I have dismissed Mr. Do's claim of fraudulent misrepresentation. I am not persuaded that, in any other respects, Mr. Sinclair's behaviour was reprehensible, malicious or high-handed.

[103] Mr. Do's claim for punitive damages is dismissed.

Are any amounts owing payable by UBLS as opposed to Mr. Sinclair?

[104] In his Statement of Defence, Mr. Sinclair refers to UBLS as though it is the 'Defendant' in this case. At the same time, the Statement of Defence does not specifically challenge the fact that Mr. Sinclair is the named Defendant. Nor is there any argument about this issue in Mr. Sinclair's factum. Indeed, the factum states at paragraph 12: "Tim intends and has always intended to fulfil his contractual obligations under the Promissory Note".

[105] Nevertheless, at the hearing, Mr. Sinclair argued that he should not be found personally liable, because everything the parties agreed to involved UBLS.

[106] That argument is unpersuasive. The Promissory Note states that "the Holder shall only have recourse against the Debtor in respect of this Promissory Note." The "Debtor" is Mr. Sinclair. I am satisfied that the Promissory Note was drafted, in part, to protect UBLS from precisely the type of action that Mr. Do has brought. UBLS is not a named party in this proceeding and Mr. Sinclair made no efforts to add it as one. Therefore, accepting Mr. Sinclair's argument would mean that Mr. Do has no recourse at all. That is unacceptable.

[107] For clarity, there is no genuine issue for trial on whether Mr. Sinclair is personally liable under the Promissory Note.

[108] Therefore, any amounts awarded to Mr. Do are against Mr. Sinclair, not UBS.

Costs

[109] Success in this case is somewhat divided. At the hearing the parties requested the opportunity to make further submissions.

[110] The parties are urged to come to an agreement about costs. Should they not, they may each file submissions of no more than 5 pages, together with bills and any offers to settle, within 45 days. There shall be no right of reply.

ORDER

[111] In conclusion, I make the following order:

a. The Plaintiff's motion for summary judgment is granted in part:

i. The Defendant, John Timothy Sinclair, owes

   1. $3,627,998.75 for the total owing in principal and interest (60% per annum, compounded) to December 31, 2024, for the Promissory Note given by the Defendant;

   2. $1,884.87 per diem for principal and interest (60% per annum, simple) owing under the Promissory Note as of January 1, 2025, to the date of Judgment;

   3. post-judgment interest in accordance with section 129(1) of the *Courts of Justice Act.*

ii. The Plaintiff's claim with respect to fraudulent misrepresentation is dismissed.

iii. The Plaintiff's claim for a declaration under section 178(d) of the *Bankruptcy and Insolvency Act* is dismissed.

iv. The Plaintiff's claim for punitive damages is dismissed.

v. For clarity, the Defendant is personally liable to pay all amounts owing under this Order.

vi. The parties may each file cost submissions of no more than 5 pages, together with bills and any offers to settle, within 45 days. Neither party has a right of reply.

vii. An order shall issue consistent with these reasons.

Mathen J.

Released: March 03, 2026

CITATION: Phuong Do v. Sinclair, 2026, ONSC 1285
COURT FILE NO.: CV-23-00707988-0000
DATE: 20260303

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PAUL PHUONG DO

Plaintiff

– and –

JOHN TIMOTHY SINCLAIR, AKA Sinclair

Defendant

REASONS FOR JUDGMENT

Mathen J.

Released: March 03, 2026