COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jacobs v. Yehia*
2016 BCCA 38

Date: 20160127
Docket: CA41892

Between:

Paul Jacobs, 657947 B.C. Ltd. and Columbia Cottage Ltd.

Respondents
(Plaintiffs)

And

Sam Yehia, The Cambie Malone's Corporation, Cambie Holdings (Vancouver) Corp., 494989 B.C. Ltd., Cambie Holdings (Nanaimo) Corp., 0828508 B.C. Ltd., Esquimalt Holdings Corp., and 0790012 B.C. Ltd.

Appellants
(Defendants)

Before: The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Fitch

On appeal from: Orders of the Supreme Court of British Columbia, dated May 12, 2014 (*Jacobs v. Yehia*, 2014 BCSC 845); dated February 24, 2015 (*Jacobs v. Yehia*, 2015 BCSC 267); and dated February 25, 2015 (*Jacobs v. Yehia*, 2015 BCSC 282) (Vancouver Registry 106849).

Counsel for the Appellants:	T.D. Goepel and M.B. Stainsby
Counsel for the Respondents:	J.D. Vilvang, Q.C.
Place and Date of Hearing:	Vancouver, British Columbia October 29, 2015
Place and Date of Judgment:	Vancouver, British Columbia January 27, 2016

Written Reasons by:

The Honourable Mr. Justice Chiasson

Concurred in by:

The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Fitch

Summary:

Through a private company, in November 2002 Mr. Jacobs loaned money to Mr. Yehia. The parties anticipated that the loan would be converted into equity in companies owned by Mr. Yehia, but they were unable to agree on the basis for valuing the equity contribution and other terms of the conversion. The loans bore interest at 12% which Mr. Yehia paid until September 2003. He paid no interest subsequently. In February 2005, the parties entered into two agreements. One addressed Mr. Jacobs' participation in Mr. Yehia's companies; the other dealt with the loan and stated that Mr. Yehia was not liable for it. In October 2009, the parties entered two additional agreements. The 2002 loan agreement was "renewed". Mr. Yehia terminated the relationship between the parties and repaid the loan in July 2010. The trial judge held that the February 2005 agreements failed insofar as they dealt with Mr. Jacobs' acquiring an interest in the companies, but that they extinguished the loan obligation. She concluded that the October 2009 agreements renewed Mr. Yehia's liability for the loan and interest. She held that no interest was payable between September 2002 and February 2005 by reason of the February 2005 agreements, but that interest was payable thereafter by reason of the October 2009 agreements. She found that Mr. Yehia was unjustly enriched by having use of the loan proceeds with no juristic reason for doing so. Held: appeal allowed. The February 2005 agreements were unenforceable. Mr. Yehia's obligation to pay interest was not extinguished. There was no unjust enrichment because Mr. Yehia was entitled contractually to use the loan proceeds with a concomitant contractual obligation to pay interest. Other subsidiary issues also are addressed.

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] This appeal considers the implications of a course of dealings between parties on their contractual rights and an award of damages for unjust enrichment arising out of the course of dealings.

Background

[2] The corporate appellants are owned and controlled by the personal appellant, Mr. Yehia. They are known as the "Cambie Malone Group", through which he operated a number of restaurants and bar facilities. The corporate respondents are owned and controlled by the personal respondent, Mr. Jacobs.

[3] The appellant and the respondent met in October 2002. The judge described their circumstances at that time:

> [26] Throughout October and early November 2002, Mr. Jacobs toured the Cambie Malone Group properties at Mr. Yehia's invitation. Amongst others, he met senior staff members and the businesses' bank managers. Mr. Yehia told Mr. Jacobs about the businesses and described the existing financing arrangements. He also told him about four appraisals commissioned in September, 2002 for purposes of obtaining bank financing for planned remodelling, development and expansion of the properties and businesses (the "Appraisals").
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> [27] Messrs. Jacobs and Yehia discussed many ideas of possible mutual benefit. From the outset words like "partnership" and "equity stake" were bandied about. For example, in an October 19, 2002 email Mr. Jacobs proposed that he loan up to $1 million to Mr. Yehia and his companies with an option to convert the loans to an equity stake, subject to negotiation and due diligence. He stated the equity participation would be subject to a shareholder agreement, a buy-sell mechanism and annual dividends, and described his prospective role as an "investor partner, with a broad base of general day to day duties". He further proposed that these duties be discharged through Columbia Cottages Ltd. and compensated at a rate of $60,000 per annum, plus GST and expenses.
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> [28] Mr. Yehia responded to Mr. Jacobs' email with a counter-proposal. In an October 23, 2002 email he stated his wife was "… encouraging us to try working together before committing to a partnership". He then proposed that "in the spirit of getting this potential partnership underway" Mr. Jacobs advance "a $200,000 promissory note" to the Cambie Group by November 7, 2002, which loan would earn 12 per cent interest annually, be paid at a rate of $2,000 monthly, mature in five years and be personally secured by Mr. Yehia.
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> [29] Mr. Yehia went on to propose that Mr. Jacobs would have the option to convert the loan and invest an additional $800,000 into the Cambie Group in equity or debt by May 7, 2003, subject to negotiating a mutually acceptable shareholder agreement and on mutually acceptable terms. He also stated the Cambie Group would retain Mr. Jacobs to assist and participate in expansion of the existing properties for a retainer fee of $3,000 per month.
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> [30] Shortly after this exchange, Mr. Jacobs and Mr. Yehia agreed that Mr. Jacobs would advance funds to Mr. Yehia for investment in the Cambie Malone Group. They also agreed to a six-month "honeymoon period" in which the possibility of a long-term relationship would be explored and interest would be paid on the loans (the "November 2002 Loan Agreement").
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> [31] On November 8, 2002 Mr. Jacobs advanced $200,000 to Mr. Yehia through Columbia Cottage Ltd. The loan was secured by a promissory note dated November 4, 2002 and signed by both parties.

[4] The judge described further developments:

> [33] At approximately the same time he made the $200,000 advance Mr. Jacobs began to work as a marketing and business strategy consultant for the Cambie Malone Group. A written agreement in this regard was not signed, nor even proposed. At Mr. Yehia's suggestion Mr. Jacobs incorporated 657947 BC Limited ("657"). He invoiced Mr. Yehia's management company for his services and expenses through 657 (the "Oral Management Consultancy Agreement").
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> …
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> [35] On January 27, 2003 Mr. Jacobs advanced a second loan of $500,000 to Mr. Yehia through Columbia Cottage Ltd. Like the first loan, the second was secured by a promissory note.

[5] Both promissory notes obliged Mr. Yehia to pay the money advanced plus 12% interest to the respondent Columbia Cottage Ltd.

[6] Mr. Yehia deposited the funds into his personal account and advanced them to the Cambie Malone Group as shareholders' loans. The Cambie Malone Group did not record a loan from Mr. Jacobs or Columbia Cottage Ltd.

[7] Mr. Jacobs incorporated the respondent, 657947 B.C. Ltd., which invoiced the Cambie Malone Group for consulting services provided to it by Mr. Jacobs. The judge found that it was agreed that the consulting services were to be provided for $3,000 per month, plus expenses. In fact, the Cambie Malone Group was invoiced for and paid more than $3,000 per month.

[8] The judge described ongoing discussions between Messrs. Jacobs and Yehia:

> [48] As their discussions progressed Messrs. Jacobs and Yehia agreed that Mr. Jacobs' loans would be converted to equity and they would operate the Cambie Malone Group businesses as partners. The conversion would be achieved by Mr. Jacobs receiving shares in the companies and both parties signing a shareholder agreement. The terms of the shareholder agreement would address matters such as dividend rights, corporate governance and dispute resolution. The percentage of Mr. Jacobs' equity interest would be based on the "as is" values of the Cambie Malone Group properties in the Appraisals.
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> [49] Unfortunately, although Messrs. Jacobs and Yehia agreed on the general concept of converting the loans to equity they had quite different ideas about a key element of the arrangement. In particular, they did not

> share a common understanding of the "as is" values in the Appraisals and thus the percentage of equity to which Mr. Jacobs would be entitled. Indeed, as the trial progressed it became apparent that Mr. Jacobs did not fully understand the nature of the "as is" values in the Appraisals, either in his discussions with Mr. Yehia or when he was testifying. On the contrary, I find that Mr. Jacobs misunderstood the meaning and implications of the Appraisals on this centrally important point.

[9] After Mr. Jacobs testified at trial, his counsel made an admission on his behalf that resiled from Mr. Jacobs' valuation position. The judge observed:

> [60] It was sensible for Mr. Jacobs and his counsel to make this admission. The admission differed considerably, however, from Mr. Jacobs' testimony about his understanding of the "as is" values in the Appraisals. It also differed from his written and oral communications to Mr. Yehia on this issue. In those communications he rejected the notion that the Residual Values in the Cambie, Malone's and Nanaimo Appraisals corresponded to their "as is" values for purposes of establishing his equity share.
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> …
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> [65] Regardless of the explanation, however, Mr. Jacobs' pro-rating approach to determining "as is" values was misconceived and unjustified. It was not based on the values in the Appraisals, which included assumptions as to proposed remodelling. In contrast Mr. Yehia's approach was realistic and based on the Appraisals. This was the method the parties identified for establishing Mr. Jacobs' equity entitlement.

[10] The judge noted that the practical effect of the different approaches was significant (at para. 67). On Mr. Yehia's calculation, Mr. Jacobs' equity interest would have been 10-12%. Mr. Jacobs' approach yielded an interest of 34-35%.

[11] The parties agreed that Mr. Yehia paid $70,633 in interest on the loans until he stopped paying "sometime between July and September of 2003" (at para. 72). The judge concluded that "Mr. Yehia stopped paying interest … specifically because he and Mr. Jacobs agreed the loans would be converted to equity and they would operate as partners" (at para. 76).

[12] On January 27, 2004, Mr. Jacobs loaned an additional $267,000 to Mr. Yehia. No promissory note was executed and there were no express terms as to interest or repayment. It is not clear whether the loan was made by Mr. Jacobs or by Columbia Cottage Ltd. No interest was paid on this loan.

[13] Throughout 2004, Messrs. Jacobs and Yehia exchanged correspondence dealing with Mr. Jacobs investing in the Cambie Malone Group. They were not in agreement on a number of points. Mr. Jacobs did not agree on the valuation approach to his potential equity investment being taken by Mr. Yehia or the approach being taken to value his consultancy services. He also addressed a number of other outstanding issues.

[14] The parties met in January 2005 and on February 1, 2005 they signed two letters "Shareholders Agreement in the Cambie Group of Companies" and "Investing in the Cambie Group of Companies". These are described as the "February 2005 Agreement".

[15] The Shareholders Agreement letter confirmed Mr. Jacobs' "participation as a partner" in the Cambie Malone Group and added:

> To provide clarity and avoid any confusion in the future, we have agreed that a shareholders agreement outlining the interests and rights for both Paul Jacobs and Sam Yehia…needs to be drawn and executed.

It also was suggested that a professional(s) be retained "to assist us in the reconciliation of all of the points which would be included in the shareholders agreement".

[16] The Investing letter recited the history of the loans and promissory notes and stated that in July 2003, Mr. Jacobs had agreed to convert "all of the promissory notes into an equity position" in the Cambie Malone Group. It continued:

> By executing below you acknowledge that all of the promissory notes which were advanced to me, which notes suggested a personal obligation owed by me to you, are null and void and that I am not personally liable for the repayment to you of any amounts on account of such notes.

[17] Professionals were not retained to assist in resolving outstanding issues and they were not resolved.

[18] The judge addressed the February 2005 Agreement stating:

> [263] As the February 2005 Agreement indicates, the parties "agreed to agree" on conversion of the loans as part of the intended partnership. The

> proposed conversion was, however, on unspecified terms, at an unspecified time, in an unspecified way. It is trite law that an agreement to agree does not amount to an enforceable contract, whether in original form or by way of later amendment.
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> …
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> [266] I am satisfied, however, that the November 2002 Loan Agreement was terminated by the February 2005 Agreement. When it was executed, the parties agreed Mr. Yehia was no longer responsible to repay the $967,000 advanced by Mr. Jacobs in 2002, 2003 and 2004. In these circumstances, an essential element of a loan contract was removed: liability on the borrower's part for return of the principal with accrued interest (see *Lee*, paras. 9-10). In consequence, by mutual agreement, the November 2002 Loan Agreement came to an end when the February 2005 Agreement was executed.
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> …
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> [268] As events unfolded, Mr. Jacobs' expectation of partnership did not come to fruition. In these circumstances, Mr. Yehia remained obliged to pay interest under the November 2002 Loan Agreement unless and until it was terminated. That did not occur until February, 2005.

[19] On October 23, 2009, the parties executed two further agreements: the "Loan Agreement" and the "Management Services Agreement". The Loan Agreement was between Messrs. Yehia and Jacobs. It provided in part:

> **WHEREAS**, IN SEPTEMBER OF 2002 AN AGREEMENT WAS ENTERED INTO BY THE PARTIES WHEREIN THE SECOND PARTY DID LEND OR MAKE AVAILABLE THE USE OF NINE HUNDRED SIXTY SEVEN THOUSAND DOLLARS ($967,000) TO OR BY THE FIRST PARTY (HEREINAFTER THE "INVESTMENT");
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> AND WHEREAS SUCH AGREEMENT, HAVING BEEN RELIED UPON BY THE PARTIES OVER THE COURSE OF THE SUBSEQUENT SEVEN (7) YEARS, REQUIRES A RENEWAL OF THE AGREEMENT IN ORDER TO FACILITATE THE PARTIES GOING FORWARD;
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> THE PARTIES HERETO DO ENTER INTO AN AGREEMENT, INTENDING BY SO DOING, TO SUPPLANT ANY AND ALL PREVIOUS AGREEMENTS BETWEEN THE PARTIES WITH RESPECT TO THE ABOVE MENTIONED LOAN AMOUNT;
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> **THE PARTIES AGREE THAT:**
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> 1. Paul Jacobs, the Lender has lent to Sam Yehia, the Borrower nine hundred sixty-seven thousand dollars ($967,000) in good Canadian currency;
> 2. The Borrower will provide the Lender with a personal guarantee for the entire amount owing under this agreement;
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> …

> 6. The term of this agreement shall renew automatically in one (1) year increments at the end of the year or the date on which the loan is paid in full;
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> …
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> This agreement supplants and is paramount to any precedent agreement. Where any correspondence, contract or other agreement of any kind whatsoever conflicts with this agreement it is agreed by the parties that this agreement has paramountcy.
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> …
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> By signing below each of the parties attests to the fact that they have been informed of their right to independent legal advice and independent accounting advice and that this agreement is executed in full knowledge of the importance of seeking such independent counsel and under no duress or misconception about the party's rights at law whatsoever.

There was no provision for interest. Mr. Jacobs did not obtain legal advice.

[20] The Management Services Agreement, which was between the respondent 657947 B.C. Ltd. and the Cambie Malone's Corporation dealt with aspects of the consultancy arrangement and included the following:

> 9. Upon the termination of this agreement, the Company will:
>
> a) pay out the personal loan, and any associated interest, made by Mr. Paul Jacobs, Principal of the Service Provider, to Mr. Sam Yehia, Principal of the Company. The original amount of the principal outstanding of such loan was of September 2002 was CDN $967,000.

[21] On July 1, 2010, Mr. Jacobs was advised by Mr. Yehia that he had decided to pay out Mr. Jacobs. Shortly thereafter, notice to terminate the October 2009 Agreements was given. The judge found that on July 30, 2010, Mr. Yehia paid $967,000 to Mr. Jacobs.

[22] The respondents sued. They asserted that the October 2009 Loan Agreement was unconscionable and sought rescission. They sought a declaration that they held an equitable interest in the form of a trust in the Cambie Malone Group and a certificate of pending litigation ("CPL") against land owned by the Group. Damages for breach of contract also were claimed. Alternatively, a declaration of partnership was sought. The respondents asserted that the appellants were unjustly enriched.

[23] The appellants contested all of the assertions of the respondents and counterclaimed for a $45,000 overpayment of the $967,000 loan.

Trial Judgment

[24] The trial was bifurcated. The present appeal concerns only liability. The judge observed:

> [3] … The question at the heart of the case is whether Mr. Jacobs was right about the nature of the business relationship and, if not, whether Mr. Yehia was unjustly enriched by what Mr. Jacobs did for him.

She then set out the issues for determination.

1. Were Messrs. Jacobs and Yehia partners?
2. How is the November 2002 Loan Agreement to be construed and did the defendants breach it by failing to pay interest?
3. If the November 2002 Loan Agreement was breached, is any part of the claim for damages statute barred?
4. How is the Oral Management Consultancy Agreement to be construed?
5. How are the October 2009 Agreements to be construed and were they unconscionable?
6. Did Mr. Yehia repudiate the October 2009 Agreements?
7. If Messrs. Jacobs and Yehia were not partners, was Mr. Yehia unjustly enriched and, if so, how?
8. Is any of the relief sought by the plaintiffs precluded by an equitable doctrine?
9. If the plaintiffs are entitled to a remedy, what remedy is appropriate?
10. Are the defendants entitled to a remedy and, if so, what remedy is appropriate?

[25] Not all of the issues are relevant to this appeal. I summarize the judge's conclusions with respect to those that are relevant.

[26] The judge concluded that Messrs. Jacobs and Yehia were not partners. She held that Mr. Yehia was in breach of the 2002 Loan Agreement by failing to pay interest from September 2003 to February 2005. The October 2009 Agreements were not unconscionable and were not repudiated by Mr. Yehia. Mr. Yehia was unjustly enriched. She held that the respondents are entitled to judgment for unpaid

interest and a declaration the appellants have been enriched unjustly from February 2005 to October 2009. Compensation will be calculated based on 11.73% of the increase in the net equity of the Cambie Malone Group from February 2005 to October 2009.

[27] The judge also awarded 657947 B.C. Ltd. $50,064 for unpaid GST and held that the appellants were entitled to a $45,000 set-off. In a separate order the judge refused to order the cancellation of the certificate of pending litigation.

[28] I review these conclusions in a little more detail.

[29] The judge's conclusion, that there was no partnership, was based on her analysis of the course of dealings between them. She stated that "Messrs. Jacobs and Yehia did not proceed beyond the 'intended partners' stage in their business relationship" (at para. 243) and added:

> [245] … at a minimum, until the parties' ownership interests were determined or determinable and basic governance agreed upon the joint enterprise could not and did not commence.
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> [246] … I am not persuaded there was a meeting of minds on the shared ownership issue, nor on an effective mechanism for its determination. On the contrary, Messrs. Jacobs and Yehia held distinctly different views on this key element of the intended partnership. In particular, they disagreed on the "as is" values in the Appraisals and thus on the formula for calculating their respective equity entitlement.

[30] The judge held that the entire advance of $967,000 was covered by the 2002 Loan Agreement and that it carried interest at 12%. She rejected the appellants' contention that interest was waived and held that it was payable until the February 2005 Agreement, which terminated the 2002 Loan Agreement.

[31] The judge also held that the 2005 Agreement acknowledged the debt and the respondents' claim was not statute barred.

[32] The judge rejected the respondents' contention that the October 2009 Agreements failed for lack of certainty and consideration or were unconscionable. After examining a number of troublesome provisions, she found "that I am able

objectively to discern the meaning of its essential terms". The judge rejected the appellants' submission that:

> [312] … the October 2009 Agreements clarified, confirmed or otherwise impacted the parties' *past* relationship or obligations. In particular, I reject the submission that the October 2009 Agreements confirmed "Mr. Jacobs *had been solely* a lender and a consultant" in so far as it suggests, ex post facto, that he was a lender continuously from 2002 to 2009. He was not, and the parties did not agree that he was.

[33] She continued:

> [313] I find the October 2009 Agreements, considered as a whole and in context, expressed a meeting of the minds on the way forward given what had transpired in the past, regardless of how the past was characterised. The opening recital of the Management Services Agreement referenced the past relationship and a "wish" to "express" how the relationship "had been operative", but failed to do so. On the contrary, the terms agreed upon thereafter concern only the future relationship and are unrelated on their face to the past relationship or its characterisation. The same is true of the Loan Agreement, which referenced the original loan because it was being renewed.
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> [314] The Loan Agreement did not clarify or alter the past effect of the November 2002 Loan Agreement, nor did it purport to do so. Rather, it recorded the fact that Mr. Jacobs had previously loaned $967,000 to Mr. Yehia and a renewal was required for the business relationship to go forward. In so doing, it expressed a shared intention "to supplant any and all previous agreements" with the Loan Agreement. It did not, however, cancel any prior unmet obligations (such as liability for unpaid interest) or purport retroactively to extend the life of the November 2002 Loan Agreement over the pre-renewal period.
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> …
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> [317] Taking into account the plain and ordinary meaning of the words in the October 2009 Agreements in the context of the contract as a whole and the surrounding circumstances, I find the October 2009 Agreements renewed the November 2002 Loan Agreement and replaced the existing Oral Management Consultancy Agreement. When read as a whole, they contain all the essential elements of a loan agreement. They also contain all the essential elements of a management services agreement.
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> [318] As the plaintiffs note, the October 2009 Agreements do not define the loan amount outstanding as of the date of their execution. The Loan Agreement does, however, renew the November 2002 Loan Agreement (recitals, para. 1) and thus resume liability for the amount owed thereunder after an interruption. Accordingly, I find the October 2009 Agreements established an effective mechanism for determination of the amount of the renewed loan.

> [319] Application of the established mechanism is straightforward. The November 2002 Loan Agreement encompassed a total principal sum of $967,000 advanced in three tranches, plus annual interest at a rate of 12 per cent (see also Management Services Agreement, para. 9 (a)). The outstanding principal was reduced by $45,000 in May 2004 and interest was paid monthly until approximately September 2003. Thereafter, interest accrued until February 2005, when the November 2002 Loan Agreement was terminated.

[34] The judge concluded that the parties intended to renew liability for both the principal of the loan and interest at 12%.

[35] After reviewing the relative positions of the parties, the judge concluded that the October 2009 Agreements were not unconscionable. She also assessed the conduct of Mr. Yehia and concluded that he did not evidence an intention not to be bound by the agreements, that is, he did not repudiate them.

[36] The judge addressed unjust enrichment as follows:

> [355] I find the defendants were enriched by Mr. Jacobs' $967,000 investment. The investment funds were used to operate, renovate and develop the Cambie Malone Group properties and businesses. I also find Mr. Jacobs was correspondingly deprived.
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> [356] There is a causal link between the contribution and the enrichment. The causal link was the defendants' access to and use of the investment funds.
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> [357] As previously noted, Mr. Yehia needed substantial cash for planned remodelling, development and expansion of the Cambie Malone Group properties and businesses. Bank financing was not, however, readily available for these purposes. In November 2002, Mr. Yehia found an alternate source of financing: Mr. Jacobs. From that point forward, he had access to the needed funds.
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> [358] Mr. Jacobs' funds allowed Mr. Yehia to convert his plans into reality. Combined with the properties and businesses in their "as is" state, they jointly contributed to the increased value of the Cambie Malone Group over time.

[37] She rejected unjust enrichment as it pertained to Mr. Jacobs' consultancy services because there were consultancy contracts in place. The judge continued:

> [362] Between November 2002 and February 2005 the defendants also accessed and used the $967,000 pursuant to a valid and enforceable contract: the November 2002 Loan Agreement. The same is true of the period after the October 2009 Agreements. Between February 2005 and October 2009, however, there was no such contract in place because

> Mr. Yehia persuaded Mr. Jacobs they were "partners completely". Although naïve, this belief was held in good faith and was based on the cumulative effect of Mr. Yehia's conduct and representations.

[38] The judge addressed the basis for calculating compensation:

> [364] Based on their history and Mr. Yehia's representations, between February 2005 and October 2009 Mr. Jacobs reasonably expected to share in the profits of the Cambie Malone Group if he left the $967,000 investment, Second Mortgage and SBIL loan guarantee with Mr. Yehia. He did so. The profits he expected to share in were the increase in net equity of the Cambie Malone Group, including any increase in land values. They were to be calculated taking into account any difference between the fair market value of his services and those of Mr. Yehia.
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> [365] Mr. Jacobs also reasonably expected that his share entitlement would be a relative percentage of the Cambie Malone Group's "as is" value, as outlined in the Appraisals. For purposes of this unjust enrichment analysis, I accept as accurate Mr. Yehia's repeated assertions that it was reasonable for Mr. Jacobs to expect to receive 11.73 per cent of the net equity in the Cambie Malone Group.
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> [366] The defendants have failed to show a reason it would be just for them to retain the benefits from February 2005 to October 2009. Mr. Yehia had no such reasonable expectation.
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> [367] In reaching the foregoing conclusion I have considered the parties' entire course of dealings. I find that Mr. Yehia consciously and deliberately strung Mr. Jacobs along regarding his intentions and the nature of their relationship. In particular, he persuaded Mr. Jacobs they were partners in order to retain access to and use of his $967,000 for the benefit of the Cambie Malone Group. In so doing, he failed to deal with Mr. Jacobs with commercial good conscience by rebuffing his attempts to resolve the partnership impasse while simultaneously paying no interest on the $967,000, renouncing liability for its repayment and purporting to erode Mr. Jacobs' equity entitlement.
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> [368] All things considered, I conclude it would not be just to permit the defendants to retain the benefits so conferred.

Discussion

Effect of the February 2005 Agreements

[39] The judge and the parties proceeded on the basis that the February 2005 Agreement was comprised of both the Shareholders Agreement letter and the Investing letter. Indeed they both address Mr. Jacobs' position as an investor and the conversion of his loans into equity in the Cambie Malone Group.

[40] The judge held, at para. 263, that "the February 2005 Agreement indicates, the parties 'agreed to agree' on conversion of the loans as part of the intended partnership". She noted that the terms for doing so were not specified and that "an agreement to agree does not amount to an enforceable contract". At para. 266, she held that the November 2002 Loan Agreement was terminated by the February 2005 Agreement. In my view, that cannot be so.

[41] The judge stated that in February 2005 the parties agreed that Mr. Yehia "was no longer responsible to repay the $967,000 advanced by Mr. Jacobs", but that agreement was premised on conversion of this money into equity in the Cambie Malone Group. It was not a stand-alone agreement. The basis for the conversion was not agreed. Essentially, there was a failure of consideration. In my view, the February 2005 Agreement was not an enforceable agreement.

[42] It follows that Mr. Yehia is liable for payment of interest to Columbia Cottage Ltd. at 12% per annum from the date of advancement of funds to the date of repayment, subject only to consideration of the provisions of the October 2009 Agreements to which I now turn.

The October 2009 Agreements

[43] I agree with many of the judge's conclusions regarding the October 2009 Agreements and with her concerns about its shortcomings. The critical issue is the effect of the October 2009 Agreements on the November 2002 Loan Agreement. The appellants assert it was supplanted to the extent that no obligations derived from it survived. In my view, this does not take adequate account of the factual matrix or the language of the October 2009 Agreements.

[44] I agree with the judge's conclusion that:

> [313] I find the October 2009 Agreements, considered as a whole and in context, expressed a meeting of the minds on the way forward given what had transpired in the past, regardless of how the past was characterised. The opening recital of the Management Services Agreement referenced the past relationship and a "wish" to "express" how the relationship "had been operative", but failed to do so. On the contrary, the terms agreed upon thereafter concern only the future relationship and are unrelated on their face

> to the past relationship or its characterisation. The same is true of the Loan Agreement, which referenced the original loan because it was being renewed.

[45] These agreements were entered into to resolve many years of disagreement and uncertainty. This history included the February 2005 Agreements by which the parties purported to relieve Mr. Yehia from any obligation to repay the $967,000 loan on the basis that the money was "invested in the Cambie Group of Companies for equity participation".

[46] The October 2009 Loan Agreement begins by referring to the 2002 Loan Agreement. It states, perhaps curiously, that the parties had relied on that agreement for seven years and that the agreement "requires a renewal". The renewal was to "supplant" all previous agreements; that is, to "supersede and replace" them (*Concise Oxford English Dictionary*, 11th ed. (Oxford: Oxford University Press, 2004)).

[47] The October 2009 Management Services Agreement set out the basis on which the loan was to be paid out. On termination of that agreement The Cambie Malone's Corporation would repay the loan "and any associated interest". Reference was made to the amount of the indebtedness as of 2002.

[48] It is apparent immediately that the October 2009 Agreements took off the table any relationship between the loan and an equity investment by Mr. Jacobs. It also is apparent that the loan addressed in the Agreements was linked to the November 2002 Loan Agreement and to interest payable on that loan.

[49] Although it is somewhat troublesome, the legal interest of Columbia Cottage Ltd., which advanced at least the first two tranches of the loan and which was the beneficiary of two promissory notes, appears to have been ignored at the time of the October 2009 Agreements. I conclude that the parties intended that the loan would be treated as directly between Messrs. Yehia and Jacobs.

[50] I see no basis in the factual matrix or the language of the October 2009 Agreements to suggest that Mr. Jacobs was forgiving interest that had accrued or

forgoing interest for the future. There is no suggestion that an equity position would derive from the loan. The monthly fee payable for Mr. Jacobs' services is not linked to interest on the loan. There had been considerable disagreement over the years on the value of those services.

[51] As of October 2009, the November 2002 Loan Agreement was extant. It provided for interest at 12% payable annually. There also were terms of repayment. On the evidence, the loan was advanced in the context of the expectation that the parties would agree to terms on which the loan would be converted into equity.

[52] The October 2009 Loan Agreement superseded and replaced the November 2002 Loan Agreement. It no longer governed the relationship between the parties. The issue becomes the proper construction of the October 2009 Agreements.

[53] The October 2009 Agreements dealt with the loan strictly as a loan and provided for its repayment. Interest was included although a rate was not specified.

[54] In my view, the effect of the October 2009 Agreements was to continue the November 2002 loan bearing interest at 12% payable on the termination of the Management Services Agreement. To interpret the October 2009 Agreements as absolving Mr. Yehia of the obligation to pay interest on a $967,000 loan makes no business sense in the circumstances of this case. The 2009 Loan Agreement provides that the loan is to Mr. Yehia and that he will guarantee its repayment. In addition, the Management Services Agreement provides that The Cambie Malone's Corporation will "pay out the personal loan, and any associated interest".

[55] The loan was repaid on July 30, 2010. Mr. Yehia is liable for interest at 12% from the date money was advanced to July 30, 2010 as adjusted by interest and principal previously paid. The Cambie Malone's Corporation also is liable for this amount.

Unjust Enrichment

[56] The judge rejected unjust enrichment for the periods November 2002 to February 2005 and after October 2009 because there was a contractual basis on which Mr. Yehia retained the $967,000. She held there was no such basis between February 2005 and October 2009 because the February 2005 Agreement terminated the 2002 Loan Agreement; there then was no juristic reason for Mr. Yehia's retention of the benefit he derived from the loan funds.

[57] I have concluded that the February 2005 Agreement did not terminate the 2002 Loan Agreement. It remained extant. It continued as a juristic reason for Mr. Yehia's retention of the benefits he derived from the loan funds.

[58] Until there was agreement on the basis on which the loans would be converted to equity, they remained loans to Mr. Yehia. He was enriched to the extent he did not pay interest and Mr. Jacobs was deprived of that interest, but Mr. Jacobs had an enforceable contractual right to recover his loss. Mr. Yehia's use of the funds in the business did not give Mr. Jacobs an interest in whatever benefits may have accrued to the Cambie Malone Group. He did not have an interest in the business because the parties did not agree on the terms for him to do so.

$45,000 Overpayment

[59] It is common ground that Mr. Yehia overpaid $45,000 on the loan. He and The Cambie Malone's Corporation are entitled to a set-off in that amount.

GST

[60] The October 2009 Management Services Agreement provided for the payment by The Cambie Malone's Corporation of GST in addition to the monthly fee. Previous agreements apparently did not. The Cambie Malone Group was invoiced for fees only and paid the invoices.

[61] I agree with the appellants that 657947 B.C. Ltd. is not entitled to payment of GST for the time prior to the 2009 Management Services Agreement.

Certificate of Pending Litigation

[62] The judge declined to order the cancellation of the CPL on the basis that there was no hardship on the appellant and because the CPL related to the award of damages for unjust enrichment. In my view, that award is not sustainable. The respondent Mr. Jacobs is entitled to an award of interest on the loan. No interest in land is involved. The CPL should be cancelled.

Conclusion

[63] The appellants seek an order setting aside paras. 1-6 of the judge's order and varying paras. 7 and 8 of her order to provide for judgment rather than set-off. I address these provisions.

[64] I would vary para. 1 to provide that Mr. Yehia breached the October 2009 Agreements by failing to pay interest that was due and owing from the date of advancement of funds to July 30, 2010.

[65] I would vary para. 2 to provide that Mr. Jacobs is entitled to an accounting for unpaid interest from the date funds were advanced to July 30, 2010 plus court ordered interest as against Mr. Yehia and The Cambie Malone's Corporation to be determined at the second stage of the trial.

[66] I would set aside para. 3 as unnecessary.

[67] I would set aside paras. 4, 5 and 6.

[68] I would not disturb para. 7.

[69] I would modify para. 8 to read: "The Defendant, The Cambie Malone's Corporation, is entitled to set-off against the compensation awarded to the Plaintiffs the value of any ineligible expenses paid to the plaintiff, 657947 B.C. Ltd., over the course of the Oral Management Consultancy Agreement or the October 2009 Agreements. The value of any such ineligible expenses shall be determined at the second stage of the trial".

[70] In my view, the results of this appeal are mixed. The finding of unjust enrichment is set aside, but Mr. Yehia is liable for interest. I would direct that each side bear its own costs in this Court and in the Supreme Court.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Mr. Justice Fitch"