IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pillar Capital Corp. v. Horseshoe Valley Ranch Ltd.,* 2023 BCSC 82

Date: 20230119
Docket: H220064
Registry: Vancouver

2023 BCSC 82 (CanLII)

Between:

Pillar Capital Corp.

Petitioner

And

Horseshoe Valley Ranch Ltd.,
Elvern Kenneth Esau, Stacy Elvern Esau,
and Leanne Alma Esau

Respondents

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for the Petitioner:	J.B. Ross
Counsel for the Respondents:	B. La Borie
Place and Date of Hearing:	Vancouver, B.C. November 16–17, 2022
Place and Date of Judgment:	Vancouver, B.C. January 19, 2023

Table of Contents

INTRODUCTION **3**
BACKGROUND **3**
THE LEGAL CONTEXT **4**
DEFENCES TO PILLAR'S CLAIM **6**
Misrepresentation Inducing the Loan Agreement 7
Breach of Section 8 of the *Interest Act* 10
Criminal Interest Rate 10
Improvident Realization 12
Monitoring Fees 14
Calculation Issues 14
Breach of the Loan Agreement, the Duty of Honest Performance and the *Farm Debt Mediation Act* Stay of Proceedings 15
RESOLUTION OF THE TRIABLE ISSUES **16**
Orders 17

2023 BCSC 82 (CanLII)

2023 BCSC 82 (CanLII)

Introduction

[1] In this proceeding, the Petitioner, Pillar Capital Corp ("Pillar") seeks an *order nisi* based upon collateral mortgages granted by the Respondents Horseshoe Valley Ranch Ltd. ("Horseshoe"), Elvern Kenneth Esau, Stacy Elvern Esau ("Stacy Esau"), and Leanne Alma Esau (together, the "Respondents"). The proceeding involves nearly two dozen separate parcels of land in the Peace River District of British Columbia known generally as the Horseshoe Valley Ranch.

[2] The Respondents raise a number of defences to Pillar's debt claim. They seek an Order that this proceeding be referred to the trial list pursuant to Rule 22-1(7)(d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

Background

[3] Horseshoe is the registered owner of most of the parcels. The individual Respondents, Elvern Kenneth Esau, Stacy Esau, and Leanne Alma Esau are the registered owners of the other parcels.

[4] Pillar is an Alberta corporation in the lending business.

[5] In 2015, Tyran Transport Ltd. ("Tyran") was seeking refinancing of a loan it then held with RBC. It entered into discussions with Pillar for replacement financing.

[6] The subject mortgages were granted by the Respondents as security for guarantees made by each of them in relation to a Loan Agreement (the "Loan Agreement") dated January 22, 2016 between Pillar and Tyran. The Loan Agreement provides for two facilities: "Facility One" in the amount of $2,280,000; and "Facility Two" in the amount of $520,000.

[7] As contemplated by the Loan Agreement, each of the Respondents executed a Guarantee of the indebtedness of Tyran under the Loan Agreement (the "Guarantees"), and each of the Respondents provided a mortgage securing all of his, her or its obligations to Pillar under the Guarantees (the "Mortgages"). The

Mortgages were each registered in the British Columbia Land Title Office on March 2, 2016.

[8] Pillar made the advances to Tyran under the Loan Agreement. Tyran did not repay the amounts when due as required by the Loan Agreement.

[9] These proceedings were commenced in Prince George on June 18, 2018. The Respondents filed a Response to Petition on August 24, 2018. Since then, the parties have amended and supplemented their materials and the petition has been adjourned on two previous occasions. In October 2022, cross-examinations of Steve Dizep and Keaton O'Brien, representatives of Pillar, were conducted by counsel for the Respondents.

2023 BCSC 82 (CanLII)

The Legal Context

[10] Rule 22-1(7)(d) provides that on a hearing in chambers, the Court may "order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding." Rule 21-7(5)(k) provides for such an order in foreclosure proceedings.

[11] In the recent case of *Cepuran v. Carlton*, 2022 BCCA 76, the Court of Appeal of British Columbia clarified that where a triable issue is raised by a respondent to a petition, a judge is not obliged to refer the matter to the trial list under R. 22-1(7), but has a discretion to do so or to employ other pretrial procedures for the resolution of the issues:

> [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

2023 BCSC 82 (CanLII)

[12] In *Phaneuf v. 0896459 B.C. Ltd.*, 2022 BCSC 1706, the Court explained the application of *Cepuran* to the issue of whether a petition should be referred to the trial list, stating:

> [46] A determination that there is a triable issue is no longer the end of the analysis: *Cepuran* at para. 158. Instead, where a judge hearing a petition proceeding concludes it raises a triable issue, they have the discretion to refer it to the trial list or to use hybrid procedures pursuant to R. 16-1(18) and R. 22-1(4) within the petition proceeding itself to assist in determining the issues: *Cepuran* at para. 160. Some of the factors that may be relevant in deciding whether to convert a petition proceeding to an action include the undesirability of multiple proceedings, the desirability of avoiding unnecessary costs and delay, whether the particular issues involved require an assessment of the credibility of witnesses, the need for the Court to have a full grasp of all the evidence, whether there is some urgency or the matter is highly time sensitive, and whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute: *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 at paras. 49, 51 [*Boffo*] citing *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627 at para. 39, both cited with approval in *Cepuran* at para. 165. In considering whether to order the use of hybrid procedures within the petition proceeding itself, or to refer the matter to trial, at minimum a chambers judge "will need to be mindful of the object of the *Rules* set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding": *Cepuran* at para. 166.

(See also *The Owners, Strata Plan NW 499 v. Louis*, 2022 BCCA 231 at paras. 40–42).

[13] Pillar relied on decisions pronounced prior to *Cepuran* in which this Court has suggested that the threshold for converting a foreclosure petition into a trial ought to be a low one. For example, in *Do v. Nichols*, 2014 BCSC 1082, the Court held:

> [39] In my view, the courts have established a low threshold for converting a foreclosure petition into an action for trial because of a well-placed concern that people should not be deprived of their interest in property by way of a foreclosure without a full canvassing of all the relevant evidence and arguments and that a property owner should have a fair and full opportunity to present their case.

[14] On the other hand, the Court in *Cepuran* remarked that in those matters that are properly advanced by petition, the starting point is that a summary procedure ought to be appropriate:

> [158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the *Rules* contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29-30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.

2023 BCSC 82 (CanLII)

[15] In *Phaneuf* at para. 47, the Court set out the issues to be determined when a petition respondent seeks to have the proceeding referred to the trial list:

> 1. Is the proceeding one that was properly initiated by petition?
>
> 2. If so, does the proceeding raise triable issues?
>
> 3. If so, should the triable issues be determined by referring the petition to the trial list or by hybrid procedures within the petition proceeding?

On the facts of this case, there is no issue as to whether this proceeding was properly initiated by petition, the first issue identified in *Phaneuf*.

[16] For the purposes of R. 22-1(7), a triable issue is an issue of fact or law that is not bound to fail: *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160 at para. 80.

[17] In order to raise a triable issue, the Respondents must do more than make bare assertions in response to the claims advanced by Pillar. In Forjay Management Ltd v. 0981478 B.C. Ltd., 2018 BCSC 1494 [Forjay], this Court held:

> [30] A party will not succeed in responding to such an application by simply relying on bald assertions. He must "put [his] best foot forward" with respect to the existence of material issues to be tried: *McLean* at paras. 36–38. See also *Trowbridge v. Connelly*, 2017 BCSC 2336 at para. 5; *Richter v. Stoeckli Stucco Ltd.*, 2016 BCSC 1294 at para. 11.

Defences to Pillar's Claim

[18] The Respondents raise six issues in defence of Pillar's claim, which they describe in their submissions as follows:

a) Did Pillar misrepresent the amounts to be secured by its collateral mortgages under the Loan Agreement to the Respondents?

b) Did the agreement among the parties (the "Loan Agreement") breach s. 8 of the *Interest Act*, R.S.C. 1985, c. I-15, and if so, what impact does that have on the amounts sought?

c) Has Pillar received an annual rate of interest in breach of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46, and if so, what impact does that have on the amounts sought?

d) Has Pillar improvidently realized on its security?

e) What amount is due and owing to Pillar given the repeated mistakes made in Pillar's own calculations?

f) Did Pillar otherwise breach the Loan Agreement, its duty of honest performance, or the *Farm Debt Mediation Act*, S.C. 1997, c. 21 stay of proceedings?

[19] In addition, in relation to issues (c) and (e), there is an additional question regarding the manner in which interest is to be dealt with concerning a monitoring fee payable under the Loan Agreement.

[20] In light of the authorities described above, I will address each of these issues in turn.

Misrepresentation Inducing the Loan Agreement

[21] The Respondents allege that when they entered into the Guarantees and Mortgages in late February 2016, they were induced to do so by a misrepresentation made by Pillar.

[22] The misrepresentation claim revolves around the negotiations between the parties leading up to the signing of the loan, guarantee and security documents in

2023 BCSC 82 (CanLII)

late February 2016. The parties, including the Respondents, were represented by solicitors during the making of the Loan Agreement.

[23] On or around December 22, 2015, Pillar issued a commitment letter. The commitment letter contemplated that mortgage security would be granted by the guarantors for the entire amount of the debt.

[24] Stacy Esau deposed that in January 2016, he engaged in several communications with Mr. Dizep, in which they discussed the idea that the loan was to be structured into two facilities whereby one loan would be secured by equipment and the other against real property.

[25] The misrepresentation claim is based on an email dated January 19, 2016 to Stacy Esau from Mr. Dizep, which states as follows:

> I will follow up with a call but in order to proceed, we will have to amend as follows:
>
> Total loan (as agreed) = $2,800,000
>
> Segment 1) $2,280,000
>
> - this is supported by equipment at an advance of 75% against value
> - all terms remain the same, with the exception of principal payments.
> - blended principal and interest payments of $62,500 monthly are required, balloon end of term
>
> Segment 2) $520,000
>
> - this Segment is supported by a 2nd position against real estate owned, including all personal and commercial
> - interest only, priced at 2% per month, facility fee of 4%
> - interest reserve to be funded from loan advance for the minimum term (4 months)
> - 50% of loan ($260,000) to be repaid by end of minimum term (4 months)
>
> …
>
> The equipment portion is straightforward. However, the real estate portion of the loan is a stretch and require the above amendment in order to proceed. The personal real estate value is undetermined as we have no 3rd party assessments / appraisals completed. The commercial real estate (Kicking Horse) has limited equity based on purchase price and vendor note.

2023 BCSC 82 (CanLII)

[26] The Respondents argue that this email constituted a misrepresentation, in light of the fact that the Loan Agreement, as finally presented and signed, included unlimited mortgage security over both facilities.

[27] Pillar takes the position that the pre-agreement correspondence between the parties is inadmissible, as it violates the parol evidence rule.

[28] On the other hand, the Respondents cite the decision in *TCC Mortgage Holdings Inc. v. Alysen Place*, 2011 BCSC 383 at paras. 72–74, in which the Court held that a contest about whether the parol evidence rule applied was sufficient to warrant referral to the trial list.

[29] In my view, this case is distinguishable from *TCC Mortgage Holdings*, in that this issue can be determined, in my view, without resolving the question of the admissibility of the parol evidence.

[30] In my view, this misrepresentation claim cannot succeed at law. The email from Mr. Dizep is ambiguous but, accepting the Respondents' interpretation, the best that can be said for the Respondents' position is that the email set out what Mr. Dizep contemplated the Loan Agreement would say.

[31] Generally speaking, in order to be actionable, a false representation must be one of fact. There is an exception in relation to statements of future intention but in order for that exception to be operative, the claimant must prove that the other party deliberately misstated their present intention: see *Satnam Education Foundation v. MB Dream Construction & Supplies Ltd.*, 2020 BCSC 1089 at para. 30.

[32] The alleged misrepresentation in the present case is not a misrepresentation of fact, and it is not the type of case encompassed by the future intention exception. That exception was applied in *International Casualty Co. v. Thomson* (1913), 48 S.C.R. 167, wherein the plaintiff bought shares in a company as a result of representations that within a fixed time the company would be in business in Vancouver and the plaintiff would be made the medical examiner of the company for that city. The Court held that if the representor did not in fact intend those things to

2023 BCSC 82 (CanLII)

happen at the time that he made the representation, a claim in fraudulent misrepresentation would be available.

[33] No authority has been brought to my attention in support of the proposition that pre-contractual negotiations as to what a future written contract between the parties is intended to say can ground a claim in misrepresentation.

[34] To the extent that there was a collateral agreement which was not consistent with or contradicted the Loan Agreement, such a collateral contract would be unenforceable: see *Hawrish v. Bank of Montreal,* [1969] S.C.R. 515, cited in Bottoms v. Witzke, 2022 BCSC 1875 at paras. 87–88.

[35] To the extent that the Respondents allege a prior agreement not reduced to writing in the Loan Agreement, no rectification proceeding has been commenced.

[36] In the circumstances, even if the prior negotiations and correspondence between the parties were admitted into evidence despite the parol evidence rule, the Respondents' defence to the claim on the basis of this alleged misrepresentation cannot succeed. In my view, it is bound to fail.

[37] There is no triable issue in respect of the Respondent's misrepresentation claim.

Breach of Section 8 of the *Interest Act*

[38] The Respondents have raised various complaints regarding the application of the default interest rate. Pillar has agreed to waive the default interest rate for the purposes of this application and so there is no longer a dispute regarding this issue.

Criminal Interest Rate

[39] The Respondents advance an analysis through the evidence of Stacy Esau that purports to show that the required payments under the Loan Agreement would result in the charging of a criminal interest rate contrary to s. 347 of the *Criminal Code*. In response, Pillar has provided evidence of its vice-president of operations,

2023 BCSC 82 (CanLII)

Mr. O’Brien, in which Mr. O’Brien purports to correct what he characterizes as Stacy Esau’s “errors” and states there is no breach of the *Criminal Code*.

[40] Neither Stacy Esau nor Mr. O’Brien appear to have any special expertise to make the calculations at issue, and neither is independent.

[41] The explanations as to why these calculations differ are unclear and confusing.

[42] In my view, neither Pillar’s evidence nor the Respondents’ evidence is sufficient for me to determine this issue. In any event, I am not permitted to weigh evidence or to undertake complicated factual analyses on this application.

[43] The parties are required to put their best foot forward on this application, and I have considered whether the Respondents’ argument on criminal interest rate ought to be rejected simply because they have not advanced expert evidence to prove the defence. I note that in a Consent Order dated November 2, 2022, Justice Blake amended an earlier order of Justice Funt which permitted the parties to file additional affidavit evidence “related solely to the amendments in the Further Amended Response to Petition”, in respect of the *Interest Act* (which issue has been waived for the purpose of this hearing) and the *Criminal Code*.

[44] On the other hand, the Respondents have advanced some evidence from Stacy Esau suggesting that there is a criminal interest rate defence.

[45] Pillar has not satisfied me that there is no triable issue in respect of whether there is a criminal interest rate defence.

[46] There is also a triable issue regarding what the consequences ought to be if the interest under the Loan Agreement contravened the criminal interest provisions at s. 347 of the *Criminal Code*. In *Forjay,* the Court held as follows at para. 71 regarding the remedies that are available when a criminal interest rate has been charged:

2023 BCSC 82 (CanLII)

> [71] Accordingly, the spectrum will run from contracts declared void *ab initio* in the "most egregious and abusive cases" to notional severance of any illegal aspects where a contract is otherwise "unobjectionable": *Transport North American Express* at para. 40. In determining where on the spectrum a particular contract falls, the Court adopted the considerations identified by Blair J.A. in *William E. Thomson Associates Inc. v. Carpenter* (1989), 61 D.L.R. (4th) 1 (Ont. C.A.):
>
>> [24] In *Thomson*, at p. 8, Blair J.A. considered the following four factors in deciding between partial enforcement and declaring a contract void *ab initio*: (i) whether the purpose or the policy of s. 347 would be subverted by severance; (ii) whether the parties entered into the agreement for an illegal purpose or with an evil intention; (iii) the relative bargaining positions of the parties and their conduct in reaching the agreement; and (iv) whether the debtor would be given an unjustified windfall. He did not foreclose the possibility of applying other considerations in other cases, however, and remarked (at p. 12) that whether "a contract tainted by illegality is completely unenforceable depends upon all the circumstances surrounding the contract and the balancing of the considerations discussed above and, in appropriate cases, other considerations".

[47] In summary, there are triable issues raised regarding the criminal interest rate issue which will have to be determined using hybrid procedures within this petition proceeding, as addressed below.

Improvident Realization

[48] The law in respect of the doctrine of improvident realization was summarized by Justice Fenlon (as she then was) in *HSBC Bank Canada v. Kupritz*, 2011 BCSC 788, as follows:

> [35] The question in each case is whether the secured party took all reasonable steps to obtain the best price for the collateral: *Greyvest*, at para. 45. A debtor alleging failure of a secured party to deal with collateral in a commercially reasonable manner bears the burden of proving not only that the manner of selling the collateral was improvident, but also that the failure to act in a commercially reasonable manner resulted in recovery of less money (and therefore an increased deficiency) than would otherwise have been the case: *J. & W. Investments Ltd. v. Black* (1963), 38 D.L.R. (2d) 251 (B.C.C.A.) at 264.
>
> [36] In practical terms, this onus of proof requires the debtor to establish both that the secured party departed from industry norms, and that a higher price would have been obtained if the secured party had done what is considered to be reasonable in that particular sector or industry. Generally,

2023 BCSC 82 (CanLII)

> meeting that burden will require the debtor to provide expert evidence on the industry standard against which the debtor's allegation of substandard conduct can be measured. However, it will not always be the case that expert evidence is required; in some cases the conduct of a secured party may so obviously depart from commercial common sense that evidence of what was done alone will suffice …

[49] Pillar argues that the evidence advanced by the Respondents is insufficient to establish the defence of improvident realization, characterizing Stacy Esau's evidence as "self-conflicting and vague".

[50] However, there are allegations and some evidence to support the proposition that Pillar acted in a commercially unreasonable manner when certain equipment was sold by way of auction sale.

[51] In particular, the Respondents allege that certain equipment was not advertised properly in that the auction that did not have proper registration information in the presale advertising. The auctioneer admits that at least one auction lot was sold with incorrect information but asserts that any effect on price was immaterial.

[52] Further, the Respondents have advanced evidence which shows estimated values of the equipment compared to realized values, and they rely on that evidence to submit that there was a shortfall.

[53] Viewing the evidence and submissions together, there is clearly a dispute as to whether there was improvident realization, whether there was a shortfall, and whether there is a causative link between any improvident realization and any shortfall. In my view, these disputes cannot be fairly determined on the record before me.

[54] I have concluded that there are triable issues in respect of the improvident realization issue which will have to be determined using hybrid procedures within this petition proceeding, as addressed below.

2023 BCSC 82 (CanLII)

2023 BCSC 82 (CanLII)

Monitoring Fees

[55] An issue was raised in the proceeding as to the treatment of “monitoring fees” under para. 2.4 of the Loan Agreement.

[56] This issue, as I understand it, needs to be determined in order to calculate the amount owing under the Mortgages.

[57] There was a question as to whether these fees were “capitalized” as part of the loan. By this I understood the issue to be whether the fees were added to the loan balance so that interest was paid on them, and in particular how this was done.

[58] It was submitted that the monitoring fees were governed by para. 9.21 of the Loan Agreement, and in particular the last sentence thereof.

[59] But in my view, the fees do not fall within para. 9.21. That section deals with fees paid to a third party by the lender. The last sentence of para. 9.21 must be read together with the rest of the sub-paragraph. When one does so, it is clear in my view that the fees referred to in that sentence refer to the fees described at the beginning of the paragraph.

[60] The monitoring fees are governed by para. 2.2 and are “other amounts not paid”. Therefore, they are subject to the interest calculations set out in paras. 2.2 (a) and (b) of the Loan Agreement.

Calculation Issues

[61] The Respondents allege that they have been unable to reconcile the loan balance supplied by Pillar in its statements and that they have asked repeatedly for information as to how the amounts were calculated.

[62] Further, the Respondents say that there are discrepancies in Pillar’s evidence, even within its own affidavit evidence advanced in these proceedings. For

example, the Respondents allege that for the date March 31, 2019, Pillar has provided the following balances owing:

Date	Facility	Source	Amount
March 31, 2019	1	Affidavit of S. Dizep #2 Ex. “A”	$848,227.30
		Affidavit of K. O’Brian Ex. “N”	$850,345.02
	2	Affidavit of S. Dizep #2 Ex. “C”	$634,821.50
		Affidavit of K. O’Brian Ex. “O”	$648,070.57

[63] In response, Pillar asserts that it has answered each of the questions raised by the Respondents in the evidence of Mr. O’Brien.

[64] I have reviewed the responsive affidavit of Mr. O’Brien on this issue but I am unable to determine on the face of that evidence whether it meets all of the concerns raised by the Respondents, and whether Mr. O’Brien’s explanations are correct.

[65] On the basis of the foregoing, I conclude that there are triable issues in respect of the calculation of the amount owing which will have to be determined using hybrid procedures within this petition proceeding, as addressed below.

[66] I note that these issues are to be examined in light of para. 2.5 of the Loan Agreement which provides:

> The Borrower acknowledges that the recording by the Lender of any Advance and any principal, interest, fees, payments or other amounts owing or received under this Agreement in an account opened and maintained by the Lender in respect thereof shall constitute, in the absence of manifest error, conclusive evidence of the Borrower’s indebtedness and liability at any time and from time to time under this Agreement …

Breach of the Loan Agreement, the Duty of Honest Performance and the *Farm Debt Mediation Act* Stay of Proceedings

[67] Bare assertions of breach of agreement or dishonest performance do not add to the strength of the Respondents’ case. I was not made aware during the hearing of this petition of any specific allegations, grounded in the evidence, which raise triable issues in addition to those described earlier in these reasons.

2023 BCSC 82 (CanLII)

[68] The issue regarding a stay of proceedings under the *Farm Debt Mediation Act*, was not pursued in the submissions before me.

Resolution of the Triable Issues

[69] The Court of Appeal in *Cepuran* at para. 159 held that "the modern approach to civil procedure … is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits". This Court has the discretion to use hybrid procedures within the petition proceeding itself to assist in determining the issues.

[70] As described above, I have concluded that there are three triable issues on this petition: the criminal interest rate, improvident realization, and the calculation of the amount owing.

[71] In *Phaenuf* at para. 46, which is cited at para. 12 of these reasons, the Court listed the factors to be considered in determining both whether to convert a petition to an action and whether to use hybrid procedures within the petition proceeding.

[72] Further, as required by *Cepuran* and *Phaneuf*, it is important to balance the interests of proportionality and access to justice while preserving the court's ability to fairly determine a case on the merits. The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far, as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues and the complexity of the proceeding.

[73] I have considered these factors and I have concluded that these three issues do not require pleadings and discovery to resolve, and can be fairly determined by use of a more limited process. It is my view that these three issues do not warrant referring this petition to the trial list, and that hybrid procedures within this petition proceeding would be suitable.

2023 BCSC 82 (CanLII)

[74] I observe that the parties have had some opportunity to advance evidence and to test it in relation to these issues.

[75] The improvident realization claim has been in issue since the Amended Response to Petition was filed on April 5, 2019. Eleven affidavits have been sworn or affirmed in this proceeding since then. As stated above, cross-examinations of two representatives of Pillar were conducted by counsel for the Respondents in October 2022.

2023 BCSC 82 (CanLII)

[76] On November 2, 2022, on consent of the parties, Justice Blake allowed the respondents to further amend the petition to plead the criminal interest rate defence and the defence described above under the *Interest Act*. Since then, the affidavits of Stacy Esau and Mr. O'Brien described above, setting out the parties' respective positions on the criminal interest rate issue, have been filed.

Orders

[77] In these circumstances, in my view, the appropriate processes in relation to the first two triable issues are as follows:

a) in relation to the criminal interest rate issue, I grant the parties leave to exchange expert evidence in support of the parties' positions in respect of the criminal interest rate issue, and leave to conduct cross-examinations on that evidence; and

b) in relation to the improvident realization issue, I grant the parties leave to exchange further affidavits, including expert evidence, on that issue, and I grant leave to conduct cross-examination on those affidavits.

[78] As the burden of proving these defences falls to the Respondents, the Respondents' affidavit evidence shall be delivered first, and Pillar's affidavit evidence shall be responsive to the Respondents' evidence. Cross-examinations, if any, shall be conducted following the exchange of affidavits.

2023 BCSC 82 (CanLII)

[79] Once these processes have been completed, either party will be at liberty to apply to the Court for a determination of whether the amount owing ought to be adjusted as a result of either or both of these issues.

[80] Following that step in the process, absent a resolution between the parties of the amount owing (having in mind the two determinations described and my ruling in respect of the monitoring fee above), the matter will be referred to the Registrar for determination of the amount owing, pursuant to R. 18-1 of the *Supreme Court Civil Rules*.

[81] Pursuant to R. 18-1(3), I direct that the result of the assessment or accounting be certified by the Registrar.

[82] Pursuant to R. 18-1(5), the Registrar will be able to define the issues, order production of documents, and to hear evidence as she sees fit. If an issue arises which is beyond the jurisdiction of the Registrar to determine, the issue can be referred back to me pursuant to R. 18-1(10).

[83] Pursuant to para. 2.5 of the Loan Agreement, Pillar's calculations should be the starting point, and should be departed from only if the Respondents can demonstrate "manifest error" in those calculations.

[84] Once the Registrar's certificate is in hand, I expect that I will be in a position to provide a decision in respect of the Orders sought on the petition. If further submissions are required at that time, counsel will be advised.

[85] This matter is adjourned for the reasons set out above. I will be seized of further appearances. If the process described above is unclear or the parties cannot agree between themselves on a reasonable schedule for the steps to be taken next, the parties have liberty to apply for directions.

[86] The determination of costs will await the final hearing on the petition.

"Loo J."