IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Capital Now Inc. v. Munro,*
2023 BCSC 197

Date: 20230209
Docket: H132368
Registry: Kelowna

Between:

Capital Now Inc.

Petitioner

And:

John Alexander Munro and Rachael Bridget Munro

Respondents

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Petitioner:	S. Lefebvre
Counsel for the Respondents:	J. Bradshaw S. Arbor, Articled Student
Place and Dates of Hearing:	Kelowna, B.C. November 23 and 24, 2022
Place and Date of Judgment:	Kelowna, B.C. February 9, 2023

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Overview

[1] This is an appeal from an order *nisi* granted by a master in a foreclosure proceeding. The petitioner is Capital Now Inc. ("Capital Now") and the appellants (who were the respondents in the original petition) are John and Rachel Munro. The dispute arises out of debts, guarantees, and a mortgage relating to a lending and borrowing arrangement that spanned approximately 12 years between the parties. The parties' relationship deteriorated during the summer and fall of 2020.

[2] On October 15, 2021, Capital Now filed a foreclosure petition. On December 1, 2021, a response to that foreclosure petition was filed. In addition, on December 23, 2021, the Munros filed and served a notice of application seeking an order to cross-examine a Capital Now representative on his affidavit filed in support of the petition. On January 5, 2022, Capital Now filed an application response opposing those orders. Both matters came before a master on January 10, 2022.

[3] After hearing submissions lasting approximately 40 minutes, the master determined:

i) that the Munros failed to demonstrate the factors necessary to persuade him to allow cross-examination on the affidavits;

ii) there was a legal nexus between the parties; and

iii) Capital Now had proven the debt owing by the Munros.

[4] As a result, the master granted an order *nisi* in favour of Capital Now against the property on which the mortgage was registered. He granted a six-month redemption period ending July 10, 2022 with a redemption amount of $1,271,506.20, plus interest and assessed costs. The order also granted the petitioner personal judgment against the Munros for $7,458,911.53 based on their guarantee of monies owed by their company, Terra Nova Ventures Ltd. ("Terra Nova"), to the petitioner.

[5] The Munros appeal these orders.

Parties' Positions

[6] The Munros argue that deciding the matter summarily was wrong in law, fact, and principle. They assert that a summary determination was inappropriate given the complexity of the facts, the conflicts in the evidence, and the seriousness of the petitioner's allegations. In addition, the Munros argue that the master exceeded his jurisdiction by making a final order when there were clearly *bona fide* triable issues before him. They contend that by taking the petitioner's claim at face value, the master denied them the opportunity to properly defend themselves, including by bringing a counterclaim against the petitioner. The Munros seek to set aside the master's order, convert the petition into an action, and move the proceeding to the trial list.

[7] Capital Now argues the appellants have failed to advance a true defence, which requires a factual dispute that cannot be resolved on the evidence before the master. In addition, Capital Now asserts that the factual disputes in the evidence have no legal relevance and will not affect the outcome of the proceeding. They argue that the appellants' appeal raises new arguments and relies on fresh evidence not before the master and that the Munros are using this appeal as a "do-over" to make up for their shortcomings. Capital Now asserts that there are no *bona fide* triable issues that warrant setting aside the order *nisi* or moving this proceeding to the trial list.

Background Facts

Facts

[8] I briefly set out the facts based on the affidavits as well as the parties' written and oral submissions. Where the facts are contested, I have identified the conflicts.

[9] The appellants, the Munros, own several companies which are owned and operated in Alberta. The Munros largely conduct their business affairs in Alberta. The only assets the appellants own in British Columbia are leasehold lands on Westbank First Nation's reserve lands civically described as 1588 Marina Way,

Westbank, British Columbia. This is the property that was the subject of the order *nisi* (the “Property”).

[10] Terra Nova is a corporation incorporated under Alberta law, with a registered office located in Sherwood Park, Alberta. The appellants own Terra Nova, which I understand is a trucking service company currently in receivership.

[11] The petitioner is an Alberta-based corporation with an office located at 5149 Country Hills Blvd NW, Calgary, Alberta. The petitioner’s business assets are located in Alberta.

[12] Christopher Gerald Wawzonek is the President and Chief Executive Officer of Capital Now, and Natalia Wawzonek is its Chief Operating Officer. They are also both directors of the company. Capital Now is a factoring company, meaning it purchases the accounts receivable of companies at a discount. It then collects the debts from the third-party customers of the companies from which it purchased the debt.

[13] The relationship between the parties began with a factoring agreement in 2008. The petitioner collected monies from Terra Nova's customers upon receipt of third-party invoices. The petitioner would notify the third-party customer of the factoring agreement and arrange to collect the invoice amount at a later date. In return, the petitioner would advance immediate cash to Terra Nova in consideration for the invoice.

[14] As time went on, the financial relationship between the parties became more complicated. In or about 2009, Terra Nova and Capital Now entered into non-notification factoring agreements. According to the Munros, these agreements were similar to the initial factoring agreement, except that the petitioner did not notify third-party customers that it had assumed the debts of Terra Nova's invoices. According to Mr. Munro, in the early 2010s the parties ceased using factoring agreements. Instead of issuing invoices, when Terra Nova needed short-term financing it would simply call the petitioner and execute a promissory note. This business relationship

was similar to a revolving line of credit which was dependent on promissory notes and accounts receivable reports.

[15] Over the course of their relationship, monies were borrowed and repaid. The monies owing fluctuated over time.

[16] Capital Now argues it advanced funds to repay debts that Terra Nova owed to unknown third parties (the “Other Debt Loan”) and the Canada Revenue Agency (“CRA”). These advances were secured by promissory notes. The promissory note for the Other Debt Loan was originally $85,000, which later increased to $93,709. Importantly, the appellants guaranteed payment of Terra Nova’s debt obligations to Capital Now pursuant to individual guarantees that were signed on October 30, 2018 (the “Guarantees”).

[17] In addition, on January 8, 2019 a mortgage in the amount of $500,000 was provided by the appellants as security for the Guarantees, which in turn was security for debts owing by Terra Nova to Capital Now (the “Mortgage”). The Mortgage was registered against the appellants' leasehold interest in the Property.

[18] In summary, there are significant disagreements regarding the financial arrangements that existed between the parties. The Munros assert the financial arrangement was eventually entirely based on promissory notes. In contrast, Capital Now argues that factoring continued until December 2020 when their relationship abruptly ended because the Munros failed to meet a number of conditions. I provide details of the parties’ disagreements in further depth in the analysis section of these Reasons.

The Dispute

[19] In the summer of 2020, Capital Now’s auditor was concerned about the amount of money Terra Nova owed to Capital Now. The auditor recommended the retention of a third-party evaluator to review Terra Nova’s indebtedness. Capital Now followed this recommendation and arranged for the Munros to meet with an evaluator. The Munros complied.

[20] Mr. Munro deposed that following the evaluation, he was told that Capital Now needed to show actual invoices on which their funding to Terra Nova was based. He was advised the “monies” had to go in and out of both Capital Now’s and Terra Nova’s accounts every month. Capital Now called this process “rolling the money”.

[21] Following the evaluation, Capital Now states it agreed to continue factoring Terra Nova’s invoices on the following conditions:

(a) the Munros were to increase the principal amount of their Mortgage;

(b) Terra Nova was to enter into a forbearance agreement; and

(c) Terra Nova was to hire a chief financial officer.

[22] Mr. Munro deposed that he was told verbally by Natalie Wawzonek that Terra Nova’s credit limit with Capital Now was $1.5 million. He did not provide a date on which this credit limit was allegedly told to him.

[23] On August 26, 2020, the Munros granted to Capital Now a modification agreement that increased the Mortgage to $1 million. The modification was registered against the Property on September 9, 2020.

[24] Terra Nova also hired a chief financial officer, but it did not enter into the forbearance agreement with Capital Now. Capital Now took the position that the conditions required for continuing to factor Terra Nova’s invoices had not been met. Due to the conditions not being met, Capital Now believed it was at liberty to take enforcement actions against its security.

[25] On November 2, 2020, Capital Now sent a letter to Mr. Munro demanding payment of $3,097,035.92 under the Guarantees relating to a number of different types of loans. The demand letter included a Form 86 notice of intention to enforce a security against a debtor as required by s. 244(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[26] On May 14, 2021, Capital Now sent the Munros another demand letter for payment of an additional $1,192,290 alleged to be owing under the Mortgage and a further modified agreement registered against the Property.

[27] On September 10, 2021, a third demand letter was sent to the appellants demanding payment of $6,928,219.11 under the Guarantees. This was the amount, according to Capital Now, that Terra Nova owed it as of August 25, 2021.

The Foreclosure Proceedings

[28] On October 15, 2021, Capital Now filed a petition in this Court for foreclosure against the Property. Capital Now sought:

(a) An order *nisi,* including:

(i) pursuant to the Mortgage, as modified, granted by the appellants in favour of the petitioner, a first-ranking priority charge over the Property;

(ii) a mortgage redemption amount of $1,271,506.20 plus interest accruing at a rate of 12 percent per annum;

(iii) a redemption date of six months from the date of the order *nisi* hearing; and

(iv) personal judgment against the appellants in the sum of $7,458,911.53, together with interest.

[29] In support of the petition, Capital Now filed affidavit #1 of Christopher Wawzonek, made on October 12, 2021, which included:

(a) the Guarantees;

(b) the Mortgage; and

(c) the three demand letters.

[30] On December 1, 2021, the Munros filed a response to Capital Now's petition opposing all orders sought on the following grounds:

- that Capital Now misnamed Terra Nova in the petition materials;
- the Munros had no "legal nexus" to the named company; and
- the Munros could not be liable for the claimed indebtedness.

[31] In their response to Capital Now's petition, the Munros:

- summarized the complex financial relationship between Terra Nova, the Munros, and Capital Now;
- stressed that there were no particulars of any outstanding balances owing from Terra Nova to Capital Now, despite requests for the source documentation;
- disputed the quantum of Capital Now's claim;
- stated there was no "proper accounting" of the claimed indebtedness; and
- asserted that there were triable issues that could not be disposed of summarily.

[32] Also on December 1, 2021, the appellants filed Mr. Munro's affidavit #1. In that affidavit he deposed:

(a) that some of the amounts claimed were actually repaid by Terra Nova and those amounts were not reflected in the aggregate numbers provided;

(b) from July 2019 to June 2020 Capital Now did not fund any "new" monies to Terra Nova;

(c) that no monies were advanced under the promissory notes from December 2020 onwards; and

(d) throughout these periods (i.e., July 2019 to December 2020), Terra Nova continued to make payments to Capital Now.

[33] In other words, Mr. Munro disputes the amounts owing as well as the governing financial contractual relationship between the parties.

[34] The Munros took the position that the petition should not proceed without further disclosure or cross-examination. On December 23, 2021, the Munros filed a notice of application seeking an order to cross-examine Mr. Wawzonek on affidavit #1.

[35] By agreement, on December 31, 2021 the petitioner filed and served the materials to set the hearing of the order *nisi* to January 10, 2022**.** The appellants' application to cross-examine the petitioner's representatives was set for the same day.

[36] On December 31, 2021, Capital Now filed several new affidavits, including: affidavit #1 of Ms. Wawzonek, affidavit #1 of Samuel Halford, and affidavit #2 of Mr. Wawzonek.

[37] The statement of relief set out the particular terms Capital Now sought for the order *nisi*:

(a) a six-month redemption period starting December 15, 2021;

(b) $1,271,506.20 for the redemption amount as at January 10, 2022;

(c) interest rate of 12 percent per annum;

(d) judgment against the Munros for $7,453,273.21[1] or, in the alternative, judgment in the redemption amount;

[1] The order *nisi* granted $5,638.32 more than what Capital Now's statement of relief sought.

(e) Scale A costs if unopposed or Scale B if opposed, and the right to seek costs at a higher scale for subsequent hearings; and

(f) the right to apply for further accounting.

[38] Ms. Wawzonek's affidavit #1 contained approximately 40 attached exhibits and altogether amounted to nearly 200 pages in length. The documents provided additional context regarding what Capital Now claimed Terra Nova owed them, including monies owed under the Mortgage. Ms. Wawzonek categorized Terra Nova's outstanding balances owed to Capital Now as of December 23, 2021 into four categories which she described as:

- a debt loan of $53,032.44;
- a CRA loan of $134,612.67;
- "fake invoice" promissory notes of $3,023,945.89; and
- "fake invoices" of another approximately $4,196,575.65.

[39] None of this information was included in the original court material filed in support of the petition. The Munros were served with this new material on January 4, 2022, four business days before the petition was heard.

[40] The hearing took place on January 10, 2022. The submissions regarding both the petition and the application for cross-examination took approximately 40 minutes. The master granted Capital Now's requested orders and dismissed the application for cross-examination in oral reasons for judgment pronounced on the same day. The order *nisi* was granted.

Other Applications

[41] On March 16, 2022, the petitioners filed an application in the Court of Queen's Bench of Alberta seeking an order directing registration of the order *nisi* as a judgment of that Court.

[42] Prior to the hearing to obtain the Alberta Enforcement Order, the Munros filed a notice of application in the British Columbia Supreme Court, seeking an extension of time to appeal the order *nisi* and file a notice of appeal.

[43] I was advised the Alberta Enforcement Order was granted on April 20, 2022. The Alberta Court inserted the following term: “In the event the [Munros] successfully appeal the [order *nisi*], this Order shall be vacated.”

[44] On June 10, 2022, Justice G.P. Weatherill granted an extension of time for the Munros to file the notice of appeal. The decision granting the extension of time for filing the notice of appeal is indexed as 2022 BCSC 1044. The Munros filed a notice of appeal on June 13, 2022.

[45] On June 14, 2022, the Munros filed a notice of application in this Court seeking an order that the execution of the order *nisi* be stayed. On July 22, 2022, G.P. Weatherill J. ordered a stay of the order until the appeal of the order is determined. The decision staying the order *nisi* is indexed as 2022 BCSC 1297.

Issues

[46] The issues as stated in the notice of appeal are:

> (a) The Master erred in law and principle as the liability for, and the quantum of, the personal judgment amounts represented a triable issue not suitable for a summary determination in a foreclosure petition proceeding.
>
> (b) The Master erred in principle and exercised his discretion unreasonably by dismissing the Cross-Examination Application.
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> (c) The Master made palpable and overriding errors by making findings of fact based on contradicting and untested affidavit evidence.
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> (d) The Master erred in law and principle as the Master did not have the jurisdiction to make such a final order.
>
> (e) The Order of the Master should be set aside because his decision involved palpable and overriding errors, there is an extricable error in principle, and his decision resulted in an injustice.

[47] I note the petitioner has characterized the issues differently:

a) Is there a *bona fide* triable issue as to the Munros' liability for personal judgment under the Guarantees and the Mortgage?

b) Is the validity or enforceability of the Mortgage and Guarantees, or the Munros' personal liability under the Mortgage or Guarantees affected by alleged conflicts in the evidence?

c) Is there a *bona fide* triable issue as to the quantum of the personal judgment against the Munros?

d) If there is a *bona fide* triable issue as to quantum, should it be resolved through referral to the trial list or through alternative methods?

e) Is the existence of the Munros' proposed counterclaim grounds for refusing to grant the order *nisi* and referring Capital Now's claim to the trial list?

f) Is the need for document disclosure to raise a meaningful defence grounds for refusing to grant the order *nisi* and referring Capital Now's claim to the trial list?

g) Should there have been cross-examination on the affidavits before the hearing of the merits of the application for the order *nisi*?

Standard of Review

[48] The master's decision resulted in an order *nisi.* An order *nisi* is a final order: *Canadian Western Bank v. 353806 B.C. Ltd.,* 2017 BCSC 1072 at para. 13.

[49] Both parties agree the standard of review is correctness because it is an appeal of a final order which results in a re-hearing on the merits. Absent an order permitting fresh evidence, the re-hearing proceeds on the materials before the master. The appeal judge may substitute their own judgment for that of the master. As stated in *Collington Construction Ltd. v. CPOS Development Corp.*, 2019 BCSC 1716:

> [12] The leading case on the standard of review from a decision of a master is *Abermin Corp. v. Granges Exploration Ltd.*, 1990 CanLII 1352 (BCSC), [1990] B.C.J. No. 1060 (S.C.). In *Abermin Corp.* it was held that, on a purely interlocutory matter, the standard of review from an order of a master is whether the master was clearly wrong. However, where the master's order raises questions which are vital to the final issue in the case, a rehearing is appropriate, and the judge hearing the appeal is entitled to substitute his or her views for that of the master, even when there is an exercise of discretion involved.
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> [Emphasis added.]

[50] The matter before me concerns a final order. However, an appeal judge should not ignore or discount the master's level of experience and expertise in foreclosure proceedings: *Canadian Western Bank* at paras. 11 and 12.

Fresh Evidence

[51] The evidence before the master at the hearing on January 10, 2022 included the following six affidavits:

- two affidavits by Christopher Gerald Wawzonek;
- one affidavit by John Munro;
- one affidavit by Natalia Wawzonek;
- one affidavit by Samuel Halford; and
- one affidavit by Chantelle Akerstrom.

[52] The Munros seek to admit further affidavit evidence on this appeal that was not originally before the master. Mr. Munro seeks to admit a third affidavit dated May 25, 2022 and a fourth affidavit dated June 9, 2022. Based on the record originally before the master, I do not find it necessary to admit Mr. Munro's additional affidavit evidence because the issues in this appeal can be adequately resolved without them.

Is There a *Bona Fide* Triable Issue?

Legal Principles

[53] Pursuant to R. 21-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] a foreclosure proceeding must be started by petition and the Court has the power to summarily determine the matter.

[54] Order *nisi* hearings are regularly set before a master. The master has the jurisdiction to render a decision when there are no *bona fide* triable issues: *Western Arres Capital Inc. v. Currey,* 2011 BCSC 522 at para. 20. The petitioner in a foreclosure proceeding bears the onus of demonstrating the absence of a *bona fide* triable issue: *Griffin v. 0904713 B.C. Ltd.,* 2013 BCSC 273 at para. 34.

[55] As set out in *Griffin* at paras. 30-31 and *Yu Yue Construction & Development Ltd. v. 1098686 B.C. Ltd.*, 2022 BCSC 248 at para. 21, a *bona fide* triable issue arises when:

(a) there is a true defence;

(b) there is serious dispute as to facts or law which raises a reasonable doubt;

(c) the dispute cannot be resolved on the evidence and submissions that are before the court; and

(d) the dispute would affect the outcome of the proceeding.

[56] In *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701, Justice Ballance stated:

> [48] The dominant principle is that the Court should exercise its discretion under the rule to convert a petition into trial where there is a *bona fide* triable issue that cannot be determined by reference to the documents, and would affect the outcome of the proceeding. A *bona fide* triable issue arises where on the evidence before the Court there is a dispute as to facts or law which raises a reasonable doubt or suggests there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith*, 1991 CanLII 3954 (BC CA), [1991] B.C.J. No. 484 (C.A.). The threshold is, appropriately, a relatively low one.

> [49] The authorities indicate a tendency of the Court to convert a summary process to a full trial where serious and disputed questions of fact or law are raised. ...

[57] To forestall an order *nisi,* the *bona fide* triable issue must go to the root of the foreclosure action. This includes the validity of the mortgage, the ability of the mortgagee to claim under the mortgage, or the amount due and owing under the mortgage that is contested: *Fairmont Hot Springs Resort Ltd. v. Linwood Homes Ltd.,* 2013 BCSC 589 at para. 8. A self-serving affidavit that does not provide detailed facts or supporting evidence is not sufficient in itself to create a *bona fide* triable issue: *Yu Yue* at para. 31.

Analysis

[58] The question I must determine is whether there is a *bona fide* triable issue which would render the petition not suitable for summary determination. The petitioner argues that there is no *bona fide* triable issue and, conversely, the appellants assert there are several *bona fide* triable issues.

[59] The Munros point out that Mr. Wawzonek's affidavit #1 did not provide any accounting or any evidence of the transactions between Terra Nova and the petitioner. However, Ms. Wawzonek's affidavit #1 which was filed December 31, 2021 did provide further information on the accounting. Her affidavit attaches a table exhibiting a number of promissory notes granted from the Munros to the petitioner. Ms. Wawzonek included a list of 18 promissory notes signed on various dates between September 28, 2018 and March 15, 2019. The face amounts provide limited evidence of advances on the notes and repayments that were made or received on the account. One column indicates that there were payments made on the following days which reduced the principal amount owed:

- July 7, 2020 ($2,028.77)
- August 24, 2020 ($51,465.19)
- September 1, 2020 ($34,875.12)
- September 3, 2020 ($5,340.12)

[60] The Munros argue that there is no evidence of advance payments made to them or evidence of any repayments made by them in relation to these promissory notes. I note that the repayments are provided in a spreadsheet prepared by Capital Now. There is no corroborating or supplemental evidence that shows Capital Now actually receiving the money in their accounts. The Munros argue the details surrounding the advancement of monies and repayment are both misleading and contribute to a significant exaggeration of the debt owed by them to the petitioner.

[61] While the Munros' concerns may be overstated, based on the materials before the master there were clear conflicts in the evidence with respect to what amounts are outstanding. I pause here to note that Capital Now expressly requested the right to apply for further accounting. Although this is a standard order in foreclosure proceedings, it indicates that the debt is not a simple outstanding mortgage amount as is the case in many foreclosure proceedings. Moreover, both parties' attempts to explain inconsistencies in the accounting to me highlight the fact these accounts are not straightforward.

[62] There is also a dispute about the Guarantees. The appellants guaranteed payment of Terra Nova's debt obligations to the petitioner pursuant to the Guarantees. Mr. Wawzonek swears these were unlimited liability guarantees; whereas Mr. Munro swore that he was verbally told by Ms. Wawzonek, and had seen paperwork to this effect, that Terra Nova's credit limit with Capital Now was $1.5 million. He now questions how the debt could have risen to almost $7 million.

[63] Capital Now argues that determining the debt owed is simply a matter of calculating the advances to Terra Nova and adding the accruing interest. It is not its fault if the Munros are surprised at "how the math works out."

[64] There is also conflicting evidence of when and whether there was a shift from a traditional factoring agreement between Capital Now and Terra Nova to the relationship described in Mr. Munro's first affidavit of a revolving line of credit.

[65] The Munros argue that this “revolving line of credit” was characterized by the Wawzoneks as a process of “rolling the money”. According to Mr. Munro’s affidavit #1, in the summer of 2020 Capital Now advised them that actual invoices from Terra Nova were required to continue financing. Capital Now also told the Munros that money was required to flow in and out of both Terra Nova’s and their accounts every month. This arrangement was apparently to satisfy the petitioner’s banker and auditor.

[66] Mr. Munro deposed the appellants acceded to this process. He states this was done to give the appearance that there was a routine flow of money between the two parties, as it related to the underlying invoices, that justified the funding to the banker and auditor. This is how the Munros, or their company, came to issue the promissory notes.

[67] Capital Now disputes the Munros’ allegation regarding the “rolling the money” process; it has a very different interpretation of the arrangement. Ms. Wawzonek deposed that in the spring of 2020 Capital Now conducted its annual financial audit. Due to the amount that Terra Nova owed to Capital Now an evaluation was deemed necessary. Ms. Wawzonek deposed that in the midst of trying to obtain financing to payout Terra Nova’s debt to Capital Now, Mr. Munro verbally admitted to Capital Now that not all of the Terra Nova invoices assigned to Capital Now were collectible by third parties. This is when Capital Now discovered that Terra Nova had provided and assigned a mixture of genuine and “false” invoices to Capital Now.

[68] The Munros also question how the debt could have ballooned from just over $3 million to just under $7 million between November 2020 and September 2021, especially since no new monies were advanced under the promissory notes from December 2020 onwards. The petitioner claims the amount of $7,408,166.65 demanded by it in the third demand letter stems from an original “Fake Invoice Promissory Note” in the amount of $2,329,647.20 with simple interest at the rate of 24 percent per annum. It also includes “Further Fake Invoices” for monies advanced to Terra Nova after discovering the “Fake Invoice Promissory Note” in exchange for

assignments of further “false” invoices that Terra Nova assigned to Capital Now in the amount of $4,196,575.65. The interest rate on the “Fake Invoice Promissory Note” is calculated at a rate of 24 percent until September 6, 2020, at which time the interest was reduced to 18 percent.

[69] I note that in argument, Capital Now states at para. 61(b) that the Fake Invoice Promissory Note accrued interest only on the principal balance (not compounded). The interest was calculated at the rate of 24 percent until September 20, 2020, at which time the interest was reduced to 18 percent. I further note that at para. 61(c) Capital Now states that the Unpaid False Invoice Account Agreements bear interest on their respective principal amounts from December 31, 2020, January 31, 2021, and February 28, 2021. It had interest calculated only on the principal balance (not compounded). The interest was calculated at the rate of 24 percent until September 6, 2020, at which time the interest was reduced to 18 percent.

[70] The Munros say the only justification for this claim are the Excel spreadsheets prepared by the petitioner and included as Exhibits “B” to “E” in Ms. Wawzonek’s first affidavit.

[71] In oral submissions, Capital Now argued that:

- the conflicting affidavit evidence regarding “rolling the money” is irrelevant to the debts at issue;
- since Terra Nova is not a party to this proceeding, the financial relationship dispute between it and Terra Nova is irrelevant to the underlying dispute; and
- it is immaterial why Terra Nova created fake invoices because it is undisputed that Terra Nova assigned the fake invoices to Capital Now and that Capital Now advanced funds on those fake invoices.

[72] Capital Now further contends that those invoices are an outstanding debt that must be paid because they are unrecoverable from third parties and Terra Nova has not otherwise paid back the monies advanced under those invoices.

[73] Based on the record before the Court during the petition hearing, the Munros provided Capital Now with Guarantees and a Mortgage, which was later modified, in order for Capital Now to continue providing credit to Terra Nova. The Munros were represented by counsel when they signed the Mortgage and the modification agreement of the Mortgage. Based on the Mortgage and the Guarantees, the Munros are liable for Terra Nova's indebtedness to Capital Now. However, the record also includes the following conflicting and/or complex evidence:

i) disputes about the nature of the relationship between the parties (e.g., Ms. Wawzonek swears that the only operative governing agreement between the parties is the master factoring agreement dated September 30, 2008 whereas Mr. Munro swears that the financing arrangements changed over time);

ii) years of complicated transactions between Capital Now and Terra Nova;

iii) disputes regarding the amounts owing;

iv) a dispute regarding whether the Guarantees were capped at a $1.5 million revolving facility and, if so, whether this agreement was rendered void by the subsequent security provided by the Munros (i.e., the unlimited liability guarantee); and

v) whether Terra Nova provided false invoices to Capital Now as part of a fraudulent scheme, or whether the "fake" invoices were prepared at Capital Now's request for its own internal purposes.

[74] I accept that the disputes in the evidence must be *bona fide*, rather than hypothetical or abstract. A "proposition of law must have a *bona fide* foundation in fact": *Sommerey v. Tasci,* 2012 BCSC 2042 at para. 25. Nevertheless, it is not the Court's role during a foreclosure petition hearing to sort out complex factual issues,

nor is it appropriate to apply the law to facts which are unclear: *First West Credit Union v. Giesbrecht*, 2014 BCSC 736 [*Giesbrecht*] at para. 96.

[75] There were allegations of fraud in *Giesbrecht*, as there are here. The Court held:

> [94] At the end of the day, I am left with significantly conflicting versions as to what occurred here. I cannot put it any better than Saunders J.A. who described it as a "factually complicated ... tangled tale" where "[s]omething has gone sadly and, perhaps badly, amiss" (*First West Credit Union v. Burton* (25 February 2014), Vancouver CA041544; CA041400 at para. 2).
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> …
>
> [96] It is not the role of the court on an application for an order *nisi* to sort out these complex factual issues, nor is it appropriate to apply the law in respect of "assumed" facts when the facts are anything but clear. In sum, First West and the second mortgagees have failed to satisfy the onus of proving that it is "manifestly clear" that no *bona fide* triable issue exists.

[76] As in *Giesbrecht,* the facts of this matter are complex and not suitable for summary determination. I base this on a number of factors.

[77] First, the petitioner and the appellants have a complicated commercial relationship and the nature of the relationship is disputed. The relationship arose from a 12-year financial and business relationship involving thousands of transactions. The total amount of the debt is the result of the consolidation of several legal agreements and arrangements, including promissory notes and at least one factoring agreement. The debts were secured by a mortgage, as modified, and guarantees. In addition, it is disputed that the financing arrangement changed over time. At the end of the day, these changes may not be material to the underlying debt. However, I cannot make that determination at this time. Even if I admitted the fresh evidence the Munros proposed, those further affidavits do not assist in making this determination.

[78] Second, although the Guarantees and Mortgage agreement, as modified, on their face appear to establish the Munros liability for the company's debts, the quantum of those debts are in issue. Although well argued, the petitioner has failed

to prove that the quantum of debt owed by the appellants is a simple exercise of accounting.

[79] Third, Ms. Wawzonek raised allegations that the appellants or Terra Nova issued fraudulent invoices. Capital Now takes the position that the Munros' liability under the Mortgage and Guarantees is unaffected by any fraudulent conduct and thus immaterial. However, these allegations of fraud raise credibility concerns. Although fraud and credibility issues may not be central to this case, the Munros are entitled to have the serious allegation determined on the basis of *viva voce* evidence. They are entitled to defend against allegations of fraud made by Capital Now.

[80] Capital Now argues that the Munros "fail to say how these factual disputes go to a true defence or how the dispute would affect the outcome of the proceeding." This reverses the burden of proof. Capital Now bears the onus of demonstrating the absence of a *bona fide* triable issue in a foreclosure proceeding: *Griffin* at para. 34.

[81] As argued by Capital Now, I am not prepared to dismiss the Munros' evidence as contrived and self-serving at this time. The determination of these facts cannot be made on the basis of affidavits. I cannot assume that the facts as stated by either party are true.

[82] Given the complex factual matrix underlying the debts and the resulting obligations, the petitioner has not met its burden of demonstrating it is manifestly clear that there are no *bona fide* triable issues.

[83] In my view, enough material conflicts exist in the evidence to find there are *bona fide* triable issues.

Should I Convert the Petition to an Action?

Legal Principles

[84] If there is a *bona fide* triable issue, the Court has discretion to determine whether the petition should be converted into an action and referred to the trial list, or whether it can be resolved through alternative methods.

[85] The factors to consider in converting a petition to an action in British Columbia were set out in *Azam v. Andrews Custom Furniture Designs Inc.,* 2022 BCSC 1166 at para. 6., citing *Terasen Gas Inc. v. Surrey (City),* 2009 BCSC 627 at para. 39. Justice Dardi summarized the principles to consider as follows:

> (a) the undesirability of multiple proceedings;
>
> (b) the desirability of avoiding unnecessary costs and delay;
>
> (c) whether the particular issues involved require an assessment of the credibility of witnesses;
>
> (d) the need for the Court to have a full grasp of all the evidence; and
>
> (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

[86] While all factors are important, the most significant factor is the interests of justice. This point was explained by Justice Skolrood, as he then was, in *Taj Park Convention Centre Ltd. v. Sher-A-Punjab Community Centre Corporation*, 2022 BCSC 473 [*Taj Park*]:

> [38] The interests of justice is undoubtedly the most important factor to consider. That assessment will be informed by the other factors identified by Justices Ballance and Dardi in *Boffo Developments* and *Terasen Gas* as well as by the objective underpinning the *Supreme Court Civil Rules* as a whole of securing a just, speedy and inexpensive determination of the proceeding on its merits: R. 1-3(1)

[87] When faced with credibility issues and other *bona fide* triable issues that make summary procedures inappropriate, this Court may consider the use of hybrid procedures without transferring the matter to trial. Such procedures may include limited discovery or cross-examination on affidavits to investigate the triable issue(s): *Cepuran v. Carlton*, 2022 BCCA 76 at para. 160.

[88] There are no hard and fast rules. It is up to the Court to determine on a case-by-case basis whether a petition proceeding is suitable for adopting a hybrid procedure or whether it should be converted to an action and referred to trial: *Cepuran* at paras. 162-165.

[89] When considering what course of action to take, the Court must be mindful of the object of the *Rules* as set out in R. 1-3: to secure the just, speedy, and inexpensive determination of every proceeding on its merits, in so far as can be achieved, in ways that are proportionate to the amounts involved, the importance of the issues, and the complexity of the proceeding: *Cepuran* at para. 166.

[90] In *Taj Park,* the Court considered *Cepuran* in an application to refer a petition to the trial list. The respondents argued that there was a triable issue and therefore a determination by petition was inappropriate. The parties' commercial relationship in *Taj Park* was defined by a written lease document. There were a number of uncertainties in the lease document that the Court determined to be relevant to the issues at hand: *Taj Park* at para. 52. The Court referred the matter to the trial list. In its view, the failure of the pleadings to address the entirety of the factual and legal issues was a determining factor: *Taj Park* at para. 60.

Analysis

[91] I am mindful of the right to a just, speedy, and inexpensive determination of the dispute on its merits. Nevertheless, the proceeding should be conducted in a way that is proportionate to the amounts involved, the importance of the issues, and their complexity.

[92] The rule requiring foreclosure proceedings to be started by petition and heard in chambers was intended to recognize that in most foreclosure proceedings, default is not contested. However, R. 21-7 was not intended to prevent the parties from having their day in court where facts are contested: *Northland Bank (Liquidator of) v. Kocken* 1993, 77 B.C.L.R. (2d) 377, 1993 CanLII 287 (C.A.) at para. 34.

[93] This Court retains the inherent jurisdiction to grant procedural rights of discovery and cross-examination under the *Rules*, as well as order a reference to the Registrar. In my view, the substantial amount of money at stake, as well as the inconsistencies and complexity of the parties' evidence, indicate that a hybrid procedure is not optimal. The appellants are entitled to trial protections such as pleadings, comprehensive document production, and cross-examination. The Court will benefit from having a better grasp of the evidence.

[94] There are serious credibility issues and evidentiary gaps that need to be resolved. I do not accept, at least on the limited evidence before me, the reason why Terra Nova created fake invoices is immaterial. Until these issues are resolved, this Court cannot be confident that either parties' narrative is accurate.

[95] In addition, the petitioner's allegations of fraud and impropriety, which comprised a significant portion of the claimed debt, were not included in the original foreclosure petition. Those allegations alone, once advanced, are a basis for referring the matter to the trial list: *Taj Park* at para. 60.

[96] Based on the number of evidentiary disputes before me, I find that a summary determination of the matter, including a summary accounting of the amounts owing under the Guarantees, was an injustice: *Taj Park*. The liability for, and quantum of, the amounts set out in an order *nisi* are fundamental to the claim. They go to the root of the foreclosure action: *Fairmont Hot Springs Resort Ltd.* at para. 8. A summary disposition of the petition and dismissal of cross-examination on the affidavits are at odds with this case law, as well as with the objectives of the *Rules*.

[97] I do not accept that a reference to the Registrar or a hybrid procedure is sufficient in the circumstances. At some point, the process that looks like a trial, should be a trial: *Boffo* at para. 50.

[98] This Court ought to be cautious in making orders which have the objective of addressing the resolution of a *bona fide* triable issue through the creation of a hybrid proceeding that permits certain pre-trial and trial mechanisms to the parties but

denies them others. While the driving underpinning for such an approach is largely one of practicality, there is a risk of diminishing returns where the summary process is expanded to allow the filing of additional lengthy affidavits, cross-examination on affidavits (including possibly a broader scope of cross-examination), selective document disclosure, and other features of the trial process.

[99] It is in the interests of justice that the Munros be permitted to proceed to trial in order to obtain all relevant evidence and disclosure in the ordinary course of preparing for trial. This will allow Capital Now to attempt to prove its case on a full evidentiary record and allow the Munros to mount a meaningful defence.

[100] I accept that the arguments before the master were not nearly as developed as they were at this stage in the proceedings. However, given these facts and arguments, I am of the view that the desire for a speedy and inexpensive determination came at the cost of a just result on its merits. This case requires the procedures that are available in the trial process, particularly examinations for discovery and disclosure. These trial procedures will provide the parties with the tools to properly investigate the factual disputes.

[101] Here, anything less than full and frank disclosure and discovery rights would result in an injustice to the parties, particularly the Munros.

[102] Pursuant to R. 22-1(7)(d), I am prepared to transfer this petition proceeding to the trial list.

Appellants' Other Arguments

[103] The Munros argue their analysis is ongoing but remains hampered by the petitioner's lack of disclosure. For instance, the analysis requires manual calculations of thousands of transactions over a number of years.

[104] In reviewing the evidence that has been furnished to date, the appellants believe they have a valid counterclaim and a claim for setoff against the petitioner that may reduce the judgment amount. Due to the lack of disclosure at the hearing,

these claims and setoff amounts were not discernible in the minimal time the appellants were given to review the evidence. This left the appellants unable to advance a proper counterclaim within the original petition proceedings.

[105] Given my decision, I need not decide this issue.

Disposition

[106] I allow the appeal, set aside the master's order *nisi*, and convert this petition to an action.

"D. MacDonald J."