COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dietterle v. Vanguard Mortgage Investment Corporation,* 2023 BCCA 425

Date: 20231123
Docket: CA48563

Between:

Samuel Dietterle

Appellant
(Defendant)

And

Vanguard Mortgage Investment Corporation
(a.k.a. Canguard Mortgage Investment Corporation)

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Hunter
The Honourable Justice Griffin

On appeal from: Orders of the Supreme Court of British Columbia, dated August 30, 2022 and April 13, 2023 (*Vanguard Mortgage Investment Corporation v. Dietterle*, 2022 BCSC 1512 and 2023 BCSC 573, Vancouver Docket H200340).

Counsel for the Appellant:	S.B. Coen
Counsel for the Respondent:	C. Ferris, K.C. J.J.R. Schachter
Place and Date of Hearing:	Vancouver, British Columbia September 20, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 23, 2023

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Hunter
The Honourable Justice Griffin

Summary:

The appellant appealed a summary judgment concluding that a mortgage loan was not unconscionable and awarding special costs of the proceeding against him. Held: Appeal on the merits dismissed; special costs order varied. The appellant failed to identify any errors of law or palpable and overriding errors of fact warranting appellate intervention. The court concluded, however, that some adjustment to the costs award was required to address an aspect of the judge's exercise of discretion that was founded on an error in principle.

Reasons for Judgment of the Honourable Mr. Justice Harris:

I. INTRODUCTION

[1] This appeal arises out of a summary trial, brought within a foreclosure proceeding and relating to a residential mortgage extended to Mr. Dietterle by Vanguard Mortgage Investment Corporation, now Canguard Mortgage Investment Corporation ("Canguard" and the "Canguard Mortgage"). The issue before the judge was whether the mortgage was unconscionable at common law and violated the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*]. These defences were raised in answer to a foreclosure petition seeking an order *nisi* with a six-month redemption period.

[2] The petition was converted to an action by consent without prejudice to either party proceeding with an application for summary trial pursuant to Rules 9-6 or 9-7 of the *Supreme Court Civil Rules*, R. 15-1.

[3] In reasons for judgment cited as *Vanguard Mortgage Investment Corporation v. Dietterle*, 2022 BCSC 1512 [*Original Judgment*], the judge rejected these defences, effectively declaring the mortgage valid, granting an order *nisi* with a six-month redemption period. Mr. Dietterle appeals that conclusion, alleging a series of errors in judgment.

[4] Subsequently, the judge made an order for special costs in favour of Canguard, relying on s. 20 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*]. The reasons for this order are set out in *Vanguard Mortgage Investment Corporation*

v. Dietterle, 2023 BCSC 573 [*Costs Judgment*]. That order, too, is the subject of this appeal.

II. FACTUAL BACKGROUND

[5] Much of the relevant factual background is not in dispute. Mr. Dietterle borrowed monies, secured by a mortgage from Canguard, to allow him to refinance a previous mortgage loan that was due and owing. Mr. Dietterle was, per the judge in the *Original Judgment* at para. 28, “property rich but cash poor.” One feature of the new mortgage was that, by its terms, Mr. Dietterle avoided having to pay interest out of his income on a monthly basis. His interest obligations were dealt with in other ways.

[6] Since the circumstances leading up to Mr. Dietterle entering into the mortgage transaction are relevant to his claim that the judge erred in concluding that the mortgage was not unconscionable, I will set out that background, drawing heavily on the judge’s findings of fact which are not challenged on appeal.

[7] Mr. Dietterle was 85 years old when he entered into the Canguard Mortgage. He is a retired commercial turkey farmer with a grade 6 education. He has owned a number of different properties financed by mortgages. On two occasions, in 2008 and 2012, he took equity out of his properties and used it to fund other endeavours.

[8] Around 2012, a neighbour, Mr. Vandepol, convinced Mr. Dietterle to invest his savings in a business. In 2013, Mr. Vandepol convinced Mr. Dietterle to enter a joint venture to develop some property (the “Property”) by subdividing the land, and building and selling two new homes. Those ventures have turned out badly.

[9] To finance the development of the Property, Mr. Dietterle secured a $1.3 million mortgage registered against Mr. Dietterle’s home and the Property. The development did not proceed as planned, and Mr. Dietterle found himself in default of the mortgage, owing $650,000, and facing foreclosure proceedings against his home. To avoid this outcome, in December 2016, Mr. Dietterle refinanced the outstanding amount owing on the existing mortgage by securing a new two-year

mortgage of his home from Capital Direct Lending Corp. (“Capital Direct” and the “Capital Direct Mortgage”).

[10] Mr. Dietterle’s savings had been exhausted. He was unable to afford the payments on the Capital Direct Mortgage and it was going into default. Mr. Dietterle’s sole stable source of income was a $1,200 monthly pension and, on occasion, he received a rental income of $500 per month from his daughter.

[11] Here, I think it helpful to have recourse directly to the judge’s summary of the facts in the *Original Judgment*:

> [24] In November 2018, just before the Capital Direct Mortgage expired, Capital Direct offered to renew it at an interest rate of 11.10 percent per annum, compounded monthly, for a 12-month term. The monthly interest payments would have been $9,594. On Mr. Dietterle’s income, he could not pay that monthly amount.
>
> [25] Mr. Dietterle sought refinancing to pay out the Capital Direct Mortgage.
>
> [26] A mortgage broker, Robert Maters, was engaged to find a new lender. Mr. Maters was fully licensed with the BC Financial Services Authority. Mr. Dietterle claims that he did not engage Mr. Maters and never spoke with him throughout the process. He says that Mr. Vandepol retained Mr. Maters.
>
> [27] Mr. Maters approached Canguard about a possible refinancing of the Capital Direct Mortgage. Mr. Maters explained to Canguard that Mr. Dietterle had no other assets and no income to cover monthly mortgage payments. Mr. Maters indicated that Mr. Dietterle was seeking an equity only mortgage. Canguard was given a copy of an appraisal of the equity in the Home and it was $1,550,000
>
> [28] Mr. Dietterle was property rich but cash poor.
>
> [29] On February 7, 2019, Canguard presented Mr. Maters with the following financing offer:
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> a) Loan Amount: $1,020,000;
>
> b) Interest Reserve: $101,490 (12 months);
>
> c) Lender Fee: $20,400;
>
> d) Interest only payments for the first 12 months; and
>
> e) 9.95 percent per annum for the first 12 months and 12 percent per annum for months 13 to 15
>
> (“Canguard Offer”).
>
> [30] Because of the interest reserve, Mr. Dietterle was not required to make any payments during the first 12 months of the 15-month term of the Canguard Mortgage. The Canguard Offer also stipulated that the mortgage

> was open for repayment without penalty, meaning that Mr. Dietterle could repay the Canguard mortgage at any point during the first 12 months of the term and the remaining interest reserve would be returned to him without deduction.
>
> [31] Mr. Dietterle was not involved in negotiating the mortgage terms but he accepted the Canguard Offer. Canguard then retained Hargo S. Mundi of Kaminsky and Company as its legal counsel to complete the refinancing.
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> [32] Canguard recommended that Mr. Dietterle speak to a lawyer at Virk Viyas and Associates. Mr. Dietterle's meeting with Jagmeet Virk lasted about 30 minutes. During the meeting, Mr. Virk asked Mr. Dietterle to sign several documents. Mr. Dietterle says that Mr. Virk did not explain to him what he was signing nor did he explain the mortgage terms.
>
> [33] The transaction completed on February 15, 2019.
>
> [34] Canguard paid Mr. Maters $20,400 for his services.
>
> [35] After the interest reserve ran out, Mr. Dietterle could not afford the monthly payments.

[12] In the *Original Judgment*, the judge also noted that:

> [38] It is not disputed that if Mr. Dietterle had not received the financing from Canguard, his Home would have been subject to foreclosure by Capital Direct. Absent a sale of his Home, or receipt of money from Mr. Vandepol, Mr. Dietterle was not in a position to pay out the Capital Direct Mortgage and he could not afford the monthly payments set out in Capital Direct's offer to refinance.

[13] Mr. Dietterle accepted Canguard's mortgage offer, but when the interest reserve ran out, was unable to continue to finance the mortgage, which fell into default, leading to these proceedings.

III. REASONS FOR THE *ORIGINAL JUDGMENT*

[14] The principal focus of the *Original Judgment* is on whether the Canguard Mortgage was unconscionable at either common law or as a consumer transaction under the *BPCPA.* Mr. Dietterle does not take issue with the judge's articulation of the law; hence it is sufficient to observe that the judge recognized, applying *Uber Technologies Inc. v. Heller*, 2020 SCC 16 [*Uber*], that the doctrine of unconscionability has two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant, and an improvident transaction. Although the onus is on a supplier under the *BPCPA* to demonstrate

that a consumer transaction is not unconscionable, the test for determining whether a transaction is unconscionable is substantially the same in both contexts, although the *BPCPA* identifies *indicia* of unconscionability.

[15] The judge went on, at paras. 88–90, to accept that inequality of bargaining power exists where one party cannot adequately protect their interests in the contracting process. For example, this might arise in necessity cases where the weaker party is so dependent on the stronger that serious adverse consequences would flow from not agreeing to the contract, or, secondly, where only one party could understand and appreciate the full import of the contractual terms, thus creating "cognitive asymmetry." The judge accepted that, as stated in *Uber* at para. 72, regardless of the type of impairment involved, what matters is whether the evidence discloses a bargaining context: "where the law's normal assumptions about free bargaining either no longer substantially hold true or are incapable of being fairly applied."

[16] So far as an improvident bargain is concerned, the judge said:

> [91] The second requirement of unconscionability, an improvident bargain, refers to a bargain that unduly advantages the stronger party or unduly disadvantages the weaker party. Improvidence is measured contextually at the time the bargain was formed. The question is whether the potential for undue advantage or disadvantage as a result of the inequality of bargaining power has been realized. Proof of a manifestly unfair bargain may support an inference that one party was unable to adequately protect their interests: *Uber* at paras. 74-79.

[17] The judge went on to offer more refined commentary on the principles she was required to apply, including the relevance of knowledge an advantage is being taken, independent legal advice, and so on. None of this is in issue on appeal.

[18] The judge set out the positions of the parties. Of particular relevance is her appreciation of Mr. Dietterle's position — since that position was essentially restated

on appeal, with an invitation to us to reach a different conclusion to that of the judge on undisputed facts. That judge summarized Mr. Dietterle's position:

> [106] Mr. Dietterle characterizes the Canguard Mortgage as an unfortunate example of the predatory lending phenomenon that is growing in the Canadian private financial sector.
>
> [107] Mr. Dietterle argues that the Canguard Mortgage was an unconscionable transaction and that the *BPCPA* applies.
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> [108] He argues that the Canguard Mortgage was a "consumer transaction" because he obtained it in the hopes that he could remain in his Home. He says that no businesses had any attachment to the Canguard Mortgage and that he had no business interests, for several years, when the Canguard Mortgage was entered into.
>
> [109] He says that Canguard conducted itself poorly, and that he was financially desperate when entering the transaction with Canguard.
>
> [110] Mr. Dietterle argues that it was an improvident bargain because Canguard did not care about his desperate circumstances and was only concerned that the Home had enough equity to allow it to make a significant profit. Mr. Dietterle argues that Canguard stood to profit over $150,000 at a cost in excess of $180,000 to him. He says that had Canguard refused to enter the Canguard Mortgage, he would have contacted his family and "could have benefitted from legitimate refinancing such as a CHIP reverse mortgage".

[19] The judge first concluded that the mortgage was not a consumer transaction under the *BPCPA* because it was a second refinancing of a business debt. She then addressed the question whether the mortgage was unconscionable under that legislation, having regard to the criteria outlined in s. 8(3) of the *BPCPA*.

[20] In respect of these criteria, she found that there was no evidence that Canguard subjected Mr. Dietterle to undue pressure to enter into the Canguard Mortgage. The source of Mr. Dietterle's financial pressure was his debt resulting form his business dealings with his neighbour, who may well have manipulated and defrauded him. It is worthwhile to set out the judge's reasons in detail:

> [116] When Mr. Maters [the mortgage broker] approached Canguard on Mr. Dietterle's behalf, Mr. Dietterle had been offered a renewal of his mortgage by Capital Direct on terms to which he could not agree. He was not financially able to pay the monthly mortgage amount. Through a mortgage broker, he was seeking a mortgage in the market on terms that met his needs. Mr. Maters was trying to persuade Canguard to lend money to Mr. Dietterle.

…

[120] There was information that Canguard did not know and could not have known because of Mr. Dietterle's broker's involvement. In this case, Canguard did not deal with Mr. Dietterle directly, it dealt with a broker who was trying to arrange for an equity-only mortgage that would meet Mr. Dietterle's desire to stay in his home without the requirement to make mortgage payments for a year. In that year, Mr. Dietterle was in a position to sell the Home, refinance it, or, as he was hoping, arrange for the mortgage to be paid out by his business partner. Under the Canguard Mortgage, Mr. Dietterle could take any of those steps without a penalty.

[121] With respect to s. 8(3)(b), in this case, I cannot conclude that Canguard took advantage of Mr. Dietterle's inability or incapacity to reasonably protect his own interest because of his physical or mental infirmity, ignorance, illiteracy, age, or inability to understand the character, nature or language of the consumer transaction or any other matter related to the transaction.

[122] As I have said, this was not Mr. Dietterle's first mortgage transaction with respect to his failed business venture. He had borrowed first from Highland and White Shore and, after they commenced foreclosure proceedings, he had borrowed from Capital Direct. That loan had come due and, although he was offered a renewal, he was not prepared to renew on the terms offered.

[123] Mr. Vandepol introduced Mr. Dietterle to Mr. Maters, a mortgage broker. Due to Mr. Dietterle's inability to make monthly payments, Mr. Maters was dealing in the private lending market and looking for an interest-only mortgage. Canguard offered such a mortgage. Further, Mr. Dietterle's discovery evidence shows that he appreciated the nature of the Canguard Mortgage. He was provided with the opportunity to obtain independent legal advice. If he is dissatisfied with the nature of that advice or has concerns about whether it was truly independent, he may have a claim against his lawyer.

[124] Further, with respect to ss. 8(3)(c) and (e) it cannot be said that, when Mr. Dietterle entered into the Canguard Mortgage, the total price grossly exceeded the total price at which similar consumer transactions were readily obtainable by similar consumers. Mr. Rubin opined that the amount Canguard charged Mr. Dietterle would have been considered market price for a similarly situated borrower in February 2019.

[125] Nor can it be said that the terms or conditions entered into by Mr. Dietterle were so harsh or adverse as to be inequitable. As Mr. Rubin said in his expert report, the transaction was in accordance with what the market would charge at the time. Over the term of the Canguard Mortgage, Mr. Dietterle's Home increased in value and although the parties could not have been certain that the value would increase, such increases were not unexpected in the then market in the Lower Mainland.

[126] Finally, with respect to s. 8(3)(d), it cannot be said that, at the time of entering into the consumer transaction, there was no reasonable probability that Mr. Dietterle would be unable to repay the mortgage.

> [127] The Canguard Mortgage had an interest reserve covering the first 12 months of payments. There was sufficient equity in the Home that, if sold, the Canguard Mortgage could have been paid out. Mr. Dietterle had sufficient time to be paid out by Mr. Vandepol if Mr. Vandepol had repaid what he owed Mr. Dietterle. Mr. Dietterle hoped that he would and Mr. Dietterle retained a lawyer and sued Mr. Vandepol and his related companies a few months after signing the Canguard Mortgage. Mr. Dietterle also had sufficient time to sell the property on his own terms and not under the stigma of a foreclosure proceeding. Finally, at any time during the term of the Canguard Mortgage, he could have refinanced, including by exploring a CHIP reverse mortgage.
>
> [128] What he bargained for was what he got - 12 months without having to pay any interest and the right to sell, redeem, or refinance in that 12 months without penalty.

[21] The judge went on to apply essentially the same reasoning to her assessment of whether the transaction was unconscionable at common law. She concluded that there was no inequality of bargaining power beyond the inherent imbalance of power in any lending relationship because a borrower needs to borrow for a purpose and the lender has the money to lend. She placed weight on Mr. Dietterle's experience dealing with both banks and private lenders before obtaining the Canguard Mortgage, the fact that Canguard was not pursuing him as a customer, the fact that Mr. Dietterle retained a mortgage broker to find financing for him, and the fact that he received independent legal advice.

[22] Alternatively, even if there was an inequality of bargaining power:

> [134] … the Canguard Mortgage was fair, just, and reasonable in the circumstances. As Mr. Rubin opined, the rate charged to Mr. Dietterle reflected the market rate at the time for a borrower in Mr. Dietterle's circumstances. Mr. Dietterle's counsel suggests that Canguard owed Mr. Dietterle a duty to say no to his request for financing or, perhaps, to say no until Mr. Dietterle had spoken to a family member.

[23] The judge accepted that Mr. Dietterle might have a complaint against either the mortgage broker or the lawyer, but he could not transfer liability for any such complaint to Canguard. Moreover, Mr. Dietterle understood the key terms of the mortgage and the circumstances of the independent legal advice he received. He hoped that by taking the mortgage he would have the time to be repaid what he was owed by his neighbour. He knew that the Canguard Mortgage was a short-term

solution, but it gave him time to try to find a way out of the difficulties he was in because of his dealings with his neighbour. In summary:

> [146] According to Mr. Rubin's expert opinion, which was not the subject of cross-examination by Mr. Dietterle, based on the risk profile of the Home and Mr. Dietterle, and the private lending market at the time, the Canguard Mortgage was at market rates. Therefore, I conclude that the Canguard Mortgage was not unconscionable at common law.
>
> [147] Had Capital Direct not refinanced the Highland Mortgage, Mr. Dietterle's Home would have been foreclosed against in 2015 or 2016. Had Canguard not refinanced the Capital Direct Mortgage, Mr. Dietterle's Home would have been foreclosed against in 2019. He would have lost out on the appreciation that is reflected by the appraisal evidence that was available at trial.

IV. ON APPEAL OF THE ORDER *NISI*

[24] Mr. Dietterle alleges a series of errors in the *Original Judgment*. The core of his appeal, however, focuses on his argument that the judge drew the wrong conclusion from largely undisputed facts. At its core, his argument is that Canguard ought not to have lent funds to him as it should have been evident that he would not be able to repay the mortgage when it fell due and, as a result, it must have been apparent that a foreclosure was virtually inevitable. Given the equity in the property, Canguard stood to profit handsomely at a considerable cost to him. Even if the rates and fees charged were consistent with the market, they remained predatory, especially given that he had no viable "exit strategy" to repay the mortgage without risking losing his home, given his low income.

[25] At the outset, Mr. Dietterle contends that his appeal does not involve challenging any of the underlying facts. He says the judge erred in the conclusions she drew in applying a test that she had correctly stated.

[26] The first issue is the standard of review. It is clear that whether a transaction is unconscionable involves findings of mixed fact and law: *Principal Invt. Ltd. v. Thiele Estate* (1987), 12 B.C.L.R. (2d) 258 at 262–63, 1987 CanLII 2740 (C.A.). It is now clear that findings of mixed fact and law are reviewable on a standard of palpable and overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36). Questions of mixed fact and law are about whether the facts satisfy the legal tests or

involve applying a legal standard to a set of facts (see *Housen* at para. 26; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 43). Only if the judge has made an extricable legal error does a standard of correctness apply (see *Housen* at paras. 8, 37). Where a legal test requires consideration of certain elements, failure to consider one of these elements can be an error of law (see *Housen* at para. 27, quoting *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39, 1997 CanLII 385). So, too, can an incorrect statement of the legal standard (see *Housen* at paras. 31–35).

A. Unconscionability

[27] In this case, it is conceded that the judge correctly stated the legal tests she had to apply. She evaluated the facts to determine whether they rose to a level that met the test to conclude that the transaction was unconscionable at common law or under the statute. She evaluated the evidence against the relevant criteria. The challenge to her conclusions does not, it appears to me, assert legal error. It is an invitation to substitute our view of what conclusions ought to have drawn by rearguing the case at trial. Respectfully, I do not think we can accept that invitation. We have not been directed to any palpable and overriding error underlying her ultimate conclusions.

[28] On the first part of the test, the judge assessed Mr. Dietterle's circumstances and examined whether there was inequality of bargaining power. She concluded that there was no inequality beyond that inherent in a lender/borrower relationship. Certainly, Mr. Dietterle had a pressing need to pay off the Capital Direct Mortgage, but the judge concluded that he had alternatives. He had sufficient equity in his home that he could have sold it and repaid his debt. He might have waited for Capital Direct to start foreclosure proceedings. He could have looked to other means to finance his obligations. Canguard did not seek him out to take advantage of his need to borrow money. Mr. Dietterle used a mortgage broker to seek out precisely the kind of loan he acquired. Moreover, Mr. Dietterle understood the nature and terms of the arrangement he was entering. He was familiar with the type of transaction he was entering. He had independent legal advice. He had borrowed

money under not dissimilar terms from Capital Direct two years prior. All of these considerations, reflected in the judgment, demonstrate that the judge's conclusion that the kind of inequality of bargaining power (whether through necessity or cognitive dissonance) required for an unconscionable transaction did not exist. The conclusion she reached was a conclusion open to her on the evidence.

[29] In any event, critically, the judge concluded that the Canguard Mortgage was fair, just and reasonable in the circumstances. It is important to recognize that Mr. Dietterle had an existing mortgage on the property that needed to be financed or paid out. Moreover, he did not want to accept Capital Direct's offer to refinance, since he could not afford the out-of-pocket monthly interest rates.

[30] The judge found certain critical facts. At paras. 126–27, she found that at the time he entered the transaction there was no reasonable probability that Mr. Dietterle would be unable to repay the mortgage. He also got the benefits he was looking for. At para. 128, she found that he got a 12-month period in which he did not have to pay interest out of pocket. The judge found, at para. 127, that, during that period, he was provided the opportunity to sell the home on his own terms and not under the stigma of a foreclosure proceeding. He had the right to sell, redeem or refinance the property without incurring any penalty. Had he exercised one of those options at the time of his own choosing, he would have been repaid interest that was set aside as part of the interest reserve. He was provided time within which to seek recovery from his neighbour. All of these findings were open to the judge and support her conclusion that the transaction was not improvident.

[31] Also, of central importance is the judge's acceptance of two further facts. First, the judge accepted the expert evidence that the interest rate and fees involved in the transaction were at market rates for the type of transaction and the circumstances of the borrower. Second, Canguard attempts to avoid foreclosures since foreclosures are antithetical to its business model. In fact, Canguard has had a low number of foreclosures. It is not in the business of issuing equity-only mortgages

with a view to foreclosing to recover its loans and make a profit. In short, its business model is not inherently predatory.

[32] In view of the foregoing, the judge's conclusions were open to her, and no reversible error in them has been demonstrated. Given the standard of review applicable to findings of mixed fact and law, the judge's conclusions are to be deferred to.

[33] Having said that, a few further observations are called for. Mr. Dietterle says that the only purpose of the transaction was to let him stay in his home. Canguard should not have lent him money when it ought to have known there was no realistic possibility that he could repay the loan without selling his home. In the meantime, he incurred significant expense and Canguard stood to realize significant profits. He criticizes Canguard for lending him the money without a proper exit strategy.

[34] There are several difficulties with this argument. First, as I have already described, the judge assessed the purpose of the transaction differently. Second, she found as a fact that there was no reasonable probability that Mr. Dietterle would be unable to repay the mortgage. Third, the mortgage broker representing Mr. Dietterle represented to Canguard via email that the exit strategy was "sale of the property or pay out from sale of other property which a friend owns. this is a straight equity deal." Fourth, the argument amounts to the proposition that a lender owes a duty of care to a borrower in these circumstances. That is not the law.

[35] Finally, I have decided it is unnecessary to grapple with whether the judge fell into error in concluding that the mortgage was not a consumer transaction because it involved the refinancing of a loan secured against a residence originally taken out for a business purpose. Even if the judge fell into error, which I expressly do not conclude, it would not affect the disposition of the appeal.

B. Admission of Evidence

[36] I turn to some subsidiary issues. Mr. Dietterle complains that the judge ought not to have excluded an expert opinion tendered in support of his case. The judge

exercised her discretion to rule the opinion inadmissible on multiple grounds. Her reasons for doing so are found at paras. 40–82. On review, in the absence of an error in principle, decisions as to the admission or exclusion of expert evidence are discretionary and entitled to deference (*Wilton v. Koestlmaier*, 2019 BCCA 262 at para. 57, citing *R. v. D.D.*, 2000 SCC 43 at paras. 12–13). Mr. Dietterle did not offer a cogent argument contending that the ruling rested on any error in principle. I would not interfere with the judge's ruling.

[37] Similarly, the judge admitted two further affidavits which Mr. Dietterle says were late, and did not provide him with a fair opportunity to respond. Given what is evident about the chronology of filing materials in this case, and the subject matter of the affidavits, I am satisfied the judge's decision to admit them fell within her discretion, and did not cause any material prejudice to Mr. Dietterle.

[38] One factor that played a role in the judge's assessment of the providence of the mortgage was that, over the course of the loan, the net equity in the home (after the costs of the Canguard Mortgage are accounted for) increased significantly (by over $600,000), as evidenced by appraisal evidence. On that basis, Mr. Dietterle benefitted materially from being able to stay in the home for longer than if he had sold rather than refinanced.

[39] I accept that the status of the loan must be assessed when it is entered into, as the judge also accepted. The judge commented that increases in value of property were not unexpected in the real estate market when the loan was made. The precise basis of that observation is not clear, but I think the fact that the real estate market was rising rapidly at that time is and was a notorious fact of which the judge could properly take judicial notice. I do not think her treatment of this issue grounds a reversible error.

V. ON APPEAL OF THE COSTS ORDER

[40] The standard for reviewing discretionary orders was succinctly reiterated in *Ip v. Wilson*, 2019 BCCA 189 at para. 4: "Generally, an appellate court will not interfere

with a discretionary order unless the judge erred in principle, ignored or misapplied a relevant factor, or was clearly wrong so as to amount to an injustice."

[41] The judge ordered special costs in a separate judgment, the *Costs Judgment*, relying on s. 20 of the *LEA.* That section provides:

> 20 (1) In this section:
>
> "foreclosure", in respect of an agreement for sale, as defined in section 16 (1), means a foreclosure as defined in that section;
>
> "mortgage" includes an agreement for sale as defined in section 16 (1).
>
> (2) In a foreclosure in which costs are awarded, the court may,
>
> (a) despite any covenant or term of a mortgage respecting the payment and calculation or manner of determining costs and expenses in, arising out of, or in connection with a foreclosure, and
>
> (b) instead of making an order in accordance with that covenant or term,
>
> order that costs be assessed as party and party costs or as special costs under the Supreme Court Civil Rules, and the court may make no order for costs if it would otherwise make no order but for the covenant or term referred to in this subsection.

[42] In this case, the mortgage contained the standard provision that required Mr. Dietterle to pay the mortgagee's solicitor-and-client costs. In ordering special costs, the judge was guided, correctly, by the analytical framework set out in in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2022 BCSC 1314 at para. 66 [*Forjay*]. It is clear that an award of special costs under s. 20 does not require that a mortgagee show reprehensible conduct by the party against whom special costs are to be awarded (*Forjay* at para. 66, citing *CIBC Mtge. Corp. v. Lalji* (1986), 8 B.C.L.R. (2d) 310 at 312–313, 1986 CanLII 819 (C.A.)).

[43] The judge recognized that foreclosure procedures are intended to be summary. As the judge apprehended the matter:

> [18] The issue for determination in this case is whether Mr. Dietterle's challenge to the mortgage, on the basis that it was unconscionable at common law, and violated the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, resulted in this dispute being outside what would be a usual foreclosure dispute, warranting special costs.

> [19] The starting point under s. 20 of the *LEA* for an award of costs in foreclosure proceedings is the party-and-party scale: *Lalji at 312; Kokanee v. Family Auto et al & Reamsbottom et al*, 2000 BCSC 1773 at paras. 43–44. However, as set out by Fitzpatrick J. in *Forjay*, British Columbia courts have considered a wide variety of factors in determining whether to award special costs, or a percentage thereof, in foreclosure matters. She wrote:
>
> > [102] … Those factors include:
> >
> > a) the mortgage provided for the mortgagor's payment of solicitor-client costs incurred by the mortgagee;
> >
> > b) the mortgagor had substantial equity in the subject property;
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> > c) the transaction at issue was a commercial one with sophisticated business entit[i]es;
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> > d) the proceedings were complex;
> >
> > e) the conduct of the unsuccessful party delayed or unnecessarily lengthened the proceedings; and
> >
> > f) party-and-party costs are inadequate to provide a reasonable recovery against actual expenses incurred to enforce the mortgage.
>
> [Citations omitted.]

[44] The judge concluded, applying these considerations, that a number of factors fell in favour of an award of special costs: the presence of a solicitor-and-client costs term in the mortgage, the substantial equity and its increase over the loan period, the complexity and length of the proceedings, the inadequacy of party-and-party costs relative to actual expenses to enforce the mortgage, and Mr. Dietterle's failure to accept reasonable offers to settle.

[45] In respect of the complexity and length of the proceedings, the judge reasoned that as a result of the positions taken by Mr. Dietterle in the litigation, which ultimately were unsuccessful, Mr. Dietterle had enjoyed the use of Canguard's funds for 26 months after he made his last mortgage payment. She concluded that Mr. Dietterle should not be able to reap the contractual benefits of Canguard's financing without the bearing the contractual burden of paying his debt. She went on to say that these proceedings could have been routine with a possible extension to the redemption period. She noted that Mr. Dietterle did not succeed on his allegations of unconscionability, that his expert report was ruled inadmissible on

multiple grounds, and that Canguard was put to the expense of contesting the admissibility of the report. The judge concluded:

> [36] In this case, Mr. Dietterle's conduct delayed the order *nisi* hearing for almost two years. Over that time, Mr. Dietterle put Canguard to legal expense—far beyond what would be incurred in a usual foreclosure proceeding—culminating in a two-day summary trial before me in which he was unsuccessful.

[46] With respect, it is here that the judge fell into error. I agree that the length and complexity of proceedings, delay and the fact that a borrower has the benefit of the lender's funds are all relevant factors to consider. This will be particularly so where the borrower has delayed for the sake of delay, or has unnecessarily complicated a proceeding by advancing weak or unmeritorious positions or taking unnecessary steps. None of this requires conduct amounting to reprehensible conduct worthy of censure to meet the test set out in *Garcia v. Crestbrook Forest Industries Ltd*. (1994), 9 B.C.L.R. (3d) 242 at para. 17, 1994 CanLII 2570 (C.A.).

[47] Having said that, I do not think that there is any presumption that special costs are called for when a foreclosure proceeding is defended on its merits. In my view, the judge's reasoning, from a practical perspective, comes close to treating the fact that this matter was not dealt with in a summary chambers proceeding as sufficient to award special costs without considering whether there was something specific in the way the proceeding was conducted to warrant special costs, even though reprehensible conduct is not required. In this case, however, there is no clear finding that Mr. Dietterle conducted his defence in an inappropriate or unreasonable fashion. There is no finding, nor any basis to conclude, that he deliberately sought to delay the foreclosure proceedings for the sake of delay. The matter was moved to the trial list by consent. Mr. Dietterle did not bring unnecessary pretrial motions. He did not extend proceedings by cross-examining Canguard's expert. It cannot be said that the defence he raised to the mortgage was devoid of merit or frivolous in light of his age, personal circumstances and the market in which he was seeking to borrow. The judge does not say that the case was hopeless or should not have been

brought. Indeed, she gave the merits of the case careful consideration. Ultimately, the case was resolved at a two-day summary trial.

[48] The only suggestion of any criticism of Mr. Dietterle's litigation conduct relates to his commissioning an expert report found to be inadmissible after cross-examination. That report was an important part of Mr. Dietterle's defence, since it was intended to support his broader contention about predatory lending practices in a certain market sector. I accept that the judge, in the *Original Judgment*, was very critical of that report for multiple reasons. Reading the reasons fairly, I think it can be inferred that the judge concluded that putting Canguard to the cost of defending the allegations in the report, and its admissibility, would not be adequately compensated by party-and-party costs on an ordinary scale. To that degree, some recognition in the costs award is warranted.

[49] I also recognize that the judge placed weight on the fact that Mr. Dietterle had the use of the money for over two years and Canguard lost use of it. The judge regarded this as a factor justifying imposing on Mr. Dietterle the contractual burden of costs. Once more, I accept that this can be a relevant consideration, but here the judge did not place any weight on the fact that during the period preceding the pronouncement of the order *nisi*, he had been accruing significant interest on those funds, and Canguard benefitted from a return on those funds even though it has not had the use of them.

[50] When all of these considerations are taken together, I have concluded that an order that Mr. Dietterle pay special costs of the proceeding comes inappropriately close to punishing him for raising a *bona fide*, potentially meritorious, substantive defence by exercising a discretion that comes too close to establishing a presumption that special costs will be awarded whenever a foreclosure proceeding is moved away from a summary proceeding and an order *nisi* is ultimately pronounced. The delay, and for the most part the complexity of the proceedings, was inherent in the disposition of any proceeding on its merits, and Canguard has recovered interest on its loan to compensate it for the delay.

[51] I accept that some of the factors relied on by the judge properly weigh in favour of special costs. In my opinion, however, the judge erred in principle in the weight given to the complexity and conduct of the proceedings for the reasons I have explained. This provides a proper basis for us to intervene and reconsider whether the award should be set aside (see *Ip* at para. 4).

[52] Even considering the factors appropriately relied on by the judge, I think some adjustment to the costs award should be made. In making this adjustment, I recognize that the judge should be taken to have concluded both that putting Canguard to the cost of challenging the expert report was unreasonable, given its manifest deficiencies, and that a reasonable offer had been made that, if accepted, would have avoided those expenses being incurred. These considerations should be reflected in a costs award; hence, I think the judge did not err in her conclusion that party-and-party costs on the ordinary scale were not sufficient.

[53] In my opinion, it was not *prima facie* unreasonable, given the unconscionability defence on the merits, for Mr. Dietterle to retain an expert report. Similarly, Canguard likely needed to retain its own expert to respond to the suggestion that the transaction was unconscionable. The problems that gave raise to additional unreasonable expense relate to the flaws in the report that led to its exclusion. Those flaws made the matter more complex than it needed to be and drove additional expense. In my view, an award of special costs in relation to Canguard’s application to cross-examine, and the cross-examination itself in advance of the summary trial, sufficiently reflects the judge’s findings. Beyond that, party-and-party costs are sufficient

VI. CONCLUSION

[54] I would dismiss the appeal on the merits. I would set aside the award of special costs and substitute an award of party-and-party costs, save for special

costs as set out above in relation to the application to and cross-examination of Ms. Mandy.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Hunter"

I agree:

"The Honourable Justice Griffin"