

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *AKA Investments Ltd. v. Sathasivam*,
2023 BCSC 1464

Date: 20230823
Docket: H190833
Registry: Vancouver

Between:

AKA Investments Ltd.

Petitioner

And

Indran Sathasivam, Wing Wah Investment Inc., Andy Hong-Yu Yen, Kevin Yi-Hsiung Hsieh and All Tenants or Occupiers of the Lands

Respondents

- and -

Docket: S232844
Registry: Vancouver

Between:

Wing Wah Investment Inc. and Kevin Yi-Hsiung Hsieh

Petitioners

And

AKA Investments Ltd.

Respondent

Before: The Honourable Justice Fitzpatrick

Reasons for Judgment

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Respondent, Andy Yen.

Place and Date of Hearing:

Vancouver, B.C.
July 17, 2023

Place and Date of Judgment:

Vancouver, B.C.
August 23, 2023

Table of Contents

INTRODUCTION 4

BACKGROUND FACTS..... 4

ISSUES..... 7

DISCUSSION..... 8

 What Interest is Payable under the AKA Mortgage? 8

 Should the AKA Order Nisi be Amended under the Slip Rule or Inherent
 Jurisdiction? 11

 Should a Summary Accounting be Ordered? 20

ORDERS 22

INTRODUCTION

[1] This hearing involves applications to determine a mortgagee’s claims against a residential property in Vancouver, BC that is owned by the respondent, Indran Sathasivam (the “Property”). In substance, the issue is to determine the interest payable under a first mortgage held by the petitioner/respondent, AKA Investments Ltd. (“AKA”).

[2] In Action No. H190833, AKA commenced a foreclosure action and, in January 2020, it obtained its order nisi. The petitioners/respondents, Wing Wah Investment Inc. (“Wing Wah”) and Kevin Yi-Hsiung Hsieh were named in that foreclosure action as they jointly hold a second mortgage against the Property.

[3] In Action No. S232844, Wing Wah and Mr. Hsieh seek declarations concerning the interpretation of AKA’s mortgage, again relating to the interest owing.

[4] In these reasons, I will address Wing Wah and Mr. Hsieh’s position and interests as “Wing Wah”, in the singular, since they are the same.

[5] Mr. Sathasivam supports the relief sought by Wing Wah and he also seeks an accounting under AKA’s mortgage and other relief in the AKA foreclosure.

BACKGROUND FACTS

[6] On December 10, 2018, Mr. Sathasivam granted a first mortgage against the Property in favour of AKA (the “AKA Mortgage”). The AKA Mortgage was in the principal amount of \$1.1 million. Interest was due monthly; the expected repayment date was December 31, 2019 and the last payment date and balance due date was June 30, 2020.

[7] Also on December 10, 2018, Mr. Sathasivam and AKA executed a loan agreement with respect to the underlying \$1.1 million loan secured by the AKA Mortgage (the “Loan Agreement”).

[8] I will discuss the specific terms of the AKA Mortgage and Loan Agreement in detail below. At this time, it will suffice to state that the Loan Agreement refers to

interest accruing under the loan secured by the AKA Mortgage to December 31, 2019 at 9.25% per annum and 18% per annum thereafter.

[9] On December 11, 2018, Mr. Sathasivam granted a second mortgage in favour of Wing Wah (the “Wing Wah Mortgage”). The Wing Wah Mortgage is in the principal amount of \$225,000 and the last payment date and balance due date was December 10, 2019.

[10] By September 2019, the AKA Mortgage was in default. On November 19, 2019, following demand for payment, AKA commenced its foreclosure action. AKA’s petition in the foreclosure referred to the correct interest rate that applied at the time, namely 9.25% per annum which was stated as “the rate of \$286.12 per diem”.

[11] On January 23, 2020, this Court granted an order nisi in favour of AKA (the “AKA Order Nisi”). Kim LaBelle acted as counsel for AKA in the foreclosure. Despite being served with the court materials, neither Mr. Sathasivam, Wing Wah or Mr. Hsieh appeared at the hearing and the AKA Order Nisi was granted on an uncontested basis.

[12] The AKA Order Nisi contained the following term as to the amount owing under the AKA Mortgage:

4. the Mortgage and the Lands and Premises may be redeemed prior to July 23, 2020 upon payment of \$1,154,550.93 as at January 23, 2020 plus interest at \$286.12 per diem compounded in the Mortgage to the date of payment, together with the Petitioner’s assessed costs...

[13] In the usual fashion, and in support of the hearing, Mr. LaBelle prepared a Statement of Accounting. That Statement of Accounting was later attached to the AKA Order Nisi, as it referred to the two figures (principal amount and per diem amount) that were incorporated into para. 4 of the AKA Order Nisi, as above.

[14] It is now known that the amounts referred to in the Statement of Accounting and para. 4 of the AKA Order Nisi were in error in two respects:

- a) the Statement of Accounting included interest at 9.25% per annum, not 18% per annum, for the 23 days from January 1–23, 2020 (being the date of the AKA Order Nisi), such that the amount owing under the AKA Mortgage as of January 23, 2020 was actually higher than \$1,154,550.93; and
- b) the per diem amount after January 23, 2020 was based on an interest rate of 9.25% per annum, not 18% per annum in accordance with the Loan Agreement, which was the applicable interest rate under the AKA Mortgage from January 1, 2020 onwards.

[15] For the ensuing two years, no further steps were taken by any party in the AKA foreclosure; specifically, Wing Wah did not apply for conduct of sale of the Property under the Wing Wah Mortgage, nor did Mr. Sathasivam take any steps to sell the Property to repay his debts or refinance both mortgages, either during the six-month AKA foreclosure redemption period or beyond.

[16] On April 26, 2022, Wing Wah commenced its own foreclosure. On July 11, 2022, Wing Wah obtained an order nisi in its foreclosure (the “Wing Wah Order Nisi”). On January 17, 2023, after expiry of the redemption period, Wing Wah obtained an order for conduct of sale of the Property in its foreclosure.

[17] In February 2023, Wing Wah requested a payout statement from AKA in anticipation of arranging a sale of the Property in its foreclosure. AKA provided a response and the payout statement indicated a balance owing of \$1,921,597.81 as at March 1, 2023 (based on 18% per annum interest after January 1, 2020) with interest accruing at the per diem rate of \$947.64 after January 1, 2020 (or 18% per annum).

[18] In March 2023, in response to AKA’s payout statement, Wing Wah’s counsel objected to AKA’s claim to any interest after June 30, 2020.

[19] On April 12, 2023, Wing Wah and Mr. Hsieh filed their petition in Action No. S232844 seeking certain declarations in relation to the AKA Mortgage as to the interest owing.

[20] On May 28, 2023, Wing Wah listed the Property for sale at \$2,250,000 under its order for conduct of sale. The sale efforts have been disappointing; at present, the listing agent is recommending a list price reduction to \$2,090,000.

[21] AKA has yet to provide a full accounting of the amounts claimed under the AKA Mortgage, particularly with respect to amounts that Mr. Sathasivam says he paid to AKA under his loan. However, the difference between AKA's and Wing Wah's position as to the amount of interest owing under the AKA Mortgage is estimated at approximately \$500,000.

[22] Accordingly, if AKA succeeds in its application here, it is anticipated that the proceeds from any sale of the Property will be fully allocable to the AKA Mortgage and Wing Wah will have no recovery from any sale of the Property.

[23] Mr. Sathasivam's counsel indicates that his client is in the process of attempting to refinance both mortgages so as to avoid a sale of the Property; however, the details of those efforts are extremely vague. In any event, and understandably, Mr. Sathasivam indicates that he needs clarity as to the amounts owing under the AKA Mortgage before he could possibly refinance the debts.

ISSUES

[24] In the AKA foreclosure, AKA seeks a further summary accounting of the amounts due under the AKA Mortgage, pursuant to the AKA Order Nisi. Alternatively, AKA seek an order amending the AKA Order Nisi as it relates to the interest accruing under the AKA Mortgage after December 31, 2019, relying on R. 13-1(17) of the *Supreme Court Civil Rules* (i.e., the "slip rule") and the inherent jurisdiction of the Court.

[25] Wing Wah opposes the relief sought by AKA, supported by Mr. Sathasivam. If Wing Wah successfully opposes any further summary accounting or amendment of the AKA Order Nisi, it seeks:

- a) A declaration that the amount to be paid to AKA to redeem the AKA Mortgage shall include principal and interest to June 30, 2020 (with interest at 9.25% per annum to December 31, 2019 and 18% per annum from January 1–June 30, 2020). Wing Wah takes the position that no contractual interest is payable to AKA after that date, although it concedes that interest would still be payable to AKA on the judgment debt after June 30, 2020 at the rate provided for in the *Court Order Interest Act*, R.S.B.C. 1996, s. 79; and
- b) In the alternative, a declaration that the amount to be paid to AKA to redeem the AKA Mortgage is as set out in para. 4 of the AKA Order Nisi (i.e., 9.25% per annum interest or \$286.12 per diem to date of payment).

[26] Mr. Sathasivam seeks an order in the AKA foreclosure for an accounting of the amount owed to AKA. In addition, he seeks an extension of the redemption period in the AKA foreclosure to July 31, 2023.

DISCUSSION

[27] The issues that arise from the foregoing applications are as follows.

What Interest is Payable under the AKA Mortgage?

[28] Item 5(b) of the Form B for the AKA Mortgage (the “Form B”), relating to “Interest Rate”, refers to a Schedule which states:

5. Payment Provisions:
 - (b) 9.25% per annum compounded monthly for the period January 1, 2019 to December 31, 2019
18% per annum compounded monthly for the period January 1, 2020 to June 30, 2020[.]

[29] Item 9 of the Form B refers to the “Mortgage Terms” as being the *Prescribed Standard Mortgage Terms*, being Schedule B to the *Land Title Act (Board of Directors) Regulation*, B.C. Reg. 332/2010 (the “PSMT”). The relevant sections of the PSMT are:

1(1) **Interpretation**

...

“**interest**” means interest at the *interest rate* shown on the *mortgage form*;

...

“**interest rate**” means the interest rate shown on the *mortgage form*;

...

“**mortgage form**” means the instrument in the form approved as a mortgage by the Director of Land Titles under the *Land Title Act* and all schedules and addenda to the instrument;

“**mortgage money**” means the *principal amount*, *interest* and any other money owed by the *borrower* under *this mortgage*, the payment of which is secured by *this mortgage*;

...

“**this mortgage**” means the combination of the *mortgage form* and these mortgage terms;

...

Interest

3(1) Interest is chargeable on the *mortgage money* and is payable by the *borrower*.

...

(3) *Interest* on advances or readvances of the *principal amount* starts on the date and on the amount of each advance or readvance and accrues on the *principal amount* until the *borrower* has paid all the *mortgage money*.

Payment of the mortgage money

4. The *borrower* promises to pay the *mortgage money* to the *lender* at the *place of payment* in accordance with the payment provisions set out in the *mortgage form* and these mortgage terms.

[Emphasis in original.]

[30] In Item 10 of the Form B, the parties may set out “Additional or Modified Terms” to supplement the PSMT or any other filed mortgage terms. In the Form B, a

term was added after s. 5(1) of the PSMT, regarding “Promises of the borrower”, as follows (the “Additional Term”):

(1.1) The promises and agreements made by the Borrower to the Lender in any guarantee, promissory note or any other agreement made by the Lender and the Borrower (the “Borrower’s Agreements”) are hereby incorporated by reference and made a part of this Mortgage. The Borrower promises to fully and promptly observe and perform all of the obligations and agreements of the Borrower set out in the Borrower’s Agreements. If any provision of the Borrower’s Agreements is inconsistent or conflicts with any other provision of this mortgage or the mortgage terms, the provision in the Borrower’s Agreements will prevail.

[Emphasis added.]

[31] One of the “Borrower’s Agreements”, per the Additional Term, was the Loan Agreement executed by Mr. Sathasivam in favour of AKA. In summary, the Loan Agreement provided:

- a) At para. 4, regarding “Term and Repayment”: the term of the loan ended on June 30, 2020, consistent with the AKA Mortgage. Mr. Sathasivam was expected to repay the amounts in full by December 31, 2019 (the “Expected Repayment Date”); and
- b) At para. 5, regarding “Interest”: interest was to accrue on the principal amount (\$1.1 million) from the date of advance until “[AKA] has been repaid the Principal Amount in full” at 9.25% per annum to the Expected Repayment Date and 18% per annum thereafter. Further, para. 5 provided:

... Upon and after maturity, default or judgment, the Obligations (including any accrued but unpaid interest) shall bear interest at the rate of eighteen (18%) percent per annum calculated daily.

[32] In my view, a reading of the whole of the AKA Mortgage, including the Form B and the PSMT, is sufficient to support that the parties intended that 9.25% per annum interest would apply to December 31, 2019 and that 18% per annum interest would accrue thereafter to date of payment. The meaning of Item 5(b) in the AKA Mortgage, as above, was simply to reflect the interest payable up to June 30, 2020,

being the day before the “Last Payment Date” in Item 5(i) of the Form B. In my view, those provisions did not detract from the more general provisions in the PSMT which require repayment of the “mortgage money” with interest up to the date of payment in full, particularly under ss. 3(3) and 4 of the PSMT.

[33] I also find that the AKA Mortgage (including the Form B and the PSMT), together with the Loan Agreement, even more clearly confirm the parties’ intention that interest on any outstanding balance after June 30, 2020 would continue to accrue at 18% per annum. Indeed, it would be a very unusual commercial document for any lender to agree to stop charging any interest on a loan if the borrower defaulted in payment on the due date and did not fully repay the amounts owing on maturity.

[34] In summary, I conclude that either the Form B alone or alternatively, the Form B together with the Loan Agreement, entitled AKA to charge interest on any outstanding indebtedness secured under the AKA Mortgage at 18% per annum from January 1, 2020 to date of payment and that payment of interest did not stop after June 30, 2020.

Should the AKA Order Nisi be Amended under the Slip Rule or Inherent Jurisdiction?

[35] As stated above, AKA seeks an order amending the AKA Order Nisi as it relates to interest accruing under the AKA Mortgage after December 31, 2019. It seeks to amend: (i) the amount outstanding as at January 23, 2020 (to add further interest—from 9.25% to 18%—from January 1–23, 2020), and (ii) the per diem interest rate thereafter from 9.25% per annum to 18% per annum.

[36] The “slip rule” or R. 13-1(17) provides:

The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

[37] AKA submits that the matter of interest after January 1, 2020 was a matter that should have been adjudicated by the Court, but was not.

[38] The law relating to the application of the “slip rule” is well settled and not in dispute.

[39] An order under R. 13-1(17) is discretionary: *Sutton v. Cypress-Batt*, 2000 BCSC 232 at para. 24; *Chand v. Insurance Corporation of British Columbia*, 2009 BCCA 559 at para. 48.

[40] In *Sutton*, a litigant sought to amend an entered order to provide for a repayment of interest that was not addressed at the time of the hearing. At para. 23, Justice Sigurdson found that the issue of repayment of interest should have been adjudicated by the Court since it was, by “necessary implication”, before the Court.

[41] In addition, the Court may exercise its inherent jurisdiction to correct an entered order if it does not reflect the manifest intention of the Court: *Buschau v. Rogers Communications Inc.*, 2004 BCCA 142 at paras. 26–27. The decision in *Buschau* was later confirmed in *Chand*, where the court also stated:

[46] ... [i]t is not in the interests of justice for an order to stand that does not reflect the parties’ true entitlements...

[42] The evidence in support of AKA’s application to amend is found in the evidence of both Mr. LaBelle and Kung Hung Lau, AKA’s representative.

[43] In his Affidavit #2 sworn May 15, 2023, Mr. Lau says that he only recently became aware that the AKA Order Nisi did not reflect the correct interest rate accruing after December 31, 2019 at 18% per annum, and that it incorrectly referred to interest at 9.25% per annum. He believes that this error was simply due to oversight.

[44] Mr. LaBelle also confirms that the AKA Order Nisi includes an incorrect redemption amount as at January 23, 2020 and incorrect per diem rate of interest thereafter. He confirms that he had access to all of the relevant documents,

including the AKA Mortgage and the Loan Agreement, and that the former was attached to the petition.

[45] Mr. LaBelle states that the errors in the AKA Order Nisi arose from his inadvertence, particularly as to his preparation of the Statement of Accounting, which was filed in advance of the hearing of the petition.

[46] The facts here are similar to those in *Buschau* where the party's accountant who prepared the appropriate figure for the order simply erred in his calculation. At para. 27, the court in *Buschau* concluded that this Court should have corrected the order since it was not in the interests of justice to allow the respondents to benefit from that mistake.

[47] As I have discussed above, the interpretation of the AKA Mortgage supports the proposition that interest continues to accrue from January 1, 2020 at 18% per annum, an interpretation that is further supported by the Loan Agreement. Therefore, the AKA Order Nisi does not reflect the true entitlement of AKA under the AKA Mortgage as at January 23, 2020 and thereafter, and was a matter upon which the Court should have adjudicated at the time of the granting of the AKA Order Nisi.

[48] I am also satisfied that the matter of the determination of interest under the AKA Mortgage was a matter that is typically addressed in an order nisi. Here, that determination was incorrect as a result of Mr. LaBelle's error in preparing the Statement of Accounting to reflect the incorrect interest rate from January 1, 2020 based on the documentation.

[49] Mr. LaBelle's error does not arise from the fact that the Loan Agreement was not referred to in the AKA petition and was not attached in the materials. Mr. LaBelle had the Loan Agreement in his possession. In addition, while the AKA petition did not refer to a loan agreement, it stated the following under "Factual Basis":

5. By a covenant in writing forming part of the Mortgage the Respondent, Indran Sathasivam, agreed to pay the Petitioner all money secured by the Mortgage.

[50] The only other “covenant in writing forming part of the Mortgage” had to be the Loan Agreement. Therefore, Mr. LaBelle’s error was in not correctly updating the figures found in para. 7 of AKA’s petition into the later Statement of Accounting.

[51] Further, as AKA’s counsel argues, the Loan Agreement is consistent with the AKA Mortgage, and the Loan Agreement would have equally supported the allegations in the petition which were accepted by the Court at the time the AKA Order Nisi was granted. As such, the Court’s reference now to the Loan Agreement does not constitute reliance on “new evidence” that was not before the Court on January 23, 2020.

[52] This is a similar fact pattern to that before Justice Garson, as she then was, in *Canada Trustco Mortgage Company v. Rao*, 2002 BCSC 1052. In that case, the petition set out the correct balance owing under the mortgage, but the “Summary of Relief Sought at Hearing”—akin to the Statement of Accounting presented for the AKA Order Nisi—provided by the petitioner mortgagee to the Court at the foreclosure hearing inadvertently set out a much lower, incorrect balance. The order nisi incorporated this incorrect balance. In *Rao* at paras. 17–19, Garson J. had no difficulty applying the “slip rule” so as to correct the order nisi to include the correct balance owing at that time.

[53] As I stated above, Wing Wah concedes that the AKA Mortgage entitles AKA to 18% per annum interest at least to June 30, 2020. This concession alone supports a correction of the AKA Order Nisi at least to that date.

[54] My conclusions, as above, also support, at least on a *prima facie* basis, that AKA is entitled to the relief sought with respect to the 18% per annum interest rate both before and after June 30, 2020, either under the “slip rule” or the Court’s inherent jurisdiction.

[55] The parties agree that the discretionary nature of the relief sought—to amend or correct the AKA Order Nisi—requires a consideration as to whether another party took irrevocable steps in reliance of the order or has suffered undue prejudice as a

result or whether there has been undue delay: *Sutton* at para. 24; *Buschau* at para. 27; *Chand* at para. 46.

[56] Wing Wah alleges what it describes as material or “profound” prejudice.

[57] Mr. Hsieh’s evidence is that he and Wing Wah relied on the AKA Mortgage (which includes the Form B and PSMT) before deciding to advance monies under the Wing Wah Mortgage. More particularly, he states that they relied on his interpretation or reading of the Form B (particularly Item 5(b)) as being that AKA could not charge any interest post–June 30, 2020. Mr. Hsieh states that this satisfied Wing Wah that there would be sufficient equity in the Property to repay the amounts under the Wing Wah Mortgage. Finally, Mr. Hsieh states that he and Wing Wah would not have loaned Mr. Sathasivam any monies under the Wing Wah Mortgage had they known that AKA could charge interest post–June 30, 2020.

[58] In *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2019 BCSC 238 at paras. 69–74, 91 [*Forjay*], I discussed the Torrens System and the “mirror principle”, which provide that a person, such as Wing Wah, is entitled to search the title to a property to ascertain any prior registrations as may be relevant to that person’s decision in respect of any later transactions affecting the lands.

[59] I have already interpreted the AKA Mortgage, including the Form B and PSMT, as providing for the interest now claimed by AKA. In that respect, unfortunately, Mr. Hsieh was under a misapprehension of his own making.

[60] Wing Wah also alleges prejudice arising from the Loan Agreement to the extent that it supports that interest continued at 18% per annum after June 30, 2020.

[61] Wing Wah refers to *Romspen Investment Corp. v. 0895249 B.C. Ltd.*, 2016 BCSC 730 at para. 27 [*Romspen*]. In that decision, the Court stated that any collateral agreement between a prior mortgagee and borrower is of no force and effect against a subsequent mortgagee unless there is consent, or the registered prior mortgage so provides. In other words, subsequent mortgagees *can* be affected by collateral agreements between a prior mortgagee and the borrower that are not

necessarily reflected in detail in the Form B, as long as the registered prior mortgage provides for that application to subsequent mortgagees “in clear terms”.

[62] In *Forjay*, referencing *Vancouver City Savings Credit Union v. Alda Wholesale Ltd.*, 2000 BCSC 411 at paras. 11–12 and 29, I stated that the terms of a mortgage, including the Form B, may serve to alert subsequent mortgagees to other agreements that may affect the amounts recoverable of either principal or interest under that mortgage:

[82] The cautionary tale from *Vancouver City Savings* is, therefore, that any party seeking to know the amount outstanding under the mortgage at any given time will typically be required to make enquiries of the mortgagee. While that case refers only to principal and interest, 625 readily concedes that an amount outstanding under a mortgage may also include other items that have been, in accordance with the mortgage terms, added to it. This will typically include such things as costs and protective disbursements. Indeed, such provisions are found in the Mortgages.

[63] Wing Wah also refers to *Reynolds Extrusion Co. Ltd. v. Cooper* (1978), 21 O.R. (2d) 416 (Ont. H.C.J.), where the court refused to give effect to certain amendments to a first mortgage that were not agreed to by the subsequent mortgagee. The court in *Reynolds Extrusion* makes the point that a second mortgagee is bound by the terms of a prior mortgagee that were known to them:

I think the proper way to approach the matter is to consider the position of the second mortgagee. He is bound by the terms of the prior encumbrancer as known to him when he entered into his contract with the mortgagor. If that prior mortgage contains a [clause] entitling the mortgagee to charge greater interest or the mortgagor to an extension then the subsequent mortgagee must accept the amendments when they are made. If the mortgage does not contain such terms the subsequent mortgagee cannot be bound by the subsequent agreement. This does not, however, as I view it, give priority to the subsequent mortgagee. Perhaps if the result of the amendments could only be construed as a discharge of the old mortgage and the taking of a new one a question of priority might arise together with a consideration of the right of subrogation, but that is not the case here. The mortgage must continue to have priority to the extent of the original contract of which the subsequent mortgagee had notice. For example, so long as the interest rate is not increased the priority remains: to the extent that it is the priority is lost. ... This way the subsequent mortgagee remains unaffected by the amending contract to which he was not a party, but he obtains no windfall in the form of priority of encumbrance from the mere failure to obtain his consent to the amendment.

[Emphasis added.]

[64] I would also add that a second mortgagee is bound by the terms of a prior mortgage that *should have been known* to the subsequent mortgagee on reviewing the Land Title documents then filed.

[65] Here, the Additional Term referenced in the Form B clearly directed any person dealing with the Property to any relevant “Borrower’s Agreements” between AKA and Mr. Sathasivam which were incorporated by reference into the AKA Mortgage and, indeed, took precedence in terms of their effect. Such an enquiry would have assisted such a person who may have wished to clarify the amount secured under the AKA Mortgage and its terms, including the relevant interest rate(s) under the AKA Mortgage.

[66] In that event, it was incumbent upon Wing Wah to enquire about what “Borrower’s Agreements” existed at the time it decided to advance monies under the Wing Wah Mortgage. There is no evidence that Mr. Hsieh noted the reference in the Form B to “Borrower’s Agreements”; he makes no mention of it and does not refer to making any enquiries in that regard of AKA to determine what “Borrower’s Agreements” were in effect that were relevant to Wing Wah’s decision to fund the Wing Wah Mortgage.

[67] In short, all of the terms of the AKA Mortgage and the incorporated terms of the Loan Agreement were known or should have been known to Wing Wah when it advanced its loan to Mr. Sathasivam.

[68] Further, Mr. Hsieh states that, if Wing Wah had known that AKA was seeking interest post-June 30, 2020, Wing Wah would have challenged the application for the AKA Order Nisi and taken immediate steps to redeem the AKA Mortgage in order to preserve equity for the Wing Wah Mortgage.

[69] In my view, Wing Wah also faces considerable difficulty alleging prejudice arising from the documents filed by AKA in its foreclosure and the granting of the AKA Order Nisi.

[70] There is no evidence that Mr. Hsieh sought to confirm the details of the “covenant in writing forming part of the Mortgage” referred to in para. 5 of AKA’s foreclosure petition, which I have found was a reference to the Loan Agreement as a material fact supporting the relief sought in the petition.

[71] In addition, a plain reading of the AKA Order Nisi would have made Mr. Hsieh fully aware that interest was accruing, not just until June 30, 2020, but until payment was made in full under the AKA Mortgage. Paragraph 4 of the AKA Order Nisi clearly refers to interest accruing “to the date of payment”, albeit at the incorrect and lower interest rate.

[72] Further, the declaration sought by Wing Wah that interest stops at June 30, 2020, or that any further accrued interest under the AKA Mortgage after that date is subsequent in priority to the Wing Wah Mortgage, is clearly contrary to the AKA Order Nisi that provides that interest accrues after that date “to the date of payment”. In foreclosures, orders nisi are final orders and the Court is *functus officio* upon entry: *Century Services Inc. v. LeRoy*, 2010 BCSC 328 at para. 26. The court is then unable to alter or vary an order nisi, save in limited circumstances, as I have already discussed above: *Chand* at paras. 42 and 46.

[73] Wing Wah does not seek an amendment or variation to the AKA Order Nisi; it only seeks certain declarations that are contrary to its terms. I reject that Wing Wah can seek to have the AKA Order Nisi effectively amended through the guise of a “declaration”. I agree with AKA that this would amount to a collateral attack on the AKA Order Nisi.

[74] Wing Wah’s further arguments as to prejudice are largely centered on the contention that, if it had known of the higher interest rate accruing under the AKA Mortgage, it would have taken earlier steps to protect the equity of redemption available to it so as to preserve, as much as possible, the ability to recovery under the Wing Wah Mortgage.

[75] However, Wing Wah took no steps under its own mortgage from January 2020–April 2022, either by making an application in the AKA foreclosure or starting its own foreclosure, which it only commenced about two years after the AKA Order Nisi was granted.

[76] Further, it is not the case that Wing Wah was suddenly and first made aware of the higher interest rate claimed by AKA in spring 2023, when arguably the AKA Mortgage amount had increased substantially so as to put Wing Wah’s recovery into jeopardy.

[77] In early/spring 2022, there were some communications between AKA and Mr. Hsieh concerning the amount owing under the AKA Mortgage, which was based on an interest rate well beyond the 9.25% per annum incorrectly provided for in the AKA Order Nisi.

[78] In January 2022, Mr. Hsieh appears to have received a text message from a mortgage broker representing AKA who attached a Statement of Accounting that indicated the amount outstanding under the AKA Mortgage as at January 1, 2022 was \$1,353,082.74. Mr. Hsieh replied in part:

Shitttt...that’s a lot [emojis omitted] ...
Or do u know how much is the interest rate right now?
And can u ask the 1st charge when Indran stop paying interest?

[79] Another payout statement as of March 2022 provided by AKA to Wing Wah referred to interest accruing at 15%, not 18%, with an outstanding balance as at March 15, 2022 of \$1,369,927.86.

[80] In the face of this information, Mr. Hsieh did not register any objection to AKA about the continuation of interest after June 30, 2020 or even the interest rate, which Mr. Hsieh alleges he understood at the time as being at 9.25% per annum.

[81] Further, armed with such information, Mr. Hsieh gave no evidence about assessing Wing Wah’s position at that time in terms of ensuring Wing Wah acted in

a timely manner so as to protect its position, either in the AKA foreclosure or by commencing its own foreclosure.

[82] Rather, a further one year went by before Wing Wah acted by starting its own foreclosure. Wing Wah’s counsel acknowledged in argument that this further delay arose from Wing Wah’s decision to wait and see if Mr. Sathasivam was going to redeem the mortgages. Any prejudice arising during that period cannot be laid at the feet of AKA in terms of denying the relief it seeks.

[83] In the above circumstances, I am unable to find that Wing Wah is prejudiced by the amendment of the AKA Order Nisi.

[84] Finally, I find that AKA acted as soon as possible upon discovering the error in the AKA Order Nisi and no issues of delay arise as may have been relevant to the exercise of the Court’s discretion.

[85] I conclude that AKA has established that relief is appropriate to correct the AKA Order Nisi, either under the “slip rule” or by the exercise of the Court’s inherent jurisdiction.

Should a Summary Accounting be Ordered?

[86] Alternatively, if the Court declines to amend the AKA Order Nisi to reflect the 18% interest rate after January 1, 2020 either under the “slip rule” or its inherent jurisdiction, AKA argues that the AKA Order Nisi provides for a further summary accounting to allow recovery of the difference between 9.25% and 18% interest. In that event, AKA seeks a further summary accounting to add the further interest amount (i.e., another 8.75% per annum) accruing after January 1, 2020.

[87] The AKA Order Nisi provides:

8. the Petitioner may conduct a further summary accounting before this Court or the District Registrar of any amounts due to the Petitioners for interest, taxes, arrears of taxes, insurance premiums, costs, charges, expenses or otherwise since the filing of the Petition herein and that such amount be provide by the Affidavit of an Officer of the Petitioner and the amount due certified by this Court or the District Registrar...

[88] The only authority on this point is found in *CIBC Mortgage Corp. v. Duguay*, [1991] B.C.J. No. 450 (S.C.). The issue raised was the extent of the further interest (compound interest not referred to in the order nisi), costs and disbursements sought by the mortgagee under the “liberty to apply” clause, which is akin to the “further summary accounting” clause in the AKA Order Nisi.

[89] In *Duguay*, Master Kirkpatrick, as she then was, considered the effect of this type of clause, leaving aside any application to apply the “slip rule”. She stated:

The "liberty to apply" clause should not, in my view, extend to amounts which the petitioner, at the time of the granting the order nisi, knew or ought to have known were chargeable or payable under the mortgage but which it failed to include in its summary accounting. By this, I do not include amounts incurred by the petitioner which are not included in the summary accounting through inadvertence or by reasonably explained failure to communicate the expense to the solicitor conducting the foreclosure on behalf of the petitioner. In those cases, prompt application should be made to add such expenses to the amount required to redeem as soon as the petitioner becomes aware of the failure to include them in the summary accounting.

...

In my opinion, the "liberty to apply" clause is limited to those costs and disbursements reasonably incurred after the date of the order nisi. The order nisi of foreclosure is a final order. [As] far as possible, the summary accounting should disclose with reasonable finality the amount required to redeem. The "liberty to apply" clause should be employed only to add those expenses which are necessarily incurred during the redemption period. In unusual circumstances exceptions may be made to include costs and disbursements incurred prior to the order nisi but which, in reasonably explained circumstances, were not included in the initial summary accounting. In this instance, compound interest is [not] recoverable.

[Emphasis added.]

[90] The Master rejected the claim for compound interest, finding that there was no evidence that the failure to claim compound interest arose from inadvertence or a failure to communicate the proper claim to the lawyer who was preparing the court materials.

[91] Wing Wah’s counsel suggests that the “liberty to apply” or “further summary accounting” clause in the AKA Order Nisi is unusual in that it is not restricted to amounts that may accrue *after* the granting of the order nisi, as the Court in *Duguay* noted. In my view, this argument is without merit. Whether unusual or not, this type

of provision appears to have been in use since as early as 1991 when *Duguay* was decided, where the Court held that amounts inadvertently excluded from the summary accounting—i.e., amounts accrued *before* the granting of the order nisi—are still redeemable under the “liberty to apply” clause after the granting of an order nisi. In addition, both the AKA Order Nisi and the Wing Wah Order Nisi clearly provide for a further summary accounting with respect to amounts that may have accrued both *before* and *after* the granting of the order nisi.

[92] I have already recounted the evidence of Mr. LaBelle and Mr. Lau as to how the errors in the AKA Order Nisi arose and when they came to AKA’s attention.

[93] I conclude that these are unusual circumstances here and that AKA has provided a reasonable explanation for how the errors arose. This evidence equally supports the conclusion that the failure to calculate interest at 18% after December 31, 2019 in relation to the amount outstanding as at January 23, 2020 and the incorrect interest per diem set out in the AKA Order Nisi arose simply from inadvertence on Mr. LaBelle’s part.

[94] In addition, there is no dispute that AKA applied to the Court to correct the error as soon as it came to Mr. Lau’s attention.

[95] Therefore, in the alternative, I grant AKA’s application for a further summary accounting so as to allow AKA to recover the difference between the interest rate set out in the AKA Order Nisi, 9.25% per annum, and 18% per annum from and after January 1, 2020.

ORDERS

[96] I grant the order sought by AKA to amend or correct the AKA Order Nisi to reflect the correct redemption amount as at January 23, 2020 and rate of interest accruing under the AKA Mortgage thereafter, both to include the 18% per annum interest rate post–December 31, 2019.

[97] Wing Wah’s petition is dismissed.

[98] If the parties are unable to agree on the amount currently required to redeem the AKA Mortgage, based on the amended AKA Order Nisi and any other matter, such as any payments by Mr. Sathasivam, the matter is to be referred to the Registrar to prepare a report and recommendation in accordance with R. 18-1(3).

[99] Mr. Sathasivam's application to extend the redemption period in the AKA foreclosure to July 31, 2023 has become moot. If, however, he seeks a further extension of the redemption period in either the AKA or Wing Wah foreclosure, as a result of this hearing, he has liberty to apply in the usual fashion.

[100] AKA will have its costs of its application as against Wing Wah, Mr. Hsieh and Mr. Sathasivam on a joint and several basis. AKA will have its costs of the Wing Wah petition as against both Wing Wah and Mr. Hsieh on a joint and several basis.

"Fitzpatrick J."