IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Prospera Credit Union v. 1321725 B.C. Ltd.,* 2024 BCSC 696

Date: 20240426
Docket: H230936
Registry: Vancouver

Between:

Prospera Credit Union

Petitioner

And

1321725 B.C. Ltd., Syndicate Lending Corporation, Angela Minhas, Inam Ahmed Ali Qureshi and All Tenants or Occupants

Respondents

Reasons for Judgment

Counsel for Prospera Credit Union:	S.H. Stephens
Counsel for 1321725 B.C. Ltd.:	B.S. Khatra
And no other appearances	
Place and Date of Hearing:	Vancouver, B.C. March 14, 2024
Place and Date of Judgment:	Vancouver, B.C. April 26, 2024

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[1] This matter involves the hearing of a petition in foreclosure, in which the petitioner seeks order *nisi* with the usual relief including a standard 6-month redemption period (although commencing February 1, 2024 given adjournments of the hearing of the petition since that date), and setting the redemption amount at $877,449.30 as of March 14, 2024, and judgment on the personal covenants in that same amount.

[2] The sole issue in dispute is whether or not the respondent mortgagor, 1321725 B.C. Ltd. ("132") is in default of the subject mortgage. 132 takes the position that it is not in default and that either the petition must be dismissed, or by application filed February 29, 2024, an order made to refer the matter to the trial list with discovery by way of exchanges of lists of documents and examinations for discovery or, alternatively, that 132 be relieved from the consequences of any default, namely accelerated payment, in accordance with s. 25 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 ("*LEA*").

[3] There is no dispute that, prior to the accelerated demand, 132 remained up to date on its covenants to pay. The defaults alleged to give rise to the right to accelerate and issue demand in that respect are non-financial. The failure to pay the accelerated demand is in and of itself a default, provided demand was properly made, however the parties only addressed the alleged defaults that gave rise to the accelerated demand.

Background

[4] By mortgage registered in the land title office on October 14, 2021, 132 granted a mortgage charge (the "Mortgage") over commercial lands (the "Property") owned by 132, as security for what is titled a "Creditmaster Commercial Term Loan" in the principle amount of $937,500 (the "Loan"). The terms of the Mortgage are set out in the Form B as well as the Standard Mortgage Terms ("SMT") incorporated by reference therein.

[5] As further security for the Loan, 132 granted Prospera Credit Union ("Prospera") a security interest in all of its present and after acquired property by

virtue of a general security agreement ("GSA") and guarantees given by the respondents, Syndicate Lending Corporation ("Syndicate"), Angela Minhas ("Ms. Minhas"), and Inam Ahmed Ali Qureshi ("Mr. Qureshi" and, collectively, the "Guarantors"), each of whom also provided security by way of their own GSAs.

[6] Mr. Qureshi and Ms. Minhas are each 50% shareholders of Syndicate.

[7] None of the Guarantors have filed a response in these proceedings, nor did they appear or take a position on this application, although Mr. Qureshi and Ms. Minhas each swore affidavits in support of 132's position. The parties' arguments were restricted to 132's alleged defaults. As such, I will only refer to the Loan, Mortgage and GSA terms as agreed to by 132 as those being the relevant agreements in respect of the current issue before court as to default. Although, the agreements largely mirror each other.

[8] Given that the issue of default is largely one of contractual interpretation, excerpts of the relevant terms in those agreements are reproduced and attached as Schedule "A" to these reasons. In summary:

1. The term of the Loan, and therefore maturity of the mortgage, occurs on November 1, 2026. Until that time monthly blended payments are to be made in the amount of $4,365.00.

2. Upon an "Event of Default" (as defined therein) payment can be accelerated with the whole of the obligations as secured by the Mortgage and GSA then becoming due and payable on demand.

3. For clarity, under the terms of the Loan, notwithstanding any reference to the Loan being payable on demand in any of the agreements, Prospera agreed to not make demand except upon an event of default, as defined therein (an "Event of Default").

4. An Event of Default includes:

i. if there is an order made, resolution passed, or “petition” filed for the winding up of 132;

ii. a failure to observe or perform something required to be done, or a covenant or condition set out in the Loan, Mortgage or GSA; or

iii. if any representation or warranty is untrue in any material respect.

5. The relevant representations, warranties, covenants and obligations in this respect include that:

i. 132 will “carry on and conduct its business in a proper, efficient and businesslike manner and in accordance with good business practices” (a covenant);

ii. there are no actions or proceedings pending or, to the knowledge of the Borrower, threatened which might result in a material adverse change in the financial condition of 132 or the Guarantors which would materially adversely affect the ability of any of them to perform their obligations under the Loan (a representation); and

iii. 132 will provide annual financial statements for both itself and Syndicate, within 120 days of a fiscal year end, or such other financial information as required by the petitioner (an obligation).

6. The Loan contains a conflict resolution clause whereby its terms govern in the event of a conflict between it and the other relevant agreements such as the Mortgage and the GSA.

7. The form of guarantees, the Mortgage and the GSA each contain the usual cross default provisions such that, upon an Event of Default by 132, the petitioner is entitled to enforce those agreements as well.

[9] 132 was incorporated shortly before the Loan was made, and had no financial history. In this respect, the evidence of 132 is that it was incorporated to be a holding

company for the Property. The evidence of the petitioner is that the Loan was underwritten on the basis that Syndicate, which did have an established financial record and ability to service the debt, would occupy the Property as a tenant, pay rent and initiate leasehold improvements, with Ms. Minhas intending to manage the office as a new mortgage brokerage office for Syndicate. To that end, the shareholders agreement between Ms. Minhas and Mr. Qureshi was provided to the petitioner, and set out this general structure.

[10] The Loan was granted to 132 for the acquisition of the Property, and the Property remains the sole material asset of 132.

[11] Unfortunately, shortly after the Property was acquired Ms. Minhas and Mr. Qureshi had a difference of opinion and a dispute arose between them as to the operation of an office for Syndicate at the Property. To put it in the terms phrased by Ms. Minhas in her affidavit, the purchase of the Property was “putting the cart before the horse” as the parties were not sufficiently in agreement as to the intended venture between themselves.

[12] On January 21, 2022, Mr. Quershi emailed the petitioner to advise that they would not be opening a Syndicate office at the Property, noting that:

> [Ms. Minhas] has decided not to open a [Syndicate] office at this location. Since the loan was approved under the condition that [Syndicate] would open an office there, we would like to release our corporate guarantee” and asking as to how that may be done.

[13] In response, Mr. Baerg, an employee of the petitioner who acted as 132’s relationship manager, wrote that a “bigger conversation” had to be undertaken as to releases of the guarantees given that “the guarantee was taken as [Syndicate] was the tenant”, and asking who the tenant would ultimately be. In response, Mr. Qureshi confirmed that there was no tenant.

[14] By email of January 26, 2022, Mr. Baerg wrote as follows:

> We have a commercial mortgage to a single purpose incorporated company on a shell property with no tenant. As the risk has changed since we put the Mortgage in place, we are not open to releasing any security at this time. if

> there is an executed lease to a non-arms length tenant we could re-view [sic] the security package and contemplate changes.

[15] Ms. Minhas and Mr. Qureshi sought to resolve the issues between them through a buyout by one of the other's shares. It appears, although the full context and details are not before the court and not much turns on it, that the initial thought was that Mr. Qureshi would buy out Ms. Minhas with a term for such a buy-out being that her guarantee would be released. However, Ms. Minhas' affidavit exhibits her own correspondence with Mr. Baerg by which she was proposing to buy-out Mr. Qureshi's shares.

[16] Regardless as to the mechanics of a resolution, the petitioner continued to communicate with 132 and the Guarantors to discuss how, from the petitioner's perspective, a resolution could possibly occur and, specifically, what would be required by the petitioner.

[17] For example, by a February 14, 2022 email, Mr. Baerg advised that he would prepare an application for a release of Ms. Minhas' personal guarantee subject to receipt of, among other things, a letter of intent for the share transfer from Ms. Minhas to Mr. Qureshi. On October 21, 2021 the accountant prepared financial statements for Syndicate for review.

[18] Discussions continued throughout the spring of 2022 with Ms. Minhas and Mr. Qureshi reaching out to Mr. Baerg from time to time, including with respect to obtaining revised terms for what was characterized as a replacement loan, subject to final approval, on the basis of the removal of Ms. Minhas as shareholder.

[19] Despite that there appears to be acknowledgement by Mr. Qureshi that one of the conditions of the Loan was that Syndicate would be opening an office at the Property, such as that in the February 14, 2022 email referenced above, 132 disputes that is the effect of the statements made by Mr. Qureshi in those emails. Ms. Minhas specifically disputes that that was a requirement of the Loan.

[20] 132 argues that the petitioner's evidence as to that being a condition is in fact contradicted. Specifically, by email on April 20, 2022 to Mr. Baerg, Mr. Qureshi requested "something from [the petitioner] that confirms the condition that the [Loan] was provided to open a [Syndicate], meaning owner occupied, Property" which was responded to with the statement from Mr. Baerg that "the requested letter is unavailable". 132 argues that saying the letter is unavailable means that the petitioner's evidence as to condition of the Loan is inconsistent. Prospera argues that that email references only that the petitioner was not willing to provide a letter, or inject itself into the dispute between the parties.

[21] In this respect, on April 25, 2022, Mr. Baerg emailed Mr. Qureshi, writing that the petitioner "asks that you solve the shareholder dispute without our involvement, and solve it quickly".

[22] Thereafter, on November 14, 2022 the petitioner wrote a letter to 132 as follows, with a copy being emailed to both Ms. Minhas and Mr. Qureshi:

> We refer to our Commitment Letter dated September 16, 2021, and the Commitment Letter dated October 8, 2021, which were accepted by you on September 22, 2021 and October 13, 2021, respectively, constituting "an agreement". We highlight the following items outlined in this Agreement:
>
> > NEGATIVE COVENANT:
> >
> > The Borrower shall not, without the prior written consent of the Credit Union:
> >
> > f) permit any claims against its assets, including without limitation, liens, or other court actions to be outstanding more than 30 days.
> >
> > CHANGE IN RISK:
> >
> > Without limiting the Credit Union's right to make demand for payment at any time, the Loan will be subject to review form time to time at the Credit Union's discretion, and at least annually and/or before maturity, at the option of the Credit Union. The Credit Union reserves the right to withdraw their support at any time should any of the aforementioned terms and conditions not be kept or be abridged or should there be in the Credit Union's option:
> >
> > b) legal implications detrimental to the affairs of the Borrower and/or any Guarantors of the condition of the Credit Union Security.
>
> A recent review of the file revealed that while you are not currently in default of the afore mentioned covenants, you would be should legal action be taken in relation to the Borrower. Please be advised that the Credit Union will take whatever steps it considers necessary to protect its security.

> In the spirit of co-operation, we are willing to allow you time to resolve these issues. Failure to comply may result in Prospera Credit Union seeking repayment in full and pursuing available remedies.
>
> We ask that the dispute between the Shareholders of the Borrower be resolved by January 31, 2023 at the latest.
>
> This letter shall not constitute a waiver or relinquishment of any future covenant or terms and conditions of the loan, and we are entitled to invoke any remedy available to us under the loan agreement of by law despite forbearance or indulgence in this instance.

[23] The commitment letters as referenced in this letter are not in evidence before the court. For the purpose of this application, the petitioner relies upon the terms of the Loan, Mortgage and GSA.

[24] By email of December 12, 2022, Mr. Qureshi wrote to Mr. Baerg advising:

> We intend to file an application tomorrow morning and should have a judgment against Ms. Minhas. I would like to send you the copy of the legal documents so that you can forward to your legal team for review.

[25] The email from Mr. Qureshi's counsel was attached, along with a draft oppression remedy petition and supporting affidavit to compel the sale of Ms. Minhas' shares to Mr. Qureshi and obtain an accounting under s. 227 of the *Business Corporations Act*, SBC 2002, c. 57. In the draft petition, Mr. Qureshi alleged various breaches by Ms. Minhas to the "partnership agreement" entered into between them, including in the facts as plead that "the financing for the purchase of the [Property] was only obtained through Mr. Qureshi and [Syndicate]" and that the Property "was to be used as a corporate office for [Syndicate] and Ms. Minhas would work from that location", with Syndicate being "the anchor in securing" the Loan.

[26] On March 10, 2023, Mr. Qureshi filed a notice of civil claim (the "Shareholder Claim") against Ms. Minhas which sought an order conveying Ms. Minhas' interest in the Property to the claimant at cost and damages for, among other things, breach of contract specific to an alleged partnership agreement, fraudulent misrepresentation, and breach of fiduciary duty. In the Shareholder Claim Mr. Qureshi pleads that the Property was sourced by him, but that after discussions with Ms. Minhas he brought her on as a partner, and pursuant to the terms of a partly oral, partly written

partnership agreement, it was agreed that the Property would be used as a corporate office for Syndicate, managed by Ms. Minhas with no intention for it to be "investment property".

[27] Mr. Qureshi further pleads that he was advised by Prospera that financing for the acquisition of the Property was granted "on the premise that it would be a branch of" Syndicate, and that the partnership would only "sustain should the [Property] be operated as a Syndicate office".

[28] There is, curiously, no reference to 132 in the notice of civil claim. It does not appear that the draft oppression remedy petition was ultimately filed. There is no explanation by Mr. Qureshi as to why the strategy changed in that respect such that he resiled from filing the petition, and commenced the action instead without naming 132 as a party.

[29] Subsequent to filing of the Shareholder Claim, by email of March 13, 2023, Mr. Baerg sent a follow up email, writing:

> We expected that this Loan would be paid out in the past year. Since it has not been, and in keeping with the reporting covenant in the commitment letter, we ask for information to complete our annual review.

[30] By further email of April 12, 2023, Mr. Baerg wrote:

> If no sale or clear resolution of shareholder dispute is received, or is imminent, by April 30, 2023, the account will be managed going forward by our Credit Support Group and not myself. I have sent the same above message to Angela Minhas via email today.
>
> We are also formally requesting from you the 2021 and 2022 Fiscal Year End Statements for [Syndicate] along with an explanation/notes on any Related Party transactions and receivables.

[31] On April 13, 2023, Ms. Minhas filed a response and counterclaim to the claim commenced by Mr. Qureshi. In her pleadings, Ms. Minhas references that 132 was the ultimate purchaser of the Property, and seeking that she be entitled to buy out Mr. Qureshi's shares. Ms. Minhas specifically denies that the Loan was underwritten on the basis that Syndicate would be a tenant, and has sworn an affidavit to that effect which 132 relies upon in opposition to the proceedings. Although, as noted by the petitioner, the communications with the petitioner at the time the Loan was

granted are between Mr. Qureshi and Mr. Baerg such that she had little involvement with the negotiations.

[32] By email of April 28, 2023, Mr. Qureshi indicated that they were still “doing our financials” (it is not clear whose financials, 132’s or Syndicates were being referenced) and that he required further time to respond to the petitioner’s request for such financial information.

[33] By letter of June 14, 2023 a formal demand letter was then issued to 132, accompanied by a notice of intention to enforce security under the *Bankruptcy and Insolvency Act,* R.S.C. 1995, c. B-3.

[34] The demand includes the statement that 132 is in default “including by reason of failure to provide required reporting on time or at all, an extant legal action and a material change in the financial condition”, with a copy of that demand, and individual further demands, being sent to the Guarantors. Accelerated payment was demanded to be made by June 26, 2023, failing which notice was given that Prospera may instruct counsel to commence foreclosure proceedings.

[35] On June 30, 2023, Prospera confirmed through its counsel that as a “gesture of good faith” it would assist the parties’ efforts to resolve their deadlock by providing a 30-day grace period for them to work out terms, and submit an application for an assumption of the Loan (although not identifying which of the two parties would be assuming the Loan) for consideration.

[36] On July 31, 2023, counsel for Prospera emailed the parties to confirm that the 30-day grace period had expired and they would be commencing foreclosure proceedings accordingly. Mr. Qureshi acknowledged receipt of that email, noting that he had provided his income and Syndicate’s financials as requested, which would enable any application for his assumption of the Loan to be processed.

[37] On August 8, 2023 Mr. Qureshi advised that 132 would be listing the property for sale.

[38] By email of August 15, 2023 a listing agreement signed only by Mr. Qureshi was then provided to the petitioner. In response, counsel for the petitioner confirmed that the petitioner would not be injecting itself into the private agreement between the parties, but that if a listing agreement signed by both parties was received within one week, and a sale obtained within three months thereafter with the mortgage being paid out, it would enter into a forbearance agreement.

[39] By email of September 19, 2023, after a fully signed listing agreement was ultimately provided, Prospera offered to forbear for 45 days to give 132 time to accept a sale of the Property. The Property was not, however, listed until October 23, 2023.

[40] In response to a request from Prospera as to the status of marketing of the Property, on November 6, 2023 Mr. Qureshi forwarded an email from his realtor advising that there had been no showings and only two calls received, both of which were to the effect that the list price, that being $1,599,000, was too high.

[41] On November 15, 2023, Prospera advised 132 and the Guarantors that it would no longer forbear absent a formal forbearance agreement, and provided “high level” terms for such an agreement which were refused by 132 and the Guarantors.

[42] As there was no indication of a sale, or payout of the mortgage, this petition was then filed on November 29, 2023, in the usual form.

[43] Specifically, the petition (supported by an affidavit deposing that the statements in the petition are true, and attaching the various agreements, and demand letter), states:

> 7. The respondents, 1321725 B.C. Ltd., Syndicate Lending Corporation, Angela Minhas and Inam Ahmed Ali Qureshi are in default of the terms of the Security, including by reason of failure to provide required reporting on time or at all, an extant legal action and a material change in financial condition. The said respondents neglected or refused to pay the amount due despite demand and, as a result, the full balance due pursuant to the Security is due and payable.

[44] By letter dated January 18, 2024, counsel for 132 wrote to counsel for the petitioner to specifically dispute that 132 was in default of its obligations to the petitioner, confirming that all payments were up to date and noting that the petition materials as filed contained a “tenuous” basis for the assertion of a default.

[45] The hearing of the petition originally came for hearing on February 15, 2024. At that time, 132 had filed an affidavit confirming:

1. All payments had been made, with none being missed at any time;
2. There has been no change in the financial condition of 132 since April 2022 in that it “has always been and remains a holding company” for the Property.
3. Other than these proceedings, 132 is not a party to any extant legal proceedings.
4. 132 was not aware of any proceedings that have been commenced “or threatened” with respect to the winding up or dissolution of 132.
5. 132 is not insolvent or a party to proceedings under the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3 or *Companies Creditors Arrangement Act,* R.S.C. 1985, c. C-16;
6. 132 was not aware of any failure to make reports to the petitioner;
7. There was no change of control of 132; and
8. The Property was listed for sale at a price of $1,599,000, with the consent of the petitioner (the list price has recently been reduced to $1,499,000).

[46] 132 sought an adjournment to enable it to respond to a late filed affidavit filed by Prospera, specifically an affidavit of the manager of Business Banking & Lease Credit filed February 7, 2024, which further particularized the alleged defaults.

[47] As a primary position, 132 took the position that the late filed affidavit was not admissible as leave had not been obtained to file it and it amounted to a splitting of the case given the allegation that Prospera failed to fully particularize the basis for the demand being made in the petition and supporting affidavit.

[48] When the matter came on for hearing on February 15, 2023 I granted the adjournment as requested and, to the extent necessary, granted leave to the petitioner to rely upon the February 7, 2024 affidavit. In my view, it was in the interests of justice to grant such leave notwithstanding the concern expressed by 132 as to “case splitting”. While the petitioner is obligated to put its full case forward when filing the petition, given that foreclosures are determined on a summary basis with the majority being unopposed, it is not practical to expect that a petitioner answer all defences which may or may not arise.

[49] In this case, given the history of communications between the parties and nature of the communications between them, it is not credible that 132 was caught off guard in any way by the petitioner enforcing its rights under the Mortgage and Loan, or the reason that it was doing so.

[50] It was not necessary, as 132 argued, for the petitioner to plead which specific provision of which agreement gave rise to the defaults. The petitioner properly plead that there was a default, which acts constituted a default and, upon 132 putting that assertion in issue and disputing that the petitioner was entitled to issue demand, and filing an application to refer the matter to the trial list or seek relief from acceleration, to tender a further affidavit to address those facts. It is proper reply evidence.

[51] Further, any prejudice, although I do not accept that there was any, as a result of this later filed affidavit is easily addressed by virtue of the adjournment by which sufficient time was granted to tender any sur-reply. None was in fact filed.

[52] As of the date of this application now coming on for hearing the Property remains unsold, Syndicate has never entered into a lease or occupied the Property since its acquisition by 132 in October 2021, the Property remains vacant, and

Ms. Minhas and Mr. Qureshi have yet to resolve their dispute through a buy out by one of the other's shares such that the Shareholder Claims remain to be determined in the extant legal proceedings with, I am advised, trial being scheduled for May 2024 to resolve those issues.

The Parties' Positions as to Default

[53] On this hearing, Prospera alleges the following defaults under the Loan (with references to the applicable section of the Loan) entitled it to accelerate the balance and issue demand and, given the failure to then payout as so demanded, now entitles it to the foreclosure remedies being sought:

1. ***Misrepresentation (ss 9.1(f) and 12.1(c) of the Loan) –*** There are legal proceedings commenced and threatened, namely the Shareholder Claim as well as the threatened oppression remedy petition, which "might result in a material adverse change in the financial condition" of 132 or the Guarantors or affect their ability to perform their obligations, contrary to the representation made a s. 9.1(f) of the Loan;

2. ***Failure to observe a covenant (ss 10.1(b) and 12.1(a) of the Loan) –*** 132 has failed to carry on business in a proper, efficient and businesslike manner, by not entering into the lease agreement with Syndicate, or any other tenant for that matter, contrary to its covenant in subsection 10.1(b) of the Loan;

3. ***Failure to perform required reporting (ss. 10.2 and 12.1(a) of the Loan)*** – 132 has failed to supply the required annual financial statements within 120 days of its fiscal year end of October 30, and other financial information as requested, contrary to its obligation in subsection 10.2(a) and (b) of the Loan. While the Syndicate records have now been provided, at no time have any financial statements been provided for 132.

[54] The arguments of 132 that those do not constitute defaults are summarized as follows:

1. ***Misrepresentation (ss 9.1(f) and 12.1(c) of the Loan) –*** The representation under s 9.1(f) that there are "no actions or proceeding pending or, to the knowledge of [132] threatened…. which might result in a material adverse change inf the financial condition of [132] or any [of the Guarantors] to perform its/their obligations" was not false. 132 argues that in order to be a misrepresentation it would have to be false in October 2021 when the Loan was entered into. At that time, there had been no threats of litigation. The Shareholder Claim had not been commenced.

   Further, and regardless, 132 emphasizes that the issue of whether or not there was a misrepresentation was not specifically plead, and argues that it cannot be raised now as a basis for default.

   Finally, 132 argues that the Shareholder Claim does not include 132 as a party such that it cannot constitute a default.

   As to whether the litigation constitutes a material change in financial risk, 132 points out that the wording of the Loan notably does not include what is typical language that the determination of whether or not a change is material is solely within the discretion of the petitioner. The term "material change" is not defined in the Loan, or any of the other agreements. As such, 132 argues that the court will be required to find that such facts create, objectively, a materially adverse change in risk. That, in 132's position, will require the court to determine if the Loan was granted on the strength of the Property being used as a Syndicate office, which they say is ambiguous given the April 25, 2022 email from Mr. Baerg that a letter confirming that to be the case "is unavailable".

2. ***Failure to observe a covenant (ss 10.1(b) and 12.1(a) of the Loan) –*** 132 disputes that it was a condition that it operate a Syndicate office. Given it was a single purpose holding company, it is carrying on and conducting business, as a holding company would. As such, any argument that 132 is in breach of its covenant to "carry on and conduct its

business in a proper, efficient and businesslike manner and in accordance with good business practices" can only be determined, 132 argues, following a trial with evidence from Mr. Baerg who negotiated the Loan on behalf of the petitioner giving evidence as to the requirements in that regard.

132 argues that it is of note that Mr. Baerg has not provided evidence in these proceedings despite that he was the individual who communicated with 132 and the Guarantors throughout their relationship, including when the Loan terms were being negotiated. Rather, the affidavit in support of the order *nisi* is filed by a representative of the special credit department, to which this matter was referred by Mr. Baerg (as advised by him would be the case in his April 12, 2023 email). The affidavit filed in that respect is, therefore, on information and belief and, 132 argues, without the deponent providing the source for such information it is inadmissible for the purpose of the order *nisi,* it being a final order. However, I do note that the affiant does depose that in "making this affidavit I have reviewed Prospera's records kept in the ordinary course of business".

3. ***Failure to perform required reporting (ss. 10.2 and 12.1(a) of the Loan)*** - As to the obligation to provide financial reporting, 132's position is that Syndicate's financial statements have now been provided, and that 132 has conducted no business so has no financial statements to provide. Thus, any such default is technical only, has been cured with respect to Syndicate as their financial records were delivered on June 30, 2023, such that any consequence of the default ought to be waived, and with respect to 132 can be cured through the delivery of "NIL" statements given that no business has ever been conducted by 132, a fact which is not in dispute.

Legal Basis – Triable Issues

[55] Rules 21-7(5)(j)(k), specific to foreclosures, and 22-1(7)(d) specific to chambers matters, permit the court to order that a matter or any issue therein be

referred to the trial list, and to give directions for the conduct of trial and any pre-trial proceedings.

[56] Historically, the Court of Appeal has held that unless it is "manifestly clear" that the mortgagors are without a defence to be tried the application to have the matter referred to the trial list ought to be made as was stated in *HGE Administrative Services Ltd. v. Perrick* (*HGE*), 2011 BCCA 308:

> [17] It is well established that an *order nisi* will not be granted unless it is "manifestly clear" that there is no *bona fide* triable issue. In *Northland Bank v. Kocken* (1993), 1993 CanLII 287 (BC CA), 100 D.L.R. (4th) 753 at 760, 77 B.C.L.R. (2d) 377, this Court found:
>
> > The issue raised by the appellants was whether the proceeding should go to trial in the ordinary way or be determined on affidavit evidence. In *Bank of British Columbia v. Pickering* (1983), 1983 CanLII 178 (BC CA), 62 B.C.L.R. 136 (C.A.), this court set out the question that must be asked in deciding just such an issue. At p. 138 Mr. Justice Taggart said:
> >
> > > On an application such as this the provisions of R. 52(11) govern. ... There has been some suggestion in some of the authorities to which we were referred that there is a distinction to be drawn between what must be found in order to act under R. 18, the summary judgment rule, and that which must be found in order that the court may act under R. 52(11). I think the distinction is somewhat illusory. To me, I think the matter is stated as clearly as it can be stated by Seaton J.A. in the *Skalbania* case, [*Memphis Rogues Ltd. v. Skalbania* (1982), 1982 CanLII 469 (BC CA), 38 B.C.L.R. 193, 29 C.P.C. 105 (C.A.)]. There at p. 202 he said:
> > >
> > > > "The question has been stated in a number of ways: Is there no real substantial question to be tried? Is there no dispute as to facts or law which raises a reasonable doubt? Is it manifestly clear that the appellants are without a defence that deserves to be tried? Although cast in different terms, all point to the same inquiry,

> namely, is there a bona fide triable issue?"
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> [18] In *Royal Bank of Canada v. Rizkalla* (1984), 1984 CanLII 396 (BC SC), 59 B.C.L.R. 324 at 325, 50 C.P.C. 292 (S.C. Chambers), McLachlin J., as she then was, set out the principles that should guide the court in determining whether a petition for foreclosure should be referred to the trial list:
>
> > There is no dispute as to the legal principles which should guide this court in determining whether the petitioner's claim should be referred for trial. Unless it is manifestly clear that the mortgagors are without a defence that deserves to be tried, their application to place the matter on the trial list should be granted.... [Emphasis added.]
>
> [19] In determining whether a triable issue exists, the role of a judge in chambers or a master is not to determine any issue of fact or law. Rather, their function is limited to a determination of whether a *bona fide* triable issue arises on the material before the court in the context of the applicable law: *Re Hughes v. Sharp* (1969), 1969 CanLII 792 (BC CA), 5 D.L.R. (3d) 760 at 763, 68 W.W.R. 706 (B.C.C.A.).

[57] Counsel for 132 relies upon this line of authority, and specifically *HGE* which, it argues, is factually similar to this matter where the issue was whether there had been a default, noting that the threshold to have a matter converted to trial is low, and that it is "not the role of the court on an application for order *nisi* to sort out complex factual issues, nor is it appropriate to apply the law in respect of "assumed" facts when the facts are anything but clear": *First West Credit Union v. Giesbrecht,* 2014 BCSC 736 at para. 96.

[58] Decisions that pre-date *Cepuran v. Carlton*, 2022 BCCA 76 ("*Cepuran*") must be approached with some caution, including *HGE* which applied the test from *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 ("*Saputo*") in considering the issue as the five-panel court held that *Saputo* no longer applies, noting as follows:

> [147] There has been considerable reform in civil litigation since the days when it was thought that the only way to allow litigants their day in court, when there were contested issues, was to have a full trial with all the procedural bells and whistles available in an action.
>
> …

> [150] The Supreme Court of Canada has noted that streamlined procedures for the resolution of civil disputes can increase access to justice and be a more proportionate manner of determining a dispute than a full trial, in some cases: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1, 4, 5, 21, 23–25, 28; *Hudema v. Moore*, 2021 BCCA 482 at paras. 49–50.
>
> [151] The authorities referred to in *Saputo* did not refer to the impact and meaning of R. 16-1(18), which was brought into force in 2010.
>
> …
>
> [158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the *Rules* contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29–30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.
>
> [159] The modern approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.
>
> [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[59] The current approach recognizes that the overarching object of the Rules is the just, speedy, and inexpensive determination of a proceeding on its merits, such that the court ought to strive to resolve matters summarily whenever possible. The summary process is an important tool to that end, and one specifically contemplated for matters such as foreclosures.

[60] In *Capital Now Inc. v. Munro,* 2023 BCSC 197 (*Capital Now*), the court summarized the factors for referring a matter to the trial list post *Cepuran*, in a foreclosure proceeding, as follows:

> [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.

[61] During their arguments each party conflated, to differing degrees, the issue of whether there is a *bona fide* triable issue, that being the threshold question, with how

any such issues ought to be resolved. Specifically, the tenor of the petitioner's argument is that because the factors do not support the matter being converted to a trial, there is no *bona fide* triable issue.

[62] However, the issue of whether there is a *bona fide* triable issue must first be answered before the consideration is made as to the factors which guide what changes, if any, to the standard summary process is to be considered, namely whether the matter should be converted to a trial or a hybrid process employed through the use of pre-trial procedures.

[63] It is only if there is a *bona fide* triable issue that the factors are to be considered, as set out in *Cepuran* and summarized in *Capital Now*, in deciding how the matter ought to be determined, and whether it ought to be by way of a referral to the trial list or through the summary process intended, but with pre-trial discovery being conducted as appropriate.

[64] In addition, I note that by virtue of s. 8(f) of Practice Direction 50, if there is a *bona fide* triable issue an associate judge has no jurisdiction to determine a final order in foreclosure, such as an order *nisi*, although the issue as to the scope of my jurisdiction was not raised by either party.

[65] If the matter had been before a justice, the presider would have jurisdiction to pronounce the order *nisi* on the merits, even if they found a *bona fide* triable issue, if they were still able to do so summarily considering the factors noted.

[66] If, however, there is no *bona fide* triable issue, the order *nisi* may go as sought, with no issue as to jurisdiction.

[67] Many of the decisions as to what is and is not a *bona fide* triable issue pre-date *Cepuran*. Those decisions frame a *bona fide* triable issue as one that cannot be determined by reference to the documents, and would affect the outcome of the proceedings: *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.,* 2009 BCSC 1701, at para. 48.

[68] In the specific context of foreclosures, as noted in *HGE,* the "manifestly clear" test is used, but with the issue having to go to the "root or foundation" of the foreclosure action, in that they "must relate to the validity of the mortgage, the ability of the mortgagee to claim under the mortgage and commence the foreclosure" proceedings in the first instance: *TCC Mortgage Holdings Inc. v. Alysen Place Developments Inc.,* 2011 BCSC 383 at para. 15.

[69] As noted in *Gupta v. 0856716 Ltd*., 2012 BCSC 1407 (*Gupta*), citing *Freshwest Equities Trading Corp. v. Dosanjh,* 2015 BCSC 952 (*Freshwest)* at para. 36, "not every case that raises a triable issue must necessarily be placed on the trial list. The notion of a low threshold is to be tempered with the analysis as to whether there is a *bona fide* issue that needs to be tried."

[70] While the petitioner does not argue that these pre-*Cepuran* decisions are no longer binding, the tenor of the argument was that since the starting point is a summary process and that, as stated in *Cepuran,* "the mere fact that there is a triable issue is no longer a good reason" to depart from that, suggests that the court should strive to resolve factual disputes by reference to the evidence as much as possible, and not simply avoid resolving such disputes altogether, as confirmed in *Gupta* and *Freshwater*.

[71] The onus of demonstrating an absence of a *bona fide* triable issue falls upon the petitioner: *Griffin v. 0904713 B.C. Ltd.,* 2013 BCSC 273, citing *HGE* paras. 23 – 24. However, a bald assertion that there is a defence is not generally sufficient to cause an inquiry to be made further. Rather, as noted in *Freshwest*:

> [37] A person alleging a *bona fide* defence must establish some evidentiary basis for that defence. The corollary to this is that bald assertions will rarely be sufficient to raise such a defence. Further, some assessment of that evidence is necessary in order for the court to determine whether or not a *bona fide* triable issue has been raised and whether or not it is bound to fail. In *Pacifica Mortgage Investment Corporation v. Laus Holdings Ltd.* 2010 BCSC 1904 at para. 17, aff'd 2013 BCCA 95, I stated:
>
> > [17] The cases suggest that some weighing of the evidence is necessary in order for the court to determine whether or not a *bona fide* triable issue has been raised. Depending upon the circumstances, a bold assertion may not be enough:

> see *Southeast Toyota Distributors Inc. v. Branch*, 1997 CanLII 2089 (BC SC), [1997] B.C.J. No. 1426 (S.C.) at paras. 60 to 63. At paras. 69 and 74 of *Branch*, the court found that when faced with issues concerning the interpretation of documents, the court was in a position to review the matter to determine whether there were any disputed facts or legal issues and whether a valid defence had been raised.
>
> [38] There are numerous cases where the court was able to interpret documentation in order to assess whether a *bona fide* triable issue exists: *Gupta v. 0856716 B.C. Ltd.*, 2012 BCSC 1407 at para. 41. Such documentation has included ordinary commercial documentation such as loan documentation and security such as guarantees and mortgages. *Laus* involved a consideration of a mortgage and commitment letter.

[72] Generally, in foreclosure matters, the initial onus upon the petitioner is met by the petitioner usually by deposing in the affidavit in support the basic facts of the granting of the loan, the default (with the relevant loan and security documentation being exhibited) and swearing that they know of no defence. In this case, while the petitioner used standard form materials to commence the foreclosure, it's principal failed to depose that it "knows of no defence".

[73] 132 argues that, by failing to do so, the petitioner has not met the onus upon it to establish that it is "manifestly clear" that there is no *bona fide* triable issue, relying on *HGE*, as follows:

> [23] Additionally, since HGE did not submit it knew of no defence to the *order nisi*, it failed to discharge the burden to have the order granted summarily. In *Progressive Construction Ltd. v. Newton* (1980), 1980 CanLII 493 (BC SC), 117 D.L.R. (3d) 591 at 596, 25 B.C.L.R. 330 (S.C.), Mr. Justice Esson, as he then was, found in the context of an application for summary trial judgment under R. 18 that the applicant has the onus of establishing that no *bona fide* triable issue exists:
>
> > The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether on the relevant facts and applicable law, there is a *bona fide* triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear," which I take to mean much the same as beyond a reasonable doubt. If the Judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

> [24] By failing to plead or depose that no defence to the mortgage existed, and instead relying on an interpretation of the terms of the Legal Services Agreement, HGE failed to make it "manifestly clear" that there was no triable issue between the parties.

[74] I note, however, that these comments in *HGE* are made further to the finding that had already been made that the evidence raised by the mortgagor as to a triable issue was uncontradicted (para. 22).

[75] In other words, where there was no evidence to refute the evidence as to a triable issue, such as that standard statement as is usually included in a petitioner's affidavit in support of its foreclosure, it was not open to the petitioner to rely solely on the documents' interpretation. While it is a prudent course of action to include such a statement, and doing so will satisfy the initial burden upon the petitioner, I do not take the comments in *HGE* to mean that a failure to do so means that that a petitioner cannot answer a mortgagor's assertion as to a defence through evidence, as is available under the Rules, including though a reply affidavit as was done here.

Analysis

Triable Issues

[76] I agree with counsel for the petitioner that the court ought to strive to resolve the issues summarily in foreclosure proceedings, however it must be satisfied that it can do so on the record before it. If a *bona fide* triable issue has been raised, then either a full trial, or a summary process, with or without pre-trial processes being used, before a justice, is needed to determine the matter.

[77] While the law post *Cepuran* remains the same in terms of the jurisdiction of an associate judge, namely that there is no jurisdiction to decide a *bona fide* triable issue of fact or law with the determination as to whether such an issue arises being limited in scope in that there ought not be a detailed consideration of the merits and weighing of evidence, the court must determine if there is a *bona fide* triable issue.

[78] To do so, an associate judge is not only entitled to but ought to do so based on the evidence before it, which includes a review of the documentation in support. To do otherwise, would enable bald assertions of a defence to defeat the summary

process for foreclosures as intended by the Rules, and be contrary to the objectives of an efficient resolution that a summary process provides, as referenced in *Cepuran.* However, any conflict in the evidence requires the type of weighing of evidence which is not permitted.

[79] In the context of this case, while the issue of whether or not there is a default is posed by 132 as a singular issue there are three non-financial defaults being relied upon by the petitioner. Any of those three defaults, under the terms of the Loan, entitles the petitioner to enforce its foreclosure remedy.

[80] In respect of the alleged defaults, there is no dispute as to the following facts:

1. There is no current financial breach by virtue of non-payment of the monthly blended mortgage obligation;
2. The amount stated to be owing under the Loan as secured by the Mortgage, and referenced in the filed statement of accounting, is due and owing;
3. The Loan was granted to fund the purchase of the Property;
4. When 132 was incorporated, it was intended that it would acquire the Property and that a Syndicate office would be operated out of it, albeit with the purchase of the Property "putting the cart before the horse" in respect of those intentions, as stated by Ms. Minhas;
5. This purpose was communicated to the petitioner with the petitioner having been given the agreement between Ms. Minhas and Mr. Qureshi that set out this arrangement;
6. Shortly after the Loan was granted and the Property acquired, the dispute between the shareholders of 132 arose.
7. As a result of the dispute between the shareholders of 132:
    i. 132 not only failed to enter into an arrangement to carry on business in accordance with the stated intention set out in the agreement it

provided to Prospera with its sole purpose thereafter being to own the Property;

ii. An oppression remedy action was threatened, with a draft petition and affidavit being provided to the petitioner; and

iii. The Shareholder Claims action was commenced, with a counterclaim, whereby each of the shareholders claim that the other must buy them out of their shares in 132, despite that the notice of civil claim artfully seeks this remedy without referencing 132 itself.

[81] The primary conflict in evidence is whether or not the petitioner relied on the representation that Syndicate would operate an office on the Property, in making the Loan. Evidence to this effect, and that favourable interest rates were given as a result of those representations, was given by the petitioner in its reply affidavit. That assertion is denied by the 132. However, what the petitioner relied upon would not be known by 132 such that any denial of such a fact is a bare assertion. Further, in my view, what was relied upon in granting the Loan is not relevant to the issue of whether or not 132 was in default.

[82] Rather, the terms of the Loan (and other agreements) set out the contractual basis on which the Loan was made. Applying the undisputed facts to the terms of the Loan and alleged defaults, I note as follows:

1. ***Misrepresentation (ss 9.1(f) and 12.1(c) of the Loan) –*** 132's interpretation of the Loan that, in order to be a misrepresentation, the statement had to be false as of October 2021 is non sensical on its face. A default arises under 12.1(c) if any representation "is untrue in any material respect". The Loan does not include the words that the representation "was untrue at the time made", it says it "is" untrue. The Loan is an executory contract with ongoing obligations of the parties thereunder, as noted by the Events of Default speaking in the present tense. Thus, if a representation made as to the underlying circumstances as enumerated in the Loan becomes untrue, it is an Event of Default.

However, the misrepresentation must be "material". Legal proceedings between two shareholders by which each are claiming to buy out the other, i.e. effect a change of control, is objectively material given that a "change of control" is, on its own, an event of default (paragraph 13.1(p)).

Further, as to the argument that because 132 is not a party to the Shareholder Claim is it not material, that is also not supported in the Loan terms, which do not in any way say that the proceedings must involve 132 as the representations are made by the Guarantors as well as 132. To limit the interpretation of this term as suggested to only a claim in which 132 is a party would effectively mean that a borrower could avoid a default merely by strategically deciding not to pursue an oppression remedy claim in favour of a claim by one shareholder against the other, but seeking the same type of relief, as appears to have been done here. As to the failure to plead misrepresentation, as I previously noted the fact of the legal proceedings as a basis for default was plead sufficiently.

2. ***Failure to observe a covenant (ss 10.1(b) and 12(a) of the Loan) –*** the argument of 132 that it did not know that it was a "condition" of the Loan that Syndicate operate an office disregards the wording of the Loan. Specifically, the covenant was that 132 would carry on and conduct its business in a proper, efficient and businesslike manner. The business it intended to conduct was as landlord. In my view, nothing turns on the argument that 132 was a "holding company" only. Ultimately, by not leasing the premises it is not conducting any business. The terms of the Loan do not require the petitioner to have lent on the condition of any particular business being undertaken, only that 132 would conduct business as intended. It provided an agreement that showed what its intention was. It did not operate business on that basis.

3. ***Failure to perform required reporting (ss. 10.2 and 12.1(a) of the Loan) –*** There is an internal inconsistency between the argument that 132

> is not conducting business such that it ought not be required to prepare financial statements as it covenanted to do, and the previous argument that it is doing business as it covenanted to do so. In any event, I do not accept that the filing of financial statements would be "nil" statements given that, at the very least, there is some debt of some sort that would be disclosable given that 132 has had no ability to make the mortgage payments since the mortgage was granted, but has been doing so. That there is debt being incurred by 132, without any income being received, is a relevant financial fact that the credit union is entitled to know through the financial reporting requirement. That it is relevant was made known in its request for those records by Prospera specifically asking that such financial statements include "an explanation/notes on any Related Party transactions and receivables."

[83] On the face and the wording of the Loan, and the undisputed facts, it is manifestly clear that 132 is in default of the Loan in respect of at least one, if not all three, Loan terms.

[84] I am satisfied that there is no *bona fide* triable issue as to whether or not 132 was in default when the demand was made, entitling the petitioner to accelerate demand and, upon payment not being made, entitling the petitioner to its foreclosure remedies as sought.

Relief from Acceleration

[85] 132 argues that, even if there is a default, that it is not so contemptuous or flagrant that relief ought not be given, relying on s. 25 of the *LEA:*

> **Relief against acceleration provisions**
>
> **25** (1) Despite an agreement to the contrary, if because of a default in payment of any money due under, or in the observance of a covenant contained in
>
> (a)a mortgage of land, or
>
> (b)an agreement for sale of land,

> the payment of money or the doing of anything is or may be required at an earlier time than would be the case if the default had not occurred, then, in a proceeding for the enforcement of rights under the instrument, the court may, before a final disposition of the proceeding, relieve any person from the consequence of the default.
>
> (2) In granting relief under subsection (1), the court may impose any terms as to costs, expenses, damages, compensations and all other matters that it considers appropriate.
>
> (3) This section applies to an instrument referred to in subsection (1) (a) or (b) made before or after the coming into force of this section, and to proceedings commenced before or after the coming into force of this section.

[86] In *Bank of Montreal v. Amar Enterprises Ltd.,* 1994 CanLII 2128 (BCSC), the court considered a similar mortgage which allowed for it to be payable on demand, but only once a default arose. The Court accepted that the defaults had been substantially rectified, or could be, with the exception of the resolution of litigation involving the borrower. The court granted relief on terms that the costs of the petitioner be paid on a special costs basis, and that a required occupancy permit be delivered within 30 days. The issue as to whether or not there was relief from the default arising from the litigation, the court adjourned that portion of the application pending the determination of the action.

[87] Prospera relies on *Island Savings Credit Union v. Durand,* 2002 BCSC 937, at para. 11, and *Athwal v. Scotia Mortgage Corporation* 2013 BCSC 1305, at para. 22, for the proposition that it is not open for the Court to, under the guise of granting relief from acceleration, re-write the agreement between the Prospera and the respondents. As noted at para. 20 of *Athwal:*

> [20] Mr. Athwal's counsel relies on *Emerald Christmas Tree Co. v. Revcon Holdings Ltd.* (1978), 1978 CanLII 255 (BC SC), 7 B.C.L.R. 339 (S.C.) which was approved by our Court of Appeal in *CIBC Mortgage Corp. v. Branch*, 2000 BCCA 154 at para. 14. While that case does support a liberal approach to relief from contractual forfeiture and penalties, it also provides that, in deciding whether to exercise discretion to grant such relief, some of the key factors that have to be considered by the Court are contractual promises (they should be observed and contractual rights respected), and the undesirability of the law appearing to condone flagrant and contemptuous disregard of obligations.

[88] Given that the agreements cannot be re-written, if granted by the court any relief must include such terms as necessary to ensure the parties be returned to their original positions. In other words, in order to grant relief under the *LEA* and relieve a party of the consequences of its default, those defaults must be cured or curable through terms that the court may impose.

[89] Here, I agree with 132 that the defaults are not ones that show a flagrant and contemptuous disregard of the parties' contractual obligations which disqualifies a party from relief, as noted in *CTF Holdings Ltd. v. Flint Motors Ltd.,* 1995 CanLII 2943, at para 13. However, as things currently stand, they have not been cured.

[90] It is not within the court's jurisdiction to simply forgive the defaults or say that compliance is unnecessary. Rather, if relief is to be given, it ought to be on the basis of the defaults being addressed.

[91] In this respect, 132 does not take issue with a requirement to do the financial reporting.

[92] With respect to the other defaults, there is a practical circularity in this case given their nature. In order to be carrying on any business and to meet the representation that there are no legal proceedings, the Shareholder Claim will have to be resolved. That will hopefully occur through the May 2024 trial.

[93] However, any resolution, based on the relief being sought by the parties, will result in one party buying the other out which constitutes a change of ownership which is in itself a new default. Practically, any resolution will mean a re-negotiation of the Loan and the security, including the guarantees, such that the issue as to defaults on this Loan will become moot.

[94] In the circumstance, therefore, 132 is not effectively seeking relief from acceleration on terms that the parties' positions pre-default can be restored, as contemplated by the equitable relief s. 25 provides, but a stay of the effect of the default to enable the parties to resolve their litigation and either sell the Property or the parties to buy out each other and enter into a revised or new Loan with the

petitioner, which is essentially a stay to enable them to redeem. They seek to have what they already have: a redemption period.

[95] In the circumstances, I see no utility to granting relief from acceleration as any terms the court would impose cannot be practically met other than in a way that would effectively require redemption, such that any relief would be moot.

Special Costs

[96] The Loan contains the following covenant as to costs:

> Court Costs – that in any judicial proceedings taken to enforce this Agreement and the convenants of the Borrower hereunder or to enforce or redeem the Securities or to foreclose the interest of the Borrower in any property subject thereto, the Credit Union will be entitled to costs on a special costs basis. Any costs so recovered will be credited against any solicitors' fees and charges paid or incurred by the Credit Union relating to the matters in respect of which the costs were awarded and which may have been charged by the Credit Union to the Account in accordance with clause (g) above.

[97] The GSAs each contain as similar covenant:

> Court Costs – that in any judicial proceedings taken to cancel this Security Agreement or to enforce this Security Agreement and the convenants of the Debtor hereunder the Credit Union shall be entitled to costs on a special costs basis. Any costs recovered shall be credited against any solicitors' fees and charges paid or incurred by the Credit Union relating to the matters in respect of which the costs were awarded and which have been added to the monies secured hereunder pursuant to the foregoing clause.

[98] The petitioner relies upon *Blueshore Financial Credit Union v 1134038 B.C. Ltd.*, 2023 BCSC 2304 where, at para. 10 I set out a list of factors for consideration as to whether or not special costs ought to be awarded in foreclosure matters on the basis of the contractual terms for providing same as follows:

1. The mortgage term or covenant as agreed to by the parties provides for such costs which, but for s. 20 of the *LEA*, they would be awarded:

2. The sophistication of the parties and involvement of legal counsel in the preparation and execution of the lending documents;

3. Whether the matter is a commercial matter where the use of the lender's funds was intended to generate an opportunity to profit or earn income;

4. Whether, although being brought as a foreclosure under R. 21-7, other agreements are being enforced as part of the proceedings such as personal property security, including debenture security, under s. 55(6) of the *Personal Property Security Act,* R.S.B.C. 1996, c. 359; or guarantees and indemnity agreements, each of which may have their own covenant or term, outside of the mortgage, which provides for true indemnity costs;

5. Whether there have been delays in prosecuting the matter, including the need to obtain alternative service orders and requests for any forbearance by the mortgagor, such that the mortgagor has had an extended use of the borrowed funds post default; and

6. The overall complexity of the proceedings including the number of parties, and extent of the security and collateral.

[99] While the various agreements, including the other security documents including GSAs, provide for special costs in this commercial matter, the matter is not overly complex. The number of parties is nominal. While there has been considerable leeway and concessions given by the petitioner in allowing the defaults to be addressed this is not an appropriate matter for special costs given its lack of complexity and that, until accelerated demand was made, payments were ongoing. Raising a defence does not, in and of itself, make the matter complex.

[100] Costs will be at Scale B.

Conclusion

[101] The order *nisi* shall go in the terms proposed by the petitioner and summarized in the statement of accounting and relief sought filed March 12, 2024 with the amount to redeem being $877,449.30 as of March 14, 2024. Judgment is granted against the respondents (excluding all tenants or occupiers) on a joint and several basis in that same amount.

[102] There will be a 6-month redemption period, which is to commence as of March 14, 2024.

[103] While I considered having the redemption period commence as of February 1, 2024 as sought by the petitioner, the adjournment was a reasonable request given the late filed affidavit and, as such, it is appropriate that the redemption period commence as of the hearing's come back date.

[104] As noted, costs will be at Scale B.

"Associate Judge Robertson"

Schedule "A"

Excerpts from Relevant Agreements
[*Defined Terms are as set out therein*]

Form B Mortgage:

Principal Amount:	All obligations defined in Article 1 of Part 2 of this Mortgage [*however, no Part 2, is included*]
Payment Dates:	N/A
First Payment Date	N/A
Last Payment Date	N/A

Filed Standard Mortgage Terms: MT030098

Standard Mortgage Terms:

1.5 "Event of Default" means an event described in Section 13.1

1.14 "Obligations" means, at any particular time (a) all Debts and Liabilities that the Mortgagor has, before the particular time, acknowledge in writing to, or agreed to in writing with, the Credit Union are to be secured by this Mortgage, and (b) all Debts and Liabilities that the Credit Union, in its sole and absolute discretion has, by notice in writing to the Mortgagor before the particular time, elected to add to the Obligations and be secured by this Mortgage.

4.1 "Promise to Pay" Except as specifically agreed to in writing by the Credit Union, the Mortgagor promises to pay the Obligations to the Credit Union on demand.

9.5 Reinstatement. If, in any court proceedings taken by the Credit Union to enforce this Mortgage, the Mortgagor is relieved from the consequences

of any default, the Credit Union will be entitled to special costs with respect to those court proceedings.

13.1 Events of Default. The following are events of default under this Mortgage

a) Default – if the Mortgage fails to observe or perform something hereby required to be done or some covenant or condition hereby required to be observed or performed

…

c) Misrepresentation – If any representation or warranty given by the Mortgagor (or any director or officer thereof if the Mortgagor is a corporation) is untrue in any material respect.

d) Winding Up – if the mortgagor is a corporation and if an order is made or a resolution passed for the winding-up of the Mortgagor, or if a petition is filed for the winding up of the Mortgagor.

…

g) Execution, Etc. – If any execution, sequestration, extent, or other process of any Court becomes enforceable against the Mortgagor or if a distress or analogous process is levied against the property of the Mortgagor or any part thereof.

…

p) Change in Control – if the Mortgagor is a corporation and if, without prior written consent of the Credit Union, there is, in the opinion of the Credit Union, a change of effective control of the Mortgagor.

13.2 Acceleration. Upon the occurrence of an Event of Default, unless the Credit Union waives the Event of Default pursuant to Section 13.3, all Obligations will immediately become due and payable and the security of this Mortgage will become enforceable.

Loan Terms:

1.1 "Event of Default" means an event described in Section 12.1

1.6 Conflict with other documents – if the provisions of this Securities or any of them conflict with, or are inconsistent with, the provisions of this Agreement, the provisions of this Agreement will prevail.

1.13 Entire Agreement – This Agreement, including any schedules thereto, and the Securities constitute the entire agreement between the parties relating to the Term Loan, expressly superseding all prior agreements and communications (both oral and written) between any of the parties hereto with respect to all matters contained herein, and except as stated herein or in the Securities or any other instruments and documents to be executed and delivered pursuant hereto, contain all the representations and warranties of the respective parties.

2.1 Term of Loan - the Credit Union will lend to the Borrower, upon the terms and conditions of this Agreement, the principal sum of $937,500 as a term loan (herein called the "Term Loan")

3.2 Demand – Notwithstanding that the Mortgage or any of the other Securities (if any) is expressed to be payable on demand, the credit union will not demand payment under the Mortgage or other Securities unless and until an Event of Default has occurred under this Agreement, or unless and until an Event of Default has occurred with respect to other indebtedness secured by the Mortgage or the Other Securities secured by the Mortgage or the other Securities.

5.2 Payments [P&I – Fixed Rate] – the Borrower will make the following payments to the Credit Union:

(a) before November 1, 2021 (the "Interest Adjustment Date") the Borrower will pay all accumulated interest monthly on the first day of each month.

(b) on the Interest Adjustment Date, the Borrower will pay all accumulated interest;

(c) starting one month following the Interest Adjustment Date and continuing on the same day of each month after that and until and including November 1, 2026 (the "Last Payment Date" the Borrower will pay to the Credit Union payments each in the amount of $4,365.00; and

(d) one month following the Last Payment Date (the "Balance Due Date" the Borrower will pay to the Credit Union the whole of the outstanding balance of the Term Loan, including principal, Interest, and all Other Amounts.

9.1 Representations and Warranties – the Borrower represents and warrants to the Credit Union that:

(a) Corporate Status – if it is a corporation, the Borrower is duly incorporated and is in good standing under the laws of the Province of British Columbia

(b) Corporate Power and Capacity – the Borrower has the power and authority to carry on the business now being carried on by it and has the full power and authority to enter into this Agreement and to execute and deliver the Securities.

…

(f) No Actions or Proceedings – there are no actions or proceedings pending or, to the knowledge of the Borrower, threatened which challenge the validity of this Agreement, the validity of any of the Securities, or which might result in a material adverse change in the financial condition of the Borrower or any covenantor, indemnitor, or guarantor to which would materially adversely affect the ability of the Borrower or any covenantor, indemnitor, or guarantor to perform its/their obligations under this Agreement, the Securities or any other documents in connection herewith.

10.1 Covenants – The Borrower covenants with the Credit Union:

…

(b) Conduct Business – that it will carry on and conduct its business in a proper, efficient and businesslike manner and in accordance with good business practices

…

(g) Costs Caused By Default – that if the Borrower defaults in any covenant to be performed by it hereunder or under the Securities the Credit Union may perform a covenant of the Borrower capable of being performed by the Credit Union and if the Credit Union is put to any costs, charges, expenses or outlays to perform any such covenant, the Borrower will indemnify the Credit Union for such costs, charges, expenses or outlays incurred by the Credit Union (including solicitors' fees and charges incurred by the Credit Union) may be charged by the Credit Union to the Account and will be secured by the Securities.

(h) Court Costs – that in any judicial proceedings taken to enforce this Agreement and the convenants of the Borrower hereunder or to enforce or redeem the Securities or to foreclose the interest of the Borrower in any property subject thereto, the Credit Union will be entitled to costs on a special costs basis. Any costs so recovered will be credited against any solicitors' fees and charges paid or incurred by the Credit Union relating to the matters in respect of which the costs were awarded and which may have been charged by the Credit Union to the Account in accordance with clause (g) above.

10.2 Financial and Other information – the Borrower will supply to the Credit Union:

(a) annual financial statements of the Borrower and Corporate Guarantor, audited if so requested by the Credit Union, within 120 days of the fiscal year end of the Borrower;

(b) such other financial or other information as the Credit Union may require from time to time.

11.1 Covenants – the Borrower covenants with the Credit Union that the Borrower will not, without the consent in writing of the Credit Union first had and obtained:

…

(j) Alter Share Structure – if it is a corporation, in any way vary or alter its share structure.

…

12.1 Events of Default – the whole of the outstanding balance of the Term Loan (including principal, Interest and all Other Amounts) will immediately become due and payable the Securities will become enforceable in each and every of the following events:

(a) Default – if the Borrower fails to observe or perform something hereby required to be done or some covenant or condition hereby required to be observed or performed.

(b) Permits to be Done – if the Borrower does, or permits to be done, anything with the Borrower has herein agreed not to do or permit to be done;

(c) Misrepresentation – if any representation or warranty given by the Borrower (or any director or officer thereof if the Borrower is a corporation) is untrue in any material respect;

(d) Winding Up – If the Borrower is a corporation and if an order is made or a resolution passed for the winding up of the Borrower, or if a petition is filed for the winding-up of the Borrower.