Court of King's Bench of Alberta

Citation: Vision Credit Union Ltd v Stayura Well Services Ltd, 2024 ABKB 576

Date: 20240930
Docket: 2103 11648
Registry: Edmonton

Between:

Vision Credit Union Ltd.

Appellant

- and -

Stayura Well Services Ltd.

Respondent

Reasons for Decision
of the
Honourable Justice John T. Henderson

I. Overview

[1] This is an appeal from a decision of Application Judge Schlosser reported as ***Stayura Well Services Ltd v Vision Credit Union Ltd***, 2023 ABKB 716. The Applications Judge directed that Vision Credit Union Ltd, (the "Lender") discharge a mortgage held as security for a loan to Stayura Well Services Ltd. (the "Borrower") in accordance with the provisions of s 74(2) of the *Law of Property Act*, RSA 2000, c L-7. In reaching his decision, the Application Judge rejected an interpretation of the mortgage documents that would have permitted the Lender to maintain registration of the mortgage past maturity, despite full payment of the indebtedness plus interest so the Lender could use the mortgage as security for defence costs in an action by the Borrower alleging wrongdoing on the part of the Lender.

[2] For the reasons that follow, I dismiss the appeal.

II. The Facts

[3] The facts are not in dispute and can be simply stated.

[4] On May 5, 2016 the parties entered into an agreement in writing (the "Loan Agreement") pursuant to which the Lender agreed to advance to the Borrower $800,000 on repayment terms that included monthly payments commencing August 1, 2016 with the final loan balance due on June 1, 2021. The Loan Agreement was secured by an "All Purpose Mortgage" dated May 10, 2016 which incorporated by reference the "Standard Mortgage Terms". The "All Purpose Mortgage" and the "Standard Mortgage Terms" (collectively the "Mortgage") were registered against the lands of the Borrower.

[5] The parties also entered into a second agreement in writing (the "Overdraft Protection Agreement") pursuant to which the Lender authorized the Borrower to overdraw its chequing account up to $100,000, provided that several conditions were met, including a condition that the Borrower maintain a debt service ratio of a minimum of 1.25:1. The Overdraft Protection Agreement was also secured by the Mortgage.

[6] The "Standard Mortgage Terms" include the following:

> **3. Obligations Secured**
>
> The debts and liabilities secured by the Mortgage are all debts and liabilities, present or future, absolute or contingent, matured or not, at any time owing by you to us or remaining unpaid by you to us, either arising from dealings between you and us or from any ***other dealings or proceedings*** by which we may be or become in any manner whatever your creditor ….
>
> **……**
>
> **16. Enforcing our Rights**
>
> If you do not repay the Obligations Secured after we have demanded payment of them or if you have not corrected any other default under this Mortgage or Agreements we can take immediate possession of your property. Upon giving you notice as required by law, we may sell the property or lease it or pursue any other remedy available to us under Alberta law. You will immediately pay all our expenses of **enforcing or protecting** our security or any of our rights under the Mortgage or any Agreements. Our expenses include our costs of taking or keeping possession of the property, an allowance for the time and services of our employees utilized in so doing, **our legal fees on a solicitor and own client indemnity basis** and all other costs related to protecting or enforcing our interest under the Mortgage**. These expenses will form part of the Obligations Secured** and will bear interest as provided for in the Agreements…
>
> (emphasis added)

[7] In or around 2019 a dispute arose between the parties as to whether the Borrower was compliant with the debt service ratio requirements of the Overdraft Protection Agreement. When

this dispute could not be resolved, the Lender unilaterally terminated the Overdraft Protection Agreement on or about July 20, 2020.

[8] On September 16, 2020, the Borrower commenced an action against the Lender as action number 2003 14483 (the "AOD Action") claiming damages arising from the alleged wrongful termination by the Lender of the Overdraft Protection Agreement. In the AOD Action, the Borrower alleged that the Lender's actions were "arbitrary and capricious", without reasonable notice, were taken in "bad faith and dishonestly" and in breach of the Lender's statutory duties under the *Personal Property Security Act*.

[9] While the AOD Action was outstanding, and prior to the June 1, 2021 maturation date of the Loan Agreement, the Borrower sought a payout figure from the Lender so that it could satisfy the requirement that the full amount of the loan be repaid on June 1, 2021. Counsel for the Lender responded to this request by letter dated April 15, 2021 (exhibit "E" to the affidavit of Colin Stayura sworn July 14, 2021) in which it was explained that the Lender would accept full repayment of the principal and interest owing under the Loan Agreement. However, it was made clear that the Mortgage would not be discharged until after the AOD Action was discontinued, a release was provided to the Lender and the Lender's solicitor and client costs were paid in relation to the defence of the AOD Action. The relevant portions of the April 15, 2021 letter provide:

> … we confirm your request for payout information in respect of the Mortgage granted to [the Lender] by [the Borrower] as security for the loan and overdraft facility in May of 2016.
>
> While the mortgage is not at issue in the action [the AOD Action] … we must advise that it is relevant to the extend that it will not be discharged by [the Lender] unless and until the [AOD Action] has been discontinued, and an appropriate release executed in favour of [the Lender] by your clients …
>
> ……
>
> While we acknowledge your request for payout information in respect of the mortgages that remain registered against the lands owned by [the Borrower] … we must advise that, while it is available to your client to pay any amount it may decide (outside regular payments) against the balance of the mortgage facility, [the Lender] will not provide a discharge while the [AOD] Action is pending. …
>
> [The Lender] maintains that any costs that it incurs in defending the [AOD] Action are secured by the mortgage … on a full indemnity basis. While the [AOD] Action, and the possibility of the claims put forward in the [AOD] Action, subsist, your client's mortgage will not be discharged.
>
> (emphasis added)

[10] The Borrower tendered the full amount of the principal and interest under the Loan Agreement on 3 separate occasions in the summer of 2021, but the tender was rejected by the Lender each time because the Lender would not accept the Borrower's condition that the Mortgage be discharged.

[11] On December 3, 2021, the Borrower tendered the full amount of the principal and interest outstanding under the Loan Agreement but did not impose a condition in relation to the discharge of the Mortgage.

[12] It is common ground that there is no principal or interest outstanding that is secured by the Mortgage, either pursuant to the Loan Agreement or pursuant to the Overdraft Protection Agreement.

[13] The Borrower filed an Originating Application under s 74(2) of the *Law of Property Act* seeking a determination of the amount payable under the mortgage and for an order directing the Registrar of the Land Titles Office to discharge the Mortgage on the payment of the amount owing on the Mortgage into a bank. The application was heard on November 30, 2023.

[14] Applications Judge W.S. Schlosser, *inter alia,* directed a discharge of the Mortgage.

[15] The Lender appeals from this decision.

III. Standard of Review

[16] An appeal from a decision of an Applications Judge is an appeal on the record of proceedings before the Applications Judge as described in Rule 6.14(3). Although not relevant in this case, additional evidence may also be considered where the appeal judge is of the opinion that the new evidence is relevant and material to the appeal.

[17] The standard of review is correctness. No deference is owed to the decision of the Applications Judge: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166.

[18] There has been some discussion in the authorities regarding nomenclature in relation to an appeal from an Applications Judge, specifically with respect to whether the term "*de novo*" is an appropriate characterization of the appeal. However, as Justice Cote explained in ***Bahcheli*** at para 3 when discussing the standard of review:

> It is sometimes called non-deferential, and sometimes called an appeal *de novo*. But more commonly the term used is "correctness", and that has become the almost universal term since recent decisions of the Supreme Court of Canada starting with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. I do not intend to distinguish among the three terms. For convenience and familiarity, I will use throughout the term "correctness".

[19] Therefore, the standard of review on all issues on an appeal from an Applications Judge is correctness: ***Bahcheli*** at para 30. This does not mean that the decision of the Applications Judge can be ignored. Instead, it is necessary to consider the reasons of the Applications Judge in the application of the correctness standard.

IV. Grounds of Appeal

[20] The Lender raises 4 grounds of appeal:

a) Reliance upon *Hierath v Shock*.

[21] The Applications Judge cited the decision of Master Robertson in ***Hierath v Shock***, 2020 ABQB 35. The Lender correctly points out that an appeal from this decision was successful: ***Hierath v Shock***, 2021 ABQB 185.

[22] The Applications Judge cited ***Hierath*** only for the purpose of referring to the principles of contractual interpretation described by the Supreme Court in ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 (***Sattva Capital***). The paragraph quoted by the Applications Judge from Master Robertson's decision contains no error, even though the decision was subsequently overturned on appeal.

[23] Other than the description of the principles of contractual interpretation, the Applications Judge did not rely on ***Hierath*****.**

[24] This ground of appeal cannot succeed.

b) Failure to properly consider, interpret and apply the express terms of the Mortgage.

[25] There is no dispute between the parties regarding the principles of contractual interpretation.

[26] The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction: ***Sattva Capital*** at para 47. The goal of the interpretive process is to determine the objective intention of the parties. In undertaking this analysis, the "actual words chosen are central to the analysis because this is how the parties chose to capture and convey their contractual objectives": ***Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc*****,** 2024 SCC 20 at para 63. Thus, the contract must be read in its entirety in accordance with the words used by the parties giving them their ordinary and grammatical meaning consistent with the surrounding circumstances known the parties at the time the contract was entered into. The relevant surrounding circumstances include the genesis of the contract, its purpose, the nature of the relationship created by the contract, and the nature or custom of the market or industry in which the contract was made: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 83.

[27] While surrounding circumstances may be relied upon in the interpretive process, "courts cannot use them to deviate from the text such that the court effectively creates a new agreement": ***Sattva Capital*** para 57. Nor can the consideration of the surrounding circumstances be used to overwhelm the analysis, effectively introducing a deviation from the text of the contract in a way that was not intended by the parties at the time the agreements were entered into: ***Paramount Resources Ltd v Chubb Insurance Company of Canada, 2024 ABCA 266*** at para 34.

[28] However, the Alberta Court of Appeal has cautioned that courts ought not to sanction contractual interpretations disconnected from economic reality. "[C]ommercial contracts should be interpreted in accordance with sound commercial principles and good business sense… In the absence of evidence of a bad bargain courts should not interpret a contract in a way that yields an unrealistic or absurd result": *IFP* at para 88, citing John D McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at 763-766; ***Trico Developments Corp v El Condor Developments Ltd***, 2020 ABCA 132 at para 29. In ***Trico Developments*** at para 31 the Court cited with approval the following statement made by Lord Reid in ***Wickman Tools v Schuler AG***, [1974] AC 235 at 251:

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

[29] The primary issue on this appeal involves the application of the principles of contractual interpretation described in ***Sattva Capital.***

[30] The Lender argues forcefully that the express words of the Mortgage specifically capture the expenses that the Lender has incurred, and will continue to incur, as it defends the AOD Action. In this regard the Lender specifically refers to clause 3 of the Standard Mortgage Terms:

> **3. Obligations Secured**
>
> The debts and liabilities secured by the Mortgage are all debts and liabilities, present or future, absolute or contingent, matured or not, at any time owing by you to us or remaining unpaid by you to us, either arising from dealings between you and us or from any ***other dealings or proceedings*** by which we may be or become in any manner whatever your creditor ….
>
> (emphasis added)

[31] The Lender submits that the AOD Action is a "dealing or proceeding" by which the Lender may become a creditor of the Borrower because, at the conclusion of the AOD Action, an award of costs, on a solicitor and own client indemnity basis in accordance with the terms of clause 16 of the Standard Mortgage Terms, or on some other basis at the discretion of the Court, may be made against the Borrower in favour of the Lender. The Lender submits that even though this potential award of costs is "future" or "contingent", it is nevertheless part of the "Obligations Secured" by the Mortgage.

[32] When viewed in isolation, the express words of clauses 3 and 16 of the Standard Mortgage Terms support the interpretation proposed by the Lender. The AOD Action is a "proceeding" between the parties and "solicitor and own client indemnity costs" form part of the "Obligations Secured". However, the analysis does not end simply by viewing the words in the Standard Mortgage Terms in isolation. Instead, it is necessary to consider the contract as a whole and the reasonable expectations of the parties at the outset of the transaction.

[33] An assessment of the context of the relationship between the parties at the time the contract was made is critical. This was a commercial lending transaction in which the Lender was to advance substantial funds to the Borrower for commercial purposes. Like all other commercial lending transactions, it was reasonably expected that the funds would only be advanced on strict terms to insure, to the greatest extent possible, that the Lender would be fully protected, and the principal, interest, fees and appropriate expenses would be repaid and that all these amounts would be secured by mortgages and personal guarantees. Commercial lending terms may seem to be highly favourable to the Lender, but those were the terms on which the Lender was prepared to advance the funds and those were the terms on which the Borrower was prepared to accept the funds.

[34] It is also important to recognize that the terms of the Mortgage were not subject to negotiation between the parties. Instead, the Standard Mortgage Terms were mandated by the Lender, as is typical in many commercial lending transactions.

[35] The definition of "Obligations Secured" in the Standard Mortgage Terms makes it clear (and on an objective basis both parties contemplated) that the scope of the security went well beyond the recovery of the principal and interest advanced pursuant to the Loan Agreement and the Overdraft Protection Agreement and included any "debts and liabilities … at any time owing". As a result, for example, had the Lender and the Borrower entered into a further

agreement to advance funds for some other purpose, the terms of the Mortgage are sufficiently broad that it would secure the further advances of funds. ***Toronto Dominion Bank v Del Grande***, 1997 *Canlii* 1926 (ONCA) provides an illustration of the interpretation of a similar clause in a general security agreement. The Ontario Court of Appeal concluded that the wide terms of the security agreement clearly extended its operation beyond repayment of the specific loan taken at the time of the agreement to include "all obligations, indebtedness and liabilities, direct and indirect". The result was that the security covered not just the primary loan that had been repaid but also additional outstanding loans that were made after the original loan.

[36] Other types of obligations, although fitting within the four corners of the language of clause 3 of the Standard Mortgage Terms when viewed in isolation, would not meet the objective test and would not be secured by the Mortgage. For example, assuming that after entering into the precise lending agreements that exist in this case, the borrower was in the lender's premises on unrelated business when he slipped and fell causing an injury. An action flowing from the slip and fall would be a "proceeding" by which the lender "may be or become … [a] creditor" of the borrower if the personal injury action was unsuccessful and the Court awarded costs to the lender. In argument before me, the Lender conceded that despite fitting within the four corners of the words of clause 3 of the Standard Mortgage Terms, the Mortgage would not secure the award of costs in these circumstances. This is because on an objective basis, the parties at the time of entering the original commercial transaction would not have reasonably believed that the mortgage would cover those types of events. The slip and fall had no connection with the lending transaction.

[37] These two examples illustrate that there exists a spectrum of circumstances that may give rise to ongoing relationships between the Lender and the Borrower, not all of which are secured by the Mortgage, despite the wording in clause 3. The two examples provided are at outer ends of the spectrum for which the application of the objective test yields results that seem obvious from the perspective of a reasonable person taking into consideration sound commercial principles and good business sense. The circumstances of the present case are not as clear.

[38] The Lender cites the decision of ***3072453 Nova Scotia Co v 1623242 Ontario Inc***, 2015 ONSC 2105 ("***307 v 162***") as an illustration of a case where the Court concluded that defence costs in a related action were secured by a mortgage. In that case, 1623242 Ontario Inc. ("162") acquired lands from Wolverine Tube Canada Inc. ("Wolverine"). 162 paid $337,500 cash and granted a mortgage in the amount of $1.012 million to Wolverine. Wolverine then assigned the mortgage to 3072452 Nova Scotia Co. ("307"), a corporation related to Wolverine. It turned out that the lands were contaminated with PCBs. Five years after the sale, the Ministry of the Environment ordered the parties including 162, 307 and GLC, (also a corporation related to Wolverine) to undertake remediation measures. 162 refused to do the work but GLC complied with the remediation order. On completing the work, GLC filed a lien against the lands for the work it had undertaken and took steps to enforce the lien. 162 then sued Wolverine, GLC and 307 for fraud, alleging that the defendants conspired to sell the lands to 162 without disclosing the contamination. In the meantime, 162 had stopped making mortgage payments and 307 commenced foreclosure proceedings. The actions were consolidated.

[39] On an application to determine the amount that was required to secure the discharge of the mortgage, the Court concluded that the legal fees in the defence of the fraud action should be included in the amount secured. In arriving at this decision, the Court explained at para 117:

> It is implicit in Karakatsanis J.'s reasons that the court should give a broad interpretation to the words in clause 8 of the charge terms: "proceedings taken in connection with or to realize upon the security given in the charge." In *1427814 Ontario Ltd v. 3697584 Canada Inc.*, Karakatsanis J. concluded that such costs reasonably include the mortgagee's costs of defending an action by the mortgagor for damages for negligence in an improvident sale. In the present case, I find that they reasonably include the mortgagee's costs of defending 162's Fraud Action ***in which the validity of the Mortgage is called into question***.
>
> (emphasis added)

[40] ***307 v 162*** does not stand for the proposition that legal fees in a related action are always secured by a mortgage even where the mortgage has broad language similar to that in the Standard Mortgage Terms in the present case. Instead, it remains necessary to consider whether, on an objective basis, the parties, as reasonable businesspeople, would have believed at the time of the original transaction that the legal expenses would be included within the scope of the Mortgage terms. In ***307 v 162***, the Court concluded that the costs of defending the fraud action were secured by the mortgage because that action specifically called into question the validity of the mortgage, thus challenging the ability of 162 to recover the amount of the principal and interest outstanding. Thus, the fraud action was directly connected to the mortgage, and it was objectively reasonable that the legal fees to defend the fraud action be included. The present case is distinguishable because the validity of the Mortgage is not being attacked and there is no principal or interest outstanding to the Lender.

[41] In ***1427814 Ontario Ltd v. 3697584 Canada Inc***., 2004 OJ 607 (the case referred to in ***307 v 162***) the court was asked to determine whether a mortgagee, after selling a property under power of sale, could withhold payment of the surplus funds to the mortgagor and instead hold the funds as security for the costs it would incur in further litigation with the mortgagor. Karakatsanis J., as she then was, held that the mortgagee was not entitled to hold the funds as security for future costs. This decision does not assist either of the parties in the present case because the decision is based on the provisions of s 27 of the *Mortgages Act* (Ontario) which has no application here.

[42] There is very little authority in Canada to assist in determining whether the past and future legal expense of the Lender in defence of the AOD Action should be caught by the terms of the Mortgage.

[43] This case is distinguishable from the slip and fall example referred to earlier in these reasons. The slip and fall example had no connection with the lending arrangement. In the present case the AOD Action has some connection to the lending arrangement because the action alleges an improper termination of the Overdraft Protection Agreement. But this connection is, at best, tangential. Importantly, the AOD Action does not challenge the validity of the mortgage as in ***307 v 162***. Nor does the AOD Action challenge the right of the Lender to recover the full amount of the principal and interest outstanding in accordance with the lending arrangement. For all practical purposes the AOD Action is distinct from the lending transaction because the focus is on the alleged misconduct of the Lender.

[44] The lack of connection between the Mortgage and the AOD Action was expressly acknowledged by counsel for the Lender in its letter dated April 15, 2021 when he said:

> While the mortgage is not at issue in the action [the AOD Action] … we must advise that it is relevant to the extend that it will not be discharged by [the Lender] unless and until the [AOD Action] has been discontinued, and an appropriate release executed in favour of [the Lender] by your clients …
>
> (emphasis added)

[45] I conclude that, when viewed objectively and in accordance with sound commercial principles and good business sense, the parties at the outset of the transaction would not have considered the language of clause 3 of the Standard Mortgage Terms to include legal fees for the defence of the AOD Action. The AOD Action is founded on the alleged misconduct of the Lender and does not challenge the validity of the Mortgage or attempt to undermine the recovery of the loan principal and interest. For that reason, I conclude that the Mortgage cannot be interpreted as including security for the legal fees in defence of the AOD Action. The Lender's fees in defence of this action are too remote.

[46] Moreover, reasonable businesspeople at the outset of this transaction would have recognized the commercial reality that the presence of the Mortgage on title to the Borrower's lands would effectively prevent the sale or refinancing of the lands secured. Such a restriction is an objectively reasonable outcome in circumstances where principal and interest remain payable. That is the primary purpose of the Mortgage security – to ensure that the lands are available to satisfy the obligation in the event of a default. Such an outcome would also be reasonable where other obligations directly related to the lending arrangement remain outstanding.

[47] Where there is no principal, interest, or other obligations directly related to the lending arrangement outstanding, the reasonableness of serious restrictions on the sale or refinancing of the lands is much different. This is particularly so in circumstances such as these where the restrictions are only in place because of an action alleging misconduct on the part of the Lender. Viewed objectively, reasonable businesspeople would not have expected that the provisions of the Mortgage would permit this outcome.

[48] At the outset of this transaction, reasonable businesspeople would have contemplated the possibility of future litigation of some sort between the parties. But it does not follow that for every piece of litigation the defence costs are necessarily included within the Obligations Secured. This is because reasonably informed observers would recognize that the *Rules of Court* provide mechanisms for Summary Judgment, Security for Costs and Streamlined Trial processes to minimize the expenses associated with the litigation and to reduce the risk that any costs awards will not be paid.

[49] In the present case the Lender characterizes the AOD Action as "frivolous" and argues that it is entitled to recovery of its defence costs because it is "protecting its security" and its right to terminate the Overdraft Agreement. I am unable to assess the merits of the AOD Action on this appeal. However, if the action is truly "frivolous" then the *Rules of Court* have mechanisms in place to address those concerns. The Lender filed an application for Summary Dismissal on April 22, 2022, yet has failed to bring forward the application for hearing.

[50] However, if the Borrower is ultimately successful in the AOD Action then there is a reasonably high likelihood that taxable costs will be awarded to the Borrower. Yet despite being successful, the lands would have still been subject to the Mortgage for the duration of the

litigation. Reasonable people would not have expected that the Standard Mortgage Terms could be interpreted in a way to permit this outcome.

[51] Moreover, if the Lender's interpretation were to be accepted, that would lead to an unreasonable result because, despite there being no principal or interest outstanding, the presence of the mortgage would significantly impede the ability of any borrower to sell or refinance the lands secured, thus negatively impacting its ability to raise capital and in this way impacting its ongoing business operations. This a factor that would present a serious obstacle to any action seeking damages based on a lender's alleged misconduct. In some cases this would effectively foreclose the possibility of a borrower pursuing the action. For all practical purposes, the lender would be using the continuation of the mortgage security to shield it from its own alleged misconduct. What took place leading to the June 1, 2021 maturation date clearly illustrates the point. The Lender was only prepared to discharge the mortgage on the payment of costs, the discontinuance of the AOD Action and a release signed by the Borrower. That is unreasonable and would not be objectively contemplated by reasonable businesspeople at the outset of the transaction. As was explained by Lord Reid in ***Wickman Tools v Schuler*:**

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties intended it, and <u>if they do intend it the more necessary it is that they shall make that intention abundantly clear</u>.
>
> (emphasis added)

[52] For all these reasons, I conclude that the Mortgage Standard Terms cannot be interpreted in a way to permit the Lenders defence costs in relation to the AOD Action to be included in the Obligations Secured.

[53] This ground of appeal cannot succeed.

c) Failure to engage in a proper analysis of s 74(2) of the *Law of Property Act*.

[54] The Lender argues that the Applications Judge failed to undertake any analysis of s 74(2) of the *Law of Property Act* to explain why he exercised his discretion to direct a discharge of the Mortgage.

[55] The foundation of the Lender's submission is that s 74(2) is only engaged if the mortgagor "becomes entitled" to pay off the mortgage. The Lender argued before the Applications Judge and before me that the entitlement did not exist because there was an existing and future obligation of the Borrower to pay defence costs. However, for the reasons I have just given, the legal fees in defence of the AOD Action are not secured by the mortgage.

[56] In this case the term of the Lending Agreement was to expire on June 1, 2021. The Borrower sought a payout statement to permit it to honour its obligations and pay the full amount of the principal and interest on that day. The Lender refused to provide a payout statement, but the Borrower tendered the full amount of the principal and interest, which was rejected by the Lender.

[57] In these circumstances I conclude that the Borrower was "entitled" to pay off the mortgage and was entitled to apply to the court for relief under s 74(2).

[58] Moreover, the relative equities favour a discharge of the Mortgage. It is true that the Lender will incur legal defence costs in relation to the AOD Action and may be awarded costs at the conclusion of the litigation if it is successful in its defence. Like all litigants, the Lender may find itself in a position at the end of the litigation that may make it difficult to recover those costs. However, in this case the Lender is not without options to mitigate that risk. An application for summary dismissal has been filed but the Lender has not proceeded with the application. Obviously, if the litigation is summarily dismissed the ongoing costs will be significantly reduced. Furthermore, the *Rules of Court* provide a mechanism to seek security for costs and that avenue is available to the Lender. Finally, the Lender currently holds more than $78,000 in the form of the Borrower's Member Share Account. Thus, the Lender already holds security for the costs that it may be awarded at the conclusion of the AOD Action.

[59] From the perspective of the Borrower, the full amount of the principal and interest have been fully paid. Yet the mortgage remains on title thus preventing any sale or refinancing of the property. This is an impediment that would impact most businesses.

[60] I conclude that the equities favour a discharge of the mortgage.

[61] This ground of appeal must fail.

d) Finding that the Mortgage violated the principles of good faith and honest performance.

[62] The Lender argues that the Applications Judge erred when he said at para 17: "[The Lender's] position also violates the *Bhasin* principle of good faith and honest performance …"

[63] This sentence in the reasons follows the Application Judge's conclusion that the interpretation of the Mortgage terms did not support the meaning suggested by the Lender. This was an alternate reason for his decision.

[64] In light of my conclusion on the other grounds of appeal, it is unnecessary for me to address this ground.

V. Conclusion

[65] The appeal is dismissed.

[66] If the parties are not able to reach an agreement on costs, they may contact my assistant within 30 days to arrange to speak to the issue.

Heard on the 27th day of August, 2024.
Dated at the City of Edmonton, Alberta this 30th day of September, 2024.

John T. Henderson
J.C.K.B.A.

Appearances:

Matthew T Feehan
for the Appellant

Jeremy H Hockin, K.C.
for the Respondent