
CANADA / JUDGMENT

Century Services Corp. v. LeRoy

2017 BCSC 1880

COURT

Supreme Court of British Columbia

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2017 BCSC 1880 Century Services Corp. v. LeRoy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Century Services Corp. v. LeRoy,

2017 BCSC 1880

Date: 20171024

Docket: S12043

Registry: Duncan

Between:

Century Services Corp.

Plaintiff

And

Cynthia Rebecca Delores LeRoy

Defendant

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:

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Morgan L. Burris

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Andrew G. LaCroix

Steven F. Leichter

Place and Dates of Trial:

Duncan, B.C.

November 21-25, 28-30;

December 1-2, 2016

Vancouver, B.C.

February 10, 2017

Place and Date of Judgment:

Duncan, B.C.

October 24, 2017

Introduction

- [1] This foreclosure proceeding was commenced by petition in November 2008 and subsequently referred to the trial list by Goepel J. (as he then was), with reasons for judgment indexed as *Century Services Inc. v. LeRoy*, 2010 BCSC 328. The initial plaintiff was Century Services Inc. During the trial, I granted an order substituting Century Services Corp. as plaintiff as a result of the acquisition by Century Services Corp. of all the assets of Century Services Inc., including this claim. The entity involved in the matters that gave rise to this dispute was Century Services Inc. and a reference in this judgment to "Century" is a reference to that corporation.
- [2] The plaintiff seeks to foreclose on a mortgage granted in March 2008 by the defendant, Cynthia Rebecca Delores LeRoy, against her home on Maple Bay Road in Duncan. Ms. LeRoy provided the mortgage, together with a limited recourse guarantee, as security for the indebtedness of Ted LeRoy Trucking Ltd. ("TLT") to Century. The principal of TLT was Ms. LeRoy's husband, Ted LeRoy.
- [3] TLT's indebtedness to Century arose under a loan agreement (the "TLT Loan Agreement"), pursuant to which Century advanced the principal amount of \$14,250,000. Ms. LeRoy's liability was limited to \$2 million plus interest from the date of demand at rates as specified in the TLT Loan Agreement, and costs and expenses payable under the guarantee and mortgage. Century's recourse under the guarantee was limited to realizing on the Maple Bay home.

- [4] TLT defaulted on its obligations to Century. Century issued a demand for payment to TLT, appointed a receiver to realize on the collateral, and issued a demand to Ms. LeRoy under the guarantee. Century eventually received significant funds from the realization of TLT's assets but, even after accounting for those funds, TLT remains indebted to Century for more than \$2 million.
- [5] The plaintiff seeks the standard relief to enforce the mortgage including declarations that Ms. LeRoy has defaulted and setting the amount owing; orders setting a one-day redemption period and providing that, if not redeemed, the home be sold, subject to court approval, with the plaintiff having conduct of sale.
- [6] Ms. LeRoy advances two fraud-based defences, each of which she says nullifies the guarantee or, in other words, discharges her from any obligation to Century and renders the mortgage unenforceable. First, she says she was induced to enter into the guarantee as a result of Century's fraudulent misrepresentation that it intended to administer the loan in accordance with the terms of the TLT Loan Agreement. Second, she says that Century performed its obligations under the TLT Loan Agreement in a fraudulent manner so as to entitle her to be discharged of her obligations under the guarantee. Underlying both of these defences is Century's conduct in posting interest and expense charges to TLT's loan account that Ms. LeRoy says were not authorized by the TLT Loan Agreement. She says that this was not inadvertent and did not result from an honest but mistaken interpretation of the TLT Loan Agreement. Rather, she says Century was indifferent to the terms of the TLT Loan Agreement, ignored its provisions, and posted the unauthorized charges in accordance with its standard practices.
- [7] In the alternative to the fraud-based defences, Ms. LeRoy claims that Century negligently realized on some of TLT's assets, for which she pleads the principles of set-off and equitable set-off.
- [8] Ms. LeRoy seeks the dismissal of the claim or, in the alternative, a declaration that her liability is reduced as a result of Century's improvident realization.
- [9] It is not disputed that even if every possible disputed charge was backed out of TLT's loan account and the balance recalculated, there would still be more than \$2 million owing. (Century's unchallenged expert evidence established that if every charge except direct cash advances and certain undisputed fees was backed out there would have been more than \$4,880,687 owing as of November 9, 2015, the date of the expert report, much of which is accrued interest.) Accordingly, to avoid liability Ms. LeRoy must prove that the guarantee is void and/or that the balance owing by TLT would have been satisfied but for the improvident realization of TLT's assets by Century. Century says she has failed to prove either.

Background

- [10] There are very few material facts in dispute. A consolidated statement of admitted facts was entered into evidence by agreement. The following summary draws heavily from that statement and is supplemented by other uncontroversial evidence.
- [11] TLT was, for many years, one of British Columbia's largest private logging contractors. Its primary business was located on Vancouver Island, where it provided logging services to three main customers: TimberWest Forest Products Ltd. ("TimberWest"); Western Forest Products Inc. ("WFP"); and Island Timberlands GP Ltd. Most of its work was performed pursuant to what are referred to as "Bill 13 Contracts", which are replaceable logging contracts made pursuant to the Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96.
- [12] Mr. LeRoy was the sole director and shareholder of TLT. Ms. LeRoy was employed by TLT for many years. She had responsibility for accounts receivable and payable, managing the secretarial staff, and running a catering business that supplied food to TLT's camps. However, she did not make significant business decisions.
- [13] TLT had a long-standing banking relationship with Royal Bank of Canada ("RBC"). However, in September 2007, RBC assigned TLT's account to RBC's Special Loans Division because TLT had encountered a number of problems that attracted RBC's attention. In particular, RBC had determined that TLT was undercapitalized with a debt to capital ratio of 92%.
- [14] By the end of September 2007, RBC recommended that TLT retain either PricewaterhouseCoopers ("PWC") or KPMG to provide professional advice with respect to a "go forward business plan". TLT complied with that recommendation and retained PWC to prepare the plan.
- [15] Michael Vermette is a partner with PWC, a chartered accountant, a chartered professional accountant, a chartered insolvency and restructuring professional ("CIRP") and a licensed insolvency trustee. He heads PWC's Corporate Advisory and Restructuring Group in Vancouver and had primary responsibility for PWC's dealings with TLT.
- [16] In early December 2007, RBC called TLT's loans, which, at the time, stood at approximately \$18,000,000. TLT had pledged all of its present and after-acquired property as security for the loans pursuant to a general security agreement with RBC.
- [17] On December 14, 2007, TLT sought and obtained a stay of proceedings (the "Stay Order") pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA]. Pursuant to the Stay Order, PWC was appointed as monitor.
- [18] On December 28, 2007, in the CCAA proceeding, TLT obtained an order permitting it to hire Norman Slavik of Norcon Forestry Ltd. for additional operational management expertise. In about January 2008, TLT hired Mr. Slavik to act as a consultant.

- [19] On January 11, 2008, TLT sought and obtained an extension of the Stay Order to February 15, 2008 to permit it to finalize an operating plan for 2008. PWC supported the extension because it considered that TLT had made progress in addressing RBC's concerns. This included the addition of three professionals to TLT's senior management team (Ray Moore, Marty Eakins and Norman Slavik); efforts to obtain auction proposals from Ritchie Bros. Auctioneers ("Ritchie Bros.") and Maynard's Industries in anticipation of a spring 2008 auction to facilitate permanent reductions to TLT's RBC debt from surplus equipment sales; and ongoing meetings with TLT's three main customers to determine production volumes for 2008 in light of difficult market conditions for the Coastal forest sector, with a view to verifying its 2008 production schedule, preparing and operational analysis based on these volumes and identifying additional surplus equipment.
- [20] TLT finalized its 2008 operational and financial plans during the week of February 4, 2008. Mr. Vermette and Mr. Slavik travelled from Vancouver to Toronto to present and discuss these plans with RBC on February 7, 2008. However, RBC was not prepared to continue financing TLT in the long term.
- [21] Mr. LeRoy and Ms. LeRoy were both aware that if TLT did not obtain financing to pay out RBC's debt, it would be forced into bankruptcy and liquidated.
- [22] Throughout this period, TLT was investigating alternative financing options. By February 12, 2008, it anticipated obtaining bridge financing from Century to permit it to substantially pay out RBC's debt and complete its operational and financial restructuring. By about February 13, 2008, TLT had paid Century a due diligence fee of \$75,000.
- [23] By March 14, 2008, TLT and Century reached an agreement in principle that would allow TLT to replace RBC with Century as TLT's primary lender.
- [24] On March 27, 2008, Century and TLT entered into the TLT Loan Agreement pursuant to which Century advanced \$14,250,000 to RBC to acquire TLT's indebtedness to RBC and an assignment of the security held by RBC in respect of that indebtedness.
- [25] It was a condition of Century's loan to TLT that Ms. LeRoy provide the guarantee and the mortgage over the Maple Bay home, which was then unencumbered. The guarantee was entered into by Ms. LeRoy as of March 27, 2008, and the mortgage was granted on March 28, 2008. Ms. LeRoy received independent legal advice in connection with the guarantee and mortgage.
- [26] The TLT Loan Agreement defined the "Loan" as the sum of the principal of \$14,250,000 and the commitment fee of \$725,000, and provided for interest of 24% per annum payable on the Loan. It was a term of the TLT Loan Agreement that TLT would pay "all reasonable out-of-pocket costs and expenses" of Century incurred in relation to the loan and security. The TLT Loan Agreement also provided that upon the occurrence of an event of default (including TLT's assignment into bankruptcy), all obligations shall at Century's option become due and payable, the security, including the mortgage, shall become immediately enforceable, and a

"success fee" in the amount of \$435,000 shall become due and payable by TLT.

- [27] Pursuant to the guarantee, Ms. LeRoy agreed that if an event of default occurred under the TLT Loan Agreement, which was not waived by Century, she "as a primary obligor and not merely as surety shall forthwith, on demand pay to Century the full amount of [TLT's indebtedness to Century]". However, the guarantee also provided that Ms. LeRoy's liability under the guarantee was limited to \$2 million together with interest from the date of demand for payment at the rate specified in the TLT Loan Agreement in effect from time to time and all costs and expenses payable under the guarantee and the mortgage, and that Century's sole recourse against Ms. LeRoy was limited to realization on the Maple Bay home.
- [28] Pursuant to the mortgage, Ms. LeRoy mortgaged her interest in the Maple Bay home, limited to the principal amount of \$2,000,000, plus interest at the rate of 24% per annum from the date of demand and all costs, charges and expenses incurred by Century in the enforcement of the mortgage. The mortgage provides that it is payable on demand and is security for all present and future indebtedness and liability of Ms. LeRoy to Century under the guarantee and all costs, expenses and other monies payable to Century under the guarantee, whether or not referred to in the mortgage.
- [29] Unfortunately, soon after TLT entered into the TLT Loan Agreement and Ms. LeRoy provided the guarantee and mortgage, TLT's financial circumstances worsened. In particular, WFP and TimberWest temporarily suspended substantially all of their Vancouver Island operations, which had a significant impact on TLT's cash flow. Fuel costs were also higher than forecast and poor weather in April 2008 reduced productivity and revenues. TLT's South Island operations remained unprofitable. TLT's insurer denied its claim relating to the sinking of a barge, in 2007, with hundreds of thousands of dollars' worth of logging equipment on board. The insurer's position was that the barge was unseaworthy at the time.
- [30] On May 31, 2008, TLT defaulted under the TLT Loan Agreement by failing to make its first payment. Nevertheless, in a report to the Court in the CCAA proceeding, dated June 13, 2008, PWC advised that:
- a) it believed that it would still be possible for TLT to maintain its operating strategy and achieve a cash-flow positive forecast of \$1.2 million over the balance of 2008 if there were no further material adverse events;
 - b) in order for TLT to focus on achieving this forecast, PWC and TLT had agreed that changes were required to TLT's organization structure and management team; and
 - c) effective June 12, 2008, TLT had made the following management changes:
 - (i) Mr. Slavik became the Chief Restructuring Officer;
 - (ii) Mr. LeRoy would redirect his entire efforts to the North Island operations;
 - (iii) Mr. Moore would continue to fulfill the role of senior financial manager; and

(iv) TLT had reduced its head office staff by five people.

[31] The reduction in head office staff included the termination of Ms. LeRoy's employment with TLT and the termination of the employment of Jason LeRoy, the son of Mr. LeRoy and Ms. LeRoy.

[32] Unfortunately, things got worse for TLT. By early July 2008, TLT's cash losses from March through June began to limit its ability to operate in the normal course. TLT expected that by the week of July 4, 2008, it would become difficult to meet its obligations. It embarked upon a full-scale liquidation and developed a plan to conduct an orderly windup of virtually all of its operations to repay the Century debt. Among other things, the plan contemplated the sale of TLT's tools and equipment, primarily by public auction, and the sale of TLT's Bill 13 Contracts.

[33] TLT entered into an agreement with Ritchie Bros. dated July 30, 2008 (the "Auction Contract") for the sale by auction of most of its equipment. Pursuant to the Auction Contract, Ritchie Bros. agreed to offer the equipment for sale at unreserved public auction on or about September 22, 2008, and to guarantee minimum gross proceeds of \$9,312,000. Subsequently, some equipment originally intended to be sold at the auction was removed from the Auction Contract to be sold separately and, ultimately, the Auction Contract was revised to reduce the minimum guaranteed gross proceeds to \$7,234,650.

[34] In July 2008, TLT also began trying to sell its Bill 13 Contracts and related assets. Specifically:

- a) it advertised the sale of its Bill 13 Contracts in industry publications;
- b) Mr. LeRoy contacted Ron Coulson, Donald Hayes and Pat Young to canvas their potential interest in purchasing TLT's Bill 13 Contract with TimberWest for the Johnston Straits;
- c) Mr. LeRoy communicated with Lyle Newton regarding his potential interest in purchasing TLT's Bill 13 Contract with WFP for the North Island;
- d) Mr. Slavik communicated with Ted Arkell regarding his potential interest in purchasing TLT's Bill 13 Contract with WFP for the North Island; and
- e) Mr. Slavik, Mr. LeRoy and Tammy Kemp, who was then Century's Director of Risk and Compliance, communicated with Roga Contracting regarding its potential interest in purchasing TLT's Bill 13 Contract with WFP for the North Island.

[35] By August 5, 2008, TLT reached an agreement with TimberWest, which included:

- a) TimberWest would purchase the Bill 13 Contract related to Johnston Straits from TLT for \$3 million (based on a purchase price of \$7.50 per m3);
- b) TimberWest would discharge its claim to a set-off of \$750,000 against TLT's assets in the CCAA proceedings;
- c) TLT would agree to terminate some other contracts with TimberWest;

- d) TimberWest would transfer an existing contract related to the Shoal Island Dryland Sort from TLT to a new company to be controlled by Ms. LeRoy;
 - e) TimberWest would pay \$150,000 to TLT; and
 - f) TimberWest would make a payment in excess of \$500,000 to be used to pay employee obligations of TLT relating to work done for TimberWest.
- [36] On September 3, 2008, TLT applied for and obtained an order in the CCAA proceeding permitting it to assign itself into bankruptcy, authorizing the sale of its equipment by Ritchie Bros. at the auction, and authorizing the sale of the Johnston Straits Bill 13 Contract to TimberWest. As of that date, TLT had not received any offers to purchase that Bill 13 Contract for a higher price than reflected in the August 5, 2008 agreement with TimberWest.
- [37] As noted, TLT's assignment into bankruptcy was an event of default under the TLT Loan Agreement. Century immediately issued to TLT a demand for payment, a notice of its intention to enforce its security, and notice of the appointment of PWC as receiver. TLT failed to pay in response to Century's demand.
- [38] Century appointed PWC as receiver and agent of TLT to realize on the collateral pledged as security for the Loan Agreement. PWC then finalized the liquidation of TLT's remaining assets, which included the equipment sold at the auction, the WFP Bill 13 Contracts, and TLT's head office property located in Chemainus.
- [39] Ritchie Bros. conducted the TLT auction on Monday, September 22, 2008. The equipment to be sold was made available for preview commencing on August 22, 2008. Ritchie Bros. undertook an advertising campaign, and its sales representative ensured its customers were aware of the auction. However, TLT takes issue with the manner in which the equipment was organized and presented.
- [40] The gross proceeds of the auction were \$9,081,225, which exceeded the guaranteed minimum. After accounting for the costs incurred by Ritchie Bros. and the commission due to Ritchie Bros., the net proceeds generated by the auction were about \$7,280,000.
- [41] On November 26, 2008, PWC sought and obtained an order approving the sale of the WFP Bill 13 Contracts to 0836793 B.C. Ltd. and Strathcona Contracting Ltd. for the total amount of \$627,760.
- [42] On December 3, 2008, PWC sought and obtained an order approving the sale of TLT's head office property.
- [43] In the meantime, on September 23, 2008, Century issued to Ms. LeRoy demand for payment in the amount of \$2 million as at that date together with accruing interest and costs, and a notice of its intention to enforce its security, being the mortgage on the Maple Bay home. Ms. LeRoy failed or refused to pay in response to Century's demand.

- [44] Century commenced these foreclosure proceedings on November 12, 2008. On May 13, 2009, a master granted an order nisi (the "May 13 Order"). The May 13 Order did not definitively determine the amount necessary to redeem, although it did set November 13, 2009 as the last date for redemption. At the hearing before the master, counsel advised that the parties were not in agreement as to the amount owing, as Ms. LeRoy had a possible claim against Century that could impact on the redemption amount. The master was asked to set a redemption amount that, by its terms, would be subject to further order of the court. The master ultimately acceded to the parties' request and granted the order in the terms requested.
- [45] In January 2010, the time for redemption having expired, Century applied, before Justice Goepel, for an order for sale, among other things. Ms. LeRoy claimed that as a result of Century's negligent realization of its equipment at the auction, the amount owing was less than that claimed by Century. She applied for an order that the petition be referred to the trial list to determine the amount owing. Justice Goepel concluded, among other things, that Ms. LeRoy had raised a triable issue as to the amount owing and that this issue could not be determined summarily. He set aside the May 13 Order and referred the matter to the trial list to determine the redemption amount and the last date for redemption.
- [46] Ms. LeRoy's claim subsequently expanded. The negligent realization aspect of it now extends beyond the equipment auction to include the sale of the Bill 13 Contracts. In addition, through the discovery process she learned about the posting of what she says are unauthorized charges and, as a result, she now advances the fraud-based defences that she says nullify the guarantee and render the mortgage unenforceable.

Issues

- [47] As mortgagee, Century must establish a *prima facie* entitlement to an order nisi of foreclosure. As mortgagor, Ms. LeRoy then bears the burden of proving any defences to displace Century's entitlement. Walter Traub puts it this way in *Falconbridge on Mortgages*, loose-leaf 5th ed. (Toronto, Ont: Thompson Reuters Canada, 2016), ch. 26 at 18:

The claim of a mortgagee is *prima facie* proved in the master's office by the production of the duplicate mortgage or a certified copy thereof, and the filing of an affidavit verifying the mortgagee's claim and stating the amount due for moneys advanced to the mortgagor and secured by the mortgage; the onus of reducing the amount rests on the defendant.

- [48] With respect to defences, Mr. Traub states:

Basic defences in a foreclosure action include: (i) no monies owing; (ii) no default; (iii) no right of foreclosure for the particular default; (iv) set off; (v) agreement not to foreclose (known as forbearance); (vi) unconscionable mortgage; (vii) breach of the Interest Act, R.S.C. 1985, c. I-15; (viii) non est factum; (ix) void mortgage; (x) limitation period; and (xi) failure to comply with the preconditions found in the Farm Debt Mediation Act, S.C. 1997, c.21, or the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

[49] In this case there is no issue with respect to the prima facie enforceability of the guarantee and the mortgage. The documents were executed, the funds were advanced, and Ms. LeRoy had independent legal advice. Rather, Ms. LeRoy raises the defences of no money owing and set-off. She says she is relieved of her obligations under the guarantee and mortgage because she was induced to enter into the documents by Century's fraudulent misrepresentation or because of Century's dishonest performance in posting the unauthorized charges to TLT's loan account. Alternatively, she says that the sale of TLT's assets was conducted improvidently and this resulted in losses sufficient to set-off or significantly reduce the amount owing under the guarantee.

[50] The issues that arose at the trial are:

1. Is Ms. LeRoy entitled to rescission of the guarantee and mortgage because of a fraudulent misrepresentation by Century that induced her to enter into the guarantee or because of Century's dishonest performance in posting unauthorized charges to TLT's loan account?
2. If the guarantee and mortgage are enforceable, how much does Ms. LeRoy owe Century? Specifically, was Century improvident in realizing on TLT's assets and, if so, do the principles of set-off and equitable set-off apply to reduce Ms. LeRoy's obligations?
3. If the guarantee and mortgage are enforceable, what is the appropriate redemption period?

[51] Because of the conclusion I have reached on the first issue, it is not necessary to deal with the other issues.

Analysis

[52] As discussed in more detail below, it is clear from the Supreme Court of Canada's decision in *Pax Management Ltd. v. Canadian Imperial Bank of Commerce*, [1992] 2 S.C.R. 998, that there is a fundamental difference between the effect on the validity of a guarantee of a misrepresentation made at the time of the formation of the guarantee contract and the effect on the validity of a guarantee of subsequent misconduct by the creditor. Where a creditor has knowingly made a misrepresentation at the time of formation of the guarantee the fundamental question is whether the misrepresentation induced the guarantor to provide the guarantee. If so, the guarantee will be vitiated. Where the courts have vitiated guarantees as a result of the creditor's performance of the underlying loan agreement (as opposed to misrepresentation at the time of contracting), the misconduct has materially increased the risk of the guarantor being called upon to pay. I will deal first with

misrepresentation and then subsequent misconduct.

Fraudulent misrepresentation

[53] The Supreme Court of Canada described the requisite elements for the tort of civil fraud in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21:

... (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[54] The burden is on the plaintiff to prove these elements on a balance of probabilities, "having due regard to the seriousness of the allegations made": *Wellesley Lake Trophy Lodge Inc. v. BLD Silviculture Ltd.*, 2006 BCCA 328 at para. 10. Put another way, there must be evidence that provides "clear and convincing proof of the elements of fraud, including the mental element": *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 at para. 29.

[55] Having said that, if a false representation is reckless, it is not necessary that there be an intention to deceive, just a wanton disregard as to whether it will deceive: *Century Services Inc. v. LeRoy*, 2014 BCSC 702 at para. 57, citing *WS Leasing Ltd. v. Platinum Equipment Ltd.*, 2012 BCSC 558 at para. 33.

[56] Further, while reliance must be proved as a matter of fact, where a false representation is "one which was calculated or which would naturally tend to induce" the other party to act on it, reliance may be inferred, and the onus then shifts to the representor to rebut the inference: *Kripps v. Touche Ross & Co.* (1997), 89 B.C.A.C. 288 at paras. 98-103. The Court of Appeal has recently said that in such cases, the party to whom the representation was made must establish that the misrepresentation is at least one factor that induced it to act to its detriment and that "its reliance was objectively reasonable" (*Soprema Inc. v. Wolridge Mahon LLP*, 2016 BCCA 471 at para. 17), which is another way of saying that the representation was one that "would naturally tend to induce".

[57] To be actionable, an alleged misrepresentation must pertain to a matter of present or past fact; a representation as to future conduct, which may create a collateral contract the breach of which could found a claim in damages, is insufficient: *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489; *MacMillan v. Kaiser Equipment Ltd.*, 2003 BCSC 672 at para. 84.

[58] However, a representation as to an existing intention is itself a present fact that is capable of grounding an action for fraudulent misrepresentation, although proving that the representor did not have the stated intention at the time the representation was made may be difficult. The distinction is explained well by Hollingsworth J. in *Datile Financial Corp. v. Royal Trust Corp. of Canada*, [1991] O.J. No. 1859 at para. 42 (Ont.S.C.), rev'd on different grounds [1992] O.J. No. 3680 (Ont.C.A.):

At this juncture, the second issue is to determine whether these representations are actionable as misrepresentations. As stated above, representations as to the future are not actionable. Halsbury's Laws of England, *supra*, provides an accurate statement of the law on this point at page 618:

A statement of intention is not a representation as to the matter said to be intended, because that belongs to the future and is not a matter of present or past fact. On the other hand, a statement of intention involves a representation as to the existence of the intention which is itself a present fact. However, the difficulty of proving the non existence of the intention diminishes the value of such representations. The mere circumstance of the expressed intention if not fulfilled does not by itself establish the non existence of the intention at the time when it was expressed, although the non fulfilment of the intention may be some evidence, strong or weak according to the circumstances of the individual case, that the intention never existed at all.

.....

A promise that something will or will not be done or occur in the future is in itself not a statement of a matter of present or past fact and therefore not a representation. However, it may happen that language which contains promissory expressions can be shown, nevertheless, to have been intended as a statement of an existing intention. Conversely, although a party used words expressive of intention, it may be apparent from other expressions or the surrounding circumstances, that what he really meant, and the other party understood to be conveyed, was a promise or offer and nothing else (emphasis mine).

Based on the above, it is clear that no action will lie for misrepresentation unless it is a statement of an existing fact. Put another way, only representations of fact can give rise to actionable negligence. On the other hand, representations as to future occurrences do not form a ground for legal relief as negligent misrepresentation unless they import by implication a misstatement of an existing fact.

[59] It is necessary to start by clearly identifying the specific representation Ms. LeRoy relies upon as the foundation of this defence. As stated by Justice McIntyre for the court in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 at 111: "In each case there is a clear finding of a specific misrepresentation which led to the formation of the contract in question".

[60] Part 1 of Ms. LeRoy's Amended Response to Civil Claim describes the representation in paragraph 31:

In the spring of 2008, prior to entering into the Guarantee Contract with the Defendant, the plaintiff forwarded a copy of the Guarantee and Loan Agreement to the Defendant and represented to her that if she entered into the Guarantee, her liability, if any, would be limited, *inter alia*, to amounts payable pursuant to the Loan Agreement (the "Representation").

[61] In her written argument at trial, Ms. LeRoy characterized the representation in slightly different terms, focussing not only on Ms. LeRoy's liability but also on Century's performance. Paragraph 23 of her written submission reads in part:

With respect to the fraudulent misrepresentation defence, the defendant says the following:

a. Century made a representation which was false. At the time the defendant entered into the guarantee contract Century represented to the defendant that her obligations, ergo its performance of the contract, would flow from the obligations in the loan agreement. .

[62] Similarly, in oral argument, Ms. LeRoy's counsel characterized the representation in these terms: Century "will perform the loan agreement according to its terms and you, guarantor, will be liable, if at all, based on those terms".

[63] The plaintiff's written argument characterized the representation in similar terms at paragraph 25:

Ms. LeRoy claims that Century misrepresented the terms of the Guarantee by representing (in the terms of the Guarantee document) that her obligations would be defined by the TLT Loan Agreement, when Century did not in fact intend to comply with the TLT Loan Agreement.

[64] Ms. LeRoy acknowledged that she had no communications with anyone from Century regarding the terms of the TLT Loan Agreement, the guarantee or the mortgage; she admitted she did not read the documents before executing the guarantee and the mortgage; and she said she relied on her husband to read the documents. Mr. LeRoy did not testify about discussing the terms of the TLT Loan Agreement with anyone from Century, but he did read it. In the circumstances, any representation arose by implication from Century's conduct in proffering the documents.

[65] It is clear from the foregoing that both parties understood that Ms. LeRoy's theory is that Century's act of proffering the TLT Loan Agreement and the guarantee gave rise to a representation, by implication, that Ms. LeRoy's liability would be limited to amounts payable by TLT under the TLT Loan Agreement or, in other words, that Century intended to administer the loan in accordance with the terms of the TLT Loan Agreement.

[66] Nevertheless, the plaintiff submits that there is no evidence of any misrepresentation which "could have caused Ms. LeRoy to misunderstand the nature or effect of either the Guarantee or the TLT Loan Agreement". This misses the point. Ms. LeRoy does not claim to have misunderstood the nature or effect of the documents. The plaintiff also submits that an allegation that Century failed to disclose its billing practice cannot ground the defence because "as a general rule, mere silence cannot form the basis for a misrepresentation". This too misses the point. Ms. LeRoy relies on an affirmative representation, albeit one that arises by implication; that is, Century intended to administer the loan in accordance with the TLT Loan Agreement.

- [67] Again, to ground a claim of fraudulent misrepresentation giving rise to rescission, an alleged misrepresentation must pertain to a matter of present or past fact. It is not enough to find that by proffering the documents Century represented that it would in the future administer the loan in accordance with the TLT Loan Agreement. The question is whether, by proffering the documents, Century represented that, at the time of contracting, it had the intention of administering the loan in accordance with the TLT Loan Agreement.
- [68] I have no difficulty concluding that a stated willingness to enter into a particular contract amounts to a representation, by implication, of an existing intention to comply with the contract. Of course, after the contract is entered into a contracting party may breach the contract and face the consequences of doing so, and there is always the possibility of disputes over the interpretation of the contract. However, the focus here is on the parties' intentions at the time they agreed to enter into the contract. At that time, they impliedly, if not expressly, represented to each other an existing intention to fulfill the obligations imposed on them by the contract. This is fundamental and consistent with the "basic level of honest conduct" that the Supreme Court of Canada recognized in *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 59-62, as "necessary to the proper functioning of commerce". For these reasons, I find that Century's act of proffering the TLT Loan Agreement and the guarantee to Ms. LeRoy gave rise to a representation, by implication, that Century intended to administer the loan in accordance with the terms of the TLT Loan Agreement.
- [69] It is more difficult to determine whether Ms. LeRoy has established that Century's representation was false or, in other words, that Century did not have the intention of administering the loan in accordance with the terms of the TLT Loan Agreement at the time it proffered the documents to her. As observed in the passage from Halsbury's quoted by Hollingsworth J. in *Datile*, the mere fact that the expressed intention was not fulfilled does not by itself establish the non-existence of the intention at the time it was expressed, although the non-fulfilment of the intention may be some evidence that the intention never existed at all.
- [70] I start then by determining whether the intention was fulfilled; in other words, whether Century posted charges to TLT's loan account that were not authorized by the TLT Loan Agreement. There are four categories of charges in issue, which I refer to collectively as the "Contested Charges".
- [71] First, Ms. LeRoy contests \$95,375 that Century posted to TLT's loan account for time spent by two of its employees on realization activities (activities directed at recovering assets that secure a loan that has gone into default) (the "Contested Employee Charges"). This was referred to by Century's witnesses as "capitalization". Tammy Kemp's time was capitalized at \$375 an hour and Gene Harmeson's time was capitalized at \$250 an hour. Century acknowledges that these rates significantly exceeded the cost to Century of paying Ms. Kemp and Mr. Harmeson to do the work (which was estimated at no more than \$75 per hour), with the difference reflecting a profit margin for Century. It was Century's standard practice to charge its employees' time spent on realization activities at rates that included a profit

margin. Century concedes that the TLT Loan Agreement did not permit it to do so in relation to the TLT loan.

- [72] Rod Hudson was the chief financial officer at Century at the time of the events in question. His job included supervising the accounting staff responsible for administering the TLT loan account. He testified that Century "capitalizes" its employees' time because realization is a time-consuming process. Although Mr. Hudson referred to capitalizing employee time as a standard practice at Century, he also said that Century does not bother capitalizing its employees' time if there are insufficient assets to satisfy the debt because there is no chance of recovering any additional amounts. He acknowledged that when a decision has been made to capitalize employee time to a loan account, the employees submit to Century's accounting department a capitalization request setting out the hours to be billed and there is no management oversight of the reasonableness of the number of hours being charged. He also acknowledged that Century did not, as a matter of practice, send any statement or notification to its borrowers when employee time was capitalized and that such information would only be sent to a borrower in the event of a specific request by the borrower.
- [73] As noted, Tammy Kemp was Century's Director of Risk and Compliance at the time of the events in question. Her duties included the day-to-day administration of the TLT loan such as keeping track of payments in and out and conducting margin assessments on an ongoing basis. She confirmed that the Contested Employee Charges were posted to TLT's loan account in accordance with Century's standard practice to capitalize employee time spent on realization activities at rates that included a profit margin. She identified documents that were submitted to Century's accounting department on her behalf and on behalf of Mr. Harmeson to cause the time to be posted to TLT's account. Those documents indicate the number of hours to be charged and the hourly rate but they provide virtually no detail as to what Ms. Kemp and Mr. Harmeson were actually doing during the time that was charged to TLT's account. No timesheets or itemized billing records were tendered in evidence.
- [74] Second, Ms. LeRoy contests more than \$180,000 in legal fees that Century charged TLT's loan account (the "Contested Legal Fees"), which were incurred by Century litigating two priority disputes in the CCAA proceeding. One of these disputes concerned whether the protection provided to wages pursuant to the Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1 and s. 81.3 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] extends to payments, such as union dues, made by an employer to third parties on behalf of employees. Century took the position that the protection extends only to funds payable directly to employees. The chambers judge disagreed and determined that the protection did extend to third-party payments (2009 BCSC 41). The Court of Appeal dismissed Century's appeal (2010 BCCA 223). Century's application for leave to appeal to the Supreme Court of Canada was dismissed ([2010] S.C.C.A. No. 259). The other priority dispute concerned whether the Crown has priority, in bankruptcy, for unremitted GST. Century took the position that any priority the Crown had for GST was lost in bankruptcy. The chambers judge agreed. The Crown's appeal was allowed (2009 BCCA 205). Century sought and obtained leave

to appeal to the Supreme Court of Canada and its position was ultimately upheld (2010 SCC 60).

- [75] It is not disputed that the Contested Legal Fees significantly exceeded the maximum amount Century would have recovered had it been successful in both priority disputes. When pressed in cross-examination, to explain why Century pursued uneconomic litigation, Ms. Kemp acknowledged that Century did so to set legal precedents that would be of assistance to Century in future loan files.
- [76] Third, Ms. LeRoy contests a charge of \$1,500 that Century paid to Tom Capital Associates Inc. for due diligence carried out by that company in the course of considering whether to purchase, from TLT, a chose in action in relation to TLT's barge loss insurance claim (the "Contested Tom Capital Charge"). Tom Capital was in the business of buying litigation claims. During TLT's insolvency, Tom Capital considered purchasing the barge chose in action for \$10,000. While Tom Capital ultimately did not purchase the chose in action, it billed Century \$1,500 for due diligence it carried out regarding the possibility. Century then passed on that charge to TLT by posting it to TLT's loan account. At the time, Century and Tom Capital had a common owner; a person who was an owner or the owner of Tom Capital was also a passive investor in Century.
- [77] Fourth, Ms. LeRoy contests interest Century charged on certain expenses and fees that were posted to its loan account (the "Contested Interest"). She says that the TLT Loan Agreement provided for interest payable on only the principal cash advance of \$14,250,000 and the commitment fee of \$725,000. It is not disputed that Century charged interest on all amounts posted to TLT's loan account, including the Contested Employee Charges, the Contested Legal Fees and the Contested Tom Capital Charge.
- [78] As noted, Century admits that the TLT Loan Agreement did not permit it to charge its employees' time at rates that included a profit margin, but submits that the TLT Loan Agreement did permit it to charge its employees' time at cost. It characterizes the posting of the Employee Charges as a mistake that resulted in an overcharge of approximately \$74,000. Century did not specifically address, in its final submission, whether the posting of the Contested Legal Fees, the Contested Tom Capital Charge or the Contested Interest to the TLT loan account contravened the TLT Loan Agreement. Rather, Century submitted that even if the posting of the Contested Charges was a breach of the TLT Loan Agreement, this had no impact on the magnitude or likelihood of the materialization of the risk undertaken by Ms. LeRoy in entering into the guarantee and that even if all of the Contested Charges were removed and the outstanding loan balance recalculated, TLT's indebtedness to Century would exceed Ms. LeRoy's maximum liability of \$2 million.
- [79] For the reasons set out below, I conclude that none of the Contested Charges were permitted by the Loan Agreement.

[80] There is no provision in the TLT Loan Agreement that imposes on TLT the obligation to pay for time spent by Century's employees on any activities, including realization activities, at rates that included a profit margin for Century. Pursuant to clause 9.11 of the TLT Loan Agreement, TLT was required to pay "all reasonable out-of-pocket costs and expenses" of Century incurred in relation to the loan and security. The material portions of clause 9.11 read:

9.11 Expenses and Indemnity

The Borrower shall pay on demand all reasonable out-of-pocket costs and expenses of the Lender incurred in connection with:

- (i) the Lender's acquisition of the RBC Security and the RBC Indebtedness;
- (ii) the preparation, negotiation, execution, delivery, administration, periodic review, modification or amendment of the Credit Documents;
- (iii) the Lender's participation in the CCAA Proceedings and all legal advice and attendances in respect thereof;
- (iv) any enforcement of the Credit Documents;
- (v) obtaining advice as to its rights and responsibilities in connection with the Loan and Credit Documents;
- (vi) reviewing, inspecting and appraising the collateral that is the subject of the Security in connection with the enforcement of its rights under the Security; and
- (vii) any other matters relating to the Loan and Credit Documents.

The Borrower shall indemnify the Lender against any liability, obligation, loss or expense which it may sustain or incur as a consequence of:

- (i) any representation or warranty made by the Borrower or any Guarantor which was incorrect at the time it was made or deemed to have been made;
- (ii) a default by the Borrower in the payment of any sum due from it; and
- (iii) any other default by the Borrower or any Guarantor under any Credit Document.

In addition, the Borrower shall indemnify the Lender and its directors, officers, employees and representatives (the "Indemnified Parties") from any against any and all actions, proceedings, claims, losses, damages, liabilities, expenses and obligations of any kind that may be incurred by or asserted against any of them as a result of or in connection with the Loan and the Lender taking, holding and enforcing the Security, other than arising from the gross negligence or willful misconduct of the Lender or any other Indemnified Party.

The agreements in this Section 9.11 shall survive the termination of this Agreement and repayment of the Obligations.

- [81] The plain meaning of this provision is that TLT, as borrower, must absorb all reasonable costs and expenses incurred by Century, and all liabilities, losses or obligations asserted against or sustained by Century, as a result of granting the loan. It does not permit Century to generate a profit at TLT's expense. Century was therefore not authorized by the TLT Loan Agreement to post the Contested Employee Charges to TLT's loan account. Further, and in any event, it was not reasonable for Century to post any charges for employee time, even if the charges had reflected only Century's costs, without documenting what, specifically, the employees were doing and without some management oversight of the time being spent.
- [82] As noted, clause 9.11 of the TLT Loan Agreement expressly limits TLT's obligation for legal costs incurred by Century in relation to the CCAA proceedings to those that are "reasonable". The Contested Legal Fees were not reasonable. It may have been reasonable, from Century's perspective, for it to incur litigation costs that substantially exceeded the potential recovery for the purpose of setting precedents for future use, but it was not reasonable to do so at TLT's expense. Century was not authorized by the TLT Loan Agreement to post the Contested Legal Fees to TLT's loan account.
- [83] Similarly, I am not persuaded that the Contested Tom Capital Charge was reasonable. On its face, the payment of a fee in the amount of 15% of the estimated value of an asset, to a related party, for the purpose of the related party deciding whether to purchase the asset, seems unreasonable. Century did not establish what was actually done by Tom Capital to earn the fee. An invoice from Tom Capital in the amount of \$4,900 plus GST was tendered by Century. The invoice had handwritten notations on it indicating that \$1,500 of that amount had been allocated to TLT but the basis for the allocation was not explained. In the circumstances, the Contested Tom Capital Charge was not reasonable and, accordingly, Century was not authorized by the TLT Loan Agreement to post it to TLT's loan account.
- [84] I turn now to the Contested Interest. As noted, it is not disputed that Century charged interest on all amounts posted to TLT's loan account, including the Contested Employee Charges, the Contested Legal Fees and the Contested Tom Capital Charge. The material provisions of the TLT Loan Agreement provided:

4.1 Commitment Fee and Loan

In consideration of the Lender entering into this Agreement the Borrower and the Guarantors acknowledge that the Lender has earned a non-refundable commitment fee in the amount of \$725,000 (the "Commitment Fee") and that the Commitment Fee is now owing by the Borrower to the Lender. The Commitment Fee shall be added to the principal amount of the Secured Loan [defined, in clause 3.1, as the principal amount of \$14,275,000] resulting in an aggregate loan in the principal amount of \$14,975,000 (the "Loan") payable by the Borrower to the Lender in accordance with the terms of this Agreement.

4.2 Interest

The outstanding daily balance of the Loan shall bear interest at the rate of 24% per annum both before and after maturity, default and judgment. Interest shall accrue daily from and after the date of this Agreement and shall be calculated, compounded and payable monthly, not in advance, on the last day of each month commencing April 30, 2008 and continuing until the principal amount of the Loan is fully paid and satisfied. Interest on arrears of interest will be calculated at the same rate and in the same manner.

[Emphasis added.]

Thus, the TLT Loan Agreement expressly provided that interest was payable on the "Loan", which was defined as the sum of the principal of \$14,250,000 and the commitment fee of \$725,000. Century was not authorized by the TLT Loan Agreement to post the Contested Interest to TLT's loan account.

[85] As already alluded to, the fact that Century posted charges to TLT's account that were not authorized by the TLT Loan Agreement does not by itself establish that Century did not have the intention to comply with the TLT Loan Agreement at the time the representation was made. However, when this fact is considered together with the other circumstances outlined below, I am satisfied that Century did not have the intention to comply with the TLT Loan Agreement at the time it proffered the guarantee to Ms. LeRoy.

[86] There was no consideration by any Century employee of the actual language of the TLT Loan Agreement before the Contested Charges were posted to TLT's account. Rather than checking the actual language of the TLT Loan Agreement, Century simply followed its standard practices and was indifferent as to whether those practices conflicted with the terms of the TLT Loan Agreement. Under cross-examination, Ms. Kemp admitted that she could not recall if she checked the TLT Loan Agreement to determine whether it permitted Century to capitalize employees' time. She emphasized that capitalizing employee time was Century's standard practice. She also acknowledged that she did not refer to the TLT Loan Agreement to determine how interest on the TLT loan was to be calculated. She confirmed that Century followed its standard practice of charging interest on the entire loan balance, including any fees and expenses that had been charged to the account. She said she could not recall if she considered whether the Contested Legal Fees were reasonable before posting them to TLT's account, but that posting legal fees to debtors' accounts was in accordance with Century's standard practice. She did not mention whether she considered the reasonableness of the Contested Tom Capital Charge. Mr. Hudson testified that he was not aware of any Century employee reviewing the TLT Loan Agreement to see whether its language permitted Century to capitalize employee time.

[87] No one from Century testified about Century having any standard practice or system directed at ensuring that its employees administer its loans in accordance with the actual terms of its loan agreements. In other words, there was no suggestion that Century had such a practice or system but that a mistake had been made in the administration of the TLT loan. To the contrary, Mr. Hudson said Century's standard practice in relation to capitalizing

employee time did not include checking the language of the loan agreement in question because on "most" files Century's counsel was instructed to include language in the loan agreement to permit the capitalization of employee time. As a result, he said "we roll ahead on a policy basis that we've got the right to charge those expenses". Similarly, with respect to interest charges, Mr. Hudson testified that Century uses proprietary software to run interest calculations and that Century's employees refer to the loan agreements only to ascertain the applicable interest rate but that no further inquiry is made to determine whether there are any specific provisions related to the manner in which interest is to be calculated.

- [88] Century's failure to ensure that the language of the TLT Loan Agreement was checked before posting charges to TLT's loan account might be understandable if Century used a standard form loan agreement. However, the evidence falls far short of establishing that Century did so. No Century witness testified that Century used a standard form loan agreement. Mr. Hudson testified that Century had different law firms preparing different agreements with different debtors and he acknowledged that some debtors negotiate specific terms to be included in their particular loan agreements. Although he said that on "most" files Century's counsel was instructed to include language that permitted the capitalization of employee time, this implies that on some files Century's counsel was not instructed to do so. In the circumstances, his assertion that they simply "roll ahead on a policy basis" is troubling.
- [89] Ms. Kemp testified that around the time that Century entered into the TLT Loan Agreement, it had loan agreements with other borrowers that expressly permitted Century to recover from the borrower its internal costs incurred in preserving or enforcing its security "at its regular billing rates". She identified two such agreements and referred to each of them as "a form of loan agreement" that Century was using at the time. She testified that one of these was "likely created" by Century's Calgary counsel "to use as a precedent document" but she did not say that it was in fact used as a precedent. She did not say anything about whether and to what extent Century actually used precedent loan agreements. Both of the example agreements that Ms. Kemp testified about appear to be copies of actual loan agreements entered into by Century. Both of the example documents are dated, both appear to have had the borrowers' particulars included but those portions are obscured in the copies tendered at trial, and both are signed on behalf of Century. The point is that neither of these particular documents appears itself to be a precedent document.
- [90] Although Century submits that the language permitting Century to recover from the borrower its internal costs incurred in preserving or enforcing its security "at its regular billing rates" was most likely omitted from the TLT Loan Agreement by mistake or oversight, the evidence does not support the drawing of that inference. Mr. Hudson's evidence to the effect that Century had different law firms preparing different agreements with different debtors and that its counsel was instructed to include language that permitted the capitalization of employee time on "most" files is more consistent with the inference that for some reason, on this file, the language was intentionally omitted.

[91] In summary, I find that:

- (a) Century posted the Contested Charges to TLT's account and was not authorized by the TLT Loan Agreement to do so;
- (b) there was no consideration of the actual language of the TLT Loan Agreement before the Contested Charges were posted to TLT's account and, rather than checking the actual language of the TLT Loan Agreement, Century simply followed its standard practices concerning the posting of charges and was indifferent as to whether those practices conflicted with the terms of the TLT Loan Agreement;
- (c) Century had no standard practice or system directed at ensuring that its employees administered its loans in accordance with the actual terms of its loan agreements;
- (d) Century did not use a standard form loan agreement; and
- (e) the language of the TLT Loan Agreement with respect to the charging of interest and expenses, which did not authorize Century to post the Contested Charges, was not the result of oversight or mistake.

[92] These findings compel the conclusion that at the time Century presented the documents to Ms. LeRoy, it was indifferent about whether it would comply with the terms of the TLT Loan Agreement and, specifically, that it intended to post charges to the TLT loan account in accordance with its standard practices irrespective of whether those practices conflicted with the provisions of the TLT Loan Agreement. Accordingly, Century's representation to Ms. LeRoy that it intended to administer the TLT loan in accordance with the terms of the TLT Loan Agreement was false.

[93] I turn now to consider whether Century made the false representation knowing it to be untrue, without belief in its truth, or reckless as to whether it was true or false. Again, if a false representation is reckless, it is not necessary that there be an intention to deceive, just a wanton disregard as to whether it will deceive. As is apparent from the findings I have already made, Century had no system directed at ensuring that its employees would administer the TLT loan in accordance with the provisions of the TLT Loan Agreement. Instead, it simply administered the loan in accordance with standard practices, indifferent as to whether those practices conflicted with the terms of the TLT Loan Agreement. The Contested Charges were not posted to TLT's loan account as a result of an honest but mistaken belief that they were authorized by the TLT Loan Agreement, but rather because Century was intent on following its standard practices and was indifferent to the actual terms of the TLT Loan Agreement. In the circumstances, I find that Century was reckless with respect to the truth of the representation and displayed a wanton disregard as to whether Ms. LeRoy would be deceived by it.

- [94] The next question is whether Ms. LeRoy has established that the misrepresentation induced her to provide the guarantee and mortgage and that her reliance on the misrepresentation was objectively reasonable.
- [95] Ms. LeRoy testified that she and Mr. LeRoy have lived in the Maple Bay home since 1984 and prior to granting the mortgage in question there had never been a mortgage on the home. She testified that she understood she was guaranteeing TLT's obligations under the TLT Loan Agreement. She said she did not read the TLT Loan Agreement but that Mr. LeRoy did read it and she relied on him. She testified that she did not know that Century was going to charge TLT for its employees' time. When asked whether she would have done anything differently had she known, she said "most definitely". She also said that another party was interested (presumably another lender) and that she had never had to pay such charges before. She complained about the fact that no documentation had been provided and instead the charges had been "buried" by Century. She also said she would not have signed the guarantee or granted a mortgage on her home. She was not cross-examined on this point.
- [96] Although it was Ms. LeRoy who provided the guarantee and granted the mortgage, I accept her evidence that she relied entirely on Mr. LeRoy in deciding whether to do so. Accordingly, Mr. LeRoy's evidence concerning the inducement factor is relevant. He testified that he first learned that Century had charged TLT's loan account for its employees' time through documents produced in this proceeding. When he was asked whether he would have done anything differently, he said he "wouldn't have been prepared to give someone an open ticket to charge us whatever they liked" and that "we weren't going to get into a position of putting our house up if someone could inflate fees or charge fees - we would have been better off to cut our losses, keep our house that had no mortgage on it and let the company go down". He was not cross-examined on this point.
- [97] There is no doubt that at the time Ms. LeRoy signed the guarantee and mortgage, TLT's options were limited. RBC had made clear it did not believe the company was viable. TLT had to either find replacement financing or liquidate its assets. Mr. LeRoy and Ms. LeRoy both knew that TLT's only chance of survival was to obtain new financing. Mr. Vermette testified that it was his assessment at the time that Century was the only viable potential replacement lender available to TLT. I accept that evidence. Further, Mr. LeRoy had been advised by TLT's counsel that unless TLT was able to achieve a high level of efficiency, its restructuring would likely fail and they would lose the house.
- [98] Century submits that in these circumstances the LeRoys' evidence that they would have rejected Century's offer of financing if they had known about its billing practice is not credible given the magnitude of the risk they were both willing to assume for the opportunity to save TLT. In my view, this submission characterizes the evidence relevant to the inducement element too narrowly. The question is not whether Ms. LeRoy would have granted the guarantee and mortgage if the TLT Loan Agreement had expressly permitted Century to charge its employees' time for realization activities at billing rates that included a profit margin. The question is whether she would have done so had she known that Century

did not intend to administer the TLT loan in accordance with the terms of the TLT Loan Agreement, but rather intended to post charges to the TLT loan account in accordance with its standard, and undisclosed, practices irrespective of whether those practices conflicted with the provisions of TLT Loan Agreement. I am satisfied that, considered together, Mr. LeRoy's evidence and Ms. LeRoy's evidence on this point establishes that she would not have done so.

- [99] It is clear from Ms. LeRoy's evidence that her complaint was not just about the magnitude of the billing rates for the employees' time but also arose from Century's failure to provide documentation and Century's conduct in "burying" unauthorized charges, which she clearly found repugnant. I accept that she would not have granted Century a mortgage over her home, which had never been encumbered, had she known Century intended to conduct itself in the manner in which it did; specifically, ignoring the actual terms of the TLT Loan Agreement, imposing charges in accordance with its standard practice irrespective of whether doing so contravened the TLT Loan Agreement, and failing to advise TLT that it had done so.
- [100] It is clear from Mr. LeRoy's evidence that his complaint was that Century acted as if it had an "open ticket to charge" whatever it liked. I accept that he would not have advised his wife to grant a mortgage over their family home to Century had he known Century intended to conduct itself as if it had an open ticket.
- [101] Century's misrepresentation that it had the intention, at the time it proffered the guarantee and the TLT Loan Agreement to Ms. LeRoy, to administer the loan in accordance with the TLT Loan Agreement is one that would naturally tend to induce. In fact, a reasonable commercial person would demand no less. While the LeRoys were admittedly prepared to risk the family home for the chance of saving TLT, it would be unreasonable to find they would have done so irrespective of the terms or, in other words, with a lender that was going to act as if it had "an open ticket". They were prepared to do so on the terms proffered by Century and in reliance on Century's representation that it intended to conduct itself in accordance with those terms. I am satisfied that Century's misrepresentation is a significant factor that induced Ms. LeRoy to provide the guarantee and grant the mortgage and that her reliance was objectively reasonable.
- [102] The final question is whether Ms. LeRoy has established that she suffered a loss as a result of providing the guarantee and granting the mortgage. Century submits there was no loss because Ms. LeRoy has failed to establish that TLT would have obtained alternative financing from a lender that did not require her to grant a mortgage over her home as security. I disagree with that submission because it ignores the LeRoys' other option of liquidating TLT's assets to pay off the RBC debt, letting the company go, and keeping their home. I accept Mr. LeRoy's evidence that had he known Century was going to treat TLT's loan as an "open ticket" he would have taken that option. The loss that Ms. LeRoy suffered is the fact that she entered into the guarantee, which rendered her liable for the shortfall on TLT's loan and exposed her home to foreclosure.

[103] Ms. LeRoy has established a fraudulent misrepresentation that vitiates the guarantee and renders the mortgage unenforceable. Although this conclusion is sufficient to dismiss the claim, I will briefly address Ms. LeRoy's alternative argument in support of rescission.

Subsequent misconduct

[104] Ms. LeRoy says that Century's conduct in posting the Contested Charges to the TLT loan account was fraudulent because Century knew TLT was not obliged under the TLT Loan Agreement to pay them or Century was reckless as to whether they were properly payable. She says the fraud "crystallized" when Century issued a demand to her that included the Contested Charges. She submits that in these circumstances her liability under the guarantee is wholly discharged. She relies on various lines of authority in support of this position.

[105] For example, Ms. LeRoy relies on *First Island Financial Services Ltd. v. True West Construction Ltd.*, 1999 CanLII 6554 (BC SC), which considered whether an agreement that has been physically altered by one party, without the knowledge of the other party, is enforceable in its altered state and, if not, in its original state. (See also *Canadian Imperial Bank of Commerce v. Skender* (1986), 67 B.C.L.R. 126 (C.A.).) That line of authority is based on what is referred to in *First Island* at para. 25 as "the old rule set out in *Pigot's case* (1614) 77 E.R. 1177, that a promisee, who alters a written contract in a material way, cannot enforce the contract against the promisor". The modern application of that rule is summarized succinctly in *First Island* at para. 45:

It appears that the rule in *Pigot's case* is still the law in this Province, although perhaps further modified by *Skender* which seems to suggest that alteration of an Agreement no longer automatically prevents the person altering the agreement from enforcing the original unaltered Agreement. The penalty is appropriate where there is fraud; and fraud or mischievous purpose is assumed, where there is a material alteration and no acceptable explanation given for it. If the purpose of the alteration is found to be innocent and well-intentioned, then in addition to considering whether there was any alteration in the legal effect of the document, there must be some additional balancing of the interests of justice, some flexibility in the concept of materiality, and some recognition of the principles of unjust enrichment.

[106] There is no suggestion that Century physically altered the TLT Loan Agreement or the guarantee, but Ms. LeRoy submits that the principles reflected in *First Island* should be extended to cases where a party has attempted to perform a contract fraudulently. However, the applicable line of authority is that which considers the circumstances under which a guarantor may be discharged as a result of the creditor's misconduct in its performance of the underlying loan agreement. As noted, where the courts have vitiated guarantees based on performance of the underlying loan agreement (as opposed to misrepresentation at the time of contracting) the misconduct has materially increased the risk of the guarantor being called upon to pay. Often this is where the misconduct of the creditor causes, or increases the chance of, the principal debtor defaulting. Such is not the

case here.

[107] Pax Management is the leading authority. In that case, the creditor had clearly lied to the guarantors, who were shareholders of the debtor company, in order to obtain the company's consent to an investigation of the company's affairs and then it lied again to cause the debtor company to consent to a receivership. The representative of the bank knowingly misrepresented to the guarantors that if the debtor did not consent to the receivership, the bank would commence proceedings the next day. However, the trial judge concluded that the creditor's deceit did not entitle the guarantors to be released from their guarantees. The Court of Appeal refused to interfere with the trial judge's findings of deceit but found that the deceit was sufficient to discharge the guarantors from their obligations under their guarantees. The Supreme Court of Canada declined to interfere with the finding of deceit but found that the Court of Appeal had erred in holding that the effect of the deceitful acts was to discharge the guarantors in the absence of actual prejudice to the guarantors.

[108] Justice Iacobucci, for the Court, noted that the Court of Appeal relied on the judgment of Bingham J. in *Bank of India v. Trans Continental Commodity Merchants Ltd.*, [1982] 1 Lloyd's Rep. 506 (Q.B. Com. Ct.), which was also quoted with approval by Wilson J. in *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551 at p. 567. In *Pax Management*, at pp. 1015-1016, Iacobucci J. distinguished *Bank of India* from the case before him on the basis that in *Bank of India* Bingham J. was referring to concealment amounting to misrepresentation at the formation of the contract of guarantee:

In my view, neither *Bank of India* nor *Wilder* support the conclusion of the Court of Appeal in the case at bar that, once there is a misrepresentation by the creditor, it is not necessary for there to be any prejudice, actual or potential, to the guarantors for them to be discharged. I find this especially so when one views these decisions in the light of the case law on the discharge of a guarantor's liability resulting from the conduct of the creditor.

With respect to *Bank of India*, looking at the judgment of Bingham J. as a whole, it is clear that, in the emphasized passage of the quotation above, Bingham J. was referring to concealment amounting to misrepresentations at the formation of the contract of guarantee. Bingham J. was not concerned with misrepresentations by the creditor subsequent to the formation of the contract. On the page previous to that from which the quotation in question is taken, Bingham J. said this about misrepresentations by the creditor (at p. 514):

Certain principles are well-established Non-disclosure at the time when the guarantee is given of facts potentially prejudicial to the surety may be held to amount to and to have the consequences of misrepresentation. (*Lee v. Jones*, (1864) 17 C.B.N.S. 482).

[Emphasis added by Iacobucci J.]

An examination of the case relied upon by Bingham J. to support this proposition, *Lee v. Jones* (1864), 17 C.B.N.S. 482 (Ex. Ch.), 144 E.R. 194, settles the question. In that case, the defendant had executed a guarantee. The plaintiff sued the defendant on the guarantee. The defendant pleaded

by way of defence that he had been induced to make the contract of guarantee by the fraudulent concealment by the plaintiff of a material fact. The Exchequer Chamber, by a majority, affirmed the judgment of the court below that the guarantor was discharged by the concealment. The following passage from the judgment of Blackburn J. makes it clear that the issue in *Lee v. Jones* was whether the misrepresentation was such that the guarantor would not have entered into the agreement had he known the truth :

The improbability that any one could suppose that sureties would have entered into such an agreement if they had known the truth, is so great that the jury might well think that the plaintiffs knew that the defendant was in ignorance of it: and, if the jury so thought, they might from that alone draw the inference that the representation was fraudulently intended to deceive.

[109] In contrast to the situation where there has been a misrepresentation at the time of the formation of the contract of guarantee, Iacobucci J. then summarized the law where the wrongful conduct takes place later on at pp. 1016-1018:

Moreover it is clear from the passage excerpted by the British Columbia Court of Appeal that Bingham J.'s main point in *Bank of India*, and in fact the basis on which that case was decided, was that there is no general principle that irregular conduct which is prejudicial to the surety discharges him or her from liability. The "irregular" conduct in *Bank of India* which was held not to discharge the guarantor was the creditor bank's delay in delivery of written confirmations of the principal contract. This position was affirmed on appeal, [1983] 2 Lloyd's Rep. 298. Goff L.J. stated (at p. 302):

[T]here is no general principle that "irregular" conduct on the part of the creditor, even if prejudicial to the interests of the surety, discharges the surety, though there are particular circumstances in which the surety may be discharged, of which the instances specified by the learned Judge provide certainly the most significant, and possibly the only, examples But that merely irregular conduct on the part of the creditor, even if prejudicial to the interests of the surety, does not discharge the surety, there can in my judgment be no doubt.

[Emphasis added by Iacobucci J.]

In *Wilder*, supra, Wilson J. was faced with the question of the effect on the surety's liability of a breach of the principal contract between the creditor and the debtor. Wilson J. began by observing that a variation in the principal contract which prejudices the guarantor will discharge the guarantor (at p. 562):

It is trite law that any material variation of the terms of the contract between the creditor and the principal debtor to the prejudice of the guarantor without the guarantor's consent will discharge the guarantor.

Wilson J. emphasized that a guarantor gives his or her guarantee on the basis of the risk inherent in the contract which is being guaranteed, and that equity will intervene if the guarantor's right of subrogation is impaired by a variation by the creditor of the risk assumed by the guarantor without the guarantor's consent (at p. 566):

In the case of a specific contract it is to be assumed that the guarantor gave his guarantee in contemplation of an ascertainable and clearly identified risk inherent in the contract. The guarantor in such a case is discharged because he is powerless to protect against variation of the principal contract by the parties to that contract. Once he has given his guarantee on the basis of that particular risk equity protects him against any variation of it to which he was not a party.

Wilson J. held therefore that the question to be asked in determining whether a breach of the principal contract discharges the guarantor is whether the breach materially changed the risk assumed by the guarantor, to the guarantor's detriment (at p. 569):

... the key question becomes whether the subsequent breach of [the principal contract] by the Bank materially changed the risk assumed by the guarantors to the guarantors' detriment. I think there can be no doubt that it did. I agree with Lambert J.A. that the Bank's breach caused the Company's default. It materially impaired the value of the security it held for the Company's indebtedness by preventing the Company from continuing as a viable commercial operation. As a consequence, the guarantors' equitable rights of subrogation and indemnity were seriously interfered with if not effectively destroyed.

Thus the guarantors were discharged in *Wilder* because of the finding of prejudice to them.

I should now like to turn to a brief discussion of other relevant case law on discharge of sureties. In general, once a contract of guarantee has been made, the surety will be discharged entirely only if the principal contract is varied without the guarantor's consent, in a manner not obviously to the benefit of the guarantor, or if the creditor breaches the contract of guarantee. The surety will be partially discharged from his or her obligation under the guarantee if the creditor impairs the value of the security, but only to the extent that the surety's rights of subrogation under the contract of guarantee are affected. This was the position summarized by Laskin J.A. (as he then was) in *Rose v. Aftenberger*, [1970] 1 O.R. 547 (C.A.), at p. 554:

In my view, the encompassing principle to be applied is that a surety is discharged if either the principal contract to which he gave his guarantee is varied without his consent in a matter (as the Supreme Court of Canada said in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165 at p. 172 ...), not plainly unsubstantial or necessarily beneficial to the guarantor; or, if the terms of the contract of guarantee between the creditor and the surety are breached by the creditor.

Where, as here, there is simply a wrongful dealing with the security taken by the creditor, and it is not shown that the taking (and hence the keeping as well) of the security was a condition of the giving of the guarantee, then the surety cannot be relieved beyond the value of the security lost to him.

To the same effect is the following summary from K. P. McGuinness, *The Law of Guarantee* (1986), at p. 282:

[A] surety is entitled to a full release from liability only in two situations: (1) where the effect of the conduct or dealing of the creditor is to vary the risk of default by the principal; and (2) where the creditor violates a condition [page1019] of the surety's liability. Where an act by the creditor merely affects the amount for which the surety will be liable in the event of default, discharge is available only to the extent of the prejudice actually suffered.

[110] Justice Iacobucci concluded, at p. 1019, that discharge from liability in respect of misconduct of the creditor (other than at the formation of the contract of guarantee) is based on two principles:

... First, that the guarantor has undertaken a particular risk, and should not have a materially different risk imposed upon him or her by the variation or breach of the terms of the principal contract. In such situations, since it should be left to the surety to decide whether to continue as a surety and bear the new risk, he or she is entitled to be discharged absolutely if his or her consent was not obtained. Second, where the surety's risk of being called upon remains the same, but the amount for which he or she will be liable is increased by an act of the creditor, the surety may be entitled to be discharged to the extent of that increase.

However, where the creditor breaches the principal contract but the breach does not prejudice the guarantor, the guarantor will not be discharged. ...

[111] Here, Century's conduct in wrongfully posting the Contested Charges to TLT's loan account did not increase the risk imposed upon Ms. LeRoy of being called upon under the guarantee. She did not argue otherwise. It is not disputed that at the time Century issued its demand to her, in September 2008, there was more than \$12 million owing on the loan. Had I not concluded that the guarantee was vitiated as a result of Century's misrepresentation at the time the guarantee was entered into, Ms. LeRoy would have been entitled to a proper accounting of the quantum of her liability but the guarantee would have remained valid.

[112] I have not overlooked Ms. LeRoy's submission to the effect that this result would not serve as a sufficient deterrent to wrongful conduct on the part of a creditor but, in my view, the circumstances here are not distinguishable from those in *Pax Management* where, notwithstanding a clear finding of deceit on the part of the creditor, the guarantors were not entitled to be discharged on their guarantees.

Conclusion

[113] Ms. LeRoy has established a fraudulent misrepresentation that vitiates the guarantee and renders the mortgage unenforceable. In summary:

- (a) at the time she agreed to guarantee TLT's indebtedness, Century represented to her that it intended to conduct itself and administer the loan in accordance with the terms of the TLT Loan Agreement;
- (b) that representation was false because, at that time, Century was indifferent about whether it complied with the terms of the TLT Loan Agreement and it intended to post charges to the TLT loan account in accordance with its standard practices irrespective of whether those practices conflicted with the provisions of the TLT Loan Agreement;
- (c) Century was reckless with respect to the truth of the representation and displayed a wanton disregard as to whether Ms. LeRoy would be deceived by it;
- (d) Ms. LeRoy relied on the representation and would not have agreed to guarantee TLT's indebtedness and provide the mortgage over her home had she known that Century was indifferent to the terms of the TLT Loan Agreement and intended to administer the TLT loan in accordance with its standard practices irrespective of whether those practices conflicted with the terms of the TLT Loan Agreement; and
- (e) Ms. LeRoy suffered a loss as a result of entering into the guarantee because it rendered her liable for the shortfall on TLT's loan and exposed her home to foreclosure.

[114] The action is dismissed. If the parties wish to speak to costs they may do so by contacting the registry for a hearing date.

"WARREN J."

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