

CANADA / JUDGMENT

Century Services Corp. v. LeRoy

2022 BCCA 239

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 239 Century Services Corp. v. LeRoy

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Century Services Corp. v. LeRoy,

2022 BCCA 239

Date: 20220708

Docket: CA47647

Between:

Century Services Corp.

Appellant

(Plaintiff)

And

Cynthia Rebecca Delores LeRoy

Respondent

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated

June 30, 2021 (Century Services Corp. v. LeRoy, 2021 BCSC 1285,
Duncan Docket S12043).

Counsel for the Appellant:

R.J. Robinson

Counsel for the Respondent:

A. Crabtree

M. Abdelkader, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

May 16, 2022

Place and Date of Judgment:

Vancouver, British Columbia

July 8, 2022

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Horsman

Summary:

Defendant Ms. L guaranteed indebtedness of her husband's company ("TLT") to plaintiff C on a limited recourse basis, and granted a mortgage on her home as security for her guarantee. TLT went into CCAA protection and then bankruptcy, and C called its loan and commenced foreclosure proceedings against Ms. L. TLT's assets were liquidated, partially by public auction supervised by accounting firm PWC, which was also CCAA monitor, trustee in bankruptcy, and had been appointed as (private) receiver by C. When C sought to foreclose on Ms. L's mortgaged property, the exact amount of TLT's remaining indebtedness to C was unknown and interest was accruing at 24% per annum compounded monthly. Thus the redemption amount was unknown.

At trial in this foreclosure proceeding, judge found auction had been carried out "improvidently" and that C had 'padded' its claimed debt with charges not permitted by the loan agreement between TLT and C. Trial judge found C had been "reckless" in doing so and that charging interest at the contractual rate over the years of legal proceedings in this matter engaged public policy considerations in favour of exercising an equitable jurisdiction to decline to calculate interest on

redemption amount at the contractual interest rate. She ordered that interest calculated at the court order interest rate should be charged from February 2009 to the date of her reasons, and that thereafter, the contractual rate should apply up to date of payment in full.

On appeal, Court rejected C's argument that PWC could not have acted as its agent because of duties to the court. This would be correct if PWC had been court appointed, but in fact it was privately appointed and as such had acted as C's agent. Court found no palpable and overriding error in trial judge's findings of fact regarding improvident auction, amount of "loss" occasioned thereby and padded charges. Thus TLT's indebtedness, guaranteed by Ms. L, was to be reduced by the consequential loss and improper charges were to be deducted from TLT's debt as trial judge had ordered.

Trial judge had requested and received counsel's submissions on the question of interest, although a report submitted by C and prepared by an independent accountant was by C's own admission not completely accurate. Although s. 19 of Law and Equity Act gave the court some discretion in exceptional circumstances to vary (for example) the date to which interest is calculated, there is no equitable principle that would permit a court to rewrite a commercial loan agreement by varying the agreed-upon interest rate because of judge's opinion that the rate agreed upon, though legal, was excessive or that a party's misconduct was deserving of punishment. Accordingly, interest had to be calculated at the contractual rate, compounded monthly.

Finally, Court ruled that punitive damages were not appropriate, even if they had been pleaded.

Appeal allowed. Determination of redemption amount of Ms. L's mortgage was remitted back to Supreme Court with interest to be calculated at contractual rate on principal amount of debt, unless parties could settle on a redemption amount that would not involve more time and money. Given that guarantee was a limited recourse obligation, this should not be difficult.

Reasons for Judgment of the Honourable Madam Justice Newbury:

Overview

- [1] This long and hard-fought foreclosure proceeding arose out of a common fact situation: in order to assist in the financial restructuring of a company of which her spouse was the principal, the defendant Ms. LeRoy provided a guarantee, limited in amount to \$2,000,000 plus interest, to a new lender, the plaintiff Century Services Corp. ("Century"). The guarantee was secured by a mortgage on the couple's home near Duncan, British Columbia, of which Ms. LeRoy is the sole registered owner. She obtained independent legal advice before signing the guarantee. At the time of trial, the property was appraised at \$1.3 million.
- [2] Shortly after the restructuring documents had been signed, the debtor company, Ted Leroy Trucking Ltd. ("TLT"), defaulted under the new loan agreement (the "Loan Agreement"). A long liquidation of TLT's assets began, including a public auction of a large volume of equipment and smaller items. However, a deficiency remained, in large part because of the

high rate of interest (said to constitute an annual effective rate of 26.82%) accruing on the loan. In due course, Century made demand to Ms. LeRoy under her guarantee and notified her of its intention to enforce the mortgage. Now, more than 13 years later, the amount required to redeem under the order nisi is still the subject of contention.

- [3] Around the same time that it defaulted, TLT was already in CCAA proceedings. It then petitioned itself into bankruptcy, although it did so only to allow the transfer of certain governmental contracts to third party purchasers. All other aspects of the bankruptcy process were stayed by order of Chief Justice Brenner dated September 3, 2008. (This order was the focal point in *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60.) TLT also appointed Messrs. Price Waterhouse Coopers ("PWC") as a private (as opposed to court-appointed) receiver. Eventually, the Court approved the holding of a public auction of various items of logging equipment as part of the liquidation of TLT's business.
- [4] PWC supervised the auction, which netted proceeds of over \$9,000,000. When the time came for an order nisi to be issued in the foreclosure action against Ms. LeRoy, however, she contended that the sale had been carried out negligently and that certain charges had been improperly made by Century to TLT's loan account. These circumstances, she argued, prevented her from knowing the amount of her liability and of course, the amount necessary to redeem the mortgage.
- [5] The implications of these "defences" were the subject of the first portion of the trial in late 2016, after which the trial judge found that Ms. LeRoy had established that Century had never intended to administer the loan in accordance with the Loan Agreement but had impliedly made a representation to her that it would do so. She had relied on that implied representation in agreeing to provide her guarantee. The trial judge ruled that the representation was "a fraudulent misrepresentation that vitiates the guarantee and renders the mortgage unenforceable." (See 2017 BCSC 1880 at para. 113.)
- [6] Century appealed, and for reasons indexed as 2018 BCCA 279, this court allowed the appeal, declaring that the guarantee was enforceable. The Court remitted the case back to the Supreme Court for resolution of "the remaining defence" based on the allegedly improvident sale of TLT's assets.
- [7] The trial resumed with the filing of further submissions in August 2020; and the judge issued her reasons, indexed as 2021 BCSC 1285, on June 30, 2021. In them she noted, correctly, that the factual findings she had made in 2017 had not been disturbed by this court. She purported to exercise an equitable jurisdiction that permitted her to decline to calculate the redemption amount at the contractual interest rate of 24% per annum, compounded monthly. Instead she found that the redemption amount was \$378,000, and that interest should be calculated on that amount at prejudgment rates payable under the Court Order Interest Act, R.S.B.C. 1996, c. 79, from February 26, 2009 to the date of the judge's 2021 reasons, and at the contractual rate thereafter.

[8] Century appeals this conclusion, as well as others.

Factual Background

Relevant Dates

[9] I do not intend to recount the facts in detail, since the proceedings below involved many questions that are no longer in contention or are irrelevant to the grounds of appeal asserted by Century. I will provide a skeletal history of the parties' dealings, referring only to the facts found by the trial judge that are necessary to describe and decide the issues raised in this court. The judge was helped considerably, as are we, by the fact that the parties agreed on a consolidated statement of admitted facts. She drew upon these at paras. 11-43 of her 2017 reasons and repeated them at para. 13 of her 2021 reasons.

[10] The following events are relevant for our purposes:

December 10, 2007

The Royal Bank of Canada ("RBC") demanded payment of its loans to TLT in the amount of approximately \$18,000,000.

December 14, 2007

TLT obtained a stay of proceedings under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). PWC was appointed as the monitor, but the order stated that the Monitor was not to take possession of the Property.

March 27, 2008

TLT entered into the Loan Agreement with Century, under which Century advanced \$14,250,000 to RBC to acquire TLT's debt. All of RBC's security (including PPSA security) over TLT's assets was assigned to Century. Century received a commitment fee of \$725,000 and interest at 24 percent, compounded monthly, was to accrue on TLT's indebtedness.

Ms. LeRoy signed the "limited recourse guarantee" for \$2,000,000 secured by a mortgage on the LeRoys' home. (We are told that Mr. LeRoy was released from a mortgage he had granted in the principal amount of \$1,000,000 and that there were other "benefits" described in Century's factum at footnote 2.) The guarantee stated that if an Event of Default under the Loan Agreement occurred, Ms. LeRoy would pay forthwith on demand "the full amount of the Borrower Obligations due and payable (by acceleration or otherwise) by the Borrower [TLT], free from any claim, counterclaim or defence of the Guarantor against Century." Century's recourse against Ms. LeRoy was limited, however, to her interest in the Duncan property.

April 7, 2008

The stay order under the CCAA was extended to November 28, 2008 to allow for a proposed restructuring. Several subsequent extensions were granted.

May 31, 2008

TLT defaulted on its first loan payment to Century under the Loan Agreement.

July 1, 2008

TLT presented an "orderly wind up and liquidation plan" to Century and in accordance therewith, negotiated an auction contract with Ritchie Bros. Auctioneers (Canada) Ltd. for the auctioning of most of its business assets.

July 30, 2008

TLT and Ritchie Bros. Auctioneers agreed that the latter would carry out a public auction of specified equipment belonging to TLT.

September 3, 2008

TLT petitioned itself into bankruptcy, with PWC continuing as monitor and trustee in bankruptcy.

Chief Justice Brenner ordered that TLT and a related company were permitted, "subject to the supervision of [PWC], in its capacity as Monitor herein or in its capacity as Receiver of [TLT], to proceed with a sale of their assets ...;" that the proceeds of sale after reasonable selling costs and the payment of certain priority claims were to be paid to Century; that TLT was permitted to file an assignment in bankruptcy "with [PWC], but all proceedings under the bankruptcy are stayed until further order of the Court"; and that TLT or any receiver thereof was authorized to proceed with the Auction Agreement "notwithstanding any bankruptcy proceedings in respect of the Petitioners."

September 4, 2008

Century issued a demand for payment and gave notice to TLT of its intention to enforce its security. The amount of TLT's indebtedness was said to be \$13,024,353.34 as of August 31, 2008, plus interest of \$8,563.95 per day.

Century appointed PWC as receiver under its security instruments, with the power to "take possession of and get in any and all of the Collateral and take such steps as may be necessary" for its preservation and to "make any arrangement or compromise, with the consent of Century" that PWC thought "expedient".

September 22, 2008

Ritchie Bros. conducted the auction of TLT's equipment, resulting in gross proceeds of approximately \$9,081,225.

September 23, 2008

Century made demand on Ms. LeRoy for payment of the amount guaranteed and issued a notice of intention to enforce the mortgage. No payment was made. The notice of enforcement stated that on September 3, TLT's indebtedness had stood at just over \$13 million and that although some payment was expected, the total debt still exceeded \$2 million as of September 23, 2008. As a result, Century made demand on Ms. Leroy for the sum of \$2 million plus interest in an unspecified amount.

November 12, 2008

Century commenced foreclosure proceedings in respect of the mortgage on Ms. LeRoy's Duncan property.

May 13, 2009

A master of the Supreme Court of British Columbia granted an order nisi in the foreclosure action and fixed the last date for redemption as November 13, 2009. The redemption amount was set at \$1,737,932.35 plus contractual interest of \$1,111.54 per day, but was "subject to any further Order of this Court as to the amount due under the limited recourse guarantee"

March 16, 2010

Asserting a defence to the enforcement of the guarantee and mortgage based on the "improvident realization" of TLT's assets, Ms. LeRoy obtained an order of Goepel J., as he then was, referring the question of the final foreclosure order to the trial list. (See 2010 BCSC 328.)

April 24, 2014

Ms. LeRoy obtained an order in the foreclosure proceeding allowing the addition of an allegation of fraudulent misrepresentation to her pleading, a ruling upheld in March 2015 by this court. (See 2015 BCCA 120.)

February 9, 2016

Ms. LeRoy applied for and obtained an adjournment of the trial.

November 21, 2016

Trial commenced.

October 24, 2017

Trial judge delivered the 2017 reasons, finding that Ms. LeRoy's guarantee was "vitiating" by reason of fraudulent misrepresentation.

July 10, 2018

As mentioned earlier, this court allowed Century's appeal and remitted the case back to the Supreme Court for resolution of the "defence" of improvident realization.

August 12-13

Further submissions heard by trial judge.

June 30, 2021

Trial judge delivered the 2021 reasons.

The 2017 Reasons

- [11] As the trial judge noted at para. 8 of the 2021 reasons, the first part of the trial (from late 2016 to early 2017) had seen the expansion of the parties' dispute in the course of the discovery process. It was during this process that Ms. LeRoy learned that Century had posted certain charges to TLT's loan account (the "Contested Charges") which she claimed were improper. Thus in addition to the "improvident realization defence", she advanced a defence based on fraud relating to the Contested Charges and argued that the fraud nullified or vitiated her guarantee and made the mortgage unenforceable.
- [12] The judge found that the Contested Charges had not been authorized under the terms of the Loan Agreement and that Century had "improperly and recklessly" posted them to TLT's loan account. She also found that:
- (b) there was no consideration [by Century] 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. [At para. 91.]
- [13] These findings led her to the conclusion that at the time Century made its demand on Ms. LeRoy for payment under the mortgage, it had been "indifferent" as to whether it would comply with the terms of the Loan Agreement and indeed had intended to post charges irrespective of whether they were permitted. From this, the judge inferred that Century had made an implied representation to Ms. LeRoy that it intended to administer the loan in accordance with the Loan Agreement and that that representation had been false. (At para.

92.) Further, this representation had been a "significant factor" that had induced Ms. LeRoy to provide the guarantee and grant the mortgage and her reliance had been objectively reasonable. (At para. 101.)

[14] Finally, the judge found on this point:

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 LeRois' 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.

Ms. LeRoy has established a fraudulent misrepresentation that vitiates the guarantee and renders the mortgage unenforceable. [At paras. 102-3; emphasis added.]

[15] The judge added that if she had not concluded the guarantee had been vitiated as a result of Century's implied misrepresentation at the time it 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. (At para. 111.)

Court of Appeal's Reasons: 2018 BCCA 279 (leave to SCC dismiss'd [2019] S.C.C.A. No. 12)

[16] This court allowed Century's appeal for reasons dated July 10, 2018. Speaking for the Court, Hunter J.A. reviewed the relevant authorities, including *Bauer v. the Bank of Montreal* [1980] 2 S.C.R. 102, *Hamilton v. Watson* (1845) 12 Cl & F 109 (H.L.), *Royal Bank of Scotland v. Etridge* (No. 2) [2002] 2 A.C. 773 (H.L.), *Toronto-Dominion Bank v. Rooke* (1983) 49 B.C.L.R. 168 (C.A.), *Royal Bank v. Hislop* (1989) 39 B.C.L.R. (2d) 392 (C.A.), and finally, *Collum v. Bank of Montreal* 2004 BCCA 358. From these, he summarized the applicable principles:

From this I extract the following principles concerning the circumstances when a creditor has a duty to disclose information to a prospective guarantor who has not asked questions of the creditor:

- (a) the information must be material;
- (b) materiality is to be assessed on an objective basis, that is, whether the information would be likely to affect the mind of a reasonable guarantor in the position of the prospective guarantor; and
- (c) the information must be of facts connected to the dealings between creditor and debtor (or other guarantor) which are the subject of the guarantee, that the surety would expect not to exist.

The scope of this disclosure obligation facilitates efficient credit markets. Prospective guarantors are able to make informed decisions because they are provided sufficient information to assess the risks they are assuming, and lenders are not unduly burdened by having to disclose information that a reasonable person would not find material or unexpected. [At paras. 69-70; Emphasis added.]

[17] Applying them to the case at bar, the Court reasoned that the trial judge had erred in law in concluding that the "mere proffering of the loan agreement and guarantee, without disclosing information relating to how Century intended to post charges if the loan went into default, was capable of constituting a misrepresentation that vitiates the guarantee." That information, it was said, had not been material to the risk assumed by Ms. LeRoy in guaranteeing the loan. In Hunter J.A.'s words:

A reasonable person in the position of Ms. LeRoy would not have declined to sign the guarantee because of a concern that Century might seek to recover unauthorized charges if the loan went into default. If Century overcharged by following its standard billing practices instead of following the actual terms of the agreement, neither the debtor nor Ms. LeRoy would be obliged to pay the charges. The terms of the loan agreement and guarantee would govern, regardless of Century's billing practices. [At para. 9; emphasis added.]

[18] This court also disagreed with the trial court's finding that the proffering of the Loan Agreement had constituted an implied representation that Century intended to abide by its terms. This characterization did not, Hunter J.A. said, "transform the analysis into one of express misrepresentation. Any offer to contract carries with it a promise to comply with the contract at such future time as contract performance is required. Breach of the promise to perform does not render a contract voidable." (At para. 79; my emphasis.) Applying the objective standard he had described, he concluded that the guarantee was enforceable. The Court remitted the issue of alleged negligence in the liquidation of TLT's assets back to the Supreme Court.

[19] I add that at no stage did Ms. LeRoy raise the duty of honest performance in contract as established in *Bhasin v. Hrynew* 2014 SCC 71.

Trial Judge's 2021 Reasons

[20] After describing the factual background and the parties' positions when the trial resumed, the trial judge described the issues before her as follows:

1. Is it open to Ms. LeRoy to seek a set-off for improvident realization in the absence of a counterclaim?
2. If so, has she established that the sale of the TimberWest Bill 13 Contract, the sale of the WFP Bill 13 Contract, and/or the organization of the auction were commercially unreasonable and, as a result, that less money was recovered than would otherwise have been the case?

3. If so, did Century have a duty to maximize TLT's recovery?
4. Even if Century had a duty to maximize TLT's recovery, is Ms. LeRoy prevented from challenging the reasonableness of the liquidation by application of the collateral attack doctrine or res judicata principles?
5. What is the amount required to redeem?
6. What redemption period should be set?
7. What costs award is appropriate? [At para. 23.]

Set-off for Improvident Realization?

[21] Under this rubric, Century made an argument based on portions of ss. 68 and 69 of the Personal Property Security Act, R.S.B.C. 1996, c. 359 ("PPSA"). These sections provide in part:

68 (1) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

(2) All rights, duties or obligations arising under a security agreement, this Act or any other law applicable to security agreements or security interests must be exercised or discharged in good faith and in a commercially reasonable manner.

69 (2) A person to whom a duty or obligation is owed under this Act has a cause of action against any person who, without reasonable excuse, fails to discharge the duty or perform the obligation.

(3) Subject to subsection (5) in an action under subsection (2), the plaintiff is entitled to recover damages from the defendant for losses that are reasonably foreseeable as being liable to result from the failure to discharge the duty or perform the obligation.

...

(7) In an action for a deficiency, the defendant may raise as a defence the failure on the part of the secured party to comply with obligations in section 17, 18, 59 or 60, but non-compliance limits the right to the deficiency only to the extent that it has affected the ability of the defendant to protect the defendant's interest in the collateral or has made the accurate determination of the deficiency impracticable.

...

(9) Except as otherwise provided in this Act, a provision in a security agreement or any other agreement that purports to exclude a duty or onus imposed by this Act or that purports to limit the liability of or the amount of damages recoverable from a person who has failed to discharge a duty or obligation imposed by this Act is void.

I also note s. 17, which states:

17 (1) In this section, "secured party" includes a receiver.

(2) A secured party must use reasonable care in the custody and preservation of collateral in the possession of the secured party and, unless the parties otherwise agree, in the case of an instrument or chattel paper, reasonable care includes taking necessary steps to preserve rights against other persons.

[22] Century contended that although the PPSA created a cause of action for breach of the duty to act in good faith and in a commercially reasonable manner, it did not create a right of set-off or defence in an action for a deficiency. The judge rejected this submission, observing that the fact that s. 69(7) does not include a defence based on a party's breach of its duty under s. 68(2) does not mean that no defence could be asserted on the basis of improvident realization. Century also cited this court's decision in *J & W Investments Ltd. v. Black* [1963] B.C.J. 125 for the proposition that an aggrieved debtor who has a complaint of improvident realization has an equitable cause of action but may not have an equitable defence to a secured creditor's deficiency action. Again, the trial judge did not agree. In her analysis:

... The point being made is that a successful assertion of improvident realization gives rise to an equitable right to an account (in other words, a right to an account that would ground a set-off against any deficiency), but not a claim for tort damages. An equitable set-off may be raised as a defence to an action for debt: *Cactus Restaurants Ltd. v. Morison*, 2010 BCCA 458 at para. 12.

As Century acknowledges, several cases in this jurisdiction have determined allegations of improvident realization framed as a defence to a deficiency action: see e.g., *Kupritz; Mercedes-Benz Financial Services Canada Corp. v. 1063995 B.C. Ltd.*, 2018 BCSC 1324; *Arbutus Capital Vehicle Leasing Ltd. v. Hanif*, 2013 BCSC 189; *Bank of Montreal v. Tolo-Pacific Consolidated Industries Corp.*, 2012 BCSC 1785 [Tolo-Pacific]; and *Canadian Western Bank Leasing Inc. v. SSC Ventures (No. 98) Ltd.*, 2016 BCSC 223 [Canadian Western Bank]. There is no express consideration in these cases of the existence of a defence of improvident realization but, in my view, that is because its existence is obvious.

The defence may be framed as an equitable set-off. It is also a specific example of the doctrine of mitigation. As stated in Kevin McGuinness, *The Law of Guarantee*, 3rd (Markham, ON: LexisNexis, 2013):

§10.56 Vis-à-vis a surety, the duty of prudent realization is no more than a normal obligation of a contract party to mitigate the damages that flow from a breach of contract. A failure to discharge the duty of prudent realization does not render the creditor liable to the surety. It merely releases the surety from liability to the extent of any prejudice suffered.

[At paras. 28-30; emphasis added.]

- [23] In summary, the trial judge was of the view that Ms. LeRoy was entitled to raise the question of improvident realization in defence to a "deficiency action". As far as the PPSA was concerned, she found it would not be inconsistent with the statute to "supplement" the defences expressly mentioned in s. 69(7) with a defence of improvident realization. Given this, Ms. LeRoy was entitled to seek an equitable set-off for improvident realization in the absence of a counterclaim. (At para. 34.)
- [24] The judge also held that it would not be fair to bar Ms. LeRoy from asserting improvident realization because of her lateness in pleading such a defence or set-off. Century had been aware since at least January 2010 that she was contesting Century's claim on these grounds. (At paras. 35-6.) Further, the fact Ms. LeRoy had in the guarantee agreement expressly waived "all defences of a surety to which [she] may be entitled" did not prevent her from raising this defence: Ms. LeRoy could be liable only up to the amount of TLT's indebtedness, which depended on Century's having fulfilled its duty of prudent realization; and a secured creditor cannot contract out of its statutory duties under the PPSA: see s. 69(9).

Had Ms. LeRoy Established that the Auction was Commercially Unreasonable?

- [25] This issue required a great deal of detailed analysis by the trial judge, which I hope not to rehearse here. She began by describing "the test" for improvident realization, which had been expressed in *Canadian Western Bank Leasing Inc. v. SSC Ventures (No. 98) Ltd.* 2016 BCSC 223 and *HSBC Bank Canada v. Kupritz* 2011 BCSC 788 as a test of reasonableness -- i.e., did "the secured party [take] all reasonable steps to obtain the best price for the collateral"? The burden is on the debtor to show that the manner of sale of collateral was improvident and that the failure to act in a commercially reasonable manner meant that less money was recovered than would otherwise have been the case. (At para. 40.) The judge continued:

As Justice Fenlon observed in *Kupritz* at para. 36, in practical terms this requires the debtor to establish that the secured party departed from industry norms and that a higher price would have been obtained if the secured party had done what is considered to be reasonable in the industry in question. As she noted, the debtor will generally be required to provide expert evidence on the industry standard against which the allegedly substandard conduct may be measured, although in some cases the conduct may so obviously depart from commercial common sense that evidence of what was done will suffice.

The standard of "commercially reasonable" is an objective one. Justice Fenlon identified the following potential considerations:

- the method of sale (private sale or public auction);
- the extent to which the sale was advertised;
- the time and place of the sale;
- whether an opportunity to inspect the goods was provided;

- whether the collateral was sold as one parcel or in smaller lots;
- costs associated with the sale or delaying a sale; and
- whether collateral should have been repaired or improved prior to a sale.

(Kupritz, at para. 34)

Applying this objective standard in the case at bar, the trial judge found that the sale of both the so-called "TimberWest" and "Strathcona" Agreements had been reasonable.

- [26] The equipment auction was a different matter. (See paras. 58-77.) Overall, the judge found that the sale of the small items of equipment had been "very poorly organized" (see para. 67-8); that the refusal of Mr. Slavik (who had been hired by TLT for "operational management expertise"), to accede to a request from Ritchie Bros. that Jason LeRoy be hired to assist, had been commercially unreasonable (at para. 72.); and that if Jason LeRoy had been hired or more manpower and expertise had been provided, more sale proceeds would have been recovered. This, the judge said, was the only reasonable inference to be drawn from the extensive evidence of the disorganized state of the equipment during the auction.
- [27] At para. 85, the judge carried out a rough calculation of the quantum of the difference between the proceeds actually realized and what would have been realized had the auction been properly organized. She estimated that about \$450,000 more would have been realized.

Century's Role in Asset Realization

- [28] At para. 88, the trial judge turned to the matter of what responsibility, if any, Century had owed to TLT (and indirectly to Ms. LeRoy as a guarantor thereof), to maximize TLT's recovery from the realization process. Century's position was that it had no such duty because it was not in control of the process; nor was any "relevant party" in control as its agent. It said TLT itself had remained in possession and control of its assets until sold "in the context of the ongoing CCAA proceeding". As well, the lender contended, PWC had acted as the monitor under the CCAA or as receiver, and in both capacities was an officer of the Court and obliged to consider the interests of all parties. Thus in Century's submission, PWC had never acted as its agent.
- [29] The trial judge did not accede to this argument. In her analysis, it overlooked the fact that the invocation of the CCAA and the appointment of PWC as a private receiver had been followed by later events that vested possession and control of TLT's assets clearly in PWC. (At para. 91.) As the judge observed:

... First, there was a subsequent order in the CCAA proceeding on September 3, 2008, permitting TLT to file an assignment in bankruptcy with PWC (para. 4) and authorizing TLT "or any Receiver of [TLT]" to, among other things, proceed with the auction (para. 6). Second, TLT subsequently filed an assignment in bankruptcy and, on September 4, 2008, Century appointed PWC as its receiver.

The September 3, 2008 order reflected a fundamental change in circumstances: the restructuring of TLT with CCAA protection had become a liquidation and winding up of the company. The assignment in bankruptcy was required to crystalize the claims and priorities of creditors. However, the Bill 13 Contracts were subjected to termination in a bankruptcy, which would eliminate substantial value. The solution, as reflected in the Chambers Brief filed for the September 3, 2008 hearing and the reasons of Chief Justice Brenner dismissing an application by the Federal Crown for payment of GST monies that had been segregated earlier in the CCAA proceeding, was for Century to privately appoint PWC as receiver to finalize the liquidation, and for the Court to permit the assignment into bankruptcy to be filed, but then to stay the proceedings in the bankruptcy and continue the CCAA stay, all of which would maximize Century's recovery. [At paras. 91-2; emphasis added.]

[30] TLT had assigned itself into bankruptcy on September 3, 2008 and although Chief Justice Brenner's order of that date had stayed the bankruptcy proceedings, TLT's assets became vested in its trustee in bankruptcy -- i.e., PWC -- in accordance with s. 71 of the BIA. (Citing *Royal Bank of Canada v. North American Life Assurance Co.* [1996] 1 S.C.R. 325 at 354.) Section 71 states:

On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer. [Emphasis added.]

No statutory provision that would have permitted a court to override s. 71 was suggested.

[31] The result was that TLT's assets had vested in PWC as trustee in bankruptcy, but (the judge stated at para. 96) "subject to Century's rights as the secured creditor". In this capacity, the judge noted that Century had appointed PWC as receiver and that PWC had taken over TLT's responsibility for organizing the sale of TLT's assets at the auction. This fact had been reflected, she observed, in the statement of admitted facts at paras. 74-5 and in representations made to the Court by PWC in the CCAA proceeding, including in its various reports to the Court. As of the date of PWC's appointment as receiver -- September 4, 2008 -- the judge concluded, everything Mr. Slavik had done in relation to TLT's assets "had to have been done for PWC." (At para. 105.)

[32] Had PWC acted as Century's agent in carrying out the liquidation? Century argued that it had not, since receivers are officers of the court and do not act for the secured party who caused the appointment. Again, the judge disagreed, ruling that cases such as *Forjay Management Ltd. v. 0981478 B.C. Ltd.* 2018 BCSC 527 and *Re Philip's Manufacturing Ltd.* (1992) 69 B.C.L.R. (2d) 44 (C.A.) did not assist Century because PWC was not a court-appointed receiver. Private receivers, the judge reasoned, do not owe fiduciary obligations to the debtor or other creditors, but are agents of the secured creditor who appointed them. (Citing *Re Graham Mining Ltd.* (2001) 26 C.B.R. (4th) 28 at paras. 45 and 50 (S.C.), *aff'd* (2002) 34 C.B.R. (4th) 37

(C.A.); *Royal Bank of Canada v. Eastern Infrastructure Inc.* 2019 NSSC 243 at paras. 39-40; and *620630 Saskatchewan Ltd. v. Price Waterhouse Coopers Inc.* 2003 SKQB 175 at paras. 37-44.)

- [33] The judge went on to find that it could not be said PWC had acted as a dual agent for both TLT and Century. TLT had by this time ceased as a going concern and no longer had possession of its assets. PWC on the other hand was acting as Century's agent, for Century's benefit. (At para. 112.)
- [34] Accordingly, the judge concluded that Century was vicariously liable for PWC's negligence, provided the conduct in question (in particular Mr. Slavik's refusal to hire Jason LeRoy) was within the ambit of its authority. There could be no doubt that this proviso was met. She continued:

Century privately appointed PWC to liquidate TLT's assets. The evidence overwhelmingly establishes that Century was intimately involved throughout the liquidation and provided instructions to PWC with respect to the liquidation, going so far as to require that Mr. Slavik be put in charge. This is not a case in which PWC can be said to have been acting as a dual agent for both TLT and Century. TLT ceased to be a going concern and no longer had possession of its assets. Even a deemed agency clause in the security instrument could not have changed the reality that PWC was conducting its private receivership for the sole purpose of realizing on Century's collateral. In its capacity of privately appointed receiver, PWC was acting as Century's agent, for Century's benefit.

For the forgoing reasons, I find that as of September 4, 2008, PWC, in its capacity as private receiver, was acting as Century's agent. ... [At paras. 112-3; emphasis added.]

The Redemption Amount of the Mortgage

- [35] The trial judge returned at para. 119 to the central issue before her -- what amount was required to redeem the mortgage granted by Ms. LeRoy on her property? As seen earlier, on September 23, 2008 (the day after the auction) Century had made demand under the guarantee for \$2,000,000 plus accrued interest and costs. Century relied at trial on an expert report prepared by Ms. Potgieter of Ernst & Young, a chartered accountant and business valuator. Her report showed the amount outstanding on the TLT loan on each day between March 27, 2008 and November 9, 2015 (the date of her calculation) after deduction of the "Contested Charges" but before any allowance for the improvident realization. Applying the effective rate of 26.82% per annum, Ms. Potgieter's report showed \$12,724,590 outstanding under the loan on the date of demand. The amounts she calculated on other dates are set forth at para. 15 of the reasons.
- [36] As the judge observed at para. 119, after September 23, 2008, the loan balance had been reduced by the net realization proceeds raised through the auction and other sales, so that according to Ms. Potgieter, on October 21, 2008 the shortfall was reduced to \$3,072,943. Further proceeds were received even after this date and according to the report, the lowest

point of the TLT loan balance occurred on February 26, 2009 when the amount owing was \$976,040. The judge did her best to calculate what the result would be if the \$450,000 "loss" resulting from the improvident auction had been applied against the balance on October 21, 2008 and calculated interest accordingly. Her rough calculation was that the amount owing on February 26, 2009 (the date of the low point) would have been about \$378,000, including interest to that date. This, the judge said, was the starting point for determining the redemption amount of Ms. LeRoy's mortgage.

Interest

[37] The next question, the trial judge stated, was whether interest was payable and if so at what rate and to what date. According to Century, Ms. Leroy had not raised the question of interest until August 2020 when she filed her written submissions. Century says that without notice, the trial judge "morphed the issue to one where she could also arbitrarily choose an interest rate and the time period it would run as opposed to denying it outright" and that the judge ultimately "decided the matter based on her own research" and "mistaken accounting analysis, both seen for the first time in the reasons, without providing the parties any notice or opportunity to respond."

[38] Ms. LeRoy sought to invoke an equitable jurisdiction that would relieve her from the obligation to pay any interest or at least from paying interest as stipulated in the Loan Agreement. The trial judge described her submission, based in part on *United Savings Credit Union v. 631252 B.C. Ltd.* 2003 BCSC 367, as follows:

Ms. LeRoy says that Century's conduct, specifically, the posting of the Contested Charges to the TLT Loan account and the improvident realization, precluded her from ascertaining the true amount outstanding. This deprived her of the opportunity to make an informed decision about whether to redeem. She says that she had to endure years of discovery and a trial to determine that the Contested Charges had been improperly posted to the TLT Loan account and then several years of further litigation to determine that Century breached its duty of prudent realization, and that Century should not profit from its conduct by receiving any interest at all. She observes that had she tendered \$2 million in response to Century's demand she would have vastly overpaid.

Alternatively, Ms. LeRoy says that it would be inequitable to award Century anything more than contractual interest on the declining balance of the TLT Loan between September 23, 2008 (the day of the demand) and February 26, 2009 (the lowest point), and that interest on any amount outstanding as of February 26, 2009 should be calculated at prejudgment interest rates pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, rather than at the contractual rate. [At paras. 126-7; emphasis added.]

[39] In response, Century contended that the Court had no power to decline to award contractual interest, citing the cases mentioned at para. 128. In the alternative, it claimed that Ms. LeRoy was not entitled to invoke Equity because she did not have clean hands, having "intentionally reneged" on a contractual promise to secure a replacement mortgage on the

Duncan property. (This argument was rejected for the reasons at paras. 182-3.) As well, the lender submitted that Ms. LeRoy had not expressly sought equitable relief from contractual interest in her pleadings and that it was now too late to amend them because the matter had not been explored at trial. (At para. 129.)

- [40] The trial judge began her analysis of the interest questions by acknowledging that contractual interest at the annual rate of 24%, compounded monthly, was not illegal. It had reflected the high-risk nature of the loan made to TLT when it was in CCAA protection and there was a "real risk" of bankruptcy. The judge also expressed the view that there had been no inequality of bargaining power between the parties resulting in an improvident bargain that would justify setting aside the guarantee itself. (Citing *Uber Technologies Inc. v. Heller* 2020 SCC 16 at paras. 65 and 79.) She formulated the real issue before her as follows:

The issue is whether this Court has the jurisdiction to depart from a contractual interest rate in the course of fixing the amount required to redeem a mortgage, or order that interest is payable to a date other than the date full payment is made, because of the mortgagee's post-contracting conduct and, if so, whether that jurisdiction should be exercised in this case. [At para. 131; emphasis added.]

- [41] The judge found that none of the cases cited by the parties provided clear authority either way as to whether the Court had jurisdiction to depart from contractual interest or to make interest payable to a date other than the date of full payment. In *United Savings Credit Union, Sigurdson J.* had left the issue open: he found the case before him was not an appropriate one in which to exercise a jurisdiction to vary an interest rate, assuming it existed. (At paras. 13-8.) In *Bank of Montreal v. Awards-West Ventures Inc.* (1990) 50 B.C.L.R. (2d) 363 (C.A.), the Court was concerned with whether delay on the part of the mortgagee in pursuing a claim on the covenant constituted a defence known to law. *Agate Developments Ltd. v. United Gulf Developments Ltd.* 2009 NSSC 160 did not concern the purported jurisdiction in equity to fix the terms on which a mortgagor may exercise the equitable right to redeem, and in any event, had been overruled in *Jorna & Craig Inc. v. Chiasson* 2020 NSCA 42. Other cases to which the judge was referred had been about interest on claims in debt.

- [42] This left the Supreme Court of Canada's decision in *Bank of America Canada v. Mutual Trust Co.* 2002 SCC 43, which the trial judge described at paras. 150-4 of her reasons. It revolved around s. 128 of the Courts of Justice Act, R.S.O. 1990, c. C. 43, which permitted a court in making an order "for the payment of money" to award interest thereon at the pre-judgment interest rate, but prohibited an award of interest on interest. Similarly, s. 129 specified that money owing under an order bears interest at the post-judgment interest rate, but prohibited an award of interest under that provision "where interest is payable by a right other than under this section." The trial judge in *Bank of America*, Mr. Justice Farley, had found the respondent lender in breach of the loan contract for a number of reasons, including that it had acted in bad faith in refusing to fund the loan to which it had agreed, had caused unreasonable delay in replacing its counsel, and had taken the position that it

was relieved of its obligation to provide takeout financing as agreed. (At para. 10.)

[43] Farley J. made various adjustments to, and deductions from, the redemption amount claimed, and ordered monthly compounded interest at the rate specified in the loan agreement. As Mr. Justice Major, speaking for the Supreme Court of Canada, observed:

In deciding the appropriate measure of pre-judgment and post-judgment interest, the trial judge agreed with the appellant that it should be awarded the interest rate provided for in the Loan Agreement because, although it only intended to be an interim lender, the breach by the respondent resulted in the appellant becoming a long term lender which resulted in the appellant missing other investment opportunities as the money due to it was not paid and not available for other loans. The appellant also submitted that awarding simple interest would result in a windfall for the respondent as it would lend the money it owed to the appellant to customers at its usual compound interest rates. [At para. 12; emphasis added.]

In so ruling, the trial judge had rejected the lender's argument that it had been prejudiced because the appellant had not challenged compound interest in its pleadings. As Farley J. noted, the statement of claim could have been amended at any stage and that the lender had been fully aware of the issue of compound interest throughout. (At para. 14.)

[44] The Ontario Court of Appeal affirmed the trial judgment except for the award of compound interest, ruling that the discretion granted under the statute did not include the authority to award compound interest. That authority arose from the court's general equitable jurisdiction, so that the award was "payable by a right other than under this section". Equitable principles were found not to warrant damages at compound interest rates in what was a case of simple breach of contract. (At para. 19.)

[45] On appeal, the Supreme Court of Canada restored the trial judge's order. It recognized the time value of money, which compound interest was designed to reflect. In the Court's analysis:

Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal.

Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the western world and is the standard practice of both the appellant and respondent. [At paras. 23-4; emphasis added.]

[46] Major J. reviewed the history of "interest at law" (described as "long and miserly" by Picard J.A. in *Costello v. Calgary (City)* (1997) 152 D.L.R. (4th) 453 (Alta. C.A.)) and observed that although the initial theory underpinning an award of judgment interest was that the defendant deserved "additional punishment", the modern theory is that judgment interest should be used to compensate rather than punish. (See also M.A. Waldron, *The Law of Interest in Canada* (1992) at 127-8.) Compound interest had not historically been awarded, but is nevertheless now "well suited to "compensate" a plaintiff for the interval between when damages initially arise and when they are finally paid." (At para. 38; my emphasis.)

[47] Major J. then turned to interest in Equity. He reasoned:

If the court was unable to award compound interest on the breach of a loan which itself bore compound interest, it would be unable to adequately award the plaintiff the value he or she would have received had the contract been performed. To keep the common law current with the evolution of society and to resolve the inconsistency between awarding expectation damages and the courts' past unwillingness to award compound interest, that unwillingness should be discarded in cases requiring that remedy for the plaintiff to realize the benefit of his or her contract.

A contrary rule would lead to inequity and provide incentives to breach contracts. If courts were restricted to simple interest in assessing damages for breach of contract, an apparent abuse could occur in the following way. Money lent at compound interest would accrue compound interest until there was a breach of contract by the borrower. The lender would then sue and only be entitled to simple interest on the judgment. This would encourage borrowers not to repay loans. Contract law is not the enemy of parties to an agreement but, rather, their servant. It should not frustrate their mutually agreed intentions but, instead, absent overriding policy concerns, should permit those parties to obtain the benefit of their intended agreement.

...

With respect to the failure to repay the loan in this appeal when due, it cannot be said that the cost of such delay was not in the contemplation of both parties at the time they made the contract, particularly as both parties were in the business of lending. A loan agreement with a specified interest rate is an agreement between parties on the cost of borrowing money over a period of time. Absent exceptional circumstances, the interest rate which had governed the loan prior to breach would be the appropriate rate to govern the post-breach loan. The application of a lower interest rate would be unjust to the lender.

This analysis applies equally to pre-judgment interest and post-judgment interest. Pre-judgment interest is necessary to compensate a plaintiff for the period from when the money was initially owed until the date of the judgment. Contract law principles may require such interest to be compounded so as to award the plaintiff the benefit of the bargain. Damage awards, however, are not necessarily paid at the date judgment is rendered. Contract law entitles the plaintiff to the full value of the benefit of the bargain at the time payment is finally made. Where the parties have earlier agreed on a compound rate of interest, or there are circumstances warranting it, it seems

fair that a court have the power to award compound post-judgment interest as damages to enable the plaintiff to be fully compensated when the award is finally paid.

Additionally, it would be illogical and unfair to the plaintiff to change to a simple rate of interest charged upon the judgment at the post-judgment phase. This would delay but not eliminate the period when the defendant gains a benefit that belongs to the plaintiff by not paying compound interest. It would encourage the defendant to delay paying the judgment award. As noted above, equity is another jurisdiction under which compound interest may be ordered in accordance with s. 129(5) CJA. In light of the illogical and inequitable result that would be occasioned by refusing to extend an award of compound interest to the post-judgment phase, in addition to common law remedies, it may be appropriate to extend that award on equitable grounds where it has been already determined that compound interest was part of the damages for breach in the pre-judgment phase.

The court's common law power to award damages flows from the application of contract law. In addition, ss. 128(4)(g) and 129(5) CJA, provide statutory authority to award compound pre-judgment and post-judgment interest according to this common law power. The court also has an equitable power to award compound interest, as has traditionally been done in cases of, *inter alia*, wrongful retention of funds and s. 129(5) CJA provides statutory authority to award compound post-judgment interest according to this equitable power. [At paras. 45-6, 49-52; emphasis added.]

The Court held that the contract in question was such that compound interest was appropriate to compensate the lender properly for the borrower's breach. This was said to yield a "satisfactory result with respect to both expectation damages and restitution damages".

[48] The trial judge in the case at bar stated that Bank of America had often been cited for the proposition that an equitable jurisdiction exists to "decline to award contractual interest post breach of contract, in exceptional circumstances." (Bank of America had not been mentioned in the cases relied on by Century.) The judge then sought to identify the source of her jurisdiction to "fix a redemption amount and, in particular, determine how interest is to be calculated and paid." (At para. 137.) She found that the Court Order Interest Act (which is substantially different from the Ontario statute under consideration in Bank of America) was not engaged, since it refers to interest on a "pecuniary judgment".

[49] The judge noted that R. 21-7 of the Supreme Court Civil Rules prescribes the procedure for foreclosure proceedings in this province. Subrule (5) provides a "list" of what the Court may do, including ordering that a mortgagor "must, within a redemption period that the Court may fix, pay to the [mortgagee] what is due under the mortgage [my emphasis] and for costs, and that, in default of payment, the respondent is to be foreclosed of his or her equity of redemption"; and ordering "at what times, on what terms and in what order of priority [a mortgagor] may redeem the mortgaged property and that in default [he or she is] to be foreclosed of any interest, right or claim in or to the mortgaged property". On a plain reading, the judge observed, the general power under R. 21-7(5)(h) to fix the terms upon

which a mortgagor may redeem is not limited by the more specific power under R. 21-7(5)(b) to order a mortgagor to pay "what is due under the mortgage". (At para. 139.)

- [50] The judge noted that in *North West Trust Co. v. Paramount Management Corp.* (1979) 8 B.C.L.R. 199 (C.A.), this court recognized that the setting of terms for redemption involves the exercise of discretion in accordance with equitable principles. (There is, of course, no doubt about this, given that mortgages are creatures of Equity.) Thus, the judge observed, it is open to a court to bridge the time for redemption in an appropriate case: see *Avco Financial Services Realty Ltd. v. Gustafson* (1977) 3 B.C.L.R. 67 (S.C.) and *North West Trust* itself at para. 17. In fact, what is now s. 19 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, was enacted in order to reverse this court's decision in *North West Trust* and restore the form of "presumptive order" adopted in *Avco*. Section 19 now provides:

In a proceeding for the foreclosure of the equity of redemption in mortgaged property, the court must, unless exceptional circumstances exist, order that the payment of interest is to be calculated and payable to the date full payment is made to redeem the property. [Emphasis added.]

- [51] The trial judge observed that this provision:

... does not limit or vary the nature or scope of the court's discretion to order otherwise. To the contrary, it expressly recognizes the court's discretion to order otherwise where "exceptional circumstances exist". The Legislature did not prescribe the circumstances that would be sufficiently exceptional to justify a departure from the usual order, leaving that to the discretion of the court.

Although s. 19 was enacted in response to *North West*, on a plain reading it does not limit the court's jurisdiction, in exceptional circumstances, to select any date as the date to which interest is to be calculated and paid. In other words, there is nothing in s. 19 to suggest that there are only two permissible dates: the date full payment is made in the usual case and the last day of the redemption period in exceptional circumstances. Had the Legislature intended to constrain the court's discretion in that fashion, it could easily have said so expressly. [At paras. 145-6; emphasis added.]

In her analysis, the fact that s. 19 did not refer to a jurisdiction to vary interest rates specifically did not mean the Court did not have such jurisdiction when exercising its discretion to determine the redemption amount. Rather, s. 19 merely prescribed the "presumptive order" with respect to the date to which interest runs. It did not "limit or vary the nature or scope of the court's discretion to fix the terms upon which a mortgagor may redeem." (At para. 147.)

- [52] In light of the foregoing, the trial judge concluded that in fixing the redemption amount in a foreclosure proceeding, the Court had the discretion in exceptional circumstances to order that interest be calculated and paid to a date other than the date of full payment of redemption. She could see no principled reason why that discretion would not extend to ordering, in exceptional circumstances, that interest be calculated at a rate other than the

contractual rate. Bank of America was said to support this position. Further support was found in *Citi Cards v. Ross* 2014 ONSC 114, where the Court stated:

Exceptional circumstances that would cause a court to decline to apply a contractual interest rate must be more than just financial hardship for the borrower: vague or unclear terms, overriding policy concerns such as a criminal interest rate, unconscionable conduct on the part of the lender, or commercially unsophisticated parties. None of these apply here. [At para. 27.]

[53] The judge suggested that most contract cases in which a party seeks an order for pre- or post-judgment interest at a rate that differs from the contractual rate do not involve sufficiently exceptional circumstances to warrant such relief. However, there were some cases in which this had occurred. In *1468025 Ontario v. 998614 Ontario* 2015 ONSC 7216, *aff'd on other grounds* 2016 ONCA 504, the Court awarded prejudgment interest at 3.5% per year rather than at the contractual rate of 7% on the basis that the calculation of interest went back over 13 years during which interest rates had remained low. The contractual rate was well above market rates and there was a substantial amount of money involved. In *Canadian Tire Bank v. Saade* 2013 CanLii 54101 (O.N.S.C.), the Court found exceptional circumstances where the lender had increased the contractual interest and credit limits on two credit cards in circumstances where "it must have been obvious that the cardholder was unable to properly service the account". The lender's conduct was found to justify an award of interest at the lower, original contract rate.

[54] In a case that has some resonance to the case at bar, *Magnum Leasing v. John's Sandblasting & Painting Ltd.* (2000) 26 A.R. 309 (Q.B.), a claim of debt arose from a promissory note. The Court found the contractual interest rate to be reasonable and recognised that courts should refrain from meddling with the parties' bargain; but concluded that the cumulative effect of the interest rate was "too high in the circumstances". What had been intended as a loan for one month had turned into an 8.5 year loan because of delay and the ensuing litigation. (At para. 160.)

[55] From all the relevant cases, the trial judge in the case at bar found that she had the discretion in exceptional circumstances to order that an interest rate different from that specified in the parties' contract be paid to redeem a mortgage. Expanding on *Citi Cards*, she reasoned:

... The equity of the situation must be assessed by considering the perspective of both the mortgagor and the mortgagee. A mere breach of contract by the mortgagor or financial hardship for the mortgagee would not likely amount to exceptional circumstances that would justify the exercise of this discretion. Rather, there likely would have to be vague or unclear contractual terms, overriding policy concerns, unsophisticated parties, or some kind of wrongful conduct on the part of the mortgagor deserving of moral sanction, perhaps combined with other circumstances, such that a departure from the freely bargained contractual rate leads to a more just result. [At para. 163; emphasis added.]

The Calculation of Interest

[56] Turning to whether this equitable jurisdiction should be exercised, the trial judge found "exceptional circumstances" in the same conduct that had led her in 2017 to find the guarantee to be vitiated. She reasoned:

In the Original Trial Reasons, I found not only that the Contested Charges were not authorized by the TLT Loan Agreement but also that, from the outset, Century did not intend to comply with the TLT Loan Agreement. The Contested Charges were not posted to the TLT Loan account as a result of an innocent mistake on Century's part. It is not even possible to characterize the posting of them as the result of a legitimate dispute over whether they were permitted by the terms of the TLT Loan Agreement or an honest, but mistaken, belief on Century's part that they were permitted. There simply was no consideration by any Century employee of the actual language of the TLT Loan Agreement before the Contested Charges were posted.

Further, Century stood to gain from posting the Contested Charges. The Contested Employee Charges included a very substantial profit margin. The Contested Legal Fees (as defined in the Original Trial Reasons) were incurred litigating two uneconomical priority disputes in the CCAA proceeding. Ms. Kemp acknowledged that Century pursued this litigation on TLT's dime, notwithstanding it was uneconomical, in order to set legal precedents that would assist Century in its business in the future. The Contested Tom Capital Charge (as defined in the Original Trial Reasons) represented a payment by Century to a related party as compensation for time spent performing due diligence on the value of a TLT asset the related party was contemplating purchasing. Century provided no reasonable explanation for paying a prospective purchaser to perform due diligence on a TLT asset that Century was liquidating. The Contested Interest (as defined in the Original Trial Reasons) represented income to Century.

I found that Century was indifferent about whether it would comply with the TLT Loan Agreement and 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 TLT Loan Agreement. In the circumstances, I found that Century's implied representation to Ms. LeRoy to the effect that it intended to administer the TLT Loan in accordance with the terms of the TLT Loan Agreement, was false. Finally, I found that Century was reckless with respect to the truth of that representation and displayed a wanton disregard as to whether Ms. LeRoy would be deceived by it. None of these findings were overturned by the Court of Appeal.

Ms. LeRoy found out about the Contested Charges through discovery in this proceeding. Had she not challenged Century's position on the amount owing, she likely never would have discovered that the Contested Charges had been wrongly posted. She has had to endure more than a decade of litigation to determine the true amount owing. If she had paid the \$1,737,932.35 set in the May 13, 2009 order or the \$2.5 million sought by Century in January 2020, she would have vastly over paid.

The difference to Ms. LeRoy between calculating interest at the contractual rate and calculating interest at a lower rate, such as the prejudgment rates that would be payable if the Court Order Interest Act applied, is enormous. As explained above, my conclusion is that, but for Century's improvident realization, the amount owing would have been about \$378,000 on February 26, 2009. This is the starting point for determining the redemption amount. This is when Century had received all of the proceeds and the true shortfall could be determined. Using Ms. Potgieter's approach, if interest on \$378,000 is calculated at the contractual rate of 24 percent per annum, compounded monthly, from February 26, 2009 to July 1, 2021, the redemption amount would be about \$6.5 million. In contrast, if interest is calculated over the same period using prejudgment Court Order Interest Act rates, the redemption amount would be about \$426,000. [At paras. 173-7; emphasis added.]

[57] She contrasted Ms. LeRoy's position with that of Century, which had made a loan of \$14,975,000, paid to RBC in March 2008. There was evidence that Century collected \$15,948,496 from the sale of TLT's assets by February 26, 2009 -- a gain of "roughly 12 percent, or about 13 percent annualized." (At para. 178.)

[58] The judge again acknowledged that courts rarely interfere with a bargain freely made, but was of the view that calculating the redemption amount to include the contractual rate of interest would result in a significant injustice in this instance. This was not a case of an honest mistake in calculation or even an honest dispute about the terms of the contractual provisions; nor in her view was it a case of mere breach of contract. Century had been reckless when it posted the Contested Charges, and indifferent as to whether they were permitted by the terms of the Loan Agreement. This was "wrongful conduct" that in the trial judge's view could not be countenanced. (At para. 179.) She added:

Further, the fact that a high contractual interest rate can serve to insulate a lender from challenges to its claims regarding the amount outstanding cannot be overlooked. A mortgagor who questions the correctness of a mortgagee's payout statement is placed in a difficult situation if the only options are to pay an amount the mortgagor believes is incorrect or embark on years of protracted litigation while the amount owing exponentially increases as a result of a high contractual interest rate. That result may be acceptable on freedom of contract grounds in some circumstances, but where the amount owing according to the mortgagor is inflated to the mortgagor's benefit as a result of the mortgagor's recklessness, public policy considerations weigh in favour of exercising the equitable jurisdiction to decline to calculate a redemption amount at the contractual interest rate. A departure from the contractual interest rate is warranted in these exceptional circumstances. [At para. 180; emphasis added.]

[59] After rejecting Century's argument that Ms. LeRoy did not come to court with clean hands, the judge ruled that the fact Ms. LeRoy had not expressly sought relief from contractual interest in her pleadings was not fatal to her claim. If an amendment were required, the factors referred to in *MacDonald v. MacDonald* 1996 CanLII 1360 (B.C.S.C.) at para. 40 militated in favour of allowing it.

[60] In the result, she fixed the starting point of the redemption amount determination at \$378,000 on February 26, 2009 -- a figure that reflected the adjustment necessitated by the improvident realization in October 2008. This was equitable, she said, because Ms. LeRoy "almost certainly" would not have paid off the loan until all the proceeds of liquidation had been received by Century. On the other hand, it would not be equitable to fix the redemption amount with interest calculated and payable only up to February 26, 2009 (the "low point" date), since Century had been owed a significant amount of money for over a decade. Permitting Ms. Leroy to redeem now by paying what was due over a decade ago would result in Century's receiving payment that in real terms was less than what it was owed. Thus the judge concluded:

... In my view, the most equitable result is to fix the redemption amount at \$378,000 plus interest at the prejudgment rates that would be payable under the Court Order Interest Act if it applied from February 26, 2009 to the date of these reasons, and contractual interest (24 percent per year, compounded monthly) thereafter to the date of payment. Ms. LeRoy finally knows what is owing. There is no reason not to hold her to the contractual interest rate from now to the date full payment is made. [At para. 191.]

As well, she found no reason to order a redemption period of less than six months. With respect to costs, she asked the parties to attempt to reach an agreement and to return with further submissions if they were unable to do so.

[61] Century appeals to this Court.

On Appeal

[62] Century asserts that the trial judge erred in finding that:

- A. Century vicariously liable for the actions of TLT's consultant and a court supervised Monitor/Receiver in TLT's CCAA/BIA Proceedings;
- B. Century was not prejudiced by allowing the Defendant to raise an issue never in the pleadings, after trial, after initial judgment and after the first appeal;
- C. The court could deny contractual interest rates to a lender based on its purported moral culpability and on the facts of this case;
- D. A commercially unreasonable decision had been made by failing to include a disgruntled family member in the asset liquidation process;
- E. The improvident realization set-off defence was not a collateral attack on the CCAA/BIA Proceedings;
- F. The PPSA statutory duty could be enforced in an improvident realization set-off allegation despite the PPSA also codifying the related procedure to require a counterclaim.

I propose to deal with these in a different order than above. I will deal first with grounds A and D-F, and then with the more substantive grounds, B and C.

Standard of Review

[63] Century acknowledges the well-known standards of review for questions of law, fact and mixed fact and law, but argues that the trial judge's conclusions "are both incorrect as a matter of law, equity and policy, and founded on a number of demonstrably wrong factual conclusions."

Vicarious Liability

[64] Century strongly disputes the trial court's conclusion that it is vicariously liable for PWC's conduct of the auction. It contends that PWC could not have acted as Century's agent "to the exclusion of its court-appointed duties" and while PWC was operating under the Court's supervision. As I understand it, Century does not rely on TLT's bankrupt status (which dated from September 3, 2008) -- nor could it, in my view, since all the bankruptcy proceedings had been stayed by Chief Justice Brenner's order.

[65] I agree with the trial judge that as a privately-appointed receiver, PWC was Century's agent. A clear distinction can be drawn between private and court-appointed receivers in this respect. On this point, I note first *Re Graham Mining Ltd.*, supra, where Cameron J. observed:

A privately appointed receiver is the agent of the party which appointed it. It must take possession of and protect the security of the secured party at whose instance it was appointed. It owes no fiduciary duty to the debtor. The receiver may exercise the power to sell in accordance with the security instrument and, in this case, the provisions of the Personal Property and Security Act ("PPSA") s. 63 and the Notice of Intent provisions of BIA s. 244. In doing so the Receiver must act honestly and in good faith and deal with the property in a commercially reasonable manner ...

...

A privately appointed receiver is the agent of the secured creditor which appointed it: Bennett pp. 29-30. A privately appointed receiver has only the statutory obligations to act in good faith and in a commercially reasonable manner. It need not take on risks of the cost of uncertain litigation in enforcing its security. [At paras. 45, 50; emphasis added.]

(See also 620630 Saskatchewan at para. 39; *Arctic Co-Operators Ltd. v. Sigyamiut Ltd.* 5 C.B.R. (3d) 271 at para. 10; *Ostrander v. Niagara Helicopters Ltd. et al.* (1973) 40 D.L.R. (3d) 161 at 166).

[66] In chapter 2 of Bennett on Receiverships (4th ed., 2021), the author Frank Bennett describes the powers, status and practical implications of each type of receiver. He notes that a court appointment may involve extra delay and expense, but will often be necessary where there are many creditors with competing claims. A court-appointed receiver is obviously an officer

of the court and is "therefore not an agent of the security holder nor that of the debtor" (citing *Parsons v. Sovereign Bank of Canada* [1913] AC 160 (JPC) at 167). It has a general duty to "preserve the goodwill and property of the debtor unless otherwise provided in the order." (At 52.) Bennett refers in particular to *Royal Bank of Canada v. First Pioneer Investments Ltd.* (1979) 106 D.L.R. (3d) 330 (H.C.J.), *aff'd* (1981) 121 D.L.R. (3d) 510 (C.A.), *rev'd* on other grounds [1984] 2 S.C.R. 125 and *Ostrander v. Niagara Helicopters Ltd.* (1973) 1 O.R. (2d) 281 (H.C.J.) and then summarizes the distinction thus:

Unlike the court-appointed receiver who is neither the agent of the security holder nor of the debtor, the privately appointed receiver acquires the powers of the security holder and is therefore an agent on behalf of the security holder in the exercise of those powers. The privately appointed receiver is empowered to take possession, realize and remit the proceeds to the security holder. The privately appointed receiver takes instructions from the security holder to whom the receiver is responsible and is clearly acting as the agent of the security holder. The party appointing the receiver usually indemnifies the receiver in the proper discharge of its powers and duties save for claims of negligence, misfeasance or non-feasance.

If the security instrument provides for a deemed agency clause, then the receiver is also the agent of the debtor vis-à-vis third parties such as employees, landlords, and trade creditors. In this capacity the receiver acts as a manager of the business.

In essence, the receiver is an agent of the security holder and appointed primarily to recover the debt. The receiver is not appointed to carry on the business in the best interests of the debtor but merely to realize upon the property. The receiver does not become an officer of the debtor but it does become a manager of the debtor's property akin to a mortgagee in possession. . [At pp. 54, 58-9; emphasis added.]

[67] It is true that private receivers will often be seen as wearing 'two hats', one as agent for the debtor (as is often specified in loan agreements) and one as agent for the security holder: see Bennett at 58; *Peat Marwick Ltd. v. Consumers' Gas Co.* (1981) 113 D.L.R. (3d) 754 (Ont. C.A.) at 762. (Indeed, in the case at bar, I note that the mortgage granted by Ms. LeRoy specified that Century could appoint a receiver, who would be the mortgagor's agent.) Bennett cites the comments of Mr. Justice Houlden on this point in *Peat Marwick*, *supra*:

This point arose in the recent case of *Diegel & Feick Inc. et al. v. Donia Consulting Corp.*, released March 27, 1980, and not yet reported [summarized 2 A.C.W.S. (2d) 256]. It involved an application under the Vendors and Purchasers Act, R.S.O. 1970, c. 478. A receiver and manager was selling real property which was charged as security under a debenture. The purchaser submitted certain requisitions on title. Eberle J., dealt with the point that is relevant for this appeal in the following words:

It was also argued that a sale of the assets of the company is subject to the claims of the debenture holders and execution creditors I have referred to, because of a provision in para. 4.3 of the debenture as follows: "Any such receiver shall for all purposes be deemed to be the agent of the Company and not the agent of the holder of the Debenture." Based on that sentence, it is

submitted that in selling the assets, the receiver is acting as agent of the Company, not as agent of the holder of the debenture, and that a sale of the company's interest in the assets is subject to all encumbrances against the company's interest, including the debentures and executions I have referred to. On the other hand, if it were a sale of the interests and rights of the debenture holder, those subsequent encumbrances would be cut out. I think this submission is answered by the decision in *Re B. Johnson & Co. (Builders) Ltd.*, [1955] Ch. 634, where at p. 644, the Master of the Rolls, Lord Evershed, refers to a debenture which appears to have many terms similar to those in para. 4.3 of the debenture here, ... At that page the Master of the Rolls says:

"The situation of someone appointed by a mortgagee or a debenture holder to be a receiver and manager--as it is said, out of court--is familiar. It has long been recognized and established that receivers and managers so appointed are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment; and the powers which are conferred upon him, and which I have to some extent recited, are (as Sir Lynn observed, and I think fairly observed) really ancillary to the main purpose of the appointment, which is the realization by the mortgagee of the security ... by the sale of the assets."

...

I agree with Eberle, J.'s conclusion. It seems to me that the receiver and manager in a situation, like the present, is wearing two hats. When wearing one hat, he is the agent of the debtor company; when wearing the other, the agent of the debenture holder. In occupying the premises of the debtor and in carrying on the business, the receiver and manager acts as the agent of the debtor company. In realizing the security of the debenture holder, notwithstanding the language of the debenture, he acts as the agent of the debenture holder, and thus is able to confer title on a purchaser free of encumbrance. [At 761-2; emphasis added.]

[68] A more recent application of this principle may be found in *58 Cardill Inc. v. Rathcliffe Holdings Limited* 2018 ONCA 672 at paras. 10-11, citing *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985) 50 O.R. (2d) 267 at 277 (Ont. C.A.). There it was said that "'in realizing' the receiver acts as the creditor's agent -- to give commercial efficacy to the security agreement, i.e., so that title may be conferred on the purchaser free of encumbrance." (My emphasis.)

[69] There is also authority for the proposition that the fact a court exercises some supervision over a private receiver does not alter the nature of the receivership. *Halsbury's Laws of Canada* (Halsbury's Law of Canada (online), Receivers and Other Officers at HRC - 123) is instructive:

Historically, courts had limited ability to supervise the conduct of a privately appointed receiver. The involvement of the court was generally limited to dealing with ex post facto claims with respect to the conduct of the receiver or the secured creditor in realizing on the secured creditor's collateral or in operating the debtor's business. However, the provisions of the BIA, provincial personal property security and corporate legislation that provide the court with jurisdiction to provide advice and direction to a receiver apply equally to privately appointed receivers; the definitions of "receiver" found in such legislation are usually broad enough to include, or specifically include, both court appointed and privately appointed receivers. The BIA provides that if a conflict occurs between a security agreement under which a receiver is appointed and an order made under s. 248 or a direction given under s. 249, the provisions of Part XI will prevail.

(See also *Prudential Assurance Co. (Trustee of) v. 90 Eglington Limited Partnership* (1994) 218 O.R. (3d) 201 (Ont S.C.J.) at 207, per Farley J.)

[70] Bennett on Receiverships also emphasizes the importance of the de facto relationship between receiver and creditor in realizing on a debtor's assets: at 290. In the case at bar, Century's active role in instructing PWC as the liquidation progressed is consistent with the trial judge's finding that Century regarded itself as the de facto "boss" of PWC from at least September 4; and as the trial judge noted, PWC certainly regarded itself as acting as Century's private receiver, reporting to the Court on several occasions expressly in that capacity.

[71] In my opinion, it is clear that PWC in its realization efforts, including supervision of the auction, was acting as the agent of the security holder, Century. On an application of ordinary agency principles, then, the improvident realization was properly laid at the feet of Century as PWC's principal in the circumstances of this case.

Failure to Hire Jason LeRoy

[72] The trial judge's finding that PWC had acted in a commercially unreasonable manner in refusing to hire Jason LeRoy (or someone else with similar experience with the types of equipment being sold) was a largely factual finding. Century contends that it would not be reasonable to expect Mr. Slavik to have hired Jason LeRoy when the latter was obviously connected to the LeRoys and might "cause friction with other important personnel in the process". However, the trial judge carefully considered all the evidence, including expert opinion evidence adduced by both sides, and explained the reasons for her conclusion that if Mr. LeRoy had been retained to assist three to four weeks before the auction as requested by Ritchie Bros., the auction would have proceeded in a more organized fashion. In particular, the lots of small equipment items would have been better structured and described. Jason LeRoy would have "provided the additional manpower and expertise" without having to familiarize himself with TLT's inventory.

- [73] Applying the appropriate standard of review, I am not persuaded that any palpable and overriding error has been shown in the judge's reasoning on this point or in her estimation that the net recovery from the liquidation was about \$450,000 less than would have been the case but for the improvidence of the sale process.

The "Improvident Realization Set-off Defence"

- [74] Century submits that the "improvident realization defence" was an impermissible collateral attack on both the CCAA and BIA proceedings of TLT. It argues first that Ms. LeRoy was an interested person and "no doubt" would have had standing to voice her concerns about the auction both before and after it took place. Second, it contends the Court had already approved the holding of the auction and the gross guaranteed minimum thereunder -- presumably in the sense that under s. 11 of the CCAA, the Court had a general jurisdiction to make such order as it considered fit; and under s. 36 it had the jurisdiction to approve any sale of the debtor's assets outside the ordinary course of business.
- [75] It does not follow in my view that Ms. LeRoy's objections to the manner in which the auction was carried out was a "collateral attack" on the order of September 3, 2008. This (foreclosure) proceeding is concerned with the determination of a redemption amount by Ms. LeRoy under her mortgage of TLT's indebtedness; it is not an attack on the holding of an auction or on any other aspect of the 2008 order. Although she may have 'left things to Ted' at the time she granted the guarantee and mortgage, Ms. LeRoy became a fully involved party in this (separate) proceeding once the guarantee was 'called'. As the trial judge found, Ms. LeRoy turns out to have been right in questioning the amount demanded by Century under her guarantee.

Commercial Reasonableness and the PPSA

- [76] Century also challenges the trial judge's reasoning concerning the availability of a set-off by Ms. LeRoy due to the improvident realization, as opposed to a counterclaim that she should have advanced at some earlier time. It will be recalled that s. 69(2) of the PPSA states that a person to whom a duty or obligation is owed under that Act, has a cause of action "against any person who, without reasonable excuse, fails to discharge the duty or perform the obligation." Under subsection 3, such a person is entitled to recover damages for reasonably foreseeable losses due to the failure to discharge the duty or obligation.
- [77] As pointed out by Fenlon J. (as she then was) in *HSBC Bank Canada v. Kupritz* 2011 BCSC 788, the PPSA defines "debtor" to include a person who "owes payment or performance of an obligation secured", whether or not that person has rights in the collateral. (See also *Cuming, Walsh and Wood, Personal Property Security Law* (2005) at 14-15, who comment that "whether called a mortgagor, a chargor, a pledgor, a buyer, a lessee, or any other term, the important question is whether the person qualifies as the obligor on the obligation secured by the security interest." (At 13.)) Since s. 68(1) of the PPSA preserves equitable principles (provided they are not inconsistent with the Act, as occurred in *KBA Canada, Inc.*

v. Supreme Graphics Ltd. 2014 BCCA 117), I am not persuaded the trial judge erred in concluding that Ms. LeRoy was entitled to seek an equitable set-off for improvident realization. (At para. 34.)

[78] I also agree with the judge that whether this was framed as a defence instead of a cause of action is a matter of formality only and that the substance of the relationship should govern. It seems only fair, in other words, that since Ms. LeRoy was liable for TLT's indebtedness to the extent of \$2,000,000 plus interest, she was entitled to see her liability reduced to the extent of any defence or set-off to which TLT would have been entitled.

[79] I would not accede to the fifth and sixth grounds of appeal.

Variation of Interest

Lack of Notice?

[80] Century's first argument under this rubric is a procedural one -- it submits that the trial judge did not give the parties notice that she might decide to vary the rate of interest accruing on Ms. LeRoy's liability under the guarantee -- or at least to vary it in such a profound manner. As seen above, when it made demand under the guarantee, the lender had assumed that even without the Contested Charges, that amount still exceeded the \$2,000,000 mortgage limit (which in turn exceeded the value of the property at the time) and there was no reason for Century to "waste time and resources on a mathematically moot issue." Century says that if it had had reason to expect the trial judge might vary the contractual interest rate, it would have "revisited the accounting" to "confirm" the calculation of interest and all other amounts that were in issue at trial and affected the principal amount of TLT's debt.

[81] The trial judge, however, requested and received written submissions from the parties as to whether interest was payable and if so at what rate and to what date. (See para. 124.) Century's written response included Ms. Potgieter's expert report and a submission that the Court did not have the jurisdiction "to restrict, limit, or modify contractual interest", based on *Bank of Montreal v. Awards-West*, supra. As mentioned earlier, that case concerned whether a mortgagee could be prohibited by reason of its delay from suing on the mortgagor's covenant to pay. This court, per Madam Justice Southin, ruled that such a proposition would throw Equity into a "state of disarray". In her words:

It is, in theory, possible for this Court to say something to this effect: While, to this time, it never has been the practice in equity to prevent the prosecution of claims at law on the ground that the covenantor thought the plaintiff no longer cared about his promise to pay and therefore proceeded to arrange his affairs on the footing that he would not be called upon to pay, we shall now say it is unfair and unjust for the creditor to insist on his money.

To adopt such a course would throw the law, in which term for this purpose I include equity, into a state of disarray. Actions at law on covenants to pay would then succeed or fail according to the length of the Chancellor's foot. One would turn what is a right at law into a discretionary remedy.

I am not prepared to embark upon such a course. [At 23; emphasis added.]

[82] In any event, it cannot in my view be said that Century did not have the opportunity to address the possibility of a variation in the rate of interest, although it may well not have expected the solution ultimately adopted by the Court. I note Century's submission on appeal that Ms. Potgieter's expert report accounted only for receipts in terms of the loan balance and did not necessarily reflect other additions to the loan amount that were within Century's knowledge but may not have been known to Ms. LeRoy or her counsel. Century says there are various defects in the Ernst & Young report, and that the trial judge should have given Century an opportunity to explain differences between that report and its own calculations. The result is that even at this late date, we do not have an idea of what the redemption amount is, or the principal amount outstanding on the TLT loan.

Clean Hands?

[83] Century also reasserts its objections based on what it calls the "reneged Refinancing Obligation" which was found at s. 5.2 of the Loan Agreement and was reproduced at para. 183 of the trial judge's reasons. For our purposes it is sufficient to note that Ms. LeRoy was not a party to that Agreement. It obliged Mr. LeRoy to proceed diligently and in good faith to refinance the Duncan property by way of a new first mortgage and to pay to Century "all net proceeds ... from such refinancing up to a maximum of \$2,000,000". As the judge observed, on a plain reading, this imposed no obligation on Ms. LeRoy at all. The Duncan home was not Mr. LeRoy's to mortgage and it certainly cannot be said that Ms. LeRoy did not have clean hands by reason of the existence of her husband's covenant.

Court Order Interest Act

[84] One issue, which we raised with counsel at the end of the hearing of the appeal, can be dealt with fairly easily. The question was whether the Court Order Interest Act has any application to this case, and the answer is 'no'. This is because s. 1 applies only to a "pecuniary judgment" and s. 2 provides that s. 1 does not apply "if there is an agreement about interest" between the parties.

[85] The case law is quite clear that a pecuniary judgment is one that orders the payment of a fixed sum of money to a person or otherwise "sounds in money". On this point, I note the helpful analysis of Mr. Justice Masuhara in *Cabaniss v. Cabaniss* 2010 BCSC 513:

If one were to apply the reasoning in *Wepruk [(Guardian ad Litem) v. McMillan Estate (1993) 87 B.C.L.R. (2d) 194 (C.A.)]* and *Cathedral Ventures [Cathedral Ventures Ltd. v. Gartrell 2004 BCSC 1232]*, in addition to the definition of the words "pecuniary judgment" expounded by the Law Reform Commission, it would seem clear that the Judgment in this case is a pecuniary judgment.

The Judgment is not like an injunction or a divorce decree. It "sounds in money", in that it specifies a sum, which would appear to be sufficient to satisfy the definition contemplated by the drafters of the legislation. Although the Judgment cannot be enforced directly by a writ of seizure and sale, it could, as in *Cathedral Ventures*, be enforced by a court-ordered sale if the defendant refused to satisfy the plaintiff's judgment. In my opinion, the answer to this question is contained in the comment by the Law Reform Commission on this point, again excerpted here:

This phrase was chosen to distinguish orders which do not require the payment of money, such as a decree of divorce or an injunction, from those which are simple commands to pay money. Interest can only be calculated on a sum of money, and if no sum is referred to in the court order, then the judgment does not "sound in money." The legislature, in implementing the 1973 recommendations, adopted the phrase "pecuniary judgment" to capture this concept.

Adopting that definition avoids unnecessarily complicated, narrow, and technical distinctions and fulfils the purpose of the Act. [At paras. 30-1; emphasis added.]

(See also *S.G. & S. Investments (1972) Ltd. v. Golden Boy Foods Inc.* (1991) 84 D.L.R. (4th) 751 (C.A.)) Obviously, the order contemplated at the end of this foreclosure proceeding will not require Ms. LeRoy to pay the redemption amount; it will only inform her of what the cost of redeeming her equity in the Duncan property will be should she choose to redeem.

[86] In addition, of course, there is an "agreement about interest" in this case, within the meaning of s. 2 of the Court Order Interest Act.

The Exercise of Discretion to Vary Interest

[87] I come at last to the primary question of principle in this case -- did the trial judge err in varying the interest rate from the contractual rate to the court order interest rate between February 26, 2009 and June 30, 2021? Century contends that this ruling deprived it of over \$6 million -- although one must keep in mind the 'limited-recourse' nature of Ms. LeRoy's guarantee.

[88] As we have seen, there are some authorities (see paras. 52-3 above) in which courts have varied terms concerning the payment of interest -- most often, to vary the date from which interest runs in a foreclosure. In that context, of course, s. 19 of the Law and Equity Act applies, requiring the Court to order the payment of interest to the date of payment in full unless "exceptional circumstances" exist. (See paras. 132-149 of the trial judge's reasons.)

[89] Notwithstanding cases such as *Magnum Leasing*, *supra*, most courts are reluctant to interfere with contractual interest rates, especially those agreed upon by commercial parties. While the day has passed when "Chancery mend[ed] no man's bargain" (see *Maynard v. Moseley* [1676] 3 Swan 651 at 655, cited by Harman L.J. in *Campbell Discount Co. v. Bridge* [1961] 2 All ER 97 (C.A.), *rev'd* [1962] 1 All ER 35 (H.L.)), modern courts do not regard themselves as having some free-floating discretion to ignore or vary contractual terms of which they disapprove. Equity 'follows the law' and still operates on certain

principles to this day. It will not enforce penalties; it will relieve against certain mistakes; it will relieve against an unconscionable bargain or fraud. But I am not aware of any equitable principle that would permit a court to rewrite a commercial loan agreement solely by virtue of the judge's opinion that an interest rate (though legal) was excessive, or that a party's misconduct was deserving of punishment in the form of the denial of interest at the rate agreed upon. This was a high-risk loan and as such was always going to exact a high rate of return for the lender. The Loan Agreement was entered into by TLT in an effort to obtain more time in the very difficult circumstances facing it. Ms. Leroy has not challenged the judge's finding that there was no inequality of bargaining power resulting in an "improvident bargain". (At para. 130.) I assume that she has remained in occupation of the property since 2008.

[90] Nor is it contended in this case that any variation of the guarantor's risk, in legal terms, occurred here; we are only concerned with quantum. From that quantum, the Contested Charges and the loss occasioned by the improvident sale of TLT's equipment are to be deducted from the amount of indebtedness, effectively denying Century any financial benefit from its misconduct. The trial judge's findings concerning these Charges and the negligently-administered auction are matters of mixed fact and law and no clear and palpable error in them has been shown.

[91] This case bears some similarity to *Bidell Equipment LP. V. Caliber Midstream GP LLC* 2020 ABCA 478, I've to appeal dismissed [2021] S.C.C.A No. 72. It concerned an equipment purchase agreement under which interest at 24% per annum was payable on all instalments of the purchase price owing to the vendor. The buyer argued that this interest rate should not have been charged on cancellation or storage fees, and that it was "punitive and exorbitant, a penalty and not a genuine pre-assessment of damages". (See para. 42.) The Court agreed with the trial judge that the interest rate did not constitute a penalty and that the submission based on penalty was not appropriate in any event in a claim for debt arising under a contract. (No penalty was asserted in the case at bar, although the "success fee" payable on an Event of Default under the Loan Agreement might well have qualified.) The Court in *Bidell* cited the following passage from *Bank of America*:

To prevent defendants from exploiting the time-value of money to their advantage, by delaying payment of damages so as to capitalize on the time-value of money in the interim, courts must be able to award damages which include an interest component that returns the value acquired by a defendant between breach and payment to the plaintiff. [At para. 33; quoted in *Bidell* at para 47.]

I would add para. 49 of *Bank of America*:

With respect to the failure to repay the loan in this appeal when due, it cannot be said that the cost of such delay was not in the contemplation of both parties at the time they made the contract, particularly as both parties were in the business of lending. A loan agreement with a specified interest rate is an agreement between parties on the cost of borrowing money over a period of time. Absent exceptional circumstances, the interest rate which had governed the loan

prior to breach would be the appropriate rate to govern the post-breach loan. The application of a lower interest rate would be unjust to the lender. [Emphasis added.]

[92] The Bidell Court also cited *Cavendish Square Holding BV v. Talal El Makdessi* [2015] UKSC 67, where the U.K. Supreme Court declined to expand the jurisdiction to grant relief against penalties, to all substantive contractual provisions, observing that that step would take courts "into a new territory of uncertain boundaries, which has hitherto been treated as wholly governed by mutual agreement." (At para. 42.) The Court in Bidell continued:

The parties contracted to an interest rate of 24% per annum. Caliber could have elected to make a payment towards invoices rendered at any time. It was neither vulnerable nor a victim of oppression. It has made no payments at all. Caliber's claim that Bidell got an undeserved windfall through the accumulation of the interest since cancellation of the contract falls away when one notes that had Caliber paid the indisputable charges under the contract, the interest buildup would have been a fraction of what it was. As a result, Bidell has effectively financed the entirety of its outlays since termination of the contract on January 23, 2015. Even a contractually agreed upon high interest rate is enforceable and a creditor is entitled to judgment in accordance with the terms of the contract: *Industrial Acceptance Corp v Beaupre* [1956] 18 WWR (ns) 685, 686-687 (A.B.C.A.). This is particularly so with sophisticated commercial actors.

We do not find the interest rate as stated to be a penalty nor contractually unenforceable as punitive, exorbitant or unconscionable. We do not interfere with the considered and reasonable decision of the trial judge on this point. [At paras. 48-9.]

[93] As in Bidell, it was open to Ms. LeRoy as well to pay something, if not the total amount Century claimed under the mortgage, in order to stop interest building up over what turns out to have been a very long period indeed. At the same time, I appreciate that where a high rate of interest is running, a guarantor who does not have deep enough pockets to pay the amount demanded by the lender, but believes it is incorrect will, in the trial judge's phrase, may be motivated to avoid "years of protracted litigation while the amount owing exponentially increases" as a result of the high rate. Where the collateral is one's home, this situation is even more difficult. However, in my respectful view, the law (including Equity) does not permit a court to make a substantive change to the terms of a valid contract such as that made by the trial judge here on the ground that the rate agreed to by the parties was excessive, or that one party's conduct in breach of the loan agreement "cannot be countenanced".

[94] Finally under this rubric, I note the comments of K.P. McGuinness in *The Law of Guarantee* (2nd ed., 1996) concerning the circumstances in which a surety (or guarantor) should be able to 'walk away' from his or her obligations. The author observes:

In essence, the purpose of virtually every guarantee is to ensure that credit in some form or another is given to the principal. If that credit is given by the creditor, why then should the surety not pay? It must not be forgotten that persons who offer guarantees to creditors are usually quite anxious that the creditors will accept their guarantees. It is usually creditors who have doubts

about the merit of a guarantee, prior to entering into a credit arrangement with the principal. If the law were to permit sureties to walk away from their obligations under guarantees, then the viability of these agreements as credit facilitating instruments would be seriously undermined. Throughout the world of commerce, it is in the general interest of creditors, sureties and principals that the law respect and enforce the terms in which guarantees are drafted. [At 10.128-10.130; emphasis added.]

Punitive Damages

[95] How then should the trial judge have expressed the Court's opprobrium in respect of Century's conduct in relation to Ms. LeRoy? On this question, Century argued that the trial judge should have turned not to Equity but to the law of contract and punitive damages, as discussed in *Whiten v. Pilot Insurance Co.* 2002 SCC 18. Since *Whiten* was decided, Canadian courts have awarded punitive damages in contract, although fairly rarely. As stated in *Elia v. Chater* (1998) 167 N.S.R. (2d) 166 (C.A.):

Punitive damages are rarely awarded in contract. However, in *Vorvis [v. Insurance Corporation of British Columbia]* [1989] 1 S.C.R. 1085], the Supreme Court of Canada held:

"...while it may be very unusual to do so, punitive damages may be awarded in cases of breach of contract. It would seem to me, however, that it will be rare to find a contractual breach which would be appropriate for such an award. ... In an action based on a breach of contract, the only link between the parties for the purpose of defining their rights and obligations is the contract. Where the defendant has breached the contract, the remedies open to the plaintiff must arise from that contractual relationship, that "private law",..... (at 207-208)

As a general rule, punitive damages are rightly refused in most commercial cases. However, where the actionable wrong is markedly divergent from the general standard of business morality and where the totality of the award for compensatory (including aggravated) damages is not sufficient to punish and deter, the trial judge is entitled to consider an award of punitive damages: *Stewart v. Canada Life Assurance Co.* (1994) 132 N.S.R. (2d) 324; 376 A.P.R. 324; 118 D.L.R. (4th) 67 (C.A.), per Pugsley, J.A., for the court at p. 83 [D.L.R.]. [At paras. 57-8; emphasis added.]

(See also this court's decision in *Shanahan v. Turning Point Restaurant Ltd.* 2012 BCCA 411.)

[96] The Court in *Vorvis* also adopted the suggestion in the American Restatement on the Law of Contracts (Second) that "Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." (My emphasis.) In subsequent cases, the Supreme Court of Canada modified this principle to require only that an independent wrong of some kind be shown: see *Whiten* at paras. 79-82; *Atlantic Lottery Corp. Inc. v. Babstock* 2020 SCC 19 at para. 63. It is difficult to fit this case, a foreclosure proceeding, into that principle, and counsel made no argument based on *Vorvis*.

- [97] In *Whiten*, the Court rejected a "categorical" approach to punitive damages, although Binnie J. for the majority noted that in practice, punitive damages would be largely restricted to cases of intentional torts or breach of fiduciary duty. (At para. 67.) The Court acknowledged that the underlying objective of such damages was "punishment (in the sense of retribution), deterrence of the wrongdoer and others, and denunciation (or, as Cory J. put it in *Hill v. Church of Scientology of Toronto* [1995] 2 S.C.R. 1130], at para. 196, they are 'the means by which the jury or judge expresses its outrage at the egregious conduct')." (At para. 68.)
- [98] At the same time, the Court recognized that since criminal law is the primary vehicle of punishment, punitive damages should be resorted to "only in exceptional cases and with restraint." With respect to the factor of proportionality, Binnie J. noted a list of factors that can be helpful in determining the level of blameworthiness of the conduct in question. These included whether the misconduct was planned and deliberate; whether the defendant [wrongdoer] persisted in it over a lengthy period of time; whether the defendant concealed or attempted to conceal its conduct; whether it profited therefrom; and whether it was aware that it was doing wrong. Conversely, the degree of vulnerability of the plaintiff may be relevant, although as the Court noted, this factor militates against the award of punitive damages in most commercial situations. (At para. 115.)
- [99] It will be recalled that in this case, the trial judge found that Century had acted "recklessly" in including the Contested Charges in TLT's loan account. As far as the improvident auction is concerned, PWC, acting as Century's agent, was in charge, although Century "was exercising significant de facto control over the liquidation." (At para. 116.) The judge concluded that the standard of commercial reasonableness had not been met but did not describe PWC's conduct in organizing the auction as anything worse than commercially unreasonable. But taking these items together with the 'inflation' of TLT's indebtedness by adding interest seems to have been the final straw for the trial judge. I reproduce again paras. 179 and 180 of her reasons:

Of course, as discussed above, courts will rarely interfere with a bargain freely made. However, in this case, calculating the redemption amount as including interest at the contractual rate would result in a significant injustice. As Century points out, there is "nothing sinister or fraudulent about posting a charge [that is] later questioned by a party or disallowed by a court". But this is not a case of a mortgagee making a calculation error or arising out of an honest dispute about the construction of the material contract provisions. It is not a mere breach of contract. Century gave no consideration to the actual language of the TLT Loan Agreement before the Contested Charges were posted and was reckless in this regard. Rather than checking the actual language of the TLT Loan Agreement, Century followed its standard practices concerning the posting of charges, including charges directly benefiting Century. It was indifferent as to whether those practices conflicted with the terms of the TLT Loan Agreement. This is wrongful conduct that cannot be countenanced.

Further, the fact that a high contractual interest rate can serve to insulate a lender from challenges to its claims regarding the amount outstanding cannot be overlooked. A mortgagor who questions the correctness of a mortgagee's payout statement is placed in a difficult situation if the only options are to pay an amount the mortgagor believes is incorrect or embark on years of protracted litigation while the amount owing exponentially increases as a result of a high contractual interest rate. That result may be acceptable on freedom of contract grounds in some circumstances, but where the amount owing according to the mortgagor is inflated to the mortgagor's benefit as a result of the mortgagor's recklessness, public policy considerations weigh in favour of exercising the equitable jurisdiction to decline to calculate a redemption amount at the contractual interest rate. A departure from the contractual interest rate is warranted in these exceptional circumstances. [Emphasis added.]

[100] I have already expressed the view that the judge erred in purporting to exercise an equitable jurisdiction to disallow the contractually agreed-upon rate of interest. I am also of the view that charging this rate does not qualify as misconduct of the kind and degree that should be punished or deterred by an award of punitive damages. In this case, punitive damages would be intended only to punish or deter the improvidence in auctioning TLT's equipment and Century's 'recklessness' in adding the Contested Charges to TLT's loan account. The Charges have now been reversed and the 'loss' due to improvidence on PWC's part will be deducted, so that Century will not profit as a result. In all the circumstances -- including the fact that punitive damages were not sought by Ms. LeRoy in her pleadings -- I am not persuaded such an award would be appropriate.

Disposition

[101] Obviously, it is time to bring this proceeding to an end, and in as simple a way as possible. I would encourage the parties to try to reach an agreement on a redemption amount that will not entail more time and money -- especially since Ms. Leroy's guarantee is a limited recourse one, such that any indebtedness beyond the value of the Duncan property will be only of academic interest. Failing settlement, the matter must be remitted to the Supreme Court of British Columbia and Century would have to prepare, at its own cost, an accounting of the principal amount now outstanding under TLT's loan, after deduction of the amounts of the Contested Charges, the \$450,000 and any other payments received on TLT's account from later sales, etc. Any additions to that account that were not reflected in Ms. Potgieter's report would have to be considered by the judge or master. Interest at the contractual rate on this principal amount should then be calculated from the date of demand (September 23, 2008) in accordance with the terms of the guarantee. Subject to the foregoing, the master or judge hearing the application would have the usual discretion in such cases to impose such other terms for redemption as seem appropriate, including fixing a time for redemption.

[102] On the foregoing basis, I would allow the appeal, set aside the trial judge's order and, if the parties do not agree otherwise, remit to the court below the calculations of the redemption amount and related matters to be determined in accordance with these reasons.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Fitch"

I agree:

"The Honourable Madam Justice Horsman"

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