

CANADA / JUDGMENT

Forjay Management Ltd. v. 0981478 B.C. Ltd.

2020 BCSC 637

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 637 Forjay Management Ltd. v. 0981478 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Forjay Management Ltd. v. 0981478 B.C. Ltd.,

2020 BCSC 637

Date: 20200424

Docket: H170498

Registry: Vancouver

Between:

Forjay Management Ltd.

Petitioner

And

0981478 B.C. Ltd., Mark Chandler, Canadian Western Trust Company in trust, HMF Home Mortgage Fund Corporation, 625536 B.C. Ltd., James Mercier, Morris Kadylo, Urszula Piaseczna, U.S. Bank National Association, Baramundi Investments Ltd., Charanjit Kaur, Simrat Viridi, Mukhtiar Singh Nijar, Mohan Vilku, Jaspreet Singh Khatra, Amandeep Singh Dhaliwal, Nirmal Singh Chohan, Sajal Jain, Suparna Jain, Babal Rani Bansal, Satpal Bansal, Parminder K. Mann, Leena Jain, Vasant Patel, 1074936 B.C. Ltd., 1084165 B.C. Ltd., 1084164 B.C. Ltd., 1084322 B.C. Ltd., Surjit Kaur Parmar, Harbhajan Singh Parmar, Daljeet Kaur Gill, Bhasham Kaur Gill, 812 Capital Holdings Ltd., Catalyst Assets Corp., 0951019 B.C. Ltd., Wonder Marble & Stone Inc., Intech Pay Ltd., 1086286 B.C. Ltd., 1085537 B.C. Ltd., 1083516 B.C. Ltd. and Reliable Mortgages Investment Corp.

Respondents

- and -

Docket: S184606

Registry: Vancouver

Between:

625536 B.C. Ltd.

Plaintiff

And

Forjay Management Ltd., Canadian Western Trust Company and

HMF Home Mortgage Fund Corporation

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Forjay Management Ltd. and Reliable Mortgages Investment Corp.:

K. Jackson

Counsel for 625536 B.C. Ltd.:

J.E. Shragge

J.D. Shields

Place and Date of Summary Trial:

Vancouver, B.C.

February 24-26, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 24, 2020

I. INTRODUCTION

- [1] In August 2017, this foreclosure proceeding began. The background has been described in many of my earlier decisions, most notably *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2019 BCSC 238 (the "Summary Trial Reasons") issued in February 2019, *aff'd Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2020 BCCA 70.

- [2] The Summary Trial Reasons addressed issues concerning the validity, enforceability and priority of certain mortgages executed by the respondent/mortgagor, 0981478 B.C. Ltd. ("098"), and registered against a real estate condominium development in Langley, BC (the "Development"). The main issues addressed in the Summary Trial Reasons related to the first and second mortgages (respectively, the "First Mortgage" and the "Second Mortgage") registered against the Development.
- [3] Other issues arising in these proceedings related to the presently third ranking registered mortgage against the Development, held by the respondent, 625536 B.C. Ltd. ("625"). 625's mortgage presently stands behind the Second Mortgage pursuant to a priority agreement that remains in dispute between those parties.
- [4] This summary trial was held to determine two issues raised by 625's application in this proceeding in relation to its mortgage and/or debt:
- a) Is 625's mortgage a valid and enforceable charge or is 625's claim to security against the Development under its mortgage statute-barred pursuant to the Limitation Act, S.B.C. 2013, c. 13 (the "Act")?
 - b) Are some or all of the forbearance fees that 098 agreed to pay 625 secured against the Development by an equitable mortgage?
- [5] The petitioner, Forjay Management Ltd. ("Forjay"), and the respondent, Reliable Mortgages Investment Corp ("RMIC"), hold the First and Second Mortgages against the Development, with other parties. They oppose 625's application, asserting that 625's mortgage (not debt) is statute barred and that 625 is not entitled to secure the forbearance fees under an equitable mortgage.

II. BACKGROUND FACTS

- [6] In May 2014, 098 acquired the lands upon which the Development would be constructed (the "Lands") for \$5.2 million. 098 secured most (\$3.4 million) of the purchase price through financing from RMIC and Canadian Western Trust, in trust for Ajay Soni ("CWT" and together with RMIC, the "First Mortgagees"). The financing was secured by the First Mortgage.
- [7] Shortly before 098's purchase of the Lands completed, the First Mortgagees learned that the balance of the purchase price would be financed by way of a mortgage in favour of 625. 625 had been granted a second mortgage of the Lands by the prior owner, and agreed to partially finance the purchase of the Lands by 098 by way of what was, in effect, a vendor take-back mortgage to secure the balance due to 625 in the amount of \$1.8 million.
- [8] In connection with the purchase of the Lands, 625 and 098 entered into a loan agreement dated May 28, 2014 (the "Loan Agreement"). The Loan Agreement provided, among other things:

- a) The loan amount was \$1.8 million;
 - b) Interest rate payable by 098 was 12% per annum until August 23, 2014, and 24% per annum thereafter;
 - c) Interest was payable monthly with the first payment on the 30th day after the advance of the loan;
 - d) All principal and accrued interest owing under the Loan Agreement would be paid in full by September 1, 2014; and
 - e) 098's obligations under the Loan Agreement would be secured by way of a mortgage of the Lands in favour of 625.
- [9] In accordance with the Loan Agreement, 098 executed a mortgage in favour of 625 (the "625 Mortgage"). The 625 Mortgage was registered at the Land Title Office on May 28, 2014, and ranked it in second position, subordinate in priority to the First Mortgage.
- [10] Consistent with the Loan Agreement, the Form B to the 625 Mortgage provides that 098 is to make three interest-only payments on the 28th day of each month commencing June 28, 2014 and that the balance due date is September 1, 2014.
- [11] The 625 Mortgage incorporated by reference the Prescribed Standard Mortgage Terms (PSMT). The PSMT provide, among other things, that it is a default under the 625 Mortgage if 098 fails to make any payment as required under the 625 Mortgage.
- [12] 098 paid 625 the three required interest payments under the 625 Mortgage. All of those payments, including the first one due on June 28, 2014, were late.
- [13] Finally, 098 failed to pay the amount owing under the 625 Mortgage by September 1, 2014, as required.

III. LIMITATION ISSUES

- [14] On June 3, 2019, 625 filed its Notice of Application (NOA) in this proceeding seeking the following relief:
- a) A declaration that the 625 Mortgage is a valid and enforceable mortgage charging the Lands, subject only to property taxes and similar charges, amounts owing under the First Mortgage and, subject to further order of the Court, amounts owing under the Second Mortgage; and
 - b) A declaration that the 625 Mortgage secured the sum of \$5,640,279, together with interest accruing thereon at the rate of \$3,760.19 per day, subject to the compounding provisions of the 625 Mortgage, from May 31, 2019 to the date of payment, exclusive of legal costs.
- [15] Forjay/RMIC argue that 625's right to realize its mortgage security is statute-barred pursuant to the Act; as a result, they say that the sum owing to 625 is unsecured.

A. General Limitation Act Provisions

[16] The relevant portions of the Act are as follows:

1 . . . "claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission; . . .

. . .

6(1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered. . . .

. . .

15 A claim to realize or redeem security is discovered on the first day that the right to enforce the security arises.

. . .

[17] In the Summary Trial Reasons, I discussed the dual nature of a mortgage, such as the 625 Mortgage, as comprising both debt and security elements:

[69] It is trite law that a mortgage reflects two essential elements: debt and security: see *Bank of Montreal v. Orr* (1986), 4 B.C.L.R. (2d) 1 (C.A.) at para. 25; *Humble Investments Ltd. v. Therevan Development Corp.* (1982), 21 Alta. L.R. (2d) 40 (Q.B.) at paras. 19-23. Further, as between the mortgagee and mortgagor, those elements are to be found in the contractual provisions found in the mortgage.

[18] Within the limitations context, the dual nature of a mortgage (debt/security) was also recently discussed in *Leatherman v. 0969708 B.C. Ltd.*, 2018 BCCA 33:

[45] This Mortgage, like most mortgages, includes both a covenant to pay and security for the debt. The covenant to pay the principal, considered on its face, and alone, is a demand obligation. With respect to it, s. 14 applies; that is, it is not payable until demand. The obligation to pay interest, however, is not a demand obligation because it was payable without demand on October 31 of each year. The Mortgage also provides that the property mortgaged is security for the debt. With respect to security for the debt, s. 15 of the Act applies. The right to realize on the security arises upon discovery of that right.

[46] Discovery of the right, by s. 15, arises upon default. The default occurred when an interest payment was not made under the Mortgage, and thus the right to realize on the security arose on such default, and the two-year limitation period would apply from default, unless postponed.

[47] With respect to the demand obligation, s. 14 applied. Thus, the limitation period with respect to the ability to seek judgment enforcing the covenant to pay ran from November 9, 2016, the first day of a failure to pay after demand. With respect to the right to realize on the security, the limitation period ran from the first day that the right to enforce the security arose, namely, the date of default, October 31, 2013, by virtue of s. 15.

[48] Accordingly, absent postponement, the limitation period has expired with respect to the Leathermans' ability to realize on the security and some of the interest. However, the limitation period had not tolled with respect to their ability to seek judgment on the covenant to pay, except to the extent of the interest payable more than two years prior to the commencement of the foreclosure action.

[Emphasis added.]

[19] Accordingly, the dual aspects of the 625 Mortgage mean that there are two separate and distinct limitation periods potentially applicable with: firstly, the debt and, secondly, the security. It is always open to a lender to simply enforce the debt aspect of a mortgage, without reference to the security. Conversely, an action to enforce the security will only be allowed if the debt remains extant.

[20] It is agreed on this application that:

- a) The limitation period in respect of 625's claim for the debt (i.e., the outstanding principal and interest) under the 625 Mortgage began on the date which it was due and on which 098 defaulted in payment, namely September 1, 2014;
- b) The limitation period with respect to 625's claim to realize on its security held under the 625 Mortgage arose upon discovery by 625 of its right to do so. Pursuant to s. 15 of the Act, the right to realize the security was discovered on the first day that the right to enforce the security arises. Here, the PSMT provide that 625 had the right to enforce the 625 Security upon default (Leatherman at paras. 10 and 47). Therefore, with respect to the security held under the 625 Mortgage, that right arose when 098 failed to make payment of the first interest payment under the 625 Mortgage on June 28, 2014.

[21] Accordingly, unless the limitation periods were extended in accordance with the Act:

- a) 625's ability to claim against 098 for the amount owing under the 625 Mortgage was statute-barred as of September 1, 2016; and
- b) 625's ability to enforce its security under the 625 Mortgage was statute-barred as of June 28, 2016.

[22] Forjay/RMIC do not dispute 625's ability to claim against 098 for the amounts outstanding under the 625 Mortgage. Forjay/RMIC are satisfied that the limitation period in that respect was postponed by reason of various payout statements executed by 098, as discussed below.

B. Acknowledgements Generally

[23] The central issue and point of dispute between the parties is whether 098 provided acknowledgements of both the debt and security to 625, as required by the Act, and consistent with the reasoning in Leatherman.

[24] The requirements of an acknowledgement under the Act are found in s. 24:

-
- (1) If, before the expiry of either of the limitation periods that, under this Act, apply to a claim, a person acknowledges liability in respect of the claim,
 - (a) the claim must not be considered to have been discovered on any day earlier than the day on which the acknowledgement is made, and
 - (b) the act or omission on which the claim is based is deemed to have taken place on the day on which the acknowledgement is made.
 - (2) An acknowledgement of liability in respect of a claim for interest is also an acknowledgement of liability in respect of a claim for
 - (a) the outstanding principal, if any, and
 - (b) interest falling due after the acknowledgement is made.
 - (3) An acknowledgement of liability in respect of a claim to realize on or redeem collateral under a security agreement or to recover money in respect of the collateral, if made by a person in possession of the collateral, is an acknowledgement of liability in respect of the claim by any other person who later comes into possession of the collateral.
 - (4) An acknowledgement by a trustee of liability in respect of a claim is an acknowledgement of liability in respect of the claim by any other person who is or who later becomes a trustee of the same trust.
 - (5) An acknowledgement of liability in respect of a claim to recover or enforce an equitable interest in personal property, if made by a person in possession of the personal property, is an acknowledgement of liability in respect of the claim by any other person who later comes into possession of the personal property.
 - (6) Subsection (1) does not apply to an acknowledgement, other than an acknowledgement referred to in subsection (7), (8) or (9), unless the acknowledgement is
 - (a) in writing,
 - (b) signed, by hand or by electronic signature within the meaning of the Electronic Transactions Act,
 - (c) made by the person making the acknowledgement or the person's agent, and
 - (d) made to the person with the claim, the person's agent or an official receiver or trustee acting under the Bankruptcy and Insolvency Act (Canada).
 - (7) In the case of a claim for payment of a liquidated sum, part payment of the sum by the person against whom the claim is or may be made or by the person's agent is an acknowledgement by the person against whom the claim is or may be made of liability in respect of the claim.
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- (8) A debtor's performance of an obligation under or in respect of a security agreement is an acknowledgement by the debtor of liability in respect of a claim by the creditor for realization on the collateral under the security agreement.
- (9) A creditor's acceptance of a debtor's payment or performance of an obligation under or in respect of a security agreement is an acknowledgement by the creditor of liability in respect of a claim by the debtor for redemption of the collateral under the security agreement.
- (10) This section applies to an acknowledgement of liability in respect of a claim for payment of a liquidated sum even though the person making the acknowledgement refuses or does not promise to pay the sum or the balance of the sum still owing.
- [25] It is apparent that the dual aspects of a mortgage (debt and security) reinforced in *Leatherman* is similarly recognized in s. 24 of the Act. Although not applicable to the factual context here, s. 24(3) of the Act refers to:

An acknowledgement of liability in respect of a claim to realize on . . . collateral under a security agreement or to recover money in respect of the collateral . . .

- [26] 625 has advanced a number of arguments in that respect that I will address in detail below. In essence, 625 argues that the acknowledgements of the debt, which Forjay/RMIC accept were made, are also implicitly acknowledgements of 625's claim to security under the 625 Mortgage. These are said to include both written documents provided by 098 to 625 (s. 24(6)) and partial payments (s. 24(8)) under the 625 Mortgage.
- [27] 625 contends that these acknowledgements occurred from January 2015 to August 2018, so as to extend the two year limitation period such that it had not expired before the filing of 625's application in June 2019.
- [28] Forjay/RMIC take the position that none of the documents or payments put forward by 625 constitute an acknowledgement by 098 of 625's claim to realize on the Lands under the 625 Mortgage so as to postpone the limitation period.
- [29] The onus lies on 625 to satisfy the Court that 098 has made an acknowledgement in sufficient time to avoid the barring of a claim or cause of action under the Act.
- [30] The parties have referred to a number of case authorities which discuss acknowledgements. All of these authorities arose under BC's previous legislation or legislation in other jurisdictions; however, there is no dispute concerning what general principles relating to acknowledgements apply under the Act.
- [31] A useful starting point is the reasoning of Justice Aikins in *Podovnikoff v. Montgomery*, [1984] B.C.J. No. 1920 as to what is sufficient to be described as an acknowledgement:
- [12] I am . . . of the view that . . . a bare acknowledgment of the existence of a cause of action is quite insufficient to meet the requirements of s. 5(2)(a)(i) of the Act. Those provisions provide that a person confirms a cause of action only if he "acknowledges a cause of action,

right or title of another". The acknowledgment of a right or title must, in my view, involve the acknowledgment of some liability. The word "acknowledgment" must have the same meaning when used with reference to a cause of action. It follows, therefore, that what binds a defendant and activates s. 5(2)(a)(i) is an acknowledgment in writing of a cause of action which admits some liability thereunder.

[Emphasis added.]

- [32] Podovnikoff was cited with approval in *Ryan v. Moore*, 2005 SCC 38 at para. 45, where Justice Bastarache stated "a party can only be held to have acknowledged the claim if that party has in effect admitted his or her liability to pay that which the claimant seeks to recover". The Court also confirmed at para. 48 that the intention of the person making the communication is critical.
- [33] Both *Ryan* and *Podovnikoff* were considered in *Brons v. 622943 B.C. Ltd.*, 2006 BCSC 193. With respect to written acknowledgments, Justice Boyd stated at para. 26 that the acknowledgement "must be evident on the face of the document". Regarding how the intention of the person making the communication comes into play within the objective test, Boyd J. stated:
- [29] Thus, while the parties' intentions are now considered to be relevant, it appears that in keeping with the objective test, the Court must still consider what a reasonable person would determine the intention and purpose to be from an examination of the document.
- [34] Accordingly, a document extends a limitation period if a reasonable person would construe the words used as an acknowledgment of "some liability": *Trombley v. Pannu*, 2016 BCCA 324 at paras. 18 and 28. See also *Nguyen v. Johnson*, 2008 BCCA 218 at paras. 44-47.
- [35] In *Grimsley v. Roe*, 2018 BCSC 985, Justice Saunders applied *Ryan* and this Court's decision in *George v. McMahon*, 2006 BCSC 1394 in concluding that, when determining whether an acknowledgement has occurred, the Court must undertake a broad contextual analysis of not just the written document, but the overall circumstances:
- [65] The question of whether a particular document acknowledges a cause of action is determined not with respect to the content of the document in isolation, but with regard to the whole context in which it was communicated. The test is what a reasonable person would determine the intention and purpose of the maker of a document to be from an examination of the document in the surrounding circumstances; see the decision of Myers J. in *George v. McMahon*, 2006 BCSC 1394, at paras. 8-12, in particular his reliance upon the decision of the Supreme Court of Canada in *Ryan v. Moore*. . . .

[Emphasis Added.]

- [36] I accept the comments found in Grimsley. However, I consider that the Court should be cautious to ensure that the context of the communication does not overwhelm the actual words found in the document. In that respect, it is akin to the conclusions of the Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 where the Court issued a similar caution, albeit in respect of contract interpretation. The Court stated:
- [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
- [37] 625 refers to a number of authorities which have considered the issue of acknowledgments in the context of foreclosure proceedings.
- [38] In *Wright v. Pepin*, [1954] 2 All ER 52 (Ch.), Justice Harman considered whether an exchange of correspondence between the mortgagee's and mortgagor's solicitors constituted an acknowledgement. As with s. 24(1) of the Act, the English legislation referred to an acknowledgement of the "claim".
- [39] In *Wright*, the mortgagee had sought information about what was happening to the mortgaged property, which had almost been destroyed in the war. Through a series of letters, they advised the mortgagor that they wanted the mortgage "paid off" or "discharged", failing which they had instructions to take proceedings.
- [40] The mortgagor's solicitor responded:
- . . . I understand that Mrs. Pepin [the mortgagor] will shortly be making an appointment to see you with regard to her accounts with you for some time past. She has several questions which she wishes to raise. Steps are being taken to rebuild 101, Mountview Road. Plans have been prepared and submitted to the local authority, and as soon as the work is in hand I will let you know, when Mrs. Pepin's position can again be reviewed. . . .
- [41] At 55-56, Harman J. found that the above letter was sufficient to be construed as an acknowledgement, since it was an admission of "a charge" or the "existence of the mortgage". At 58, he stated:

Her solicitor was approached by the mortgagees' solicitors, the time not having then run, and under pressure from them Mrs. Pepin's solicitor, as she is well authorised to do, says "Please hold your hand until the property has been re-built, and then Mrs. Pepin's position can be reviewed." What is that but an acknowledgment in respect of the property and a request for forbearance?

[Emphasis Added.]

- [42] In *George*, Justice Myers relied on a letter from the mortgagors to the mortgagee's representatives regarding payment of the amount due under the mortgage after an earlier letter from the mortgagee specifically referring to the mortgage and threatening foreclosure. The reply letter, said to be the acknowledgement, referred to the common goal of having the house (presumably the security for the mortgage) sold.
- [43] *George* was decided under the previous BC limitation legislation and before *Leatherman* and did not specifically address the dual nature of a mortgage and the two separate limitation periods potentially at play. This is evident by numerous references by Myers J. to an acknowledgement of the "debt" (not the security) as being the basis upon which the order nisi was granted: see paras. 3, 10 and 12.
- [44] In my view, the result in *George* is best understood as an acknowledgement of both the debt and the security under the mortgage. Implicitly, the debtor's reference to the common goal of selling the house can be seen as acknowledging her liability under the mortgage security by recognizing the mortgagor's right to proceed against the house.
- [45] *Grimsley* was not a foreclosure action in the classic sense, namely in respect of a registered mortgage against real property. It involved an action for the recovery of a loan and the sale of a guiding territory under what was alleged to be an equitable mortgage. The sale was sought in order to repay the debt, as was provided for under the terms of a loan agreement.
- [46] Justice Saunders found that an email from the debtors, read in the context of communications from the lender and the sending of an insurance binder from the debtors to the lender, constituted an acknowledgment. The email was in response to communications from the lender which, in part, asked how the loan was to be repaid: *Grimsley* at paras. 82-88. Two further written acknowledgements were found to have been made by the debtors as to the debt: *Grimsley* at paras. 89-94.
- [47] In the result, the Court ordered the sale of the guiding territory with the proceeds going to the lender. As was the case in *George*, the communications in *Grimsley* can be understood as an acknowledgement by the debtors of their continuing liability under the creditor's right to proceed against the asset (i.e. the guiding territory); there would have been no other rational reason to raise the matter of insurance against those very assets.

C. The Alleged Acknowledgements

[48] 625 argues that from January 2015 to August 2018, 098 provided 16 separate written acknowledgements that extended the limitation period. As argued by Forjay/RMIC, the alleged acknowledgments can be categorized for the purpose of the necessary analysis as follows:

- a) The Minutes of Agreement;
- b) Extensions regarding the Minutes of Agreement / Partial Payments;
- c) Request for Lien Funds;
- d) Other communications between 625 and 098; and
- e) The Payout Statements.

[49] There is no dispute between the parties concerning whether or not the alleged written acknowledgements satisfied the technical requirements under s. 24(6) of the Act. Rather, Forjay/RMIC advance more substantive arguments as to whether these acknowledgements satisfied the Podovnikoff test.

1. Minutes of Agreement

[50] On September 1, 2014, the 625 Mortgage was in default by reason of 098's failure to pay the principal and interest outstanding. In addition, the First Mortgage was in default. Yet, 098 was not far into its development efforts and required more financing to move the project forward.

[51] At paras. 28-35 of the Summary Trial Reasons, I outlined the circumstances in late 2014 by which 098 sought and obtained further financing from Forjay, CWT and HMF Home Mortgage Fund Corporation (Collectively, the "Second Mortgagees"). This financing was eventually secured against the Development pursuant to the Second Mortgage.

[52] As noted at paras. 36-37 of the Summary Trial Reasons, it was a condition of the Second Mortgage that it would have second-ranking priority behind only the First Mortgage. Since the 625 Mortgage was already registered against the Lands at the time the Second Mortgage was executed, the Second Mortgagees required that 625 execute a priority agreement. On January 21, 2015, an agreement was executed by 625 to that effect (the "625 Priority Agreement").

[53] While negotiations toward the 625 Priority Agreement were underway, on January 6, 2015, 098's counsel, Mark Ferbers, contacted 625's counsel, Cindy Zheng, to discuss how the 625 Mortgage would be addressed in light of the fact that it had matured in September 2014. Mr. Ferbers made a proposal to address that situation.

[54] On February 9, 2015, Ms. Zhang replied to Mr. Ferbers in an email. She enclosed revisions to the draft proposal. She stated in part that:

Provided that the construction on the property proceeds efficiently and there is no breach of the proposed agreement, our client would rather allow construction to proceed, rather than start the foreclosure process.

[55] On January 12, 2015, Mr. Ferbers replied with a revised proposal and stated: "[c]oncerning forbearance, our client seeks arrangements that your client would forebear [sic] for 90 days . . . " Finally, Mr. Ferbers referred to 098's plan to refinance so as to "pay out [625] completely".

[56] Eventually, 625 and 098 agreed on the terms of the forbearance.

[57] On January 22, 2015, around the time of execution of the 625 Priority Agreement, Ms. Zheng delivered to Mr. Ferbers the final draft of a document, entitled "Minutes of Agreement", which had been executed by 625's principal, Mohinder Gosal, on behalf of 625. Her letter stated, among other things:

First, we again confirm you [sic] clients' acknowledgement and confirmation that the amount owing to our client, as of December 31, 2014, is as stated on the Statement prepared by Bouchard & Company Chartered Accountants, dated December 31, 2014.

[Emphasis added]

[58] By January 22, 2015, all parties to the Minutes of Agreement had executed that document.

[59] On January 23, 2015, Mr. Ferbers delivered to Ms. Zheng the fully executed Minutes of Agreement, as well as the December 31, 2014 Statement prepared by Bouchard & Company Chartered Accountants ("Bouchard"). His letter stated, among other things:

"Further to your letter of January 22, 2015, please find enclosed the following:

1. A copy of the Statement prepared by Bouchard & Company Chartered Accountants dated December 31, 2014, initialled by our client acknowledging confirmation of the amount owing to your client . . . "

[Emphasis added]

[60] The executed Minutes of Agreement specifically refer to the 625 Mortgage (defined as the "Mortgage"). While most of the Minutes of Agreement address matters arising under the Second Mortgage as it related to 625, the parties agree that the significant portions of the document in relation to the limitation issues are:

6. The Borrower and the Covenantor shall pay to the Lender an administrative fee of \$10,000 per month (the "Administrative Fee(s)"), until the amount owing under the Mortgage has been paid in full, to commence January 1, 2015, and the first day of each month thereafter. Failure to pay the Administration Fee(s) shall constitute a breach of this agreement and the amount of the Administration Fee(s) shall be added to the amount owing under the Lender's Mortgage.

...

8. In respect of defaults made under the Mortgage as of the date of execution of this agreement, the Lender shall forebear [sic] from foreclosure and/or execution proceedings under the Mortgage pursuant to any current breach of the Mortgage, for a period of 90 days from the date of the execution of this agreement.
- [61] Forjay/RMIC argue that the Minutes of Agreement do not include waivers of 098's defaults under the 625 Mortgage, including in respect of the late payments of interest and the failure to pay the outstanding amount due under the 625 Mortgage on September 1, 2014. Moreover, they argue that the Minutes of Agreement do not purport to amend the terms of the 625 Mortgage.
- [62] 625's counsel cites *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156 at paras. 73 and 75 for the effect of a forbearance agreement. However, I do not see how this case authority assists 625.
- [63] As discussed in *Hamilton* at para. 75, a forbearance agreement can result in a renegotiation of a debt agreement as it relates to the timing of payments. As the court notes, this in essence results in a "resetting" of the terms of the loan such that the defaults no longer exist and the running of the limitation period is delayed.
- [64] This understanding of the effect of forbearance agreements has been accepted in BC with some clarification. As discussed in *Grimsley* at para. 70, citing *Rosas v. Toca*, 2018 BCCA 191, by such terms, the parties may extend the date for repayment of a loan and delay the running of the limitation period without fresh consideration.
- [65] Here, 625 and 098 did not agree to change the time for repayment. The Minutes of Agreement did not amount to a renegotiation of the debt agreement. There is no mention of the existing payment defaults in the Minutes of Agreement, let alone a waiver of them. The Minutes of Agreement simply secure for 098 a 90-day grace period so as to avoid 625 commencing foreclosure proceedings during that time in light of the existing breaches under the 625 Mortgage.
- [66] Forjay/RMIC also argue that the Minutes of Agreement do not include any express acknowledgement by 098 of the validity and enforceability of the 625 Mortgage, or more specifically, of 098's liability under the mortgage security.
- [67] I agree, but that is not a complete answer as to whether or not 098 can be considered to have provided the necessary written acknowledgement under s. 24 of the Act. As noted in the case law, an acknowledgement can be either express or implicit.
- [68] In my view, the circumstances relating to the Minutes of Agreement are comparable to those found in *George and Wright*. As in those cases, foreclosure proceedings were being threatened. Here, that threat came from 625 and the debtor (098) was seeking to avoid that result. 098 did so by entering into the Minutes of Agreement.

- [69] I disagree with Forjay/RMIC that the Minutes of Agreement do not go beyond a "bare acknowledgement" per Podovnikoff or a "bare fact" or "simple acknowledgement" per Ryan of a cause of action, namely 625's right to commence a foreclosure to realize on the security held under the 625 Mortgage.
- [70] Taken in context, the Minutes of Agreement can only be seen as a written acknowledgement by 098 of "some liability" in respect of, not only the debt, but also 625's claim to realize on the Lands under the 625 Mortgage security. 098's execution of the Minutes of Agreement can only be interpreted as saying to 625 something to the effect of "I know you have the present right and ability to proceed against the Lands under mortgage security that I have granted - and I wish to avoid facing those consequences under my liability under that security".
- [71] I conclude that the Minutes of Agreement are an acknowledgement under s. 24 of the Act sufficient to extend the limitation period to January 22, 2017 (two years after execution of the Minutes of Agreement). I refer to this date since, again, the Minutes of Agreement did not result in an amendment to the payment dates set out in the 625 Mortgage to the end of the forbearance period. In other words, the defaults remained; the only effect of the document was that 625 agreed to hold off enforcement proceedings.
2. Extensions re Minutes of Agreement / Partial Payments
- [72] As discussed in the Summary Trial Reasons, 098's refinancing did not materialize in spring 2015 and its financial woes continued until Forjay commenced foreclosure proceedings in October 2017.
- [73] Mr. Gosal's evidence is that the forbearance period set out in para. 8 of the Minutes of Agreement was subsequently extended numerous times for short time periods by various written agreements entered into between 625 and 098:
- a) By Ms. Zheng's letter dated April 29, 2015 to Mr. Ferbers signed back by Mr. Ferbers, extending the forbearance period to May 28, 2015 "in return for payment of an additional fee of \$30,000 to the lender, on or before April 30, 2015";
 - b) By Ms. Zheng's letter dated May 21, 2015 to Mr. Ferbers, signed back by 098, extending the forbearance period to July 28, 2015, upon payment of certain fees on June 1 and July 1, 2015, which were not paid. This extension provided that failure to pay would constitute a breach of the Minutes of Agreement, allowing 625 to commence foreclosure proceedings immediately;
 - c) By Mr. Ferbers' letter dated July 30, 2015 to 625's new counsel, Jeremy Shragge, proposing an extension of the forbearance agreement to August 31, 2015 in exchange for payment of forbearance fees totaling \$100,000, which would be "paid with the balance of the mortgage proceeds due your client on the extended due date". On August 4, 2015, Mr. Shragge confirmed 625's agreement to this proposal;

- d) By Mr. Ferbers' email dated August 27, 2015, confirming 098 and 625's agreement to an extension of the forbearance period to September 30, 2015 in exchange for payment of a forbearance fee of \$60,000, whereby \$20,000 to be paid on September 1, 2015 (which it was) and \$40,000 "payable with the mortgage payout";
 - e) On September 29, 2015, Mr. Shragge confirmed in writing to Mr. Ferbers that 625 would not agree to any further extensions of para. 8 of the Minutes of Agreement, indicating that the full amount outstanding under the "Loan" was due and payable on September 30, 2015;
 - f) On October 8, 2015, Mr. Ferbers confirmed to Mr. Shragge that their clients had agreed to a further extension to October 31, 2015, in exchange for payment of forbearance fees totaling \$110,000, which would be partially satisfied by increasing the mortgage amount by \$60,000 and a payment of \$50,000 to be paid within ten days' time (which it was);
 - g) By Mr. Ferbers' letter dated October 28, 2015, signed back by Mr. Shragge on October 29, 2015, 625 and 098 agreed to extend the forbearance period to November 15, 2015 in exchange for, among other things, payment of a forbearance fee of \$45,000, "which amount will be added to the balance owing under the mortgage to be paid out [on November 15, 2015]"; and
 - h) By Mr. Ferbers' letter dated November 17, 2015, signed back by Mr. Gosal, 625 and 098 agreed to extend the forbearance period to December 15, 2015, in exchange for, among other things, payment of \$30,000 (which was received on December 1, 2015) and a forbearance fee of \$100,000, "which amount will be added to the balance owing under the mortgage to be paid out [on December 15, 2015]".
- [74] On December 16, 2015, Mr. Shragge, on behalf of 625, formally demanded payment by 098 of 625's loan. 625 alleged that 098 was in default under the 625 Loan Agreement and the 625 Mortgage. Also, 625 delivered to 098 a notice of intention to enforce security under s. 244(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 with respect to the 625 Mortgage.
- [75] Again, I agree with Forjay/RMIC's submissions that these later amending agreements did not modify the date on which principal and interest were due under the 625 Mortgage. Further, they did not have the effect of eliminating the existing defaults in payment by waiver or otherwise; rather, they simply extended the date to which 625 agreed to forbear from enforcing its rights that had arisen arising from such defaults.
- [76] The remainder of Forjay/RMIC's submissions as to the effect of these amending agreements tracks those relating to the Minutes of Agreement. Both parties contend, and I agree, that the analysis with respect to the Minutes of Agreement and the amending agreements is the same.
- [77] The amending agreements simply flow from the Minutes of Agreement. Having held that the Minutes of Agreement constitute a valid acknowledgement under the Act, the same conclusion follows for the amending agreements.

- [78] I conclude that the amending agreements are acknowledgements under s. 24 of the Act sufficient to extend the limitation period to November 17, 2017 (two years after the last amending agreement). The parties accept that, in light of the forbearance granted, the limitation period would have been extended to two years from the end of that forbearance period on December 15, 2015, being December 15, 2017.
- [79] 625 also relies on 098 having made "partial payments" to 625 on September 1, 2015 (\$20,000) and December 1, 2015 (\$50,000), as noted in the above chronology of the amending agreements.
- [80] However, these payments were for forbearance fees and not in respect of the obligation under the 625 Mortgage to pay principal, interest and other costs. Therefore, I agree with Forjay/RMIC that they cannot be considered as 098's "performance of an obligation under" the 625 Mortgage for the purposes of s. 24(8) of the Act. The 625 Mortgage does not refer to such fees as representing obligations under that security.
- [81] 625 argues that the phrase "in respect of" in s. 24(8) is to be interpreted as the "widest of any expression intended to convey some connection between two related matters", citing the Court's interpretation under the former legislation in *Nguyen* at para. 32.
- [82] I disagree. While the 625 Mortgage and the Minutes of Agreement and its amending agreements are connected, I do not see that payment of fees to delay enforcement can be said to be connected to 098's performance under the 625 Mortgage.
- [83] In any event, given my conclusion as to the effect of the amending agreements, this argument relating to partial payments does not further extend the limitation period.

3. Request for Lien Funds

- [84] A further acknowledgement advanced by 625 relates to 098's request that 625 advance further funds to it to pay certain liens.
- [85] On January 4, 2016, Mr. Ferbers indicated in an email to Mr. Shragge that he understood that 625 had agreed to advance approximately \$125,000 to 098 to discharge liens registered against the Lands. On January 5, 2016, Mr. Ferbers' sent a further email, reading in part:

In the meantime I understand the parties have discussed your client advancing the \$125,190.17 referred to below to pay the subject liens as an expense under section 6(6) of the Standard Mortgage Terms, to be added to the principal amount of the mortgage under and subject to the existing security.

[Emphasis Added.]

- [86] On January 7, 2016, Mr. Ferbers again wrote to Mr. Shragge, stating:

Concerning the initial \$125,190.17 advance to pay the liens, what is proposed on an interim basis is that these funds be advanced under the existing security as an expense under section 6(6) of the Standard Mortgage Terms to cause discharge of the liens. The amount gets added to the principal amount of the mortgage and is secured by all of the existing security. There is nothing more required by way of interim terms for this advance. This addresses the immediate issue of securing release of the liens while securing your client for the funds advanced.

...

In the interim our client seeks your client's agreement to advancing the initial \$125,190.17 under the terms of paragraph 1 above. . . .

[Emphasis Added.]

[87] On January 8, 2016, 625 provided the Lien Funds to 098's solicitors, on undertakings, expressly pursuant to s. 6(6) of the PSMT.

[88] I take 625's argument as being that 098's acknowledgement in these communications was "implicit" with respect to confirming the validity and enforceability of the 625 Mortgage. I do not doubt that 625 would not have advanced these monies save for its understanding that they would be secured under the 625 Mortgage. However, that is not the point here.

[89] Forjay/RMIC argue that these communications were not made by 098 for the intention and purpose of acknowledging, let alone admitting, liability for any claim by 625 under the 625 Mortgage.

[90] There is merit in this submission. In Ryan, Bastarache J. stated:

[48] The purpose for which these types of payments and correspondence are made is critical. In this case, they were not intended as admissions of liability, but only to promote investigation and early resolution of certain aspects of the claim.

[91] I cannot conclude that these communications by 098's counsel could be reasonably construed as acknowledging in any way, explicitly or implicitly, 625's existing rights or claims under the 625 Mortgage or 098's liability under the 625 Mortgage. They were simply communications regarding further advances by 625 under the 625 Mortgage. There was, in the words of Aikins J.A., no admission of "some liability" under the 625 Mortgage.

[92] I conclude that no acknowledgement under s. 24 of the Act arose from these communications about payment of lien funds.

4. Other communications between 625 and 098

[93] On January 8, 2016, Mr. Ferbers emailed 625's counsel, enclosing a mortgage payout statement. This statement, which Mark Chandler signed on January 2, 2016, acknowledged the amount due and owing under the 625 Mortgage as at December 15, 2015. In his email, Mr. Ferbers advised that he had been:

... instructed to acknowledge that the parties have agreed to extend the forbearance to January 15, 2016.

- [94] On February 1, 2016, Mr. Ferbers emailed Mr. Shragge indicating that he had asked for instructions on "the forbearance extension terms".
- [95] On February 2, 2016, Mr. Shragge, on behalf of 625, advised Mr. Ferbers that upon receipt of a "fully endorsed copy of a further forbearance agreement", which his assistant would send shortly, 625 would consent to the release of certain funds.
- [96] Minutes later, Mr. Shragge's assistant sent Mr. Ferbers a document, as Mr. Shragge had promised. This was a document prepared by Bouchard entitled "Loan Amortization". On this application, the parties have also described this document as a mortgage payout statement since it indicated an amount outstanding as of January 15, 2016. In addition, this document referred to "extension fees to April 15, 2016" in the amount of \$450,000. Note 10 of the document reads "FULL DUE APRIL 15, 2016".
- [97] On February 2, 2016, 098 signed this document/payout statement as "accepted and approved" by it.
- [98] Mr. Gosal in his Affidavit #3 sworn November 13, 2019 asserts that, by these February 2016 emails (not the February 2, 2016 payout statement), 625 and 098 agreed to extend "the Forbearance Agreement" to April 15, 2016. While Mr. Gosal does not state in his Affidavit #3 what exact fees were agreed to, 625's counsel submits that the February 2, 2016 payout statement referring to \$450,000 would implicitly result in a \$150,000 per month fee for three months till April 15, 2016.
- [99] I conclude that 625 faces insurmountable obstacles to establish that this payout statement is an acknowledgement under the Act.
- [100] While the payout statement very generally refers to further "extension fees", there is nothing signed by 098 and 625 to indicate what the parties agreed, let alone discussed as being the forbearance, if any, that was secured by 098 agreeing to pay those fees. There is no specific reference to the 625 Mortgage or even possible foreclosure proceedings being commenced. There is nothing signed by 098 indicating they agreed to pay \$150,000 per month, save and except for what can only be described as a very oblique reference in the payout statement, now interpreted by 625's counsel.
- [101] Critically, by this time, 625's forbearance had effectively come to an end upon 625 making demand for payment of the entire loan in mid-December 2015.

[102] There is no agreement, let alone any communication between the parties, as to how the December 16, 2015 demand by 625 was to be addressed in the context of these fees. More importantly, even accepting for the sake of argument that an agreement was reached, there is no logical connection between this agreement and the Minutes of Agreement, as extended previously and where such extensions were made in reference to para. 8 of the Minutes of Agreement.

[103] In these circumstances, I see no reasonable basis upon which it can be said that these communications by 098 amounted to an acknowledgement of its liability under the 625 Mortgage or an acknowledgment of "some liability" under the 625 Mortgage regarding 625's legitimate right to proceed under the security by foreclosure or otherwise.

5. The Payout Statements

[104] The last five written acknowledgements asserted by 625 are the various Bouchard Loan Amortization documents (also described as payout statements). By these documents, 098 accepted and agreed to various calculations of the loan:

- a) On October 6, 2016, 098 acknowledged the amount due and owing under the 625 Mortgage as at November 1, 2016;
- b) On September 5, 2017, 098 acknowledged the amount due and owing under the 625 Mortgage as at September 1, 2017;
- c) On October 25, 2017, 098 acknowledged the amount due and owing under the 625 Mortgage as at November 1, 2017;
- d) On June 1, 2018, 098 acknowledged the amount due and owing under the 625 Mortgage as at May 31, 2018; and
- e) On August 1, 2018, 098 acknowledged the amount due and owing under the 625 Mortgage as at July 31, 2018.

[105] On the second page of each document, there are oblique references to "mortgage".

[106] In his Affidavit #2 sworn May 29, 2019, Mr. Gosal himself describes the documents as confirming 098's liability under the 625 Mortgage . . . "regarding the debt owed by 098 to 625" (emphasis added). In reference to the first Bouchard payout statement as of December 2014, Ms. Zheng repeatedly referred to needing to obtain 098's acknowledgement and confirmation of "the amount owing to [625]" and the document was acknowledged as such by Mr. Ferbers in January 2015.

[107] In my view, Forjay/RMIC's reliance on Leatherman has some significance on this issue.

- [108] I agree that no reasonable person reading these payout statements could form the view that, by signing them, 098 intended to acknowledge its liability in respect of the right or claim of 625 to take steps under the security aspect of 625's Mortgage. Read at their highest, these payout statement only served to confirm 098's agreement and acceptance of the calculation of 098's debt owing to 625, including under the 625 Mortgage.
- [109] What is not found in these documents is any reference to 625's ability to proceed to enforce its security, let alone 098's acknowledgement that it faced "some liability" in that respect. Unlike the Minutes of Agreement, and by reference, the later amending agreements, there was no mention of possible foreclosure proceedings by 625 or even confirmation that 098 was providing the payout statements to avoid any such result.
- [110] In conclusion, these documents, or payout statements, are not written acknowledgements within the meaning of s. 24 of the Act.

D. Litigation Related Limitation Issues

- [111] The effect of my conclusions above are sufficient to extend the limitation period to November 17, 2017 (or December 15, 2017, as the parties agree).
- [112] On June 3, 2019, 625 filed its NOA in this proceeding for relief in respect of the 625 Mortgage. Forjay/RMIC take the position that only on that date did the limitation period under the 625 Mortgage stop. Accordingly, if Forjay/RMIC prevail on that point, 625's right to proceed under its security is statute barred.
- [113] In light of that position, 625 advances a number of arguments to the effect that certain steps taken in this proceeding were written acknowledgements by 098 that had the effect of extending the limitation period available to it. Alternatively, 625 argues that the taking of those steps effectively resulted in 625 commencing enforcement proceedings under the 625 Mortgage.
- [114] The following are the steps taken in this proceeding relevant to the limitation issue:
- a) August 25, 2017: Forjay files its petition seeking standard foreclosure relief under the Second Mortgage. As required by the Supreme Court Civil Rules, Rule 21-7(2), 625 is named as one of the respondents since the 625 Mortgage is (allegedly) subordinate to Forjay's security under the Second Mortgage;
 - b) September 5, 2017: 625 files a response in this action (the "625 Response"). In essence, by the 625 Response, 625 challenged the security claimed by Forjay on behalf of the Second Mortgagees and sought to determine the priorities among the various charge holders;
 - c) October 3, 2017: 098 files an application response in this action (the "098 Response");
 - d) October 4, 2017: this Court grants an order appointing a receiver of 098's assets. 625's counsel attends at that hearing;

- e) Summer 2018: various parties (including 625) raise several issues with respect to the validity and enforceability of the First and Second Mortgages. As a result of Case Plan Orders of this Court dated May 30 and August 31, 2018, the parties are directed to prepare for and attend a summary trial to determine certain issues. The Summary Trial was heard in October 2018 and was resolved by the Summary Trial Reasons;
- f) May 8, 2019: at a further case planning conference, this Court issued a further Case Plan Order. By this Order, 625 was directed to file and serve its NOA as to the validity and enforceability of the 625 Mortgage, an issue that 625 had earlier asserted to the parties and to the Court; and
- g) June 3, 2019: 625 filed its NOA for the relief sought at this hearing.

[115] For the purpose of 625's arguments with respect to these issues, it is helpful to refer to certain comments found on page 6 of the September 2010 document issued by BC's Ministry of Attorney General, entitled White Paper on Limitation Act Reform: Finding the Balance (Victoria: Ministry of Attorney General, Justice Services Branch, September 2010) (the "White Paper"). The White Paper no doubt was prepared toward the eventual enactment of the Act. Importantly, the White Paper discusses the rationales that underlie limitation legislation:

The current Act attempts to balance the rights of plaintiffs (those starting civil actions) and defendants (those defending them) by striking a balance between a plaintiff's need to be able to access the civil justice system and a defendant's need for certainty and predictability, namely a definite end point to potential legal liability.

The Supreme Court of Canada has repeatedly identified three rationales that underlie limitations legislation, which may be summarized as the certainty, evidentiary and diligence rationales:

Statutes of limitations have long been said to be statutes of repose... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations...

The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim...

Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

[Emphasis Added.]

[116] The above quote in the White Paper is taken from M.(K.) v. M.(H.), [1992] 3 S.C.R. 6 at 29-30, quoted in Peixeiro v. Haberman, [1997] 3 S.C.R. 549 at 562.

1. Forjay's Petition

- [117] 625 argues that the filing of this proceeding alone, in which it was named as a respondent, has effectively resulted in 625 commencing a proceeding to enforce its security (the 625 Mortgage) on that date (August 25, 2017). 625 argues that Forjay's filing of its petition has, in effect, meant that 625 commenced its own foreclosure proceeding.
- [118] 625 argues that, so long as its security was not statute barred at the time of the commencement of this proceeding, the date of the filing of its NOA is irrelevant. 625 asserts and states that it is protected from the running and expiry of the limitation period by reason of its position as a party of record in the foreclosure proceeding.
- [119] I see no merit in these arguments. 625 cannot point to any authority to support the proposition that a proceeding commenced by another party (here, Forjay) has the effect of postponing the running of limitation periods in respect of claims for debt or security of another party (here, 625).
- [120] Forjay's petition was filed to advance its interests under the Second Mortgage. It was not filed to address issues that may have been alive between other mortgagees (including 625) and 098.
- [121] I fail to see how Forjay taking this step (filing this proceeding) had the effect of notifying 098 that 625 was also advancing a claim or "holding it to account" under the 625 Mortgage in this proceeding.
- [122] 625 also argues that its June 2019 NOA is in the nature of a counterclaim. 625 argues that the filing of its "counterclaim" is protected by s. 22 of the Act:
- (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:
 - (a) proceedings by counterclaim may be brought, including the addition of a new party as a defendant by counterclaim; . . .
- . . .
- (4) Subsection (1) does not interfere with any judicial discretion to refuse relief on grounds unrelated to the expiry of a limitation period.
 - (5) In any court proceeding, the court may, on terms as to costs or otherwise that the court considers just, allow the amendment of a pleading to raise a new claim even though, at the time of the amendment, a court proceeding could not, under section 6, 7 or 21, be commenced with respect to that claim.

[123] I also see no merit in this argument. 625's NOA cannot be considered a counterclaim against Forjay. Rather, 625's NOA is directed at another respondent, 098, in respect of a matter completely separate from the substance of the claim advanced by Forjay. 625's claim is not related at all to Forjay's claim.

[124] I reject 625's argument that the limitation period in terms of enforcing the 625 Mortgage effectively stopped in August 2017 upon the filing of Forjay's petition.

2. 098's Response

[125] On September 26, 2017, Forjay filed an application for the appointment of a receiver over the Lands.

[126] On October 3, 2017, 098's counsel filed the 098 Response arising from Forjay's application for the appointment of a receiver. That application was later granted when the Court, on October 4, 2017 made that order (the "Receivership Order").

[127] 625 contends that the 098 Response was a written acknowledgement by 098 of the 625 Mortgage under s. 24 of the Act.

[128] The 098 Response was directed to Forjay's application for a receiver. By that document, 098 sought an adjournment of Forjay's application (which was not granted). 098 also stated that it did not object to the continuing sale of strata lots, with certain monies to be paid to the First and Second Mortgagees and "the balance of the funds should be paid into court".

[129] The portion of the 098 Response said by 625 to represent the acknowledgement is found in Part 4: Factual Basis, which states:

3. The following parties provided mortgage financing to the Project:

...

(c) 625 as third mortgagee; ...

4. [098] has been seeking to complete as many sales as possible, and acknowledges that all of the proceeds from initial sales should go to pay down mortgages registered against the project, including that of [Forjay].

[130] 625 argues that 098 was under no compulsion to concede that the secured lenders, including 625, should be paid. It points out that, in the 098 Response, 098 questioned the validity of the over-advances made by the First and Second Mortgagees, as well as the "large bonuses" claimed under those mortgages. 625 then states that, if 098 had believed that the 625 Mortgage was no longer enforceable, it could easily have alleged just that in the 098 Response. Finally, 625 argues that, similar to the circumstances relating to 098's request that 625 advance monies to pay the liens or the agreements to extend the forbearance period, the statements found in the 098 Response were predicated on the validity and enforceability of the 625 Mortgage.

- [131] I accept that admissions of liability made in court documents, such as pleadings, can be sufficient to acknowledge a claim and postpone the running of a limitation period: *Fournogerakis v. Barlow*, 2010 BCSC 732 at para. 111. In *Fournogerakis*, the statement of defence and counterclaim said to represent the acknowledgement of the mortgage by the mortgagor were filed in direct response to an action commenced by the mortgagee.
- [132] As with the previous alleged acknowledgements, this issue must be approached by objectively considering both the document itself and the purpose for which the 098 Response was filed: *Ryan* at para. 48.
- [133] I do not see that 098 filed this document to directly address its liability to any claim under the 625 Mortgage. Clearly, the document indicates that 098's focus was to address the claim being advanced in the proceeding by Forjay and specifically, Forjay's application to obtain the appointment of a receiver against the Development.
- [134] In addition, I do not see that the words relied on by 625 in this respect can reasonably be construed as the acknowledgement 625 suggests.
- [135] The statement by 098 that 625 provided mortgage financing for the Project as third mortgagee is simply a bare acknowledgement that 625 holds a registered mortgage against the Lands. Again, a bare statement of a claim or cause of action is not sufficient to amount to an acknowledgement of "some liability": *Podovnikoff* at para. 12; *Ryan* at para. 45; and *Brons* at paras. 30-31.
- [136] Further, I agree with Forjay/RMIC that 098's statement in the 098 Response that the proceeds of sale be used to pay down the mortgages registered against the Project must be qualified by other statements found in the 098 Response. Specifically, 098 did not acknowledge that 625 should receive any funds arising from the sale of strata units; rather, 098 stated that, after payment of certain amounts to the First Mortgagees and the Second Mortgagees, the "balance of any proceeds should be paid into court".
- [137] I reject 625's argument that the 098 Response was an acknowledgement under s. 24 of the Act so as to extend the limitation period in respect of 625's claim under the 625 Mortgage.

3. The Forjay Proceedings Generally

- [138] It is beyond dispute that 625 was able, at any time before the expiry of the limitation period, to commence its own foreclosure proceeding to enforce the security held under the 625 Mortgage.
- [139] Once Forjay commenced this proceeding, 625, as a respondent, was not prevented from commencing its own foreclosure proceeding to preserve any limitation period.
- [140] No relief was granted in this proceeding to prevent 625 from filing its own proceeding to preserve any limitation period.

[141] As in other restructuring proceedings where a general stay can be imposed to prevent creditors seeking relief against a debtor or the secured property, I granted such a stay in the Receivership Order. However, the terms of the stay, which did apply to any separate foreclosure proceeding that 625 might later have commenced against the Lands or 098, expressly allowed the filing of a proceeding to preserve a limitation period.

[142] The Receivership Order provided:

8. No proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court; provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph and provided that no further step shall be taken in respect of Proceeding except for service of the initiating documentation of the Debtor and the Receiver.

[Emphasis Added.]

[143] Further, 625 was not hesitant about filing other actions which it considered as necessary or appropriate. On December 7, 2017, 625 filed a separate action against Mr. Chandler, the guarantor under its Loan Agreement. Such a proceeding was not barred by the Receivership Order. In addition, on April 13, 2018, in Action S184606, 625 commenced an action against the Second Mortgagees seeking, among other matters, rescission of the Priority Agreement, discharge of the Priority Agreement and damages for equitable fraud (the "Priority Agreement Action").

[144] 625 suggests that the May 8, 2019 Case Plan Order, setting a deadline for the filing of 625's application for declarations as to the validity and enforceability of the 625 Mortgage in this proceeding, was an order allowing an amendment of its pleading under s. 22(5) of the Act (cited above). 625 argues that, effectively, this Court allowed an amendment of its pleading in the Priority Agreement Action by that Case Plan Order. This argument is nonsensical. At no time did 625 seek that relief and for the purpose of amending its claim in the Priority Agreement Action. No order was granted to that effect.

[145] Being named in this proceeding did not obviate the need for 625 to take steps to enforce its claims against 098, including by seeking appropriate declarations as to the validity and enforceability of the 625 Mortgage, in order to preserve limitation periods.

[146] 625 argues that, provided its limitation period had not expired, it was free to seek orders in Forjay's foreclosure proceeding confirming the validity and enforceability of the 625 Mortgage. Forjay/RMIC do not dispute that 625 had the ability to seek such relief under the 625 Mortgage in this proceeding.

[147] Accordingly, in light of the Receivership Order, 625 had various options:

- a) It could seek the permission of the Receiver or leave of the Court to commence its own foreclosure;
- b) It could file, without permission or leave, a separate proceeding if it considered it necessary to preserve any limitation period; or
- c) It could apply within this proceeding for relief under the 625 Mortgage, including enforcement of the security under the 625 Mortgage.

[148] Regarding the last option, 625's position that it was free to seek orders in this proceeding in respect of the 625 Mortgage - and Forjay/RMIC's acceptance of that position - are well supported by the Supreme Court Civil Rules, the authorities and by BC's longstanding foreclosure practice.

[149] The relevant provisions of Rule 21-7 (Foreclosure and Cancellation) cited by 625 are:

Starting the proceeding

- (1) A proceeding for foreclosure of the equitable right to redeem mortgaged property or for redemption must be started by petition.

Parties

- (2) In a proceeding referred to in subrule (1), all persons whose interest in or claim to the mortgaged property is sought to be extinguished and all persons against whom any relief is sought must be made respondents and, unless the court otherwise orders, it is not necessary to join any other person as a respondent.

...

Powers of the court

- (5) The court may do one or more of the following in a proceeding under subrule (1):

...

- (c) determine summarily, or order that an account be taken of and that a registrar certify, the amount that is due to the petitioner or to any person on the date of the hearing of the petition or on the date of the accounting, as the case may be;

...

- (e) pronounce judgment for any amount determined to be due or for any amount that has been certified to be due on an accounting;
- (f) determine summarily, or order an inquiry to determine, any issues raised between respondents, including priorities;

...

- (i) order a sale of the mortgaged property;
- (j) grant further or corollary relief;
- (k) make an order under Rule 22-1 (7) [referral to trial list].

...

Order for sale

- (7) A party of record may apply at any time for an order that the mortgaged property be sold or be put up for sale.

...

Order confirming sale

- (9) Even though the time for redemption has not expired, the person having conduct of a sale may apply to the court for an order confirming the sale, directing the disposition of the proceeds and vesting title in the purchaser.

[underlining emphasis in original by 625]

[150] 625 also cites s. 15 of the Law and Equity Act, R.S.B.C. 1996, c. 253, said to complement Rule 21-1(7):

The court may, before or after judgment in a proceeding

- (a) by a mortgagee, for the foreclosure of the equity of redemption in mortgaged property, or
- (b) by a vendor of land, where a claim for the cancellation of the agreement is made, with or without a claim for the forfeiture of money paid on account of the purchase price,

on the application of a person who has an interest in the property or land, direct a sale of the property or land on the terms the court considers just.

[151] As noted by this Court in *British Columbia (Minister of Competition, Science and Enterprise) v. Delta Fraser Properties Partnership*, 2003 BCSC 905 at para. 36, the combination of these provisions clearly allow a respondent to a foreclosure to apply for conduct of sale of the mortgaged lands. The Court found at para. 33 that, taken together, Rule 21-7(7) and s. 15 of the Law and Equity Act entitle a party of record to seek an order for conduct of sale, so long as they can establish a valid "interest in the property or land which is the subject of a foreclosure proceeding".

[152] In *Delta Fraser Properties*, the respondent was denied conduct of sale under what is now Rule 21-7(7), in part because its claim was yet undetermined: paras. 39-43.

[153] Therefore, 625 accepts in its argument that the validity and enforceability of a respondent's mortgage is a condition precedent to the exercise of the rights created by Rule 21-7(7) and s. 15 of the Law and Equity Act.

[154] 625's position as to its ability to apply in this proceeding is also supported by s. 10 of the Law and Equity Act, which requires the court to avoid, to the extent possible, a multiplicity of proceedings:

In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

[155] Accordingly, it is uncontroversial on this application that, within this proceeding, 625 had the ability to fully participate. This participation could include a defence to the claims advanced by Forjay and/or 625 advancing its own claims against 098 and/or the mortgaged property under the 625 Mortgage.

[156] Other respondents were also equally able to do just that. In fact, RMIC was added as a respondent to this action and it, along with the other First Mortgagees, advanced issues with respect to the validity and enforceability of the First Mortgage. Those issues were discussed between the parties and ultimately, with the Court. In the Case Plan Order dated May 30, 2018, the First and Second Mortgagees were directed to file any declarations sought by a certain deadline. That deadline was met and ultimately, the arguments advanced by the First and Second Mortgagees were addressed at the Summary Trial held in October 2018. 625 fully participated in that process and disputed many of the claims of the First and Second Mortgagees.

[157] This approach is consistent with the "single proceeding" model supported by the Supreme Court Civil Rules and the Law and Equity Act provisions; to the extent possible, all related issues should be determined within a single proceeding. The Receivership Order was intended to bring about order, within a single proceeding, to the chaos concerning the Development and the various efforts of the very many creditors to recover their claims.

[158] Accordingly, it was open to 625 to advance a similar claim under the 625 Mortgage in this proceeding to address the validity and enforceability of the 625 Mortgage. The dispute here concerns when 625 did just that.

[159] Again, the principles discussed in the White Paper are instructive. What, if anything, did 625 do to advance its claim within these proceedings and alert 098 (and possibly other respondents) that it was no longer "sleeping on its rights"?

- [160] 625's only formal step that could conceivably be viewed as being consistent with these principles was the NOA filing on June 3, 2019.
- [161] 625 states in its argument that it "should not be prejudiced by the delay in resolving the question of the validity of its mortgage occasioned by the orderly case management of this proceeding".
- [162] Nothing could be further from the truth. No such delay was occasioned by any person, save 625, whether from the case management process before this Court or otherwise.
- [163] On September 5, 2017, 625 filed the 625 Response to Forjay's petition, simply asserting that the 625 Mortgage ranked third in priority. On my analysis above, there was still sufficient time then for 625 to file something in this proceeding for relief before the expiry of the limitation period on November 17, 2017 (or December 15, 2017).
- [164] While the parties were centrally focussed on the issues relating to the First and Second Mortgages in 2018, nothing prevented 625 from filing its own NOA for relief after Forjay served 625 with its petition and other materials.
- [165] Nothing prevented 625 from, at any time, filing an application in this proceeding to establish the validity and enforceability of the 625 Mortgage, similar to what was filed by the First and Second Mortgagees in June 2018. The case management of this proceeding did not prevent 625 from taking that step at all. In fact, it was only through the case management process that the Case Plan Order was granted, directing that any application by 625 for such relief be filed by a certain deadline so that the issues could be decided in an expeditious manner. Only then did 625 file its application.
- [166] In short, 625 does not advance any valid argument that it was delayed in filing its application in the almost two-year period that the litigation was afoot after August 2017 and until June 2019.

E. Summary re Limitation Issues

- [167] The effect of my conclusions above under "Alleged Acknowledgements" are sufficient only to extend the limitation period for 625 to enforce its security to November 17, 2017 (or December 15, 2017). It might be noted that, even if I had accepted 625's arguments concerning the lien funds and the early/spring 2016 communications, this would only have extended the limitation period to early 2018 (or, as seems to be accepted by Forjay/RMIC, to mid-April 2018 when admittedly the last forbearance period expired).
- [168] I have concluded that the payout statements and the steps taken in the foreclosure (by either Forjay, 098 or 625) are not sufficient to extend the limitation period beyond November 17, 2017 (or December 15, 2017).

[169] In conclusion, 625's right to enforce its security under the 625 Mortgage must be considered as statute barred. As conceded by Forjay/RMIC, 625's claim against 098 in debt under the Loan Agreement remains extant and fully enforceable in these proceedings or perhaps other proceedings that might be commenced.

IV. EQUITABLE MORTGAGE ISSUE

[170] The amount of fees claimed by 625 as of February 2020 is the rather astounding figure of \$1,565,000 (the "Forbearance Fees"). The Forbearance Fees, together with the consequences of the significant interest rate under the 625 Mortgage, have contributed to the large increase in the debt owing to 625. From the original advance of \$1.8 million in May 2014, the total indebtedness is now said to exceed \$5.6 million as of May 2019.

[171] The Forbearance Fees is comprised of specific fees of \$945,000 that 098 agreed to pay over an approximate six-month period from July 2015 to February 2016, as outlined above in relation to the various amending agreements and the January/February 2016 agreements, all representing further extensions of the forbearance period. As set out above, while 098 agreed to pay these fees, either they did not have the money to do so at the time or the parties deferred payment until a later date.

[172] In addition, the fees claimed to February 2020 include monthly administration fees of \$10,000 per month from January 2015 (\$620,000), imposed pursuant to para. 6 of the Minutes of Agreement. This monthly fee continues to accrue.

[173] Initially, 625's claims advanced in this proceeding were simply in respect of the 625 Mortgage, although the parties were well aware that 625 also claimed that 098 owed the Forbearance Fees (evidenced by the payout statements).

[174] On November 14, 2019, for the first time, 625 asserted that the Forbearance Fees were secured against the Lands. Notice to the other parties of that position was first indicated by receipt of 625's amended NOA. By that amendment, 625 claimed a declaration that the Forbearance Fees charged the Lands by way of one or more equitable charges or mortgages. 625's newly amended position was necessary since claiming that the Forbearance Fees were secured under the 625 Mortgage would have been inconsistent with 625's objection to the First and Second Mortgagees similarly claiming that the fees owing by 098 to them were secured under that security. To be consistent, 625 had no choice but to concede that the Forbearance Fees were not secured under the 625 Mortgage.

[175] If successful in this argument, 625 would obtain security for the Forbearance Fees in effectively fifth position. This charge is sought as being subordinate to existing charges, being the First and Second Mortgages, the 625 Mortgage and a small fourth mortgage held by James Mercier.

[176] However, if 625 is granted a charge, 625 will have obtained a significant benefit as against 098's unsecured creditors. It is very apparent that, while not yet specifically quantified, 098 faces substantial claims from a significant number of unsecured creditors. Those claims arise from a variety of claimants, many of whom have already been identified through the course of these proceedings. They include persons who held contracts to purchase strata lots that were later disclaimed. That unsecured cohort would also include the First and Second Mortgagees to the extent that monies owed by 098 to them are not secured by their Mortgages, either by admission, or as will be calculated in light of the Summary Trial Reasons (a position that 625 spearheaded).

A. The Law

[177] There is no disagreement on what the law requires before an equitable mortgage is established.

[178] The essence of an equitable mortgage is the intention of the parties to charge certain property as security for a debt due or a present advance. In *Vancouver v. Smith*, [1985] 63 B.C.L.R. 180 (B.C.C.A.) at 183, Justice Hutcheon for the court adopted the following statement of the law by Justice Boland in *Re Sikorski and Sikorski* (1978), 21 O.R. (2d) 65 at 415:

... the important feature of an equitable mortgage is the common intention of the parties to the mortgage contract to make the property in question security for the debt due. If this intention is lacking an equitable mortgage cannot be said to have been created.

[179] In *Vancouver*, the Court found that the letter of undertaking signed by the debtor upon which the appellant bank (CIBC) relied to establish an equitable mortgage was not sufficiently certain. Further, the court found that the undertaking was only a promise to give security in the future on request by the lender over unspecified real and personal property. This lack of certainty as to which property was to be the subject of the equitable charge resulted in the undertaking being unenforceable.

[180] In *Chow v. Kwan*, [1999] B.C.J. No. 2212, Justice Hood considered whether a letter signed by a builder in favour of a homeowner constituted an equitable mortgage. That letter (cited at para. 34) provided that if the construction of the building could not be completed:

... you have [advised] that you will use the house at [address] as a guarantee for the completion.

[181] Applying the principle from *Vancouver*, the Court in *Chow* determined that it was the parties' intention to make the property in question security for the debt. In reaching this conclusion, the Court considered the letter together with other evidence from the homeowner (see paras. 62-64). Justice Hood was satisfied that the parties' intention was ascertainable with respect to the property in question and also, the obligation (there, not then due but ascertainable) that was intended to be secured against that property.

[182] Accordingly, the task here is to ascertain the common intention of 098 and 625 with respect to whether the Forbearance Fees (the obligation) would be secured against the Lands (the target of the charge).

B. Discussion

[183] 625 argues certain documents exchanged between 098 and 625's counsel are sufficiently certain to form a series of enforceable agreements on the part of 098 to give a mortgage over the Lands as security for the Forbearance Fees.

[184] 625 argues:

... the correspondence from Mr. Ferbers and the many mortgage payout statements signed by Mr. Chandler can leave no reasonable doubt as to the amounts of the Forbearance Fees, the identity of the land being pledged as security or the terms as to interest.

[185] The clearest indication of the parties' intention in relation to the Forbearance Fees, and specifically, the administration fee of \$10,000 per month, is found in para. 6 of the Minutes of Agreement. Again, that reads in part:

... Failure to pay the Administration Fee(s) shall constitute a breach of this agreement and the amount of the Administration Fee(s) shall be added to the amount owing under the Lender's Mortgage.

[186] This can be interpreted as the parties agreeing that these fees would be an additional amount owing to that which was already owed under the 625 Mortgage. However, as 625 now concedes, these fees were not "added" to the 625 Mortgage in the sense of being secured under that document.

[187] Furthermore, the Minutes of Agreement do not support that 098 and 625 had the common intention of securing the administration fees against the Lands under a further charge beyond the 625 Mortgage, consistent with what Mr. Gosal now says was 625's intention.

[188] The same can be said with respect to the remainder of the Forbearance Fees of \$945,000. Again, the email or letter exchanges between Mr. Ferbers and Mr. Shragge simply refer to some of the Forbearance Fees as being "paid" or "payable" or "added to the balance owing" on the forbearance period expiry dates, along with the amount due under the 625 Mortgage. There are no references in any of these exchanges to the effect that 098 was agreeing to a further charge on the Lands as security for the Forbearance Fees, either explicitly or implicitly.

[189] As noted by Forjay/RMIC, the language used in relation to the Forbearance Fees is very different from the language used by 098's counsel in January 2016 (quoted above) when 098 asked 625 to advance funds to satisfy certain lien claims. Counsel for 098 suggested on January 5, 2016 that the funds advanced be "added to the principal amount of the mortgage under and subject to the existing security" and on January 7, 2016 suggested that the

amount be "advanced under the existing security" and be "secured by all of the existing security". Relying on less clear language, 625 is now saying that a further charge was agreed to, in addition to the 625 Mortgage as the "existing security".

[190] 625 also relies on the payout statements as being evidence of a common intention to create a charge for the Forbearance Fees. These were signed by 098. They refer to various amounts which can be said to arise under the 625 Mortgage, such as principal, interest and legal fees; they also refer to various "extension fees". A payout statement is the only written agreement between the parties in respect of the \$450,000 fees claimed from February 2016 (which amounts are included in later payout statements too).

[191] However, at its highest, I see no basis upon which the occasional oblique and vague reference in some of those payout statements to a "mortgage" can conceivably support a finding that 098 had the intention of securing the Forbearance Fees against the Lands under a further charge beyond the 625 Mortgage.

[192] Turning to 625's intention, Mr. Gosal states in his Affidavit #3:

17. On every occasion that 625 extended the Forbearance Period, 098 agreed to pay one or more fees (the "Extension Fees"). 098 rarely had the cash to pay the Extension Fees (or so Mr. Chandler told me); accordingly, 625 agreed that 098 could add the amount of the Extension Fees to the secured debt owed to 625 and pay the same at the time the 625 Mortgage was paid out.

[193] It will be obvious that, while potentially relevant, Mr. Gosal's present statement as to 625's intention alone is not determinative. Further, this is hardly persuasive evidence even of 625's intention given that it is not a contemporaneous statement of intention and it has all the hallmarks of a self-serving ex post facto statement of intent that is questionable evidence at best. Even so, Mr. Gosal's statement above is consistent with an interpretation of the agreements that the Forbearance Fees were to be added to the debt owing under the 625 Mortgage and would simply be paid at the same time when the Mortgage debt was also paid. This is inconsistent with 625's present argument that there was to be a further charge for the Forbearance Fees.

[194] Finally, 625 argues that the "only reasonable inference" to be drawn from the evidence is that such a charge was intended. 625 argues:

It is objectively inconceivable that 625, or any other lender for that matter, would have granted 098 the indulgence of forbearance without immediately payment or security for the same. 098 had no other assets and was, at all material times, on the verge of insolvency. Mr. Chandler had few, if any, alternative financing options.

- [195] I agree that, in many respects, the issues raised between the parties in this proceeding have required the Court to consider the business and commercial realities that were at play in this lending situation. As noted by 625, many of my comments found in the Summary Trial Reasons, and in respect of the acknowledgment issues, reflect just that.
- [196] In my view, there are many reasons why 625 would have granted the forbearances, and, in some instance, forgone immediate payment of the Forbearance Fees that 098 had agreed to pay it. 625's only other option was to stand on its rights and commence foreclosure proceedings against the Development. That would have immediately caused the other lenders, particularly those in priority to 625, to take similar steps which would have resulted in a halt to construction save perhaps in a receivership. The end result would no doubt have been liquidation of the Development in very exigent circumstances. 625 would have been legitimately concerned that the values ultimately received from the Development would not be sufficient to pay its third ranking position, let alone the Forbearance Fees. I made a similar observation with respect to the Second Mortgagees at paras. 195-196 of the Summary Trial Reasons.
- [197] Effectively, all of the lenders were in the same unfortunate situation. They had to continue to support the ongoing construction of the Development. The only hope they had to obtain payment of their loans was to complete it and sell the strata units, hopefully without any insolvency proceedings interfering with and negatively affecting that process.
- [198] In the meantime, 625 made the best of a bad situation; it provided the ongoing forbearance to 098 with a view to securing whatever benefits it could from 098 in that process, while using the threat of bringing the whole house of cards down as leverage. 625 did receive some cash payments along with way; the remainder of the Forbearance Fees could not be paid by 098, as recognized by Mr. Gosal. However, he did the best he could and obtained 098's agreement to pay them. Payment of the Forbearance Fees by 098 was, by any estimation, a long shot in the circumstances, but obtaining 098's agreement to pay them represented no downside to 625 in the interim.
- [199] In conclusion, the agreements between 098 and 625 relating to the Forbearance Fees were simply agreements to increase the indebtedness owing by 098, which was intended to be paid at the same time as the amount owing under the 625 Mortgage. These agreements were entirely separate and apart from the 625 Mortgage. As the parties note, the PSMT applicable under the 625 Mortgage do not allow for forbearance fees (or other like fees) to be added to the principal amount of the mortgage and secured under it.
- [200] I am unable to find that 625 and 098 had a common intention that the Forbearance Fees would be secured against the Lands under a charge, in addition to the charge held under the 625 Mortgage.

[201] Accordingly, 625's application for a declaration of an equitable mortgage against the Lands as security for payment of the Forbearance Fees is dismissed. Any Forbearance Fees due are unsecured obligations owing by 098 to 625, subject to my discussion below.

C. Limitation Issues re Forbearance Fees

[202] Forjay/RMIC claim that any of the unsecured Forbearance Fees owed by 098 are largely statute-barred. 625 disagrees.

[203] The submissions from both parties on this issue was very scant and, for the most part, were addressed only briefly in Forjay/RMIC's submissions, 625's reply written submissions and oral argument.

[204] I am not satisfied that I have sufficient submissions from the parties in order to decide this issue. The controlling date for the purposes of this argument is November 14, 2019, when 625 filed its amended NOA to address the Forbearance Fees.

[205] The Forbearance Fees arose from agreements reached in the period from July 2015 to February 2016. Arguably, the time for payment of the Forbearance Fees was extended to April 15, 2016, when the last agreed upon forbearance period expired. In addition, 625 relies in this respect on the five payout statements, dated in October 2016, September and October 2017, and June and August 2018. Those statements, however, differ with respect to what is said to be the amount of the Forbearance Fees. The payout statement signed in October 2016 began to refer to the \$10,000 monthly administration fee from January 2015 under the Minutes of Agreement (the earlier payout statements did not).

[206] I note that Forjay/RMIC have already conceded that the payout statements were sufficient acknowledgements to confirm 625's right to claim the amounts due under the 625 Mortgage; those same payout statements also refer to the Forbearance Fees, at least sometimes and to a certain extent.

[207] In the above circumstances, without further submissions from the parties on the matter, I do not consider that I am in a position to determine the limitation issues with respect to the Forbearance Fees, including when these amounts were due and whether there were any written acknowledgements given by 098 under the Act that would have extended the right to claim these amounts before November 14, 2019.

[208] In addition, my reasons here may perhaps further inform a consideration of this issue toward the parties' refining their respective positions on this issue.

[209] In conclusion, the hearing with respect to this aspect of the limitation issue is adjourned. The parties are at liberty to provide further written submissions and/or schedule a further hearing in that respect, in the event that a determination is indeed required at the end of the day.

V. CONCLUSION

- [210] The relief sought at paragraphs 1-4 of 625's amended NOA is dismissed in respect of 625's claim to enforce the 625 Mortgage against the Development and for a declaration of an equitable charge. This result does not affect 625's unsecured claim against 098 for the amount due and owing under the 625 Mortgage.
- [211] With respect to the Forbearance Fees, and whether those unsecured amounts due to 625 are statute barred, that matter is adjourned generally and the parties have liberty to address that matter at a later time, if necessary.
- [212] The parties have agreed to defer the matter of the costs arising from this hearing. Accordingly, the parties will have leave to request a further hearing to address costs, failing agreement between them.

"Fitzpatrick J."

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