

CANADA / JUDGMENT

Sherry v. CIBC Mortgage Inc.

2020 BCCA 139

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 139 Sherry v. CIBC Mortgage Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sherry v. CIBC Mortgage Inc.,

2020 BCCA 139

Date: 20200521

Docket: CA45603

Between:

Erin Sherry

Respondent

(Plaintiff)

And

CIBC Mortgage Inc.

and in French, Hypothèques CIBC Inc.

Appellant

(Defendant)

Before:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated August 31, 2018 (Sherry v. CIBC Mortgage Inc., 2018 BCSC 1484, Vancouver Docket S116769).

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia

April 29, 2019

Place and Date of Judgment:

Vancouver, British Columbia

May 21, 2020

Written Reasons by:

The Honourable Madam Justice Dickson

Concurred in by:

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Abrioux

Summary:

This appeal concerns a class action proceeding regarding the enforceability of certain prepayment provisions in a mortgage contract. The appellant appeals from an order certifying an amended claim based on statutory illegality, arguing that the chambers judge erred by: not finding the claim was bound to fail due to this Court's earlier decision in *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 [Sherry Appeal #1] and failing to consider several alternative arguments for why the claim should be struck. Held: Appeal dismissed. The reasoning in *Sherry Appeal #1* is not determinative of the viability of the statutory illegality claim. Likewise, the appellant's alternative arguments do not foreclose the possibility that the claim will succeed at trial, but rather, raise issues that will require a merits-based analysis.

Reasons for Judgment of the Honourable Madam Justice Dickson:

Introduction

- [1] Erin Sherry is the representative plaintiff in a class action concerned with the validity of mortgage prepayment charges levied by the defendant, CIBC Mortgages Inc. ("CMI"), on its borrowing customers. CMI is a corporation continued under the Trust and Loan Companies Act, S.C. 1991, c. 45 and a subsidiary of the Canadian Imperial Bank of Commerce, a chartered bank. CMI appeals a ruling that certain amended pleadings Ms. Sherry filed in the certified class proceeding disclosed reasonable causes of action and, therefore, that her related claims could proceed to trial.
- [2] This is CMI's second appeal challenging Ms. Sherry's pleadings. In *Sherry v. CIBC Mortgages Inc.*, 2016 BCCA 240 [Sherry Appeal #1], this Court upheld certification but found that her claim that standard mortgage terms granting CMI discretion when calculating the prepayment charges were void for uncertainty was bound to fail, as was her alternative claim that CMI breached the terms of the contract by miscalculating the prepayment charges. Based on these findings, common issues related to the uncertainty and miscalculations claims were deleted from the certification order. However, Ms. Sherry's unconscionability and punitive damages claims remained certified.
- [3] After the first appeal, Ms. Sherry filed an Amended Notice of Civil Claim in which she removed the uncertainty and miscalculations claims and asserted two new causes of action. The first new claim was based on pleas that the impugned discretionary clauses were illegal, contrary to public policy and unenforceable due to CMI's alleged failures to disclose the manner in which it calculated prepayment charges in clear and comprehensible language in accordance with statutory disclosure requirements. The second, pleaded in the alternative, was based on CMI's alleged breaches of contract in calculating the prepayment charges and imposing overcharges as a result.
- [4] Ms. Sherry applied to amend the certification order to include common issues related to the new causes of action and CMI applied for an order striking them, arguing that they sought to reintroduce claims this Court rejected in *Sherry Appeal #1* and did not disclose viable causes of action. The chambers judge agreed on the overcharges claims, which she struck. However, she held that this Court's conclusions in *Sherry Appeal #1* were not dispositive of the statutory illegality claims, which she certified.
- [5] On appeal, CMI renews the same arguments. In its submission, the chambers judge erred in concluding that the statutory illegality claims were not caught by *Sherry Appeal #1* because they are built on the same "underlying premise" this Court rejected, namely, that CMI was required to calculate prepayment charges as interest foregone over the remaining term of the mortgage. In addition, CMI submits, she erred in failing to give effect to its alternative arguments that the statutory illegality claims were bound to fail because: i) the statutory provisions did not require that it disclose the internal formula used to calculate prepayment charges; ii) breach of those provisions cannot form the basis of restitutionary relief; and iii) they relate to disclosure agreements, not to mortgage contracts.

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

Background

Facts

- [7] In August 2008, Ms. Sherry and her then-husband obtained a standard, closed, ten-year fixed-rate mortgage loan from CMI secured on their Victoria residential property. The principal amount was \$447,200. The fixed rate of interest was 6.2%. Under their mortgage contract, they were entitled to repay up to 20% of the original principal amount annually without charge and to repay more than 20% of the original principal amount upon payment of a prepayment charge.
- [8] CMI included standard mortgage terms relating to prepayment charges in its mortgage contracts. Commencing in 2005, in some contracts the terms granted CMI discretion to set the calculation method used to quantify prepayment charges; in others, discretion to set a comparison interest rate from a comparable mortgage that it selected; in still others, discretion as to both. Ms. Sherry's contract provided for discretion as to both the calculation method and the comparison rate, a so-called "double discretion mortgage contract". Pursuant to its terms, the prepayment charge would be the higher of i) three months' interest on the principal sum prepaid and ii) the interest rate differential (the "IRD"). CMI calculated the three months' interest amount and the IRD amount "using a method determined by us from time to time at our discretion".
- [9] The IRD is an amount calculated based on a formula that CMI applied to the principal sum prepaid by the borrower. In mortgage contracts like Ms. Sherry's, if the borrower wished to prepay the entire outstanding principal sum the IRD was defined as the difference between the following two amounts:
1. The interest costs on the amount prepaid charged from your last scheduled regular payment date which falls on or before the prepayment date (whether or not the regular payment was made) to the maturity of your mortgage. The interest costs are calculated at your existing annual interest rate (plus any discount you received on your existing annual interest rate).
 2. The interest costs on the amount prepaid, calculated at the reinvestment rate from your last scheduled payment date that falls on or before the prepayment date (whether or not the regular payment was made) to the maturity date of your mortgage. The reinvestment rate is the interest rate posted by us on the date we prepare the mortgage payout statement for a closed FirstLine brand mortgage product which we determine to be similar to your mortgage. In determining whether a mortgage is similar to yours, we will consider the following:
 - the remaining term of your mortgage;
 - the features of your mortgage; and

· whether you have a conventional or a high-ratio mortgage.

- [10] CMI's mortgage contracts included a similar definition of the IRD used to calculate prepayment charges levied for partial prepayments of more than 20% of the principal sum.
- [11] As is apparent from these definitions, the IRD was generally relevant for quantifying the prepayment charge if interest rates had fallen when the borrower decided to prepay some or all of the outstanding mortgage principal. As is also apparent, CMI was required to calculate two separate component amounts when it calculated the IRD. The first component calculation used the existing annual interest rate, known as the "contract rate"; the second, a "comparison rate" from a mortgage CMI determined was similar to the borrower's mortgage.
- [12] One of the key features of a mortgage contract is its amortization period. The amortization period is the period after which the principal will be completely repaid on the assumption that the interest rate and periodic payments specified in the contract are constant throughout the entire period. However, most mortgage contracts have terms that are shorter than their specified amortization period. At the end of the term, known as the "maturity date", a borrower typically enters into a new or renewed mortgage contract.
- [13] Commencing in 2005, when CMI calculated the prepayment charge it did not adjust the IRD amounts to their net present value. In other words, it did not treat those amounts as a stream of interest payments that would have been received in the future over the remaining terms of the mortgages. This represented a change in its IRD calculation method, which previously applied a present value adjustment. As a result of the change, the prepayment charges that CMI levied were higher than they would have been had it present valued the IRD.
- [14] Also commencing in 2005, the mathematical formula that CMI used when calculating the IRD incorporated a shortened comparison rate amortization period ("SCRAP"), not the amortization period specified in the mortgage contract or applicable under the contract rate. Its use of SCRAP methodology produced a higher prepayment charge than using an unchanged amortization period would have produced because application of a lower interest rate to an unchanged periodic payment shortened the comparison rate amortization period by paying off the principal faster. This, in turn, decreased the amount of interest notionally payable under the comparison rate and increased the difference between the "interest costs" calculated at the contract rate and the comparison rate.
- [15] Although CMI began to use the internal mathematical formula that incorporated SCRAP in 2005, it did not disclose the formula in its mortgage documentation. Nor did it mention the amortization period used for the comparator mortgage or state that the IRD calculation would include a shortened amortization period for the comparator mortgage. However, in 2009 CMI filed standard mortgage terms containing language related to its use of SCRAP in the IRD calculation. After Ms. Sherry commenced the class action in 2012, it also took steps to change its pre-existing mortgage contracts to add such language.

- [16] In 2010, Ms. Sherry and her husband were divorcing. As a result, Ms. Sherry elected to refinance and prepay the entire outstanding principal on their existing mortgage contract. CMI issued a payout statement and assessed the prepayment charge at \$58,379.18, but later revised that figure to reflect a partial prepayment. The final prepayment charge levied by CMI and paid by Ms. Sherry in October 2010 was \$47,868.
- [17] By 2013, Ms. Sherry had recouped the amount of the prepayment charge CMI levied through lower interest payments on a subsequent mortgage with a different lender. She continued to realize interest savings in following years.

Notice of Civil Claim

- [18] On October 7, 2011, Ms. Sherry commenced the action against CMI under the Class Proceedings Act, R.S.B.C. 1996, c. 50. In her Notice of Civil Claim, she pleaded that the prepayment clauses in CMI's mortgage contracts were void for uncertainty and unenforceable because they provided for discretion as to calculation methods and comparison rates. She also pleaded that the prepayment clauses were severable, that CMI's use of the single and double discretion mortgage contracts breached its so-called plain language promise and its disclosure obligations under the Trust and Loan Companies Act, the Cost of Borrowing (Trust and Loan Companies) Regulations, SOR/2001-104, as amended, and the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 and that its agent, 3877337, breached its disclosure obligations under the Mortgage Brokers Act, R.S.B.C. 1996, c. 313 and the Mortgage Brokers Act Regulations, B.C. Reg. 100/73, as amended:
24. Further, or in the alternative, CIBC's use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts is contrary to and in breach of CIBC's statutory obligation, under the Trust and Loan Companies Act, S.C. 1991, c. 45, ss. 436(1) and 438(1)(a), the Cost of Borrowing (Trust and Loan Companies) Regulations, SOR/2001-104, as amended, to disclose, in plain language that is clear, simple and concise, the manner in which Prepayment Penalties are to be calculated.
25. Further, or in the alternative, CIBC's use of Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts is contrary to and in breach of CIBC's statutory obligation, under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, ss.67(1) and 84(m) to disclose in a clear and comprehensible manner a statement of any charge for Prepayments.
26. Further, or in the alternative, CIBC's agent, 3877337 doing business as HLC, at all relevant times had a statutory obligation under the Mortgage Brokers Act, R.S.B.C. 1996, c. 313, s.9.1, Mortgage Brokers Act Regulations, B.C. Reg. 100/73, as amended, s. 8.2(1)(d) and (g), and Business Practices and Consumer Protection Act, s. 67(1) and 84(m), to disclose in a clear and comprehensible manner a statement of any charge for Prepayments. 3877337 breached that statutory obligation when arranging and brokering Single Discretion Mortgage Contracts and Double Discretion Mortgage Contracts. CIBC is vicariously liable as 3877337's

principal for such breaches.

- [19] In the alternative, Ms. Sherry pleaded that if the impugned clauses were not void for uncertainty, CMI miscalculated the prepayment charges because the method it used to quantify them did not discount the IRD amount to its net present value. She labelled this conduct the miscalculations, which she alleged breached the term of the mortgages, CMI's good faith obligation and its fiduciary duty. In the further alternative, she pleaded that, if the mortgage contracts otherwise permitted CMI to quantify prepayment charges as it did, the clauses allowing such quantification were unconscionable at common law and equity and contrary to s. 8 of the Business Practices and Consumer Protection Act.
- [20] Ms. Sherry went on to plead that CMI wrongfully collected prepayment charges based on the impugned clauses and the miscalculations and that, as a result, she and other class members suffered losses. As to remedy, she sought a declaration that the impugned clauses were void or unconscionable, an accounting and damages for breach of contract and/or breach of fiduciary duty due to the miscalculations. She also sought class-wide punitive damages due to CMI's alleged breaches of contract, fiduciary duty and statutory obligations under the Trust and Loan Companies Act, the Cost of Borrowing (Trust and Loan Companies) Regulations and the Business Practices and Consumer Protection Act.
- [21] After filing her Notice of Civil Claim, Ms. Sherry applied to have the action certified as a class proceeding under the Class Proceedings Act.

Legal Framework

Section 4(1)(a) of the Class Proceedings Act: Adequacy of Pleadings

- [22] Section 4(1) of the Class Proceedings Act sets out the statutory requirements for certification of a class action. When they are met, the proceeding must be certified. Although the merits of the claim are not determined on a certification application, the court performs an important gatekeeping role by screening out those claims destined to founder at the merits stage of the proceeding. The threshold for certification is low, but merely symbolic scrutiny of the claim will not suffice: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 103-104; *Sherry Appeal #1* at para. 51.
- [23] The first certification requirement is pleadings that disclose a cause of action: s. 4(1)(a) of the Class Proceedings Act. That is the sole requirement at issue on this appeal. It is assessed on the standard that applies on a motion to strike-out pleadings, namely, whether, assuming the pleaded facts are true, it is plain and obvious that the action cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. In the certification context, the plaintiff bears the onus of establishing that the action has a prospect of success based on the pleaded facts, which must be assumed to be true unless they are patently unreasonable or incapable of proof. Where a reasonable prospect of success exists, the action should be allowed to proceed to trial: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 20; *R. v.*

Imperial Tobacco Canada Ltd., 2011 SCC 42 at para. 17; Sherry Appeal #1 at para. 52.

- [24] When deciding whether pleadings disclose a cause of action, the judge should read them generously, err on the side of permitting novel but arguable claims to proceed and accommodate inadequacies in form to the extent reasonable by allowing for proposed amendments to cure deficient drafting. Nevertheless, for a claim to be certified the prospect of success must be reasonable, not speculative, taking into account the salient law and the litigation context: *Imperial Tobacco* at paras. 21-25; *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at paras. 44-46. In addition, and importantly, the material facts upon which the claimant relies in making the claim must be clearly pleaded. As Chief Justice McLachlin explained in *Imperial Tobacco*, the pleaded facts form the basis upon which the prospect of success of the claim will be assessed: at para. 22.
- [25] Difficult questions of law sometimes arise on the pleadings, including complex questions of statutory interpretation. If reasonably possible, the judge should address such questions directly at the certification stage and thus ensure that judicial and other resources are not squandered. However, this does not necessarily mean that the certification judge should purport to resolve all such questions at an early stage of a class proceeding. The only issue for resolution at the certification stage is whether the test for striking-out pleadings articulated in *Hunt v. Carey* has been satisfied. However novel or weak a claim may seem, if it is arguable the certification judge should not engage in a merits-based analysis of the claim: *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 64; *Jiang v. Peoples Trust Co.*, 2017 BCCA 119 at paras. 56-70.

Statutory Disclosure Obligations

- [26] Residential mortgage lending is regulated federally by the Trust and Loan Companies Act, the Cost of Borrowing (Trust and Loan Companies) Regulations and the Bank Act, S.C. 1991 c. 46. Provincial legislation such as the Business Practices and Consumer Protection Act also applies to banks and other federally-regulated entities such as CMI: *Sherry Appeal #1* at para. 8.
- [27] As outlined above, Ms. Sherry pleaded that CMI's use of single and double discretion mortgage contracts was contrary to and in breach of its statutory disclosure obligations under ss. 436(1) and 438(1)(a) of the Trust and Loan Companies Act and the Cost of Borrowing (Trust and Loan Companies) Regulations. Section 436(1) of the Trust and Loan Companies Act prohibits a company from lending to borrowers unless the cost of borrowing and other information has been disclosed in the prescribed form and manner. Section 438(1)(a) of the Trust and Loan Companies Act provides for disclosure requirements. Sections 6-8 of the Cost of Borrowing (Trust and Loan Companies) Regulations provides for the manner, timing and content of the required disclosure:

Trust and Loan Companies Act

436(1) A company shall not make a loan to a natural person that is repayable in Canada unless the cost of borrowing, as calculated and expressed in accordance with section 437, and other prescribed information have been disclosed by the company to the borrower at the prescribed time and place and in the prescribed form and manner.

438(1) Where a company makes a loan in respect of which the disclosure requirements of section 436 are applicable and the loan is required to be repaid either on a fixed future date or by instalments, the company shall disclose to the borrower, in accordance with the regulations,

- a) Whether the borrower has the right to repay the amount borrowed before the maturity of the loan and, if applicable,
 - i. any terms and conditions relating to that right, including the particulars of the circumstances in which the borrower may exercise that right, and
 - ii. whether, in the event that the borrower exercises the right, any portion of the cost of borrowing is to be rebated, the manner in which any such rebate is to be calculated or, if a charge or penalty will be imposed on the borrower, the manner in which the charge or penalty is to be calculated;

Cost of Borrowing (Trust and Loan Companies) Regulation

6(1) For the purpose of subsection 436(1) of the Act, a company that grants credit must, in writing, provide the borrower with a disclosure statement that provides the information required by these Regulations to be disclosed

- (4) Any disclosure that is required to be made by a company under these Regulations must be made in language, and presented in a manner, that is clear, simple and not misleading.

8(1) A company that enters into a credit agreement for a loan for a fixed interest rate for a fixed amount, to be repaid on a fixed future date or by instalment payments, must provide the borrower with an initial disclosure statement that includes the following information:

- (l) the disclosure required by paragraph 438(1)(a) of the Act, including a description of any components that comprise a formula to calculate a rebate, charge or penalty in the event that the borrower exercises the right to repay the amount borrowed before the maturity of the loan and, if section 17 applies, the formula set out in subsection 17(4).

[28] Ms. Sherry also pleaded that CMI's use of single and double discretion mortgage contracts was contrary to and in breach of its statutory disclosure obligations under ss. 67(1) and 84(m) of the Business Practices and Consumer Protection Act. Sections 67(1) and 84(m) of the Business Practices and Consumer Protection Act require a credit grantor to disclose a clear and comprehensible written statement of any charge for prepayment of a mortgage loan:

67(1) A credit grantor who is required to give a disclosure statement or a statement of account under this Part must ensure that the statement

- (a) is in writing
- (b) contains the information required under this Part, and
- (c) prominently displays that information in a clear and comprehensible manner.

84 A credit grantor who has entered into, or who is negotiating to enter into, a credit agreement must ensure that the initial disclosure statement for that credit agreement discloses the following information:

- (m) for a mortgage loan, a statement of the conditions, if any, under which the borrower may make prepayments and any charge for prepayment;

[29] Ms. Sherry pleaded further that CMI's agent, 3877337, breached its statutory disclosure obligations under s. 9.1 of the Mortgage Brokers Act and s. 8.2(1)(d) and (g) of the Mortgage Brokers Act Regulations when arranging and brokering its single and double discretion mortgage contracts and that CMI was vicariously liable for those breaches. Section 9.1 of the Mortgage Brokers Act and s. 8.2(1)(d) and (g) of the Mortgage Brokers Act Regulations provide that specified provisions of the Business Practices and Consumer Protection Act are prescribed, including disclosure requirements:

Mortgage Brokers Act

9.1 (2) For the purposes of this section, the Lieutenant Governor in Council may prescribe provisions of Part 2, except Division 3, and Part 5 of the Business Practices and Consumer Protection Act.

Mortgage Brokers Act Regulations

8.2 (1) For the purposes of s. 9.1 of the Mortgage Brokers Act, the following provisions of the Business Practices and Consumer Protection Act are prescribed:

- (d) sections 66 and 67 [disclosure requirements applicable to all credit agreements];
- (g) sections 83 to 89 [disclosure required in relation to fixed credit];

History of Proceedings

[30] In August 2013, the chambers judge heard Ms. Sherry's application to certify the action as a class proceeding. In June 2014, she certified it conditionally, subject to resolution of two outstanding issues. After hearing further submissions on those two issues, in March 2015 she certified the action as a class proceeding under Part 2 of the Class Proceedings Act.

Certification Reasons: 2014 BCSC 1199 & 2015 BCSC 490

- [31] The chambers judge summarized the major allegations in the Notice of Civil Claim, the background and the requirements for certification in her initial certification reasons (2014 BCSC 1199). Then she analysed each certification requirement as it applied to Ms. Sherry's claims.
- [32] First, the chambers judge analysed the requirement under s. 4(1)(a) of the Class Proceedings Act that the pleadings disclose a cause of action. She outlined Ms. Sherry's position that the clauses granting CMI discretion to determine how much a borrower would pay in prepayment charges were insufficiently certain to be enforceable, citing *Cross v. National Australia Bank Limited*, [1994] FCA 229, a decision of the Federal Court of Australia, and CMI's position that the existence of discretion did not render the contract uncertain. After reviewing the impugned clauses, she concluded that sufficient certainty is a question of contractual interpretation in each case and stated "it is far from plain and obvious that this claim regarding interpretation of a contract is bound to fail": at paras. 81-82.
- [33] Next, the chambers judge considered whether the miscalculations claim disclosed a viable cause of action. She outlined CMI's position that *Pfeiffer v. Pacific Coast Savings Credit Union*, 2003 BCCA 122 settled the issue in its favour and Ms. Sherry's position that *Pfeiffer* was an exception to the general rule requiring net present value discounts for prepayment charges based on calculation of future losses, which rule, she asserted, applied to calculation of IRDs. The chambers judge concluded that, as matter of contractual interpretation, "*Pfeiffer* does not rule out the possibility that the language of a specific prepayment clause might clearly require that the calculation use the present value principle". Accordingly, she held, it was not plain and obvious that Ms. Sherry's attempt to distinguish *Pfeiffer* had no merit and thus that the cause of action with respect to the miscalculations must fail: at paras. 92, 95.
- [34] The chambers judge also referred to Ms. Sherry's allegations that CMI breached its plain language promise and its statutory disclosure obligations: at paras. 56-58. However, she did not analyse whether any causes of action existed based on the alleged statutory breaches, no doubt because Ms. Sherry advised her that she was not pleading those breaches gave rise to an independent cause of action. Rather, she stated, the breaches of statutory disclosure provisions were pleaded in support of her uncertainty and punitive damages pleas.
- [35] After dealing with the s. 4(1)(a) requirement on the uncertainty claim and the miscalculations claim, the chambers judge turned to other certification issues. These included the question of whether Ms. Sherry's allegations that the impugned clauses were unconscionable, void or unenforceable raised common issues suitable for determination on a class-wide basis, which, she held, clearly they did. She went on to certify the action conditional upon Ms. Sherry establishing a narrowed class and pending further submissions on a common issue on punitive damages encompassing the alleged breaches of statute and fiduciary duty.

- [36] As noted, following a subsequent hearing, the chambers judge certified the action as a class proceeding (2015 BCSC 490). She also certified two common issues on punitive damages based on the alleged breaches of the plain language promise, the Trust and Loan Companies Act, the Cost of Borrowing (Trust and Loan Companies) Regulations TLCA, the Mortgage Brokers Act, the Mortgage Brokers Act Regulations, the Business Practices and Consumer Protection Act, fiduciary duty and the miscalculations. In doing so, she reviewed various authorities, including *Bank of Montreal v. Marcotte*, 2014 SCC 55 and *Chalmers v. AMO Canada Company*, 2010 BCCA 560, and concluded that application of the bifurcated approach to determining punitive damages was appropriate in light of the systemic nature of the alleged wrongdoing:
- [17] A punitive damage award may be available in relation to CIBC's alleged breaches of its statutory obligations. This is because even where a statute does not provide a civil remedy for its breach, the common law may supply a remedy. This was recently discussed by the Supreme Court of Canada in *Bank of Montreal v. Marcotte*, 2014 SCC 55, at paras. 79 to 84. The plaintiff banks asserted that when banks breach their statutory obligations under the Bank Act, S.C. 1991, c. 46, the legislature intended those banks to be subject to criminal sanctions under the act instead of civil awards of punitive damages. The Court rejected this argument, and noted that there are many provincial laws that provide a variety of civil causes of action that can potentially be raised against banks. As long as these remedies are not inconsistent with a statute, those civil actions are still valid and available. Accordingly, as noted by the Court of Appeal in *Fakhri*, punitive damage awards are available in class actions brought under the CPA.
- [43] In this case the defendant's conduct was systemic in nature: the publicly-disseminated Plain Language Promise; the standard form mortgage documentation filed under the Land Title Act, R.S.B.C. 1996, c. 250; and a broadly-applied formula used from 2005 onward to calculate prepayment penalties
- [44] The Notice of Civil Claim discloses a reasonable and arguable claim for punitive damages, based on [the alleged breaches of the Plain Language Promise, the Trust and Loan Companies Act, the Cost of Borrowing (Trust and Loan Companies) Regulations, the Mortgage Brokers Act, the Mortgage Brokers Act Regulations, the Business Practices and Consumer Protection Act, fiduciary duty and the Miscalculations].
- [45] I find that certification of the Punitive Damages Common Issues satisfies the requirements for certification set out in s. 4 of the CPA, and that certification of those issues as common issues is the preferable means for their hearing and determination.

Sherry Appeal #1 Reasons: 2016 BCCA 240

- [37] On the first appeal, CMI challenged the findings below that Ms. Sherry's pleadings disclosed reasonable causes of action in respect of whether the impugned discretionary clauses in the mortgage contracts were void for uncertainty and thus unenforceable and whether CMI

breached the mortgage contracts or its fiduciary duty by reason of the miscalculations. It also challenged her findings that the unconscionability claim and the punitive damages claim could be determined as common issues. Speaking for the Court, Justice Newbury addressed each alleged error in turn.

- [38] The first alleged error concerned the viability of Ms. Sherry's claim that the discretionary prepayments clauses were void for uncertainty and unenforceable. Justice Newbury reviewed several Australian and Canadian authorities on the validity of discretionary clauses, noted that the chambers judge relied on Cross and held there is a division between Australian and Canadian law on whether such clauses are void or "illusory". Unlike Australian law, she explained, under Canadian law discretionary clauses are approached as valid provisions that may invoke either a subjective discretion, subject to a duty of good faith, or a discretion susceptible to objective criteria, as held in *Greenberg v. Meffert et al.* (1985) 18 D.L.R. (4th) 548 (Ont. C.A.) (leave to appeal dismissed [1985] 2 S.C.R. ix) and several other Canadian authorities. She went on to conclude that, based on Canadian law, Ms. Sherry's uncertainty claim was bound to fail:
- [66] In summary, there appears to be a clear division between Canadian law and Australian law on the question of discretionary clauses, the Australian courts being inclined to view such clauses as void or "illusory", while Canadian courts give effect to them as involving either a subjective or objective discretion. Bearing in mind that the law of this province requires courts to give effect to contractual provisions wherever possible, and to follow binding precedent, I conclude that Ms. Sherry's claim that CIBC's prepayment terms are void in whole or in part by reason of the lender's discretion in the calculation of prepayment charges, would be bound to fail. Thus I conclude, with respect, that the court below erred in ruling that a cause of action existed on that basis.
- [39] The second alleged error concerned the chambers judge's finding on the alternative miscalculations claim, namely, that a viable cause of action existed based on CMI's failure to present value the IRD amount in alleged breach of the terms of the mortgage. Justice Newbury agreed with CMI that Pfeiffer provided a complete answer to this claim. In particular, she held, the prepayment clauses in Ms. Pfeiffer's mortgage and Ms. Sherry's mortgage were functionally equivalent, neither contemplated or required the use of a present value adjustment and both provided for calculation of a one-time payment for the privilege of ending the mortgage contract early, not for calculation of interest foregone over the remaining mortgage term.
- [40] Justice Newbury found that the chambers judge failed to give effect to the fact that, as a matter of law, the impugned prepayment clauses in this case were functionally equivalent to those in Pfeiffer. She also found that the contractual interpretation issue was "systemic" in nature and involved an extricable issue of law. She went on to hold that Pfeiffer was binding and that Ms. Sherry's breach of contract and related fiduciary duty claims based on the miscalculations as pleaded in the Notice of Civil Claim were bound to fail:

- [72] I have already quoted the material conclusions of the Court in Pfeiffer. The Court rejected the notion that the calculation of a prepayment charge is "required by the mortgages and the law" to represent "compensation" or "indemnification" for the stream of future income that will be "lost" by the lender when a borrower prepays a mortgage and must therefore involve the quantification of the present value of that future loss over the term
- [73] Similar reasoning clearly applies in this case. None of the prepayment clauses with which we are concerned contemplates the computation of interest that will be foregone over the term of the mortgage or the calculation of the present value of that interest. Rather, the clauses require the calculation of a fee or charge equal to the greater of (i) three months' interest "at your existing annual interest rate on the date of prepayment" on the amount prepaid, and (ii) the IRD. The IRD is the difference between the "interest cost" on the last regular payment date to the maturity date at the borrower's existing annual interest rate, and interest costs at the posted rate charged on a mortgage which CIBC determines in its discretion to be similar to the borrower's mortgage at the time of prepayment. (See also the "plain language" explanation provided by CIBC which is reproduced in the first schedule to these reasons.) In exercising that discretion the lender must consider objective factors - the remaining term of the mortgage, its features, and "whether you have a conventional or a high-ratio mortgage." In the lexicon of Greenberg, this discretion is subject to objective criteria.
- [74] No rule of law or equity, or even logic, was cited to us that would support the notion that a prepayment clause must in law incorporate the calculation of the present value of interest that would have been payable over the term. Pfeiffer illustrates that it need not, and the wording of the clauses in this case shows that CIBC did not, do so. In terms of principle, the prepayment clause does not impose a penalty in the legal sense - i.e., an amount payable on default under the contract. Such clauses are generally unenforceable if they do not represent an estimate of liquidated damages: see *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.* [1976] 1 S.C.R. 319 at 331. When on the other hand the mortgage contract provides for a right of prepayment, there is no breach of contract, but rather the exercise of that right on payment of the stipulated charge
- [76] With respect, the judge failed to give effect to the fact that as a matter of law, the two clauses are functionally equivalent. Although contractual interpretation is now said to be a matter of mixed fact and law (see *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 at para. 50), we are concerned here with standard form contracts that are not individually negotiated or written. Thus the factual matrix is much less important than the contractual terms the issue of contractual interpretation in this case might be regarded as a "systemic" one.
- [77] Comparing the prepayment clauses in Pfeiffer with those in the case at bar, neither contemplated, much less required, the use of a present value calculation. Rather, each required the calculation described above at para. 73. The fact that CIBC's prepayment terms contained the Discretion Clauses does not affect the applicability of Pfeiffer, nor does the reference to "interest costs" as the chambers judge seemed to suggest at para. 94. If Ms.

Sherry's allegation were to be certified as giving rise to a cause of action based in some way on breach of contract (or restitution or unjust enrichment), the Supreme Court of British Columbia would be bound by Pfeiffer, as would this court, to dismiss those causes of action. This fact makes it plain and obvious that the claims for breach of contract and fiduciary duty based on the alleged "Miscalculations" would fail

- [78] I would therefore allow the appeal to the extent of ruling that the plaintiff's allegations of breach of contract and breach of fiduciary duty based on the alleged "Miscalculations" must be struck as not disclosing viable causes of action.

[Emphasis in original.]

- [41] Before conducting her analysis of the miscalculations claim, Justice Newbury noted Ms. Sherry's argument that, contrary to the terms of the mortgages, CMI miscalculated the prepayment charges both by failing to present value the IRD and by using SCRAP in its IRD calculations, the latter described as "wrongly assuming that the number of dollars of interest paid with each periodic payment would, but for the prepayment, have remained the same for the remaining term of a mortgage". However, she held, the SCRAP aspect of the argument was not pleaded in the Notice of Civil Claim and, therefore, Ms. Sherry was not permitted to advance it for the first time on appeal:

- [70] In my respectful view, it was not open to the plaintiff, by using the word "include" in her pleading, to raise further arguments in this court in addition to the one based on the lender's failure to "present value" the IRD in calculating prepayment charges. I therefore agree with CIBC that the argument at paras. 49 and 50 of Ms. Sherry's factum was not advanced in her pleading and may not be advanced for the first time in this court. I also observe that in any event this new argument assumes the legal necessity of a calculation of interest foregone over the term of the mortgage - an assumption I reject below.

- [71] Returning to whether the chambers judge erred in finding a cause of action to be made out on the basis of the Miscalculations as pleaded, it seems to me that this court's holding in Pfeiffer provides a full answer to her assertions

[Emphasis added in last sentence of para. 70.]

- [42] As I noted at the outset, in Sherry Appeal #1 this Court did not disturb the chambers judge's finding that the unconscionability claim could be determined as a common issue. Citing recent authorities in which unconscionability claims based on consumer protection legislation were certified in class proceedings, Justice Newbury commented that, in the context of the Business Practices and Consumer Protection Act, the concept of unconscionability may be expanding to conduct that is systemic in nature:

[88] It may be that particularly in the context of the BPCPA, the concept of unconscionability is in the process of expanding beyond the individual circumstances of a particular consumer or transaction, to conduct that is more "systemic". Given the purposes and objectives of the BPCPA and the fact that the novelty of a claim should not necessarily be fatal, I would defer to the chambers judge on this point.

[43] Nor did this Court disturb the finding of the chambers judge that the claim for punitive damages could also be determined as a common issue. Referring to her conclusion on the unconscionability claim, Justice Newbury stated:

[89] The same type of 'evolution' may be occurring with respect to punitive damages. The matter was discussed at some length by this court in *Chalmers v. AMO Canada Co.* 2010 BCCA 560 and has been cited several times by British Columbia courts. Given this fact, and the 'bifurcated' approach adopted by the chambers judge, I am not persuaded this court should interfere with her order insofar as it involves Ms. Sherry's claim for punitive damages.

[44] In the result, this Court ordered that the orders below be varied to read, in relevant part:

Para. 3 of the June 30, 2014 order:

3. The common issues are as follows:

(a) Are the provisions of the Defendant's Mortgage Contracts that purport to permit such calculation and charging of prepayments penalties:

i) Unconscionable; or

ii) Contrary to the Business Practices and Consumer Protection Act, S.B.C. 2004, s. 8, and if so, should those provisions be set aside pursuant to the Business Practices and Consumer Protection Act, ss. 10 and 105 or otherwise?

Para. 3 of the March 31, 2015 order:

3. The following common issue is added as a common issue in these proceedings:

(b) Do the following alleged acts and omission of the Defendant warrant an award of punitive damages?

i) a breach of the Plain Language Promise as defined in the Notice of Civil claim;

ii) a breach of the Trust and Loan Companies Act, S.C. 1991, c. 45, and the Cost of Borrowing (Trust and Loan Companies) Regulations, SOR/2001-104, as alleged in the Notice of Civil Claim;

iii) a breach of the Mortgage Brokers Act, R.S. B.C. 1996, c. 313, s. 9.1 and Mortgage Brokers Act Regulations, B.C. Reg. 100/73, as amended as alleged in the Notice of Civil claim;

iv) a breach of the Business Practices and Consumer Protection Act, ss. 67(1) and 84(m), as alleged in the Notice of Civil Claim; and

- (c) If the answer to issue (b) is yes, should an award of punitive damages be made against the Defendant and if so, in what amount?

Amended Notice of Civil Claim

- [45] Ms. Sherry filed an Amended Notice of Civil Claim shortly after Sherry Appeal #1 was decided. The principal amendments included removal of the allegations that the impugned discretionary clauses were void for uncertainty and unenforceable for that reason and, alternatively, that CMI breached the mortgage contracts by committing the miscalculations. They also introduced two new causes of action and related unjust enrichment claims: the statutory illegality claims and the overcharges claims.
- [46] Ms. Sherry maintained her original pleas that CMI's use of the single and double discretion mortgage contracts was contrary to and in breach of its statutory disclosure obligations. In support of the new statutory illegality claims she asserted that the impugned discretionary clauses were illegal, contrary to public policy and unenforceable because CMI failed to disclose the manner in which the prepayment charges would be calculated in clear, concise and comprehensible language in accordance with statutory disclosure provisions, which provisions she labelled the "Federal Laws" and the "B.C. Laws". She outlined the history and purpose of those laws, pleading that they were created to achieve "a high and effective level of consumer protection" and to "ensure consumers are informed about the cost of credit before they enter into loan contracts". She also pleaded that "[a]s a matter of law and/or public policy, it is not possible or permissible for a contract to negate the application or effect of either the Federal Laws or the B.C. Laws, or otherwise to contract out of those laws". She pleaded further that CMI was unjustly enriched by its wrongful conduct and collection of the prepayment charges, that there was no juristic reason for it to retain those charges and that it was obliged to refund them to Ms. Sherry and the members of the class. As to remedy, she sought a declaration of illegality, an accounting, a refund and punitive and exemplary damages.
- [47] Like the miscalculations claim in the Notice of Civil Claim, the new overcharges claims were pleaded in the alternative. Unlike the miscalculations claim, they referred to both the SCRAP and present value adjustment aspects of the asserted claim. Ms. Sherry pleaded that if the impugned discretionary clauses were enforceable then CMI was contractually obliged to exercise its discretion by applying an unchanged amortization period and a present value adjustment when it calculated the IRD, which obligation she labelled the reasonableness requirement. She pleaded further that CMI breached the reasonableness requirement and its fiduciary duty by applying SCRAP and failing to present value the IRD and by levying prepayment charges based on those calculations, which conduct she labelled the overcharges.

[48] After filing the Amended Notice of Civil Claim, Ms. Sherry applied to amend the certification order to include common issues related to the statutory illegality claims and the overcharges claims. For its part, CMI applied for an order striking the amendments on the grounds that they were barred by the doctrine of res judicata or otherwise an abuse of process and that they disclosed no reasonable cause of action. The chambers judge heard both applications at the same time.

Reasons of the Chambers Judge: 2018 BCSC 1484

- [49] The chambers judge struck the amended plea that CMI breached the reasonableness requirement by virtue of the overcharges on the basis that it was caught by this Court's decision in Sherry Appeal #1. In particular, she concluded, in Sherry Appeal #1 this Court considered the reasonableness of the impugned discretionary clauses when it found that they were not void for uncertainty and therefore unenforceable. In addition, she concluded, this Court decided that Pfeiffer fully answered Ms. Sherry's claim that CMI miscalculated the prepayment charges in breach of the mortgage terms by failing to present valuing IRDs and by using SCRAP when it found the prepayment clauses did not require computation of interest foregone over the remaining mortgage term.
- [50] In analysing the latter issue, the chambers judge conducted a thorough review of the salient aspects of the reasons in Sherry Appeal #1. She concluded her analysis by quoting from para. 74 and finding that this Court disposed of the overcharges claims as well as the previous miscalculations claims:
- [51] Again, in para. 74, the CA Reasons return to a discussion of the present value, finding that the prepayment clause does not impose a penalty but rather provides for a right of prepayment on payment of the stipulated charge, which I take to include that calculated without present value and with SCRAP:
- [74] No rule of law or equity, or even logic, was cited to us that would support the notion that a prepayment clause must in law incorporate the calculation of the present value of interest that would have payable over the term. Pfeiffer illustrates that it need not, and the wording of the clauses in this case shows that CIBC did not, do so. In terms of principle, the prepayment clause does not impose a penalty in the legal sense - i.e., an amount payable on default under the contract. Such clauses are generally unenforceable if they do not represent an estimate of liquidated damages: see *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.* [1976] 1 S.C.R. 319 at 331. When on the other hand the mortgage contract provides for a right of prepayment, there is no breach of contract, but rather the exercise of that right on payment of the stipulated charge

[Emphasis of Newbury J.A.]

- [52] On reading the CA Reasons as a whole, I conclude that the "stipulated charge", the prepayment penalty, includes both impugned overcharges being the absence of present value and inclusion of SCRAP. That said, the CA Reasons have considered and disposed of the present overcharges claims in addition to the previous miscalculation claims.
- [51] Then the chambers judge turned to the amendments related to the statutory illegality claims. She described Ms. Sherry's submission that a contractual provision may be illegal where it is inconsistent with consumer protection legislation and that CMI could not contract out of statutory disclosure requirements through the use of the impugned discretionary clauses. As to possible remedies, she identified the question of whether CMI breached the statutory provisions deliberately as a relevant issue and noted that it began to use the undisclosed internal formula incorporating SCRAP in 2005, filed standard mortgage terms with language related to its use of SCRAP in 2009 and purported to change its pre-existing mortgage contracts to justify that use in 2012 after the action was commenced.
- [52] The chambers judge also described CMI's argument that raising the statutory illegality claims was an abuse of process in light of Ms. Sherry's prior statements that breaches of statutory disclosure requirements were pleaded in the Notice of Civil Claim in support of the uncertainty and punitive damages pleas, not as independent causes of action. However, after considering the prior statements, the fact that the statutory breaches were already certified as a common issue on the punitive damages claim and the absence of any prejudice to CMI, she rejected it. She went on to find that this Court's conclusions on the common law causes of action in Sherry Appeal #1 were not dispositive of the new statutory illegality claims, which she found were supported by the case law.
- [53] In making her findings, the chambers judge did not specifically address CMI's alternative arguments that the statutory provisions in question regulate disclosure statements and not contracts, that the Trust and Loan Companies Act claim was barred by s. 536 of the Trust and Loan Companies Act, and that the Business Practices and Consumer Protection Act and Mortgage Brokers Act are complete codes so breaches could not form the basis for restitutionary relief. Nevertheless, she concluded that the statutory illegality and related unjust enrichment claims could proceed and certified common issues arising from those pleadings. In explaining her conclusion, she noted that the disclosure issue would proceed aside from the amendments because this Court dismissed CMI's appeal of the certification order in respect of the punitive damages claims. She also noted that the law has developed in favour of consumer protection by expanding the circumstances in which a contractual provision may be found invalid because it is inconsistent with a statutory scheme:

- [72] The appeal of the certification of the claim for punitive damages was dismissed [in Sherry Appeal No. 1]. The issue of breach of the statutory disclosure requirements will proceed even aside from the amendments in the ANOCC. The amended plea of illegality and breach of the statutory scheme and public policy due to the defendant's alleged failure to comply with the statutory disclosure requirements is supported by the case law cited by the plaintiff and referred to above.
- [73] The law has developed in favour of consumers by expanding the circumstances in which a contract or contractual provision that is inconsistent with a statutory claim may be found to be invalid: see *Niedermeyer; Fleming v. Massey*, 2016 ONCA 70, leave to appeal ref'd [2016] S.C.C.A. No. 113. It is accepted that a plaintiff may amend their claim as the law evolves in their favour.
- [74] The defendant takes issue with the plaintiff's view of the law in this regard. However, their argument is not so persuasive that it founds a conclusion that the claim is bound to fail. Further, the defendant does not allege prejudice arising from its view of the plaintiff's statements regarding her intention to rely on this ground. There has not yet been a response filed, a hearing on the merits in this case, a discovery scheduled or held, or notice to the class.
- [75] I therefore find the requirement of s. 4(1)(a) of the CPA has been met with this claim. The pleadings disclose a cause of action and the common issues arising from the pleadings will be certified.
- [81] However, in addition to claiming unjust enrichment with regard to the Reasonableness Requirement and Overcharges claims, which I have struck, the plaintiff claims that the illegality claim based on the application of the statutes relied upon gives rise to a claim of unjust enrichment. I understand that to be included as para. 71(a) of the ANOCC. This statutory claims was not considered in the CA Reasons.
- [82] Therefore the claim for unjust enrichment is allowed as it flows from a common issue now certified
- [93] The plaintiff's applications to certify the illegality claims and unjust enrichment as related to that claim are granted
- [54] CMI brings this appeal from the order of the chambers judge certifying the statutory illegality and related unjust enrichment claims.

Issues on Appeal

- [55] The issues for determination on appeal are:
- 1) Did the chambers judge err in finding that the statutory illegality claims are not bound to fail due to Sherry Appeal #1?

- 2) Did the chambers judge err in failing to give effect to CMI's alternative arguments on the statutory illegality claims, in that she failed to find:
- a. CMI was not required by statute to disclose the underlying mathematical formula used to calculate prepayment charges;
 - b. the statutory illegality claim based on the Trust and Loan Companies Act was barred by s. 536 of the Trust and Loan Companies Act;
 - c. the Business Practices and Consumer Protection Act and the Mortgage Brokers Act are complete codes and do not create restitutionary causes of action; and
 - d. breaches of the pleaded provisions of the Trust and Loan Companies Act, the Business Practices and Consumer Protection Act and the Mortgage Brokers Act cannot form the basis of a claim that a contract is illegal because they regulate the content of disclosure statements, not contracts.

Discussion

Standard of Review

- [56] The standard of review applicable to a conclusion reached under s. 4(1) of the Class Proceedings Act depends on the issue for determination. If the impugned element of the certification order involved the exercise of discretion it will be reviewed with considerable deference absent an extricable legal error, which is reviewable on a standard of correctness. The standard of review on the question of whether pleadings disclose a cause of action has been described differently in different cases, but appellate intervention is consistently viewed as appropriate where there is an error of law or principle: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para. 54; *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at paras. 39-42. In my view, as Justice Groberman stated in *Scott v. Canada (Attorney General)*, 2017 BCCA 422, the question of whether pleadings disclose a reasonable cause of action is generally a pure issue of law and, as such, does not attract appellate deference on review: at para. 44.

Did the chambers judge err in finding that the statutory illegality claims are not bound to fail due to Sherry Appeal #1?

- [57] CMI contends that both the statutory illegality claims and the overcharges claims are built on the same "underlying premise", namely, that it was required to apply a present value adjustment and an unchanged amortization period when calculating the prepayment charges. In its submission, this Court rejected that premise in Sherry Appeal #1 and held there was nothing "wrongful" about its failure to present value the IRD or its use of SCRAP. It follows, CMI says, that the chambers judge correctly concluded the overcharges claims were bound to fail based on the reasoning in Sherry Appeal #1. However, she erred in failing to reach the same conclusion on the statutory illegality claims.

- [58] In support of its submission, CMI emphasizes Justice Newbury's statements in Sherry Appeal #1 that the prepayment provision in CMI's mortgage contracts was functionally equivalent to the provision in Pfeiffer and that Pfeiffer was binding on the facts of this case. It also emphasizes her statement that "no rule of law or equity, or even logic" required it to calculate prepayment charges based on foregone interest, which conclusion encompassed both the present value and amortization issues. However, it says, despite those findings Ms. Sherry continues to insist that it failed to disclose whether it applied a present value adjustment or used an unchanged amortization period and thus breached the statutory disclosure provisions. In other words, CMI argues, relying on the same material facts pleaded in her initial certification claim, Ms. Sherry asserts that it was obliged to disclose it was not present valuing IRDs and not using an unchanged amortization period when it calculated the prepayment charge.
- [59] According to CMI, this assertion runs contrary to the conclusion in Sherry Appeal #1 that the prepayment clauses do not require it to present value IRDs or use an unchanged amortization period in its calculations. It also runs contrary to the chambers judge's finding that the overcharges claims were bound to fail because in Pfeiffer this Court held that the impugned clauses do not require the calculation of interest foregone. If accepted, CMI says, Ms. Sherry's assertion would mean that it has a positive duty to disclose all calculation methods that it does not use, even though it has no legal obligation to use them. While it acknowledges that it must disclose the basis upon which it does calculate prepayment charges, CMI says its obligations go no further and, in particular, that it need not disclose what it does not do and is not obliged to do.
- [60] In advancing its argument, CMI concedes that, in Sherry Appeal #1 and Pfeiffer, this Court did not directly consider whether the impugned clauses breached the pleaded statutory disclosure requirements. Nevertheless, it submits, because the statutory illegality claims are based on the same untenable premise as the overcharges claims, the effect of the reasoning in both those cases is that the statutory illegality claims are bound to fail. In other words, CMI says, because this Court held in Sherry Appeal #1 and Pfeiffer that the prepayment charge is simply an agreed payment, not compensation for lost interest, which is legally permissible, by necessary implication it was not illegal to fail to disclose that it did not calculate the prepayment charge as compensation for interest foregone.
- [61] CMI goes on to submit that the decision under appeal also runs contrary to the decision of Justice Raikes in *Jordan v. CIBC Mortgages Inc.*, 2019 ONSC 1178, leave to appeal refused (21 June 2019) Ont. Div. Ct. 5303/11CP, a parallel class proceeding in Ontario. *Jordan* was released shortly after the decision of the chambers judge. Although Justice Raikes considered her decision, he reached a different conclusion on the viability of statutory illegality claims based on the same core assertions as those that Ms. Sherry makes in this case. In doing so, CMI notes, he held that the issues for determination raised questions of law capable of resolution on the facts alleged and that those claims were bound to fail. However, it also acknowledges that he went on to find the plaintiff's claim disclosed a cause

of action as to whether its use of SCRAP breached the terms of the mortgage contract or its obligation to act in a commercially reasonable manner.

- [62] According to CMI, the latter aspects of Justice Raikes' reasoning in *Jordan* are faulty but they do not detract from his conclusions on the statutory illegality claims, which are sound and persuasive. It contends that he correctly concluded the viability of such claims should be determined at the certification stage and that they do not disclose a reasonable cause of action. In CMI's submission, we should reach the same conclusion in this case based on the reasoning in *Sherry Appeal #1*, from which it follows by necessary implication. Accordingly, it says, we should allow the appeal and strike the statutory illegality claims.
- [63] I am not persuaded by these submissions. In my view, the reasoning in *Sherry Appeal #1* does not determine the viability of the statutory illegality claims, directly or by necessary implication.
- [64] I agree with CMI that, in *Sherry Appeal #1*, this Court held that it was not required to present value the IRD or use an unchanged amortization period in calculating prepayment charges. I also agree this was because, as Pfeiffer determined, the prepayment charge is simply an agreed payment, not compensation for interest foregone. However, I do not agree that it necessarily follows from these findings that there was nothing "wrongful" in relation to CMI's calculation of prepayment charges. Nor do I agree with CMI's characterization of the statutory illegality claims.
- [65] Contrary to CMI's characterization, the statutory illegality claims are not built on the underlying premise that it was required to apply a present value adjustment or an unchanged amortization period in its calculations. Nor does Ms. Sherry assert, directly or implicitly, that CMI has a positive duty to disclose calculation methods that it does not use. Rather, the underlying premise of the statutory illegality claims is that CMI has a duty to disclose the manner in which it does calculate prepayment charges, which includes its use of SCRAP methodology, and that it must do so in clear and comprehensible language in accordance with statutory requirements and public policy standards. Ms. Sherry asserts that CMI's mortgage documentation failed to meet these requirements, that as a result the impugned clauses are unenforceable and that CMI was unjustly enriched by its collection of prepayment charges pursuant to the unenforceable mortgage terms.
- [66] In *Sherry Appeal #1*, this Court found Ms. Sherry's claim that the impugned clauses were void for uncertainty and unenforceable "by reason of the lender's discretion in the calculation of prepayment charges" did not disclose a viable cause of action: at para. 66 [emphasis added]. It reached the same conclusion on her alternative miscalculations claim that if the impugned clauses were sufficiently certain to be enforceable then CMI's failure to present value IRDs gave rise to a cause of action "based in some way on breach of contract (or restitution or unjust enrichment)": at paras. 77-78 [emphasis added]. In other words, in *Sherry Appeal #1* this Court found directly that the impugned discretionary clauses were legally certain and that CMI did not breach the terms of the mortgage contracts by failing to

present value IRDs because it was not contractually obliged to calculate prepayment charges based on foregone interest. In addition, it found implicitly that, for the same reason, contrary to Ms. Sherry's related and then unpleaded claim concerning its use of SCRAP, CMI did not breach the mortgage terms.

- [67] On the amendment applications that followed Sherry Appeal #1, the chambers judge considered its implications for Ms. Sherry's new statutory illegality claims and alternative overcharges claims. As I have explained, she concluded that this Court effectively disposed of all aspects of the overcharges claims. On appeal, Ms. Sherry does not challenge this conclusion. However, she says, none of the findings in Sherry Appeal #1 involved consideration of CMI's compliance, or lack thereof, with statutory disclosure requirements or related public policy standards. Nor do they necessarily imply that CMI met those requirements and standards or suggest the consequence, if any, if it did not. I agree.
- [68] In my view, a discretionary prepayment clause in a mortgage contract may be sufficiently certain to be legally binding and a lender may be entitled by the terms of the contract to calculate the prepayment charge in a particular manner, but its disclosure regarding its calculation methodology may nonetheless fail to meet statutory requirements. It follows that a finding in the lender's favour on the first two issues does not necessarily determine the viability of a cause of action based on the third. To use CMI's word, the "wrongfulness" in question is not the same.
- [69] It is true that, as CMI contends, the statutory illegality claims are based on the same material facts as the uncertainty and miscalculations claims struck by this Court and the overcharges claims struck by the chambers judge. However, this is inconsequential. The statutory illegality claims rely on a different legal theory than the previously struck common law and related equitable claims. In advancing them, Ms. Sherry built on the existing claim structure and ascribed additional legal consequences to the alleged breaches of statutory requirements and related public policy standards. As noted, those alleged breaches were already pleaded in support of the punitive damages plea in the Notice of Civil Claim.
- [70] There is nothing objectionable or inconsistent about a party advancing multiple claims based on the same material facts but relying on different legal theories in a single pleading. This is so regardless of whether one or more of the pleaded claims is found to be bound to fail. For example, in Sherry Appeal #1 this Court found that the uncertainty and miscalculations claims did not disclose reasonable causes of action, but also found that the unconscionability claim was viable. Like the statutory illegality claims, the unconscionability claim was based on the same material facts but a different legal theory than the struck uncertainty and miscalculations claims.
- [71] Further, it is unsurprising that this Court did not deal directly with issues of disclosure in Sherry Appeal #1. As noted, Ms. Sherry advised the chambers judge that the breaches of statutory disclosure requirements pleaded in the Notice of Civil Claim were not asserted as independent causes of action. Nevertheless, when she certified the punitive damages claims

the chambers judge stated that the Notice of Civil Claim disclosed a "reasonable and arguable claim for punitive damages based on [the pleaded statutory disclosure breaches]". This, too, is unsurprising. If it were otherwise, she would presumably not have certified the common issues on the punitive damages claims, at least not in the same terms.

- [72] In Sherry Appeal #1, this Court upheld the order of the chambers judge certifying the punitive damages claims as a common issue. In doing so, Justice Newbury observed that the law on punitive damages based on alleged systemic wrongdoing may be in a process of evolution. Given that the order certifying the punitive damages claims as a common issue was upheld, the trial judge will be required to determine whether CMI breached the statutory disclosure provisions in question in the statutory illegality claims. That being so, in my view it would be inconsistent for this Court to hold that the statutory illegality claims do not disclose, in the words of the chambers judge, a "reasonable and arguable claim". Moreover, I consider them to be arguable on the basis described below.
- [73] Finally, I do not find the Jordan decision helpful to CMI in advancing its argument. As I have noted, although he struck the statutory illegality claims Justice Raikes concluded that CMI's use of SCRAP could arguably breach the prepayment clause and that its failure to alert borrowers to its use of SCRAP might render its disclosure statement misleading: at para. 176. In reaching these conclusions, Justice Raikes reviewed Sherry Appeal #1 and agreed with this Court's analysis of the miscalculations claim in respect of CMI's failure to apply a present value adjustment. Nevertheless, he did not find the underlying reasoning of that analysis also determined the viability of the plaintiff's claim in respect of SCRAP.
- [74] Justice Raikes' conclusion that the statutory illegality claims were bound to fail was tied at least in part to his view that resolving the question of whether CMI was contractually entitled to use SCRAP also resolved the question of whether it complied with statutory disclosure requirements: see paras. 119-123. As I have explained, this is a proposition with which I disagree. In my view, the legal theory, analysis and implications of the two questions are distinct and not necessarily mutually dependent. It also seems to me, with respect, that Justice Raikes engaged in a merits-based assessment of the salient contractual documents and statutory provisions that went beyond the *Hunt v. Carey* threshold. Further, I find it difficult to reconcile his conclusion that if CMI was contractually entitled to use SCRAP then its disclosure met statutory requirements (paras. 119 and 125, statutory illegality claims analysis) with his conclusion that CMI did not disclose its use of SCRAP, that a plain reading of the prepayment clause suggested the "similar" comparator mortgage would be one with the same or similar amortization period, and that the failure of CMI's disclosure statement to alert borrowers to its use of SCRAP in its calculations "may also be misleading" (paras. 174-176, breach of contract analysis).
- [75] For all of these reasons, I would not give effect to this ground of appeal.

Did the chambers judge err in failing to give effect to CMI's alternative arguments on the statutory illegality claims?

[76] CMI contends further that the chambers judge erred in failing to give effect to its alternative arguments on the statutory illegality claims. Those arguments were similar, though not identical, to those it makes on this second ground of appeal. While she did not say so expressly, it is implicit in her reasons that the chambers judge rejected all of CMI's alternative arguments when she stated its "argument is not so persuasive that it found a conclusion that the claim is bound to fail" and in certifying the statutory illegality claims and related unjust enrichment claim: at paras. 74, 82, 93. Accordingly, it is necessary to consider each alternative argument in turn.

Did the chambers judge err in failing to find that CMI was not required by statute to disclose the underlying mathematical formula used to calculate prepayment charges?

[77] In CMI's submission, the statutory illegality claims do not give rise to a reasonable cause of action because the pleaded disclosure provisions do not require that it disclose the underlying mathematical formula used to calculate the prepayment charge. It contends that the meaning of these provisions is abundantly clear. On a plain reading, CMI says, they require disclosure of the manner in which the prepayment charge is calculated, including the components of the formula used in the calculation, in language that is clear, concise and comprehensible. However, disclosure of the mathematical formula itself is not required.

[78] According to CMI, it is plain and obvious that its mortgage contracts fully met the statutory disclosure requirements. In particular, it says, the contracts provided the component variables in the IRD calculation and described the method used to calculate the prepayment charge in an understandable way. Emphasizing the gatekeeping role of the court and the desirability of resolving questions of statutory interpretation at the certification stage if reasonably possible, CMI submits that a straightforward exercise in statutory interpretation reveals the statutory illegality claims should be struck as failing to disclose a viable cause of action.

[79] In support of this submission, CMI focuses on the words of the statutory provisions in question, which it says are clear and unambiguous. In particular, it notes, s. 429(a)(ii) of the Trust and Loan Companies Act requires disclosure of "the manner in which the charge is to be calculated"; s. 8(1)(l) of the Cost of Borrowing (Trust and Loan Companies) Regulations, "a description of any components that comprise a formula to calculate a charge "; and ss. 67(1) and 84(m) of the Business Practices and Consumer Protection Act, a "clear and comprehensible" written "statement of any charge for the prepayment". It also notes that no additional disclosure requirements are imposed by the Mortgage Brokers Act and Mortgage Brokers Act Regulations.

[80] In further support, CMI emphasizes the guidance provided by the Financial Consumer Agency of Canada ("FCAC") to federally-regulated financial institutions. The FCAC is the federal agency responsible for supervising such institutions and advising them on their obligations under the Trust and Loan Companies Act and the Cost of Borrowing (Trust and Loan Companies) Regulations. In its submission, FCAC Commissioner's Guidance #9 is a

helpful extraneous aid to the statutory interpretation exercise if any such aid should be necessary. Published in August 2012 and entitled "Mortgage Prepayment Penalty Disclosure", Commissioner's Guidance #9 directs lenders to disclose the "most important or highest-level" components of the formula used to calculate prepayment charges. It also provides that:

[t]he description of the components should provide the borrower with a basic understanding of each component. The description need not include any kind of underlying calculation undertaken to arrive at the numerical value of each component.

[81] Based on the foregoing, CMI contends that the statutory illegality claims do not disclose a viable cause of action and that the chambers judge erred in holding otherwise.

[82] I do not accept these submissions.

[83] At the hearing of the appeal Ms. Sherry's counsel confirmed that she does not assert that CMI was required by statute to disclose the underlying mathematical formula used to calculate prepayment charges. Rather, she asserts that CMI was required to disclose sufficient information about the process of calculation, including the components of that process, to allow borrowers to understand what they were agreeing to, but that it failed to disclose its use of SCRAP in the calculation process and thus failed to meet the statutory requirements. Referring to the evidence adduced at the certification hearing, Ms. Sherry contends that if CMI wished to calculate prepayment charges based on a shortened amortization period for the comparator mortgage it was obliged either to state expressly that the IRD calculation would include the use of SCRAP methodology or that the calculation would be based on the dollar amount of each periodic payment being unchanged (which are two different ways of saying the same thing). However, prior to 2009 it did not include any such language in its mortgage documentation.

[84] In support of her position, Ms. Sherry emphasizes the fact that CMI changed its mortgage documentation over the course of the material period. For example, the evidence revealed that commencing in 2009 it included statements to the effect that prepayment penalties based on IRDs would be based on interest costs "calculated using your principal and interest payment amount in effect" either "at the time you prepay" (for partial prepayments) or "on the date we prepare the payout statement" (for complete prepayments). As noted, the chambers judge referred specifically to these changes and to developments in consumer protection legislation when she certified the statutory illegality claims. In doing so, she implicitly recognized that a fact-finder could infer CMI made the changes to meet its perceived disclosure obligations in connection with its use of SCRAP and that some form of change may have been required.

[85] In my view, as is apparent from the foregoing, Ms. Sherry's plea that the impugned clauses did not disclose the manner in which the prepayment charges would be calculated in language that is "clear and comprehensible" is not patently unreasonable or incapable of proof. Accordingly, for present purposes that plea must be assumed to be true: Sherry

Appeal #1 at para. 52. Based on this assumption, regardless of whether CMI was obliged to disclose the internal mathematical formula used in its calculations, it is not plain and obvious that it did not breach the pleaded statutory disclosure requirements. The question of whether it did involves a merits-based analysis and, unlike the issues in Sherry Appeal #1, there is no binding authority to resolve that question based on the pleaded facts.

[86] Accordingly, I would not accede to this ground of appeal.

Did the chambers judge err in failing to find that the statutory illegality claim based on the Trust and Loan Companies Act was barred by s. 536 of the Trust and Loan Companies Act?

[87] Next, CMI submits that the statutory illegality claim based on the Trust and Loan Companies Act does not disclose a viable cause of action because s. 536 operates as a "saving provision". It follows, it says, that to the extent the statutory illegality claims are based on alleged breaches of ss. 436(1) and 438(1)(a) of the Trust and Loan Companies Act they have no basis in law.

[88] Section 536 of the Trust and Loan Companies Act provides:

536 Unless otherwise expressly provided in this Act, a contravention of any provision of this Act or the regulations does not invalidate any contract entered into in contravention of the provision.

[89] Relying on the *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298 and *Canada Trustco Mortgage Co. v. Renard*, 2008 BCCA 343, CMI argues that, as a matter of law, a mortgage contract will be valid despite a breach of a Trust and Loan Companies Act provision. In the event that a lender breaches the Trust and Loan Companies Act, it says, the lender will be exposed to prescribed penalties under the Act but the mortgage contract will not be rendered "illegal", void or otherwise nullified. In other words, in CMI's submission, even if, as Ms. Sherry claims, it breached its disclosure obligations under the Trust and Loan Companies Act, the remedy for those breaches is contained exclusively within the Act itself.

[90] In support of its submission, CMI relies on the reasoning in *Continental Bank Leasing and Renard*, which it submits determines this issue in its favour. Citing *Continental Bank Leasing*, it says the Court held that s. 20(1) of the Bank Act ousted the common law rule that a corporation's ultra vires contracts are void and unenforceable. Then, in *Renard*, this Court applied the same principle to the Trust and Loan Companies Act and held that s. 536 is an analogous saving provision which preserves the enforceability of a mortgage contract despite a breach of its lending limit provision. Speaking for the Court, Justice Frankel also held that such questions are questions of pure law which do not depend on findings of fact.

[91] Given the foregoing, CMI submits it is plain and obvious that the statutory illegality claim based on alleged violations of ss. 436(1) and 438(1)(a) of the Trust and Loan Companies Act is legally untenable. It says it follows that this aspect of the statutory illegality claim fails to disclose a reasonable cause of action and that the chambers judge erred by failing to strike it based on s. 536 of the Trust and Loan Companies Act.

- [92] I do not accept this submission. Taking into account the words of s. 536 and the principles discussed in *Continental Bank Leasing and Renard*, in my view this saving provision does not foreclose the possibility of a court granting a civil remedy for a violation of ss. 436(1) and 438(1)(a) of the *Trust and Loan Companies Act*.
- [93] In *Continental Bank Leasing*, the bank owned a leasing company that entered into a partnership with third parties as part of a winding-up process. Thereafter, the leasing company filed an election under s. 97(2) of the *Income Tax Act*, R.S.C. 1952, c. 148, which the Minister of National Revenue rejected on the basis that the partnership transaction was invalid by operation of s. 174 of the *Bank Act* and s. 34 of the *Partnerships Act*, R.S.O. 1980, c. 370. Pursuant to s. 174(2)(i) of the *Bank Act*, banks were prohibited from directly or indirectly acquiring or holding an interest or investing in a partnership and under s. 174(16) if a bank contravened this prohibition it was guilty of an offence. Pursuant to s. 34 of the *Partnerships Act*, a partnership was "dissolved" by the happening of an event that made it unlawful for the partnership business to be carried on or for the members of the firm to carry it on in partnership.
- [94] The broad issue for determination in *Continental Bank Leasing* was the validity of the partnership transaction. In analysing this issue, the Court considered the *ultra vires* doctrine, the illegality doctrine, s. 174 of the *Bank Act*, s. 34 of the *Partnerships Act* and s. 20(1) of the *Bank Act*. The majority and minority disagreed on the combined effect of these doctrines and statutory provisions in the circumstances of the case, but agreed on the underlying principles at play.
- [95] Speaking on behalf of the minority, Justice Bastarache concluded that the partnership was validly formed but that the leasing company's participation in the transaction was void and "unlawful" within the meaning of s. 34 of the *Partnerships Act* because it would be contrary to public policy to allow the parties to benefit from the bank's deliberate breach of s. 174 of the *Bank Act*. In reaching this conclusion, he reviewed the historical foundations of the *ultra vires* doctrine, the illegality doctrine and ss. 18(1) and 20(1) of the *Bank Act*.
- [96] As Justice Bastarache explained, the *ultra vires* doctrine and the illegality doctrine represent different ideas. The *ultra vires* doctrine restricted the legal capacity of corporations and provided that any acts that were not authorized by the articles of a corporation were void for want of capacity. The illegality doctrine (*ex turpi causa non oritur actio*) provided that a contract prohibited by statute or for an illegal purpose will be declared void even if it meets other requirements of a valid transaction. Although the form of a particular prohibition may render a prohibited act both *ultra vires* and illegal, there is no necessary correspondence between the two because the capacity of a corporation may be broader than its legally limited rights. In other words, based on both doctrines, a prohibited act may be i) *ultra vires* a corporation and illegal, ii) *ultra vires* a corporation but not illegal or iii) illegal but within a corporation's capacity. In the latter case, remedies may be available to enforce the legal limitations without invoking an *ultra vires* plea.

- [97] Justice Bastarache went on to explain that the ultra vires doctrine sometimes produced hardship for the public, who were expected to take notice of all limits on a corporation's capacity. In *Communities Economic Development Fund v. Canadian Pickles Corp.*, [1991] 3 S.C.R. 388, Justice Iacobucci characterized it as "a protection to no one and a trap for the unwary". In 1974, the Canada Business Corporations Act, S.C. 1974-75-76, c. 33, abolished the ultra vires doctrine for Canadian corporations by attributing to them the capacity of a natural person and providing that "[n]o act of a corporation is invalid by reason only that the act or transfer is contrary to its articles or this Act". In 1980, the Bank Act was similarly amended, attributing to banks the capacity of a natural person (s. 18(1)) and providing that "[n]o act of a bank, including any transfer of property to or by a bank, is invalid by reason only that the act or transfer is contrary to this Act" (s. 20(1)).
- [98] The aim of s. 20(1) of the Bank Act, Justice Bastarache held, was to abolish the ultra vires doctrine with respect to banks, which, by s. 18(1), were given the legal capacity to perform any act, even an offence under the Bank Act. In explaining the latter point, he quoted at para. 58 this passage from M.H. Ogilvie, *Canadian Banking Law* (Scarborough, ON: Carswell, 1991) at p. 35:

When a bank engages in any conduct - including the transfer of property to or by a bank - which is contrary to the Bank Act, the conduct is not invalid, rather merely contrary to the Act. At common law, when a company had been found to have engaged in an ultra vires transaction, the legal effect was to render that transaction void and unenforceable. Since 1980, that is no longer the case in relation to transactions with banking corporations. Legal rights and duties created in transactions prohibited to banks by the Act and conferred on third parties are valid and no longer subject to disturbance by judicial avoidance of the original prohibited transaction. Rather, the bank is subject to the penalties set out in the Bank Act, and probably also those existing in the general law, for engaging in prohibited actions.

- [99] Justice Bastarache also held that, in abolishing the ultra vires doctrine, s. 20(1) of the Bank Act did not completely oust the court's jurisdiction under the illegality doctrine. Although, like the ultra vires doctrine, the illegality doctrine sometimes produced hardship for unsuspecting third parties, under the modern approach it is not to be rigidly applied. In deciding whether to enforce or rescind a bargain based on the illegality doctrine, he stated, the court must consider a range of factors, including the harmful effect on the parties for whose protection the law making the bargain illegal exists, the purpose underlying the statutory provision, the remedy sought and the consequences which flow from a finding that the contract is unenforceable. He stated further that because s. 20(1) of the Bank Act is a "saving" provision "the same principles that guide the modern doctrine of illegality should guide a finding of invalidity under the Bank Act": at para. 72.
- [100] The majority in *Continental Bank Leasing* reached a different conclusion in its application of the foregoing principles in the circumstances under consideration. Speaking on its behalf, Justice McLachlin, as she then was, agreed that the bank violated s. 174 of the Bank Act when its wholly-owned subsidiary entered into a partnership, but concluded that,

nevertheless, s. 174 and s. 34 of the Partnerships Act were not attracted because the leasing company and the bank were separate legal entities. She also concluded that the partnership transaction should not be considered "unlawful" within the meaning of s. 34 of the Partnerships Act or otherwise by reason of the public policy component of the illegality doctrine.

- [101] In explaining her conclusion, Justice McLachlin emphasized that the term "illegal" in the context of the illegality doctrine does not necessarily mean "unlawful" in the traditional sense of being contrary to, prohibited or unauthorized by law. As a result, she found, s. 34 of the Partnerships Act was not attracted by the transaction. She also stated that, quite apart from s. 34, public policy required that breaches of the Bank Act should not lead to the invalidation of contracts and that s. 20(1) supported the view that Parliament did not intend breaches of the Bank Act to render otherwise lawful bank transactions null and void:
- [118] I find that public policy requires that breaches of the Bank Act should not lead to the invalidation of contracts and other transactions. There is good reason for this; to unravel commercial transactions on the basis that a corporate actor breached a statute is to introduce uncertainty into the affairs of individuals and businesses. This is especially true where the transactions at issue involve a subsidiary of the corporate actor.
- [119] Section 20(1) thus supports the view that Parliament never intended breaches of the Bank Act to render bank transactions, including investments in other corporations, like Leasing, null and void. This supports the argument that Parliament intended to create an offence punishable by fines, not to invalidate otherwise lawful transactions and that the doctrine of illegality should have no application in the case at bar.

[Emphasis in para. 119 added.]

- [102] In *Renard*, this Court applied the principles discussed in *Continental Bank Leasing* in determining the effect of s. 536 of the Trust and Loan Companies Act on the enforceability of a mortgage contract. The mortgagors contended that the entire transaction was illegal, the mortgage contract was unenforceable and the lender had no rights under it because, in contravention of the lending limit in s. 418 of the Trust and Loan Companies Act, the mortgage exceeded 75% of the value of their property. Justice Frankel agreed with the conclusion of the trial judge that exceeding the 75% lending limit in the Trust and Loan Companies Act did not, in and of itself, affect the validity of the mortgage contract. In reaching this conclusion, the trial judge referred to s. 536 and considered the purpose of the Trust and Loan Companies Act, which he found included the protection of financial institutions and creditors of financial institutions, not the protection of customers such as the mortgagors who received more credit than is permitted under the Act: *Canada Trustco Mortgage Co. v. Regis and Velma Renard*, 2006 BCSC 1609, paras. 209-225. In other words, in determining the validity of the mortgage contract under the Trust and Loan Companies Act and applying s. 536 as a saving provision, the trial judge followed the direction of Justice Bastarache in *Continental Bank Leasing* and was guided by "the same principles that guide

the modern doctrine of illegality".

- [103] As it does in this case, CMI relied on s. 536 of the Trust and Loan Companies Act and Continental Bank Leasing in Jordan. After outlining the principles in Continental Bank Leasing, Justice Raikes found that the purpose of s. 536 is to preserve the integrity and existence of the agreement itself, not to bar any and all common law remedies for breach of a provision of the Trust and Loan Companies Act. He held that s. 536 does not prohibit a finding that a particular clause in an agreement is unenforceable, that whether the impugned clause will be enforced is to be determined in accordance with the modern approach to the illegality doctrine and that s. 536 does not limit the consequences of breaches to prosecution of offences under the Trust and Loan Companies Act. He also distinguished Continental Bank Leasing on the basis that rigid application of the voiding provision in that case would have negatively impacted third parties whereas restricting access to common law remedies for breach of the consumer protection provisions of the Trust and Loan Companies Act would leave those intended to be protected without a remedy for the breach.
- [104] I agree with Justice Raikes' analysis and conclusion on this point. Properly interpreted, s. 536 of the Trust and Loan Companies Act does not completely oust the court's jurisdiction under the illegality doctrine or prevent a court from granting a remedy based on a breach of the Act. Like s. 20(1) of the Bank Act, the aim of s. 536 is to abolish the ultra vires doctrine and save contracts entered into in contravention of the Trust and Loan Companies Act from being nullified. However, the question of whether a severable clause contained within a valid contract is enforceable given a breach of a Trust and Loan Companies Act provision should be determined in accordance with the modern approach to the illegality doctrine, namely, taking into account the purpose of the provision, the harmful effect on the parties for whose protection it exists, the remedy sought and the consequences which flow from a finding that the impugned clause is unenforceable.
- [105] In my view, this interpretation best accords with the words of s. 536, read in their context and ordinary sense, harmoniously with the scheme and objects of the Trust and Loan Companies Act and the intention of Parliament: see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21. Section 536 provides that a contravention of any provision of the Trust and Loan Companies Act does not invalidate "any contract", not "any contract or clause therein" or words to similar effect. As Justice Raikes pointed out in *Jordan*, if Parliament intended s. 536 to bar any and all common law remedies for breaches of Trust and Loan Companies Act provisions, it did not say so expressly or by implication. And as the Court held in *Continental Bank Leasing*, the object of a saving provision such as s. 536 is to abolish the ultra vires doctrine, which concerns corporate capacity, not the illegality doctrine, which concerns contracts tainted by illegality.
- [106] This interpretation also sits comfortably with *Continental Bank Leasing* and *Renard*, both of which involved distinctly different factual contexts. As Justice Saunders observed in *Watson v. Bank of America Corporation*, 2015 BCCA 362, a case only stands for a

proposition in the context of the facts on which the decision was made: at para. 51. In both *Continental Bank Leasing and Renard*, the issue for determination was the validity of an impugned contract or transaction, not the enforceability of a severable clause in an otherwise valid contract. In addition, in both cases the public policy considerations at play militated heavily against a finding of invalidity. However, in my view, neither case supports the proposition that, based on s. 536, a court may never grant a remedy short of completely invalidating a contract given a breach of a provision of the *Trust and Loan Companies Act*. In particular, neither forecloses the possibility that, applying the modern approach to the illegality doctrine and exercising its remedial powers given a lender's breach under the *Trust and Loan Companies Act*, a court may find a severable clause of a mortgage contract unenforceable and grant a remedy to a borrower in respect of the breach.

[107] Further support for this interpretation is discernible in *Marcotte*, where the Court upheld a merits determination in a class action brought by consumers against banks in respect of undisclosed foreign currency conversion charges on credit card purchases. The trial judge found that the banks failed to disclose the conversion charges in violation of provincial consumer legislation and ordered their reimbursement. On appeal, the banks challenged his determination based on federal paramountcy, arguing that the purpose of the *Bank Act* scheme was to provide for national standards and, therefore, provincial disclosure requirements were inoperative. In rejecting that argument, the Court commented that the federal scheme was not a complete code to which no other rules apply and that provincial disclosure rules and accompanying civil remedies support the federal scheme. In declining to deal with an alternative argument, it also distinguished between the prospect of nullifying a contract and nullifying a clause within a contract and stated that the silence of the *Bank Act* on civil remedies did not suggest civil remedies are inconsistent with the Act: at paras. 79, 82-84.

[108] Based on the foregoing interpretation of s. 536 of the *Trust and Loan Companies Act*, I would not accede to this ground of appeal.

Did the chambers judge err in failing to find that the *Business Practices and Consumer Protection Act* and the *Mortgage Brokers Act* are complete codes and do not create restitutionary causes of action?

[109] CMI goes on to submit that the statutory illegality claims do not disclose a cause of action insofar as they claim restitutionary relief arising from breaches of the *Business Practices and Consumer Protection Act* or the *Mortgage Brokers Act*. It contends that both statutes are complete codes and says neither creates a restitutionary cause of action. Accordingly, to the extent she found that the Amended Notice of Civil Claim asserted viable claims for restitutionary relief in connection with breaches of the provisions of the *Business Practices and Consumer Protection Act* or *Mortgage Brokers Act*, CMI submits that the chambers judge erred in law.

- [110] In support of this submission, CMI relies on *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310, *Wakelam and Sandhu*. It says this Court concluded in *Koubi* that restitutionary relief based on breaches of the Business Practices and Consumer Protection Act is unavailable at law, which conclusion was reiterated and reinforced in *Wakelam and Sandhu*. In particular, CMI says, this Court held in *Koubi* that the objectives and provisions of the Business Practices and Consumer Protection Act reveal a clear legislative intent to provide an exhaustive code regulating consumer transactions and that therefore restitutionary relief based on a breach of that statute is unavailable. Thereafter, in *Wakelam and Sandhu*, this Court applied a "Koubi analysis" and concluded that restitutionary claims based on breaches of the Business Practices and Consumer Protection Act and the Mortgage Brokers Act did not disclose viable causes of action.
- [111] In CMI's submission, it follows that Ms. Sherry's claims for restitutionary relief are untenable to the extent they are "tied" to alleged breaches of the Business Practices and Consumer Protection Act and the Mortgage Brokers Act. Therefore, it says, those claims are bound to fail.
- [112] I am not persuaded by this submission. In my view, the restitutionary claims at issue in *Koubi*, *Wakelam and Sandhu* differed materially from the restitutionary claims at issue in this case and the scope and effect of those authorities is narrower than CMI contends.
- [113] Unlike the plaintiffs in *Koubi*, *Wakelam and Sandhu*, Ms. Sherry does not assert a common law cause of action to enforce statutorily-conferred rights and seek a restitutionary remedy that is additional to or inconsistent with the remedies contemplated by the Business Practices and Consumer Protection Act or the Mortgage Brokers Act. Rather, Ms. Sherry asserts that severable contractual clauses were tainted by CMI's alleged breaches of its disclosure obligations under those statutes such that the clauses are unenforceable based on the illegality doctrine. In these circumstances, she claims, CMI collected the prepayment charges without a contractual basis for doing so (i.e., without a juristic reason) and therefore it was unjustly enriched and must refund the wrongfully-collected funds. I see nothing in *Koubi*, *Wakelam and Sandhu* that precludes such an argument from being made.
- [114] The action in *Koubi* concerned defective door locks installed in Mazda3 vehicles. The central question for determination was whether deceptive acts allegedly committed by a supplier contrary to the Business Practices and Consumer Protection Act could provide a foundation for a claim in waiver of tort resulting in an award for disgorgement of any profits earned as a result of marketing an unfit product. Waiver of tort is a restitutionary doctrine that permits a plaintiff to recover benefits a defendant has obtained by its wrongdoing instead of damages measured by the plaintiff's loss. Ms. Koubi's claim was based on the proposition that waiver of tort is an independent cause of action and that class members need not prove individual loss as their common damages. In assessing the viability of this claim, Justice Neilson analysed the scope of the waiver of tort doctrine and the statutory rights, obligations and remedies created by the Business Practices and

Consumer Protection Act.

[115] Justice Neilson concluded Ms. Koubi had an arguable case that the novel waiver of tort doctrine might provide an independent cause of action and, if so, might permit recovery of profits Mazda gained from their wrongful conduct without the necessity of proving individual damages: at para. 40. However, citing *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 and *Macaraeg v. E. Care Contact Centers Ltd.*, 2008 BCCA 182, she stated the general rule is that there is no cause of action at common law to enforce statutorily-conferred rights unless legislators intended the statutory right to be enforced outside the statutory remedies by civil action:

[51] The relationship between a statutory breach and a civil action was addressed by this Court in *Macaraeg*, a case in which the court below had found an employee was entitled to bring a civil action to recover overtime pay. At paras. 73-74, [Justice Chiasson] summarized the proper approach as follows:

[73] The law is clear: the general rule is there is no cause of action at common law to enforce statutorily-conferred rights. The exception arises when, on a construction of the legislation as a whole, the court concludes the legislators intended that statutorily-conferred rights can be enforced by civil action. An examination of the cases suggests that the rights are not enforced per se, that is, standing alone, but are enforced in a recognized cause of action: [citations omitted]. In *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 at 222-223, the court stated that breach of a statute is evidence of negligence:

The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is, as Professor Fleming has put it, more intellectually acceptable. It avoids, to a certain extent, the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England.

[74] In my view, in ascertaining the intention of the legislators an important indicium is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and prima facie there is no civil cause of action. If the statutory remedy is inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, granting the right would be pyrrhic.

[Emphasis added.]

[116] Applying the general rule articulated in *Macaraeg*, Justice Neilson went on to find that the Business Practices and Consumer Protection Act represents an exhaustive code for the administration and enforcement of the statutory rights and obligations that it establishes. She also found that granting restitutionary relief based on the waiver of tort doctrine would be inconsistent with the statutory remedies created under the Act, which limit recovery for pecuniary loss to restoration of a consumer's own damages or loss. Therefore, she concluded that Mazda's alleged deceptive acts could not provide the predicate unlawful act

required for a cause of action based on waiver of tort and related restitutionary damages:

- [64] I discern nothing in the [Business Practices and Consumer Protection Act] to support the view that the legislature intended to augment its statutory remedies by permitting consumers to mount an action against a supplier for restitutionary relief based on the novel doctrine of waiver of tort. Such a conclusion is inconsistent with the express language of ss. 171, 172(3)(a) and 192, which clearly limit recovery for pecuniary loss to restoration of the consumer's own damages or loss arising from a deceptive act.
- [65] I conclude the chambers judge erred in failing to comprehensively address the objectives and provisions of the [Business Practices and Consumer Protection Act]. Had she done so, I am satisfied she would have recognized it represents a comprehensive and effective scheme for the administration and enforcement of the statutory rights and obligations it creates. In essence, it has occupied the field of consumer rights and remedies arising from deceptive acts by suppliers. Mazda's statutory wrongdoing under ss. 4 and 5 of the Act cannot therefore provide the predicate unlawful act required for a cause of action based on waiver of tort and restitutionary damages. Ms. Koubi is restricted to the remedies provided by the Act. I am satisfied Ms. Koubi's claim for restitutionary damages and disgorgement of profits arising from waiver of tort does not disclose a cause of action.

[Emphasis added.]

- [117] The action in Wakelam also concerned allegedly deceptive marketing acts contrary to the Business Practices and Consumer Protection Act and restitutionary claims for disgorgement of profits. The marketing in question related to cough and cold medicine for use by children. Noting that the plaintiff did not attempt to distinguish Koubi, Justice Newbury applied the reasoning in that case and found the claims premised on a breach of the Business Practices and Consumer Protection Act failed to disclose viable causes of action:
- [55] As I understand the defendants' argument on appeal, it is that in addition to the damages that might be available to her individually under s.171 of the [Business Practices and Consumer Protection Act], Ms. Wakelam seeks recovery under restitutionary principles (for "unjust enrichment, waiver of tort and constructive trust") premised on breach of the [Business Practices and Consumer Protection Act]. As Mr. Mogerman for the plaintiff put it, she relies on the alleged statutory breach as an "element" (the wrongful act) of the three purported causes of action, but the remedy sought is the restitution or disgorgement of money received by the defendants as a result of the alleged statutory breach, rather than her own damages or losses that are expressly contemplated by the [Business Practices and Consumer Protection Act].
- [66] In my view, the reasoning in Koubi applies not only to the allegation of waiver of tort advanced by Ms. Wakelam but also to her claims for unjust enrichment and constructive trust insofar as they are based on breach of the [Business Practices and Consumer Protection Act]. Although I might not have used the phrase "occupying the field" (which has constitutional connotations), I see no legislative intent to create restitutionary causes of

action arising from or based on breaches of the [Business Practices and Consumer Protection Act]; nor has the plaintiff sought to argue that the [Business Practices and Consumer Protection Act] provides only 'ineffective enforcement'.

[Emphasis added.]

- [118] Finally, in *Sandhu* Justice Saunders considered the viability of a "panoply of causes of action" in connection with allegedly undisclosed fees collected by the defendant for title insurance in respect of residential mortgage loans. In assessing the waiver of tort claim, she stated at para. 101 that the Mortgage Brokers Act and the Financial Institutions Act, R.S.B.C. 1996, c. 141, did not "per se, create rights in the customer" and were not intended to operate as a "platform for civil redress" outside their narrow parameters, then concluded:
- [102] I do not consider that either of these statutes, by themselves, create a basis for a civil suit. These statutes stand in contrast to other consumer protection legislation such as the Business Practices and Consumer Protection Act and the Competition Act that expressly provide for civil suit. Given the detail in the Financial Institutions Act and the Mortgage Brokers Act and applying a Koubi analysis, I do not consider these two statutes to create a free standing basis to claim recovery, whether for damages or as part of a waiver of tort claim...
- [103] As a restitutionary claim, I would not accept these issues for certification. As I will explain more fully in discussing the respondents' claim in unjust enrichment, I do not read the further amended notice of civil claim as alleging that the appellants obtained a benefit capable of disgorgement. In other words, it is not pleaded that the appellants retained the funds that are the subject of the allegations of misrepresentation.
- [104] Accordingly, I consider issues relating these statutes to restitutionary claims should not have been certified.
- [119] Under the heading "Other Restitutionary Claims", Justice Saunders also found that the plaintiffs' unjust enrichment claim did not disclose a cause of action because the defendants did not retain the undisclosed fees:
- [109] The further amended notice of civil claim claims unjust enrichment of the appellants through benefit of the undisclosed legal fees. They say the appellants were enriched and they were deprived, with no juristic reason for the enrichment. They claim restitution of the gains through the mechanism of a declaration of constructive trust for the amount of the enrichment, and seek disgorgement.
- [110] The judge accepted the claim of unjust enrichment for purposes of certification. He did so not on the theory of receipt of the undisclosed fees but rather on the theory the appellants benefitted by enjoying enhanced business...

[111] I agree with the appellants that payment of the contested fee would not support a claim in restitution because the further amended notice of civil claim does not allege the appellants pocketed the fees. Indeed, the further amended notice of civil claim clearly alleges, in respect to both the Sandhu and the Simmons, that the fees were paid by the appellants to the insurance company.

[Emphasis added.]

[120] As is apparent from the foregoing, Ms. Sherry's claim for restitutionary relief in connection with alleged breaches of disclosure provisions of the Business Practices and Consumer Protection Act and the Mortgage Brokers Act is materially different from the claims at issue in Koubi, Wakelam and Sandhu. Unlike the plaintiffs in those cases, she does not seek to use the common law to enforce statutorily-conferred rights, nor does she assert that the Business Practices and Consumer Protection Act and the Mortgage Brokers Act create restitutionary causes of action or claim relief that is inconsistent with the statutory remedies contemplated by those Acts. Rather, she relies upon the modern approach to the illegality doctrine to support a finding that a severable contractual clause is unenforceable and, if it is, she seeks a refund of the charges CMI collected from class members and retained without contractual justification in order to restore the status quo ante based on unjust enrichment: see *Kim v. Choi*, 2020 BCCA 98 at paras. 33-50 for a helpful discussion of the illegality doctrine, unjust enrichment claims and tainted contracts. In other words, unlike the plaintiffs in Sandhu, Ms. Sherry asserts a restitutionary claim for unjust enrichment in circumstances in which she does allege that the defendant wrongfully received and "pocketed" her funds.

[121] In my view, given the nature of Ms. Sherry's claims for restitutionary relief in connection with alleged breaches of the Business Practices and Consumer Protection Act and the Mortgage Brokers Act they are arguable regardless of whether those statutes represent complete codes for the administration and enforcement of the statutory rights and obligations which they create. It follows that I would not accede to this ground of appeal.

Did the chambers judge err in failing to find that breaches of the pleaded provisions of the Trust and Loan Companies Act, the Business Practices and Consumer Protection Act and the Mortgage Brokers Act cannot form the basis of a claim that a contract is illegal because they regulate the content of disclosure statements, not contracts?

[122] Finally, CMI submits that breaches of the statutory disclosure provisions cannot form the basis of a claim that a mortgage contract is illegal because those provisions do not govern the contract. Rather, they impose obligations in relation to disclosure statements. Citing *Haghdust v. British Columbia Lottery Corporation*, 2014 BCSC 1327, CMI says that, to succeed, Ms. Sherry must establish that a contract or contractual provision was prohibited by statute and thus illegal to form or that it required the performance of an act in a manner prohibited by statute. In both cases, it says, the statute must regulate the impugned contract or contractual provision in question.

- [123] However, CMI contends, Ms. Sherry makes no such allegation. Rather, in paragraphs 25-27 of the Amended Notice of Civil Claim, it asserts that she pleads "the contractual provisions are illegal to form -- void ab initio -- because they are prohibited by statute" (these paragraphs correspond to paragraphs 24-26 in the Notice of Civil Claim set out above). Accordingly, CMI says it is plain and obvious that the statutory illegality claims are bound to fail because, on their face, the pleaded statutory provisions do not prohibit or even regulate the content of the mortgage contract. It follows, it says, that, even if true, her allegations do not disclose a viable cause of action because there is no nexus between the statute and the purportedly invalid contract.
- [124] I do not accept this submission.
- [125] In *Haghdust*, Justice Savage determined the merits of certified claims for recovery of jackpot prizes won by claimants at casinos but withheld because they were participants in a voluntary self-exclusion program. One of the issues for determination was whether their recovery was barred by the illegality doctrine. The defendant argued that its otherwise legal gaming contracts with the claimants were so tainted by their illegal behaviour in attending at the casinos that it would undermine the integrity of the justice system to give them effect. In considering this issue, Justice Savage, then of the trial court, reviewed the principles underlying the illegality doctrine and, based on the modern approach, concluded that it did not apply in the circumstances of the case.
- [126] In my view, nothing in *Haghdust* detracts from the viability of Ms. Sherry's pleading that CMI's use of the impugned clauses is "contrary to and in breach of" its statutory disclosure obligations, which clauses she asserts are illegal and contrary to public policy. Like the pleadings in *Jordan*, the Amended Notice of Civil Claim clearly places in issue the adequacy of CMI's disclosure of the cost of prepayment charges and the manner of their calculation and the effect of that alleged inadequacy on the enforceability of the impugned clauses of the mortgage contracts (see *Jordan* at para. 83). As discussed in *Neidermeyer v. Charlton*, 2014 BCCA 165, leave to appeal ref'd [2014] S.C.C.A. No. 285 and *Fleming v. Massey*, 2016 ONCA 70, leave to appeal ref'd [2016] S.C.C.A. No. 113, among other authorities, the law has developed in favour of consumers by expanding the circumstances in which a contract or contractual provision that is inconsistent with a statutory scheme or contrary to legislative intent may be found to be invalid and unenforceable. As previously discussed, in my view under the modern approach to the illegality doctrine it is arguable that the pleaded statutory disclosure breaches could have that effect on the enforceability of the impugned prepayment clauses in this case.

Conclusion

- [127] For all of the foregoing reasons, I would dismiss the appeal.

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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