IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Versatile Mortgage Corp. v. Hemmingson,* 2010 BCSC 1361

Date: 20100928
Docket: S85766
Registry: New Westminster

Between:

Versatile Mortgage Corp., Garth Butcher, Tanys Butcher, David Bruce and Tony Vogel

Plaintiffs

And

Julie Louise Hemmingson, Rickard Hans Hemmingson, James McIntyre, carrying on business as MacCallum McIntyre, a firm

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiffs:	D. K. Magnus P. Khaira
Counsel for the Defendant Julie Louise Hemmingson :	T. C. Armstrong, Q.C.
Counsel for the Defendant Rickard Hans Hemmingson:	D. L. Stratmoen
Counsel for the Defendant James McIntyre, carrying on business as MacCallum McIntyre, a firm:	A. A. Macdonald
Place and Date of Trial/Hearing:	New Westminster, B.C. June 30, 2010
Place and Date of Judgment:	New Westminster, B.C. September 28, 2010

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Introduction

[1] This matter concerns the measure of interest payable on any amount found due and owing to the plaintiffs for money advanced under a mortgage dated November 4, 1997. The issue is whether the interest accruing on the amount due and owing is subject to interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, or the interest rate set out in the mortgage, 15.75 percent compounded monthly.

[2] The application is brought under Rule 34, seeking disposition of a point of law arising from the pleadings, or alternatively under Rule 18A.

[3] In 2008, the parties sought summary judgment under Rule 18A. Madam Justice Arnold-Bailey was asked to determine the mortgage terms. In her reasons for judgment, indexed at 2009 BCSC 64, she describes the facts at para 2:

> [T]he "Form B" mortgage, which gives rise to this litigation, was signed by the Hemmingson defendants on behalf of 542690 B.C. Ltd. in a form that made reference to non-existent Filed Standard Mortgage Terms, and was then altered after their signature to facilitate registration of the mortgage at the Land Title Office. The alteration was made by an agent of the lawyer who had prepared the mortgage, and substituted Prescribed Mortgage Terms, which include personal convenants by the Hemmingsons. Subsequently a default occurred on the mortgage, foreclosure proceedings were taken, and the plaintiffs now seek to recover the shortfall based on Hemmingsons' personal covenants contained in the Prescribed Mortgage Terms.

[4] The plaintiffs sought rectification of the mortgage by selecting the prescribed mortgage terms as its governing terms, and a declaration that the Hemmingson defendants covenanted to be personally responsible under the terms of the mortgage. Arnold-Bailey J. decided that she could not resolve the rectification issue by way of summary judgment and referred the matter to the trial list.

[5] For the purposes of this application, the defendants agree that the prescribed mortgage terms are applicable. On that basis, I find that the matter of the applicable interest rate is appropriate for determination on a point of law under Rule 34. Determining the applicable interest rate will resolve a significant aspect dispute

between the parties and will likely result in a saving of time and effort at trial. The interest calculation below amply demonstrates that.

Background

[6] The plaintiffs are transferees/assignees of a mortgage dated November 4, 1997 that was signed by 542690 B.C. Limited (subsequently renamed Ridgeback Holdings Inc.) as borrower and the defendants Julie Hemmingson and Rickard Hans Hemmingson as the covenantors. The amount of the loan secured by the mortgage was $310,000. Paragraph 5 of the mortgage prescribes an interest rate of 16 percent, which was lowered to 15.75 percent when the mortgage was renewed on October 15, 1998.

[7] The mortgage was filed on November 17, 1997 as a first charge against two properties and as a second charge against another two properties, all of which were located in Sicamous, British Columbia.

[8] On June 19, 1999, the plaintiffs commenced foreclosure proceedings against Ridgeback and the Hemmingsons.

[9] On November 29, 1999 the plaintiffs obtained an order nisi in the foreclosure proceedings on the following terms:

a) the mortgage was in default;

b) the redemption period was one month;

c) the amount required to redeem the mortgage was $259,455.12, plus interest at 15.75 percent per annum, compounded monthly, being a daily rate of $118.85;

d) judgment against Ridgeback in the amount of $259,455.12 plus costs; and

e) the application for judgment against the Hemmingsons was adjourned generally.

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[10] On October 17, 2001 in related foreclosure proceedings, an order absolute for foreclosure was granted in respect of the two properties where the mortgage stood as second mortgage on the title. On July 8, 2002 in the foreclosure proceedings, an order approving sale for $61,500 was granted to the plaintiffs in respect of one of the two remaining properties. On July 8, 2002 the order approving sale for $75,000 was granted to the plaintiffs in respect of the last remaining properties.

[11] Neither Ridgeback nor the Hemmingsons have made any payment to the plaintiffs of monies owing in the foreclosure proceedings. There is a short fall on the amount owing on the mortgage. On April 13, 2004 the plaintiffs commenced an action for judgment against the Hemmingsons jointly and severally claiming the amount of $350,608.69 plus contractual interest at the rate of 15.75 percent from the date of the filing of the statement of claim. In their prayer for relief the plaintiffs seek the following relief against the Hemmingsons:

a) judgment on the mortgage as filed in the Land Title Office on November 17, 1997;

b) alternatively, an order that the mortgage dated November 4, 1997 be rectified to contain the agreement actually made between the plaintiffs and defendants by selecting the prescribed mortgage terms as the terms which govern the mortgage;

c) damages in debt in the amount of $350,608.69;

d) in the alternative to para. c, an amount of the monies found to be due to the plaintiffs on rectification of the mortgage and an order for payment of money;

e) 15.75 percent per contractual interest from the date of filing the statement of claim.

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Interest Calculations

[12] The significance of the determination of the applicable interest rate is evident. The amount claimed by the plaintiffs on the shortfall using an interest rate of 15.75 percent compounding monthly means the shortfall owing as of April 13, 2010 is $896, 522.09. The plaintiffs calculate the amount owing as $350,608.69 as of the filing of the statement of claim on April 13, 2004, which consists of the amount of the judgment of $259,455.12 awarded against Ridgeback in the November 29, 1999 order nisi less the $136,500 proceeds of sale obtained pursuant to the July 8, 2002 court ordered sale. The plaintiffs apply the 15.75 percent interest rate on the amount of $350,608.69, which they say was owing on the mortgage as of April 13, 2004 (upon filing the statement of claim). At the interest rate of 15.75 percent compounded monthly, the plaintiffs assert they are owed, as of April 13, 2010, $896,522.09.

[13] The defendants say that the judgment against Ridgeback, $259,455.12 as stated in the November 29, 1999 order nisi accrues interest at the court ordered interest rate. As of July 8, 2002 when the court granted two orders approving the sale of the property the total owing on that judgment was $301,547.23. After deducting the proceeds of sale, the shortfall is $165,047.23, which accrues interest in accordance with court ordered interest since July 9, 2002 to April 21, 2010 of $55,792.85. The defendants assert that the total balance owing plus interest at court order interest is $223,830.08.

Prescribed Standard Mortgage Terms - Part 2

[14] The following terms are relevant to my deliberations:

> **INTERPRETATION**
>
> **1.**(1) In these mortgage terms
>
> **"borrower"** means the person or persons named in the mortgage form as a borrower;
>
> …
>
> **"borrower's promises and agreements"** means any one or more of the borrower's obligations, promises and agreements contained in this mortgage;

…

"covenantor" means a person who signs the mortgage form as a covenantor;

…

"interest" means interest at the interest rate shown on the mortgage form;

…

"interest rate" means the interest rate shown on the mortgage form;

…

"mortgage money" means the principal amount, interest and any other money owed by the borrower under this mortgage, the payment of which is secured by this mortgage;

…

"principal amount" means the amount of money shown as the principal amount on the mortgage form as reduced by payments made by the borrower from time to time, or increased by the advance or readvance of money to the borrower by the lender from time to time, and includes all money that is later added to the principal amount under these mortgage terms;

…

PROMISES OF THE BORROWER

5.(1) The borrower promises

…

(m) to pay all of the lender's costs, including legal fees on a solicitor and client basis, to

(i) prepare and register this mortgage, including all necessary steps to advance and secure the mortgage money and to report to the lender,

(ii) collect the mortgage money;

(iii) enforce the terms of this mortgage, including efforts to compel the borrower to perform the borrower's promises and agreements,

(iv) do anything which the borrower has promised to do but has not done, and

(v) prepare and give the borrower a discharge of this mortgage when the borrower has paid all money due under this mortgage and the borrower wants it to be discharged.

...

(o) to pay any money which, if not paid, would result in a default under any charge or encumbrance having priority over this

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mortgage or which might result in the sale of the land if not paid, and

...

AGREEMENTS BETWEEN THE BORROWER AND THE LENDER

...

(6) The lender may spend money to perform any of the borrower's promises and agreements which the borrower has not performed and any money so spent shall be added to the principal amount, bear interest from the date that the money was so spent, and be immediately due and payable to the lender.

...

COVENANTOR'S PROMISES AND AGREEMENTS

15. (1) As the lender would not have agreed to lend the principal amount to the borrower without the promises of the covenantor and in consideration of the lender advancing all or part of the principal amount to the borrower at the request of the covenantor, the covenantor promises

(a) to pay all the mortgage money when due, and

(b) to keep and perform all the borrower's promises and agreements.

(2) The covenantor agrees that, with or without notice, the following shall in no way affect any of the promises of the covenantor or the liability of the covenantor to the lender:

(a) a discharge of the land or any part of the land from this mortgage;

(b) any disregard or waiver of a default;

(c) the giving of extra time to the borrower to

(i) do something that the borrower has agreed to do, or

(ii) cure a default;

(d) any other dealing between the borrower and the lender that concerns this mortgage or the land.

(3) All the covenantor's promises shall be binding on the covenantor until all the mortgage money is fully paid to the lender.

(4) The covenantor is a primary debtor to the same extent as if the covenantor had signed this mortgage as a borrower and is not merely a guarantor or a surety, and the covenantor's promises and agreements are joint and several with the borrower's promises and agreements. This means that the covenantor and the borrower are both liable to perform all the borrower's promises and agreements.

(5) If more than one person signs the mortgage form as covenantor, the promises are both joint and several.

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GENERAL

16. (1) This mortgage binds the borrower and the covenantor and their successors, executors, administrators and assigns.

(2) Each person who signs this mortgage as a borrower is jointly and severally liable for all of the borrower's promises and agreements as though each such borrower had been the only borrower to sign.

(3) If any part of this mortgage is not enforceable all other parts will remain in effect and be enforceable against the borrower and any covenantor.

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Position of the Parties

[15] The plaintiffs emphasize that the Hemmingsons are covenantors not guarantors. They are joint and severally liable with Ridgeback to be personally responsible for the mortgage.

[16] The Hemmingsons requested an adjournment of judgment against them when the plaintiffs took judgment against Ridgeback in November 1999. The Ridgeback judgment did not operate as a merger of its claim against the covenantors. Merger does not operate where liabilities are joint and several, and does not apply where there is no intention to merge gathered from the circumstances attending the transaction, including the conveyance documents and the applicable terms and agreements and conducts of the parties.

[17] The plaintiffs say that the causes of actions against the principal debtor and the guarantor are separate and that judgment against one does not preclude judgment from the other: *Security Home Mortgage Corp. v. Langdon*, [2000] 8 W.W.R. 277 (Alta. Q.B.). Merger could only arise if there are obligations owed by the same entity under different security agreements: *Dicecco v. Canada Mortgage & Housing Corp.* 2002, 164 O.A.C. 187.

[18] The plaintiffs argue that the Hemmingsons could have avoided the increased interest based on the mortgage interest rate had they chosen to pay the principal debt and stop the interest running.

[19] The plaintiffs further assert that there is no merger in equity, as merger only results if that was the intention of the parties: *der Bach v. Mueller* (1987), 46 D.L.R. (4th) 320 (B.C.C.A.) at para. 23:

> The intention to merge may be expressed in the conveyance itself, or in the circumstances attending the transaction, or it may be presumed from a consideration of whether or not it is in the best interests of [the interest holder] that the personal judgment be kept alive.

[20] The plaintiffs acknowledge that the prescribed terms do not specifically address whether merger applies to limit the liability of the covenantors in this matter. They refer to para. 15 of the prescribed terms to reflect the parties' intention and expectations. In respect of para. 15(1)(a) and (b), the plaintiffs argue that money would not be lent to Ridgeback without the covenants of its principals. This demonstrates an explicit arrangement that does not allow the Ridgeback's principals to walk away from their obligations under the covenant. The plaintiffs argue that para. 15(2)(a), (b), (c) and (d) provide that the liability of the covenantor continues regardless of the lender's dealings with the borrower concerning the mortgaged lands. The plaintiffs could release or deal with or take any proceedings against Ridgeback and the mortgaged lands as they saw fit, but no such act by the borrower would release the covenantor from payment and that the covenant remain in full force until all the monies payable under the mortgage are fully paid and satisfied. The plaintiffs refer to para. 15(3) as requiring that all the mortgage money be fully paid to the lender. The definition of "mortgage money" under para. 1 includes the principal amount and interest. The definition of "interest" means that the "interest at the interest rate shown on the mortgage form" (15.75 percent compounded monthly). The "mortgage form" is Form B and the prescribed terms. The plaintiffs argue that by implication the covenantors remain liable for the mortgage money until it is paid fully. The mortgage money is the principal sum of $259,455.12 as of November 29, 1999 plus accrued interest from that date at 15.75 percent per annum.

[21] The defendants submit that the authorities relied on by the plaintiffs do not support the proposition that the mortgage rate of interest applies to a claim against the covenantor where judgment has been granted against the borrower in the order

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nisi, the property that was charged by the mortgage has been sold and the covenantors' obligations arise because he or she signed a mortgage document agreeing to be personally responsible for any debt that is owing by the borrower under the mortgage. They argue that when the judgment in the amount of $259,244.12 was granted against the borrower Ridgeback in the November 29, 1999 order nisi, this included the principal amount plus interest at the mortgage rate (15.75 percent compounded monthly), up until November 29, 1999. The covenantors' liability to pay the "mortgage money" until fully paid is restricted to the amount owing on the mortgage by the borrower. This is the "mortgage money" as defined by the prescribed terms. The extent of the covenantors' liability is the same as the borrowers. The borrowers' liability for judgment attracts a post judgment interest rate of five percent in accordance with the *Court Order Interest Act*. They are not liable for an amount that is greater than that owed by the borrower, Ridgeback.

[22] The defendants submit that the plaintiffs' argument in respect of merger is irrelevant. Taking judgment against a principal debtor does not preclude the plaintiffs from later asking for judgment against the guarantor or covenantor. In this case, the loan and guarantee/covenants are one agreement. The covenantor is liable for one debt, and that is the amount owed by the borrower, Ridgeback. The defendants assert that it is unreasonable and clearly contrary to the intention of the parties that the plaintiffs could wait five years after the order absolute and the judgment against Ridgeback to sue and collect interest at the contractual rate of interest as provided in the mortgage.

Discussion and Analysis

[23] The question of the applicable rate of interest running on a balance owing after the order nisi is granted has been the subject of significant judicial attention particularly in the mid 1980's. The issue was summarized by Caruthers J.A. in *Norfolk Trust v. Wolcoski* (1982), 38 B.C.L.R. 130 (C.A.) (in para.2):

> 2. The sole issue for determination on this appeal is whether the 5% per annum interest rate stipulated in s. 12 to 15 of the Interest Act of Canada as

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> applicable in British Columbia applies to interest accruing to a foreclosing mortgagee from and after the order nisi providing for sale of the mortgaged premises until satisfaction from proceeds of sale, or whether such interest accrues to the mortgagee and is compounded at the rate as agreed upon as provided for in the mortgage contract or agreement as contemplated by s. 2 of that statute.

[24] The court determined the issue at paras. 10 and 11:

> 10 In my view, where personal judgment is taken and the Order for Sale is in effect execution on the personal judgment, the matter of interest falls squarely within the provisions of the Interest Act and cannot be said to be a matter for resolution in accordance with the mortgage contract or agreement. S. 2 of the Interest Act opens with the words; "except as otherwise provided by this or by any other act of the Parliament of Canada," which makes the provisions of s. 12 through to 15 of that statute applicable in this case where personal judgment debt exists and is sought to be recovered. S. 13 of the Interest Act provides that every judgment debt shall bear interest at the rate of 5% per annum until it is satisfied.
>
> 11 In my view, in this case interest at 5% is applicable from and after June 28, 1979 on the reducing balance unpaid of the judgment debt.

[25] In *Canlan Investment Corporation v. Gibbons* (1983), 42 B.C.L.R. 199 (S.C.) van der Loop L.J.S.C. discussed a problem arising in foreclosure proceedings. At para. 11, he observed that the mortgagee's procedure was to postpone judgment on the personal covenant where interest would accrue at five percent per annum in accordance with the *Interest Act*, R.S.C. 1970, c. I-18 in order that the mortgage interest rate (which was significantly higher) would continue to accrue. The result was an increasing difference between the amount owing on the judgment and the amount required to redeem the property. The amount owing on the judgment attracted an interest rate of five percent whereas the amount required to redeem the property attracted the rate as prescribed in the mortgage. The court commented, in obiter, at para. 24, that "the proper procedure is for the court to deal with the relief sought against the property and under the personal covenant in one hearing and in one judgment..."

[26] In *Taylor v. Rudolph Holdings Ltd.* (1985), 68 B.C.L.R. 259 (C.A.), Anderson J.A. referred to *Canlan* and stated at paras. 13 to 16:

> 13 In conclusion, I wish to say a word about the important issues raised on appeal. Firstly, I wish to adopt the policy statements contained in the

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> reasons for judgment of van der Hoop L.J.S.C. in Canlan, which may be summarized as follows:
>
> > (1) It is not appropriate to delay an application for personal judgment for the purpose of obtaining a higher rate of interest than the rate payable under the Interest Act, RSC 1970, c 1-18.
> >
> > (2) It is not appropriate that the mortgagor or guarantor be left in a state of uncertainty as to whether a claim for a deficiency will be made.
>
> 14 Secondly, as counsel for the respondent conceded, there can be no prejudice to the mortgagee in requiring the mortgagee to seek personal judgment as of the date of the order nisi.
>
> 15 Thirdly, in order to achieve certainty and consistency in mortgage practice, it might be appropriate to enact legislation requiring a mortgagee, if he desires to obtain personal judgment, to seek such judgment at the time he makes application for an order nisi. Such legislation would probably provide the court with a discretion to adjourn applications for personal judgment in appropriate circumstances. As counsel for the respondent pointed out, it might be well, in some cases, to adjourn applications for personal judgment pending settlement negotiations.
>
> 16 Lastly, in the absence of legislation it might, as a matter of practice, be advisable to inquire of counsel, at the time an application is made for an order nisi, whether personal judgment is being sought. If the court were advised that personal judgment was not being sought, the court, in the exercise of its equitable jurisdiction, could refuse to make an order nisi or adjourn the application. Such a procedure would, pending legislation, create consistency in mortgage practice and, to some extent, protect mortgagors from the prejudice which might result from postponing applications for personal judgment.

[27] In C*ourtenay Savings Credit Union v. Harle* (1987), 13 B.C.L.R. (2d) 357 (C.A.), the mortgagee still had a charge against property, so the mortgage interest rate continued to run. The property was still available to the mortgagor to redeem with payment of the amount due and owing plus interest at the mortgage rate. Conversely, if there is no property to redeem, the mortgagee can pursue the personal judgment to which court order interest applies.

[28] Seaton J.A. described the divergent accounts at para 22:

> If the mortgage interest rate is other than 5 per cent the moment personal judgment is granted, the amount payable on that judgment and the amount payable on the mortgage begin to diverge. The judgment is attracting interest at 5 per cent and the mortgage at the mortgage rate. When the redemption period has expired there will be two quite different balances. The mortgagors can pay the amount of the personal judgment against them with interest at 5 per cent and they are no longer liable. That does not pay out the mortgage.

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> The sum necessary to redeem the mortgage includes interest at the mortgage rate. There must be two accounts kept. Proceeds of sales must be credited to each of those accounts to determine the new balance in each account. When those two accounts are considered in this case it appears that the personal judgments have been paid, but the mortgage debt has not been paid. It follows that the mortgagee can take no further steps on the personal judgments but can proceed on the mortgage.

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[29] The authorities support the conclusion that the court ordered interest rate runs on the judgment granted in the order nisi. The interest rate specified in the mortgage applies to the amount to be paid during the redemption period in order to redeem the property. After the order absolute was granted in October 2001 and the order for sale of the properties was granted in July 2002, the equity remaining in the subject property was extinguished. There was no property to redeem. The sale is an enforcement of the mortgage security. The mortgagee has a right to recover under the judgment.

[30] Anderson, J. applied the principles of *Courtenay Savings* in *Nelson & District Credit Union v. Star Chamber Building Inc.* (1991), 16 R.P.R. (2d) 209 (S.C.) where the personal guarantees of the mortgagors liability under the subject mortgage were not part of the mortgage document. He observed, at paras. 9-11:

> The several cases cited by the respondent deal with situations where the mortgagee has opted for a court ordered sale with a resulting deficiency. In such a situation, all of the mortgagee's security is gone and the only recourse open to the mortgagee is to the judgment on the personal covenant of the mortgagor. Interest on the judgment accrues at 5% pursuant to the Interest Act. When no other security is available to the mortgagee, its right to recover is limited to the amount due under the personal judgment... [citations omitted]
>
> However, that is not the case where some security remains. In Martens et al. v. First National Mortgage Co. Ltd. (1982), 38 B.C.L.R. 270, Berger, J. said:
>
> > “Even though the mortgagee's judgment carries interest at a statutory rate, the mortgagee is entitled to retain its security until it has been paid the principal together with interest at the rate fixed by the mortgage.”
>
> ...
>
> In the present matter, it is to be noted that the limited guarantee executed by the respondent is not part of the mortgage document. It is separate and distinct. Whatever amount may be owing under the guarantee is separate and distinct from the mortgage. In effect, it is a security, in addition to that of the mortgage, for the payment of the primary debt, the amount of which, at

> the date of this application, stood at $26,615.05, including interest at the agreed rate of 13.5%...

[31] This is similar to the cases relied on by the plaintiffs, particularly *Langdon* and *Dicecco* which consider guarantee agreements which are independent of the mortgage. The plaintiffs refer to that principle in their argument: merger can only arise if there are obligations owed by the same entity under different security instruments. The point is further illustrated in *Co-operative Trust Co. v. Kirkby,* [1986] 6 W.W.R. 90 (Sask. Q.B.).

[32] The prescribed mortgage terms, the covenantors are liable to pay the "mortgage money" until it is fully paid. The "mortgage money" is the "principal amount, interest and any other money owed by the borrower [Ridgeback] under this mortgage." The judgment granted against Ridgeback in the order nisi of November 29, 1999 included the principal amount plus interest at the mortgage rate (15.75% compounded monthly) up to that date. Thereafter, the rate of interest on the judgment was court ordered interest. It follows that the interest rate running on the covenantors' liability is the same as that which applies to the judgment against Ridgeback.

[33] Whether the covenantors sought an adjournment of judgment against them in November 1999 is of no moment. The plaintiffs had options: they could have adjourned the entire matter to a future date; they could have expressly reserved the right to pursue judgment against the Hemmingsons later, before the properties were sold as enforcement of the mortgage security.

[34] I am not persuaded that it is reasonable to find that the interest rate specified in the mortgage ought to be applied because the Hemmingsons could have paid the principal debt and avoided the accrual of interest in accordance with the rate specified in the mortgage. That does not address the issue of the applicable rate of interest.

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Conclusion

[35] The interest accruing on the amount due and owing is subject to interest in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79.

[36] The parties are at liberty to address costs orally or by written submission. If there are no submissions, the defendants are entitled to their costs at scale B.

"Gropper J."

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