IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Forseed Haro Holdings Ltd. v. Bank of Montreal,* 2025 BCSC 585

Date: 20250331
Docket: S245023
Registry: Vancouver

Between:

Forseed Haro Holdings Ltd.

Plaintiffs

And

Bank of Montreal, 1104227 B.C. Ltd., CM (Canada) Asset Management Co. Ltd., Cloudbreak Holdings Ltd., Terrapoint Developments Ltd.

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	C. Dennis, K.C. S. Dawson R. Power
Counsel for the Defendant, Bank of Montreal:	K. Jackson L. Hiebert R. Cotton-O'Brien
No further appearances	
Place and Date of Hearing:	Vancouver, B.C. December 18-20, 2024
Place and Date of Judgment:	Vancouver, B.C. March 31, 2025

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A. INTRODUCTION

[1] This action was filed in the aftermath of an insolvency proceeding that led to substantial financial losses by the participants in a Vancouver real estate development venture. The plaintiff, Forseed Haro Holdings Ltd. (“Forseed”), was one of those participants.

[2] The defendant, Bank of Montreal (the “Bank”), provided financing for the venture to allow the purchase of the lands. As part of the Bank’s security package, Forseed provided a guarantee and pledge of cash collateral. In October 2023, the Bank made demand on the guarantee and seized monies held in Forseed’s name so that the money could be applied in reduction of the loan.

[3] Forseed’s core allegation is that, without any right to do so, the Bank took its cash from an account or investment over which the Bank did not have security, and that the Bank took more from the proper account than it was entitled to seize. As such, Forseed seeks repayment from the Bank of the seized funds ($13,680,919.48).

[4] The Bank disputes that Forseed is entitled to any relief, as sought, in that it acted throughout in accordance with its legal, equitable and contractual rights. The Bank also contends that Forseed is estopped from advancing its arguments, based on its position in the receivership proceedings. In the alternative, in its counterclaim, the Bank seeks certain relief, such as rectification and specific performance in respect of the pledge of funds.

[5] Forseed and the Bank agree that this matter is suitable for determination by summary trial. Forseed advances claims against the defendants other than the Bank; however, those claims are alternative claims to Forseed’s claim against the Bank and are not before the Court at this time. The parties agree that those claims will be determined sometime in the future, if required.

B. AGREED AND OTHER FACTS

[6] Much of the background of this matter is set out in my earlier reasons for judgment in the receivership proceedings: *Bank of Montreal v. Haro-Thurlow Street Project Limited Partnership*, *2*024 BCSC 47 [*RFJ*].

[7] The parties have executed an Agreed Statement of Facts, supplemented by certain documents attached to the affidavits of legal assistants. In addition, the Bank's representative, Peter Mullin, has provided two affidavits. Forseed has not provided any affidavit evidence. Excerpts from examination for discovery transcripts of both parties are also before the Court.

a) The Bank's Initial Security

[8] In August 2018, Haro and Thurlow Acquisition Corp. purchased lands in the downtown Vancouver area that had development potential (the "Property"). In October 2018, this company changed its name to 1104227 B.C. Ltd. ("110").

[9] As a result of the purchase of the Property, 110 became the beneficial owner of the Property, which was legally registered in the name of Harlow Holdings Ltd., described as the Nominee.

[10] 110 financed the purchase of the Property in part by borrowing funds from the Bank. In August 2018, 110 borrowed $94 million (the "Loan") pursuant to a loan agreement dated August 21, 2018 (the "Loan Agreement"): *RFJ* at para. 19. At that time, the Bank's security for the Loan included, among other things, a mortgage of the Property. The security also included various guarantees from the participants in the venture (which did not include Forseed): *RFJ* at paras. 8, 21–22.

[11] In connection to the Loan Agreement, Forseed and other entities also executed subordination and postponement agreements in favour of the Bank. By these documents, the debt owed to Forseed by 110 and any related security for that debt, was postponed and subordinated to the debt owed to the Bank by 110 and security held by the Bank in relation to that debt.

[12] As of November 2018, the Bank's initial security package also included a pledge of cash collateral from 110 (the "Original 110 Pledge"). At that time, 110 deposited $15 million (the "Original Pledged Funds") into an account with the Bank (#0004-1810-990). The Original Pledged Funds were then invested in two guaranteed investments certificates ("GICs"), in the respective amounts of $10 and $5 million. Both GICs were redeemable on May 27, 2019.

[13] The majority of the Original Pledged Funds ($13.625 million) deposited by 110 were funded by an unsecured loan from Forseed to 110.

[14] In November 2018, 110 and Forseed executed a promissory note in respect of the $13.625 million owed to Forseed by 110 and 110 executed a direction to pay.

[15] On May 27, 2019, the above GICs in the name of 110 matured and they were renewed for a 6-month term expiring on November 22, 2019.

b) First Amendment Agreement

[16] Sometime after November 2018 (and before May 2019), 110 transferred its beneficial interest in the Property to a limited partnership.

[17] In the *RFJ*, I described the complex ownership of the Property via the limited partnership (defined as HTLP) and the entities involved in the venture at that time:

> [5] The respondent, Haro-Thurlow Street Project Limited Partnership ("HTLP"), is the beneficial owner of the development property in Vancouver (the "Property"). The respondent, Harlow Holdings Ltd. ("Harlow Holdings"), is the legal owner of the Property. The respondent, Haro and Thurlow GP Ltd. ("HTGP"), is the general partner of HTLP. I will refer to all of these respondents collectively as the "Borrowers".
>
> [6] HTLP is beneficially owned by its limited partners, the respondents, 11044227 B.C. Ltd. ("110"), as to 45%; Forseed Haro Holdings Ltd. ("Forseed"), as to 45%; and Terrapoint Developments Ltd. ("Terrapoint"), as to 10%. 110, Forseed and Terrapoint are collectively called the "Partners".
>
> [7] 110 is beneficially owned by the respondent, 1115830 B.C. Ltd. ("111"), which is, in turn, beneficially owned by the respondent Kang Yu Canning Zou ("Mr. Zou"). Mr. Zou is a director of HTGP, Harlow Holdings, 110 and 111. He is also a director of the respondents, Cloudbreak Holdings Ltd. ("Cloudbreak") and CM (Canada) Asset Management Co. Ltd. ("CM"). I will refer to all of these respondents collectively as the "CM Group".

[18] As above, Forseed acquired 45% of the limited partnership units in HTLP, the beneficial owner of the Property. The balance of the limited partnership units in HTLP are held by 110 (45%) and the defendant, Terrapoint Developments Ltd. ("Terrapoint") (10%).

[19] On May 15, 2019, Forseed's representative, Shang Wang, advised the Bank that it wanted to move "our portion of cash collateral" (i.e. $13.625 million of the Original Pledged Funds) into Forseed's account at the Bank. On May 29, 2019, Mr. Wang, confirmed Forseed's request to invest the monies by buying a GIC. Mr. Wang stated in his email:

> We think buying GIC in Forseed BMO Account will provide a layer of additional security and from our year end F/S point of view, we would be able to show it in a proper account that satisfies all parties.

[20] The Bank emphasizes that the circumstances that gave rise to the very transactions and circumstances, that are at the heart of this matter, arose from Forseed's express request to transfer "its portion" of the cash collateral then held by the Bank in 110's name as security for the Loan into its own name (rather than in 110's name), so that Forseed could benefit from earning interest on those funds.

[21] The first amendment to the Loan Agreement was required, in part, to facilitate Forseed's request that the cash collateral be held in accounts in its own name, which the Bank agreed to do. Other changes to reflect the new name of the borrower (HTLP) were required.

[22] On August 26, 2019, the parties entered into an amending agreement to the Loan Agreement (the "First Amendment Agreement") dated August 26, 2019.

[23] Pursuant to the First Amendment Agreement, among other things:

a) Forseed became a party to the Loan Agreement as a "Guarantor" and a "Credit Party" by which, under section 5.01, it was required to, among other things:

> (q) –[…] provide the Agent and the Lenders with such further information, financial data, documentation and other assurances as they may reasonably require from time to time in order to ensure ongoing compliance with the terms of this Agreement;

b) the Bank's security under the Loan Agreement was revised to include:

1. a limited recourse guarantee from 110 in the amount of $1.375 million and a cash collateral agreement from 110 securing a deposit of "not less than $1,375,000 in a GIC or interest-bearing account in the name of [110]"; and

2. a limited recourse guarantee from Forseed in the amount of $13.625 million and a cash collateral agreement from Forseed securing a deposit of "not less than $13,625,000 in a GIC or interest-bearing account in the name of [Forseed]".

[24] On November 22, 2019, Forseed executed a guarantee in favour of the Bank in the amount of $13.625 million (the "Guarantee"). The Guarantee refers to a "Cash Collateral Agreement" also being signed by Forseed. The parties agree that the "Cash Collateral Agreement" referred to in the Guarantee is a pledge of cash collateral (the "Pledge") also executed by Forseed sometime in November 2019.

[25] The bank account that is in issue in this proceeding is Forseed's account number 001-00040-1765480 at the Bank (the "480 Account"), which is expressly referred to in the Pledge.

[26] On November 22, 2019, following maturity of the original GICs in 110's name in which the Original Pledged Funds had been invested, $13.625 million (the "Forseed Pledged Funds") were paid into the 480 Account and $1.375 million was paid into 110's bank account at the Bank.

c) Investment of Forseed Pledged Funds

[27] On November 22, 2019, at Forseed's direction, the Forseed Pledged Funds were invested in GICs so that Forseed could earn interest on those Funds. The account numbers ascribed to the GICs were different from the 480 Account number.

[28] Between November 2019 and October 2023, on Forseed's instructions, each time the GICs matured, the Bank re-invested the Forseed Pledged Funds in new GICs, with the interest being deposited into the 480 Account.

[29] Forseed's GIC numbers remained the same until August 2022, when Forseed instructed the Bank to invest the funds in 30-day term deposits. At that time, one of the GIC account numbers changed.

[30] As HTLP's development efforts continued in respect of the Property, the participants in the venture went on to execute further amendments to the Loan Agreement, with the last being on September 30, 2022, being the Seventh Amendment Agreement.

d) Default / Receivership Proceedings

[31] In July 2023, the Loan Agreement, as amended, was in default. In August 2023, the Loan matured.

[32] On August 29, 2023, the Bank's counsel made demand on the participants in the venture, being HTLP as the borrower, and the various guarantors (including Forseed). The demand served on HTLP was for $95,520,027.39, including $94 million principal, interest of $1,475.027.39 and an agency fee of $45,000.

[33] On October 11, 2023, the Bank seized the $1.375 million cash collateral that had been provided by 110 as part of its security.

[34] On October 23, 2023, the Bank commenced the receivership petition proceedings, naming HTLP, and its general partner (HTGP), Harlow Holdings and various guarantors (including Forseed) as respondents (the "Receivership"). However, the Bank did not name Forseed as a respondent, or seek judgment

against it in the Receivership in respect of the Guarantee; rather, Forseed was named as a respondent by reason of its registration of a second mortgage against the Property: *RFJ* at para. 24.

[35] In the Petition, the Bank claimed that the amount due under the Loan as of October 16, 2023 was approximately $95.2 million, supported by the sworn evidence of Mr. Mullin (presumably reflecting that the 110 cash collateral had been applied to the Loan earlier on October 11, 2023).

[36] In October 2023, the Bank also moved to seize the cash collateral that had been provided by Forseed, as part of its security. Specifically:

a) on October 18, 2023, the Bank seized $10 million from Forseed's GIC account ending #568 and $41,022.22 from the 480 Account; and

b) on October 28, 2023, the Bank seized $3.625 million from Forseed's GIC account ending #835 and $14,897.26 from the 480 Account.

[37] The Bank applied all of the funds seized to the amounts then outstanding under the Loan Agreement.

[38] On December 14, 2023, Forseed filed a response to petition in the Receivership, referencing an affidavit that I will discuss in more detail below.

[39] On December 20, 2023, the Bank's counsel filed an affidavit attaching a payout statement indicating an amount owed as of December 19, 2023 of just about $82.25 million.

[40] In December 22 and 28, 2023, the Court heard the Bank's application to appoint a receiver to sell the Property. That hearing was contested, including by Forseed through its counsel at the time.

[41] On January 11, 2024, I appointed a receiver of the Property as the Bank sought, for reasons set out in the *RFJ*.

[42] In August 2024, I approved a sale of the Property and authorized the receiver to distribute the proceeds.

[43] In September 2024, the Receiver received net sale proceeds on the sale of the Property of approximately $86.1 million. The Receiver paid approximately $85.2 million to the Bank, resulting in the Bank suffering a shortfall of $2,319,013.78. The Bank then recovered that shortfall by seizing other funds pledged by 110 to the Bank.

[44] The Bank acknowledges that, given its recovery of all funds owed by HTLP, as above, it never acted on other security it held to secure the Loan under the Loan Agreement, as amended. That other security included various guarantees and a real property mortgage securing one of those guarantee obligations.

C. THE ISSUES

[45] The issues raised at this summary trial are:

a) Did the Bank breach the terms of the Guarantee and/or the Pledge?

b) If there was a breach, what remedy, if any, is appropriate?

c) If there was a breach, is Forseed prevented from asserting any remedy by reason of estoppel or approbation / reprobation? and

d) If there was a breach, and Forseed is entitled to a remedy, is the Bank entitled to relief under its counterclaim, such as rectification, specific performance or damages?

D. DID THE BANK BREACH THE GUARANTEE AND / OR PLEDGE?

[46] Forseed argues that the Bank:

a) Was in breach of the Pledge because it had no right to seize the funds in Forseed’s GICs; and

b) If the Bank did have the right to seize the $13.625 million held in the GICs, it was in breach of the Guarantee in seizing the further $55,993.15 from the 480 Account.

[47] The Bank argues that the terms of the Pledge are such that the Forseed Pledged Funds were at all times secured in its favour, both contractually and in accordance with the *Personal Property Security Act*, R.S.B.C. c. 359 [*PPSA*]. The Bank emphasizes that, at all times, the dealings with respect to the Forseed Pledged Funds regarding the GICs were undertaken at the specific request of Forseed and for Forseed's benefit.

a) Terms of the Guarantee and Pledge

[48] The Guarantee executed by Forseed in favour of the Bank was limited in two respects:

1. Forseed's liability was limited to the aggregate amount of $13.625 million plus legal and other costs, charges and expenses; and

2. the Bank's recourse under the Guarantee was limited to "the Bank enforcing its rights and remedies against the security granted by [Forseed] under the Cash Collateral Agreement" (i.e. the Pledge).

[49] The Guarantee provided:

> … [Forseed] guarantees payment to the Bank payment in cash and performance in full of the Guaranteed Obligations as they may become due from time to time, in accordance with the express provisions of the Credit Agreement, provided that the sole recourse of the Bank against the Guarantor under this Guarantee will be limited to the Bank enforcing its rights and remedies against the security granted by the Guarantor under the Cash Collateral Agreement [i.e. the Pledge].. … The liability of the undersigned (or each undersigned if more than one), under this Guarantee, is limited to the aggregate amount of [$13.625 million], from and including the date of demand until payment, and legal or other costs, charges and expenses.
>
> …
>
> IT IS FURTHER AGREED that [Forseed] shall be liable to the Bank in respect of all debts and liabilities, subject to the limitation, if any, set forth in the first paragraph of this Guarantee, stated to be owing to the Bank by

> [HTLP] under any agreement entered into by [HTLP] with respect to such debts and liabilities …
>
> AND IT IS FURTHER AGREED that this shall be a continuing guarantee, and shall guarantee any ultimate balance owing to the Bank, including all costs, charges and expenses which the Bank may incur in enforcing or obtaining payment of amounts due to the Bank from [HTLP] either alone or in conjunction with any person, or otherwise howsoever, or attempting to do so.
>
> [Emphasis added.]

[50] The Pledge provided for security for payment of all indebtedness of Forseed to the Bank. It reads in part:

> 1. [Forseed] hereby pledges to [the Bank], all monies of the undersigned in the account(s) described below and the undersigned hereby pledges to the Bank all monies so held at any time and from time to time and the delivery by the undersigned as pledgor and acceptance by the bank as pledgee of any and all monies held as aforesaid are and will be effectively established by the delivery to the Bank of the said monies.
> 2. The whole as a general and continuing collateral security for payment of all and every present and future indebtedness and liability direct or indirect, absolute or contingent, matured or not, of [Forseed] to the Bank, and any ultimate unpaid balances therefore and interest, and the said money or any part of it may, without notice to [Forseed], as and when the Bank thinks fit, be appropriated on account of such parts of said indebtedness and liability as to the Bank seems best and such appropriations may be changed and varied from time to time.
>
> [Emphasis added.]

[51] At the bottom of the Pledge, the bank account referred to in para. 1 is specifically identified is the 480 Account.

b) Did the Bank have a security interest in the GICs?

[52] The parties are agreed that the Bank held a security interest in the funds in the 480 Account under the Pledge. They part company, however, as to whether the Bank's security continued into the GICs.

[53] The *PPSA* is intended to be a code to regulate the granting of security interests and the competing security interests that may arise with respect to personal property held by debtors. Therefore, the *PPSA* addresses not only rights that arise

as between the debtor and secured creditor, but also third party rights as between secured creditors.

[54] Section 2(1)(a) of the *PPSA* states that the legislation applies to "every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral". Section 2(1)(b) specifically provides that the *PPS*A applies to a "pledge".

[55] It is important to frame this issue in the context of concepts that arise under the *PPSA*. The central concepts are "attachment" and "perfection".

[56] Attachment is the *PPSA* concept that governs whether and when a secured creditor has a security interest in personal property. Part 2 of the *PPSA* (Validity of Security Agreements and Rights of Parties) addresses attachment, and includes a provision under s. 9 that "a security agreement is effective according to its terms". This provision indicates that, generally, the *PPSA* applies to consensual security interests.

[57] Section 12(1) of the *PPSA* addresses the time of attachment:

> A security interest, including a security interest in the nature of a floating charge, attaches when
>
> (a) value is given,
>
> (b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and
>
> (c) except for the purpose of enforcing rights between the parties to the security agreement, the security interest becomes enforceable under section 10,
>
> unless the parties have specifically agreed to postpone the time for attachment in which case the security interest will attach at the time specified in the agreement.

[58] Perfection under the *PPSA* is a different concept and is addressed in Part 3 (Perfection and Priorities). Perfection is a concept that allows a secured creditor to protect itself against *other parties* (such as secured creditors and a trustee in bankruptcy). It is not a concept that affects the secured creditor/debtor relationship. No issue arises with respect to the fact that the Bank properly perfected its security

interest in the monies in the 480 Account, as referenced in the Pledge; in any event, that fact is irrelevant since no third party rights are at issue in this case.

[59] It is undisputed that the Pledge created a "security agreement" in "collateral", as those terms are defined in the *PPSA*. As an aside, I would note that it is incorrect to describe this collateral as "money" (which is a defined term under the *PPSA*). Legally speaking, a balance in a bank account is an obligation or debt owing by the financial institution to a customer (i.e. an "intangible", a catch-all category of personal property defined in the *PPSA*): see *Foley v. Hill*, (1848), 2 H.L. Cas. 28, 9 E.R. 1002 (H.L.).

[60] Ultimately, the category of personal property for the balance in the 480 Account is irrelevant, as the parties agree that the pledge secures personal property under the *PPSA*. However, to use the common vernacular, I will continue to refer to the Bank's collateral under the Pledge in the 480 Account as "money".

[61] There is no dispute that the Pledge is a transaction to which the *PPSA* expressly applies. The Pledge gave rise to the Bank holding a security interest against the money (the collateral) on deposit in the 480 Account, which was enforceable at all times against Forseed, the debtor, in accordance with the terms of the Pledge.

[62] The Pledge specifies the 480 Account as the account in which funds deposited are pledged in favour of the Bank. On November 22, 2019, the Forseed Pledged Funds were deposited into the 480 Account, as contemplated and agreed by the parties. From that time, until the seizure by the Bank in October 2023, the funds were either in the 480 Account or, on Forseed's instructions, invested in GICs issued by the Bank.

[63] The fact that most of the collateral (the money in the 480 Account) was later used to purchase the GICs gives rise to the issue of "proceeds" under the *PPSA* provisions. "Proceeds" are defined in s. 1 of the *PPSA*, as follows:

> "proceeds" means:
>
> (a) identifiable or traceable personal property fixtures and crops
>
> (i) derived directly or indirectly from any dealing with collateral or the proceeds of collateral; and
>
> (ii) in which the debtor acquires an interest, …

[64] The *PPSA* also provides:

> 28(1) Subject to this Act, if collateral is dealt with or otherwise gives rise to proceeds, the security interest:
>
> (a) continues in the collateral unless the secured party expressly or impliedly authorizes the dealing; and
>
> (b) extends to the proceeds,
>
> but if the secured part enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.
>
> …
>
> (2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected by registration of a financing statement …

[65] The Bank argues that, since the GICs arose from monies in the 480 Account, they were at all times identifiable and traceable funds (i.e. proceeds), and subject to the Bank's security interest created by the Pledge. Forseed disagrees, taking the position that the funds held in the GICs were not "proceeds" such that s. 28 of the *PPSA* applies; alternatively, Forseed argues that, even if the funds in the GICs were "proceeds", the Bank lost its security interest because this was a "dealing" with the Forseed Pledged Funds that was effected by the Bank and authorized by the Bank.

[66] On this issue, Forseed refers to two cases: *Bank of Nova Scotia, v. IPS Invoice Payment System Corporations*, 2010 ONSC 2101 [*IPS*] and *Toronto-Dominion Bank v. Kerwin Capital Corp.*, 2013 SKQB 376 [*Kerwin*].

[67] *IPS* was a case between competing secured creditors, including a lender over accounts receivable which were later factored in favour of another party. Unlike this case, the court found that the lender did not authorize the debtor to enter into the factoring agreement (para. 14). The court found that, without question, based on the

Ontario legislation (which differs from s. 28 of the *PPSA*), the lender's security extended to both the original collateral (i.e. the receivables) and the proceeds (the amount paid by the factor to the debtor for the accounts) (para. 20).

[68] Accordingly, the issue in *IPS* was whether the amount due to the lender was the full amount owing or whether it was limited to the value of the collateral (paras. 2 and 21). The court concluded that, to avoid a windfall to the secured creditor, recovery was limited to the value of the collateral (para. 33). In fact, such a limit on recovery by the secured creditor, not found then in the Ontario legislation, is expressly set out in s. 28(1) of the *PPSA*.

[69] In *Kerwin*, the original lender and a later factor disputed who was entitled to a tax credit that had been factored. The priority issue that arose was considered in the context of the Saskatchewan legislation that is the same as s. 28 of the *PPSA*. That case turned on the court's finding that the lender, in its loan documentation, had expressly consented to the debtor dealing with the collateral with another lender (paras. 33–34). In the alternative, the court considered the limitation of recovery issue that was also considered in *IPS*. On that issue, it is somewhat telling that the court in *Kerwin* found that, as in *IPS*, if the lender's consent had not been decisive on the first issue, the lender was entitled to both the original collateral and proceeds, but subject to the limitation on recovery.

[70] The issues in *IPS* and *Kerwin* involved competing third party interests and priority disputes, with both decisions also considering their terms of the agreements as between the secured creditor and the debtor. *Kerwin* specifically found that the secured creditor has agreed with the debtor that it would release its security over the tax credit. To that extent, there were significant factual findings in both cases, such that I find the reasoning in *IPS* and *Kerwin* to be of little assistance.

[71] Forseed argues that s. 28 only contemplates a scenario where there are three parties—a creditor, debtor and third party who takes the collateral (as in *IPS* and *Kerwin*). I agree that s. 28 does address that scenario but I also conclude that it has

a far broader scope that also addresses a secured party's rights more generally, including in relation to the debtor.

[72] It is helpful to return to first principles. The *PPSA* ensures that a secured creditor is able to maintain its secured rights against collateral, including when a debtor deals with the collateral without the agreement of the secured creditor (as in *IPS*). For example, if a secured creditor has a security interest in the vehicle, if the debtor sells that vehicle, the secured creditor maintains its security interest in the original collateral and also has rights to the monies that arise from the sale (i.e. proceeds).

[73] The *PPSA* provisions are clear that, in the above example, the secured creditor's rights extend to both the collateral (the vehicle) and the proceeds (the sale monies). As stated by Roderick Wood, Ronald Cuming and Catherine Walsh in *Personal Property Security Law*, 3rd ed (Toronto: Irwin Law, 2022), at 610, citing s. 28(1) of the *PPSA*:

> The *PPSA* expressly recognizes the distinction between following collateral and tracing proceeds. It provides that where collateral is dealt with so as to give rise to proceeds, the security interest continues in the collateral and also extends to the proceeds.
>
> [Emphasis added.]

[74] The authors at 615 emphasize that a primary reason to seek to claim proceeds under the *PPSA* is:

> … the extension of the security interest to assets that were not taken as collateral pursuant to the terms of the security agreement.

[75] It is open to the secured creditor to agree with the debtor to release some or all of its secured interests, in the collateral and/or proceeds, depending on the circumstances. In the above example, it would open to the secured creditor to allow the debtor to sell the vehicle clear of its interest but maintain its rights to the proceeds by, for example, requiring that those funds be paid to it upon sale.

[76] As stated in *Personal Property Security Law* at 427–428, the terms of the agreement between the secured creditor and the debtor in terms of any dealing with the collateral are key:

> The *PPSA* provides that where collateral is dealt with the security interest continues in the collateral unless the secured party expressly or impliedly authorizes the dealing [citing s. 28]. This provision can be seen as having two functions. The first is to state an essential attribute of a security interest: a security interest is a property interest that, subject to other requirements and priority rules of the Act, is not affected by the debtor's transfer of the collateral. The second function is to recognize that when a secured party expressly or impliedly authorizes the debtor to deal with the collateral, the security interest is affected to the extent of that authority. Depending upon the scope of that authority, disposition to a transferee may result in extinguishment or subordination of the security interest.
>
> The authority to deal with the collateral may be severely restricted. For example, if the debtor is given authority to deal with the collateral only with the prior express consent of the secured party, any disposition without that consent will have no effect on the security interest unless a priority rule of the Act dictates otherwise or unless the disposition is ratified after the event. The consent of the secured party is a condition that must be met before the sale takes place.
>
> However, if the condition is that the proceeds of the sale must be remitted to the secured party, or that some other condition has to be met after the disposition takes place, the security interest is extinguished. The underlying issue is whether or not the secured party has authorized the debtor to dispose of the collateral free of the security interest. …
>
> The authority to deal with the collateral may be implied from the circumstances of the parties or the conduct of the secured party. This conduct may involve an implicit waiver of an express provision in the security agreement requiring the prior consent of the secured party as a condition of the debtor's power to deal with the collateral.
>
> [Emphasis added.]

[77] One must therefore focus here on what happened between the Bank and Forseed and what the Bank and Forseed actually agreed to in respect of its security and the "dealing" with the monies in the 480 Account.

[78] In the Pledge, Forseed specifically gave the Bank a security interest over all of its "monies in the [480 Account]" and Forseed pledged "all monies so held at any time and from time to time".

[79] In my view, the express terms of the Pledge contemplated that the monies in the 480 Account, could be moved in and out from time to time, with the agreement of the Bank. That is exactly what happened here.

[80] Forseed argues that no "proceeds" arose from the transfer of the monies in the 480 Account into the GICs. I disagree. I reject Forseed's argument that the GICs cannot be identified and cannot be traced as coming from the 480 Account. It is unquestionably the case that the GICs were purchased from the monies in the 480 Account.

[81] The fact that the terms of the GICs provide for an obligation by the Bank to repay the GIC amounts on maturity and that the funds were not segregated is of no moment. "Intangibles", such as obligations owed, are defined in the *PPSA* as personal property. Further, GICs can be characterized as an "instrument", also a defined category of personal property under s. 1 of the *PPSA*, to the extent that it is a:

> … writing that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment…

[82] On a plain reading of the definition of "proceeds", the GICs are identifiable and traceable personal property (an Intangible or Instrument), in that the GICs were derived directly from dealing with the collateral (ie. the monies in the 480 Account) over which the Bank had security and Forseed acquired in interest in the GICs.

[83] When the monies in the 480 Account were transferred into various GICs, that was done by the Bank expressly at the direction of Forseed and I agree that it constituted "dealing" with the collateral. Forseed argues that the definition requires that the "dealing" be undertaken by the debtor. It will be obvious that no such limitation is found within the definition of "proceeds" above. In any event, I find that any "dealing" was done at the express direction of Forseed and was therefore effectively done by Forseed. Unquestionably, the Bank authorized that "dealing", and completed the transactions using its internal processes, but that does not alter the true characterization as to who directed that the GICs be purchased.

[84] Accordingly, I reject Forseed's contention that the "dealing" was only done by the Bank such that s. 28 has no application here.

[85] Further, and in any event, s. 28 cannot be read as eliminating a secured interest from proceeds, save and except with the secured creditors' agreement (such in as *Kerwin*). Section 28 confirms that a security interest continues in any proceeds. Clearly it contemplates a scenario where that secured creditor can consent to a removal of the secured interest in the original collateral, such as the vehicle example above illustrates.

[86] I return to the fundamental question here—what did the parties to this security agreement agree to?

[87] I agree with the Bank that the language of the Pledge does not restrict the Bank's interest only to funds in the 480 Account, but rather contemplates a continuing security interest in funds in the 480 Account "at any time" and "from time to time", i.e. any funds that were deposited into the 480 Account at any time.

[88] The Bank clearly agreed to the purchase of the GICs, but there is no evidence to support the finding that the Bank agreed to negate its rights to the GICs, as proceeds derived from the monies in the 480 Account.

[89] In that respect, the only evidence that Forseed points to are communications from various bank employees regarding the transfers from the 480 Account to the GICs. For example:

a) On November 14, 2019, before the Forseed Funds were deposited into the 480 Account, a documentation specialist advised the Bank's portfolio manager that the investment of the monies in the 480 Account into the GICs would result in the account number being changed;

b) In August 2022, in the context of renewals of the various GICs, Grace Lo, a senior documentation specialist at the Bank, advised the portfolio manager, Jude Martino, that, to "break" the investment (i.e. a GIC term

deposit) and "reopen" the new 30-day term deposit, "You will need to obtain a new collateral agreement". After Mr. Martino enquired of the "collateral agreement", Ms. Lo advised Mr. Martino that the form was available internally at the Bank; and

c) On August 30, 2022, Mr. Martino asked another Bank employee, Kenneth Bong, to prepare a new form for Forseed's GIC account holding $10 million, being a "Pledge of Instrument and Assignment of Proceeds" (not the same form as the Pledge). There is no evidence that the Bank ever prepared such a new form for Forseed to sign.

[90] The above statements by various bank employees are hardly the "smoking gun" (my phrase) that Forseed's counsel seemingly suggests they are, toward Forseed's assertion that the Bank had "admitted" that it acted in breach of its rights. In particular, I do not accept Forseed's emphasis on the above communications as determinative of its argument that the Bank lost its security in the monies in the 480 Account when they were used to acquire the GICs or that the Bank's security did not extend to the GICs as "proceeds".

[91] These communications are nothing more than the Bank's employees, presumably not lawyers, being prudent in terms of following the Bank's internal procedures and policies. I agree that it certainly would have been a prudent banking step or practice to secure further documentation to outline the state of affairs and to memorialize what was being agreed to as between the Bank and Forseed. However, that does not negate the Bank's actual steps, taken as a result of the requests of Forseed, and with Forseed's agreement at all times; nor does this correspondence alter the legal rights held by the Bank at all times in respect of not only the 480 Account, but the GICs as "proceeds", pursuant to the *PPSA* provisions.

[92] I find that at no time did the Bank authorize the dealing with the collateral (i.e. money in the 480 Account) without also having the protection of a continuing security interest in the GICs, as proceeds, until they matured and were either placed back in the 480 Account or reinvested in another instrument, that was also

identifiable and traceable back to the original collateral. To the extent that Forseed relies on *Kerwin* in that respect, the case is distinguishable.

[93] In that manner, the Bank's security interest was in the 480 Account monies (both before the transfer out to purchase the GICs and when the monies would be deposited back there from time to time, at which time they again became subject to the security interest directly under the Pledge) and in the GICs (as proceeds). I find as a fact that the Bank never agreed to give up its security interest in the funds, whether in the 480 Account or in the GICs, as proceeds.

[94] I find as a fact that the express agreement between the Bank and Forseed that arises from the entire body of evidence is that the parties agreed that Forseed could use the monies in the 480 Account only to purchase the GICs, being proceeds, which would be reinvested from time to time in the same or a similar investment vehicle, and upon maturity, would be deposited back into the 480 Account, along with any interest earned on this investments.

[95] At all times, the Bank maintained its direct control over the funds, in whatever form, in accordance with this agreement between the parties. This was entirely in accordance with what the parties contemplated from the outset and implicit in how both parties later dealt with the funds. In other words, these funds were to be held by the Bank at all times, either in the 480 Account or, if the Bank agreed, an investment vehicle arising from those funds, to secure repayment by HTLP, if HTLP defaulted in payment of the Loan.

[96] Again, I would emphasize that the body of evidence includes the express statement by Mr. Wang on May 29, 2019, on behalf of Forseed that buying the GICs in Forseed's account at the Bank would:

> … provide a layer of additional security and from our year end F/S point of view, we would be able to show it in a proper account that satisfies all parties. [my emphasis.]

[97] Taken in context, Mr. Wang could only have been referring to the Bank having that “additional security” in respect of the GICs, in terms of having rights to them as part of the security for the Loan.

[98] Forseed argues that the Bank had no right to seize both the GICs and the interest deposited in the 480 Account, since they were limited to seizing the value of the 480 Account at the time it was put into GICs by the limitation provision of s. 28 that:

> …if the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

[99] This limitation provision prevents a secured party from obtaining a windfall by simultaneously claiming the original collateral and any proceeds from its dealing (*Personal Property Security Law* at 618). This concern is clearly irrelevant in these circumstances, since the Bank at no time sought to recover both the original balance in the 480 Account (before it was transferred to the GICs) and the GICs. Indeed, the monies in the 480 Account no longer existed once the GICs were purchased.

[100] At all times, as between the Bank and Forseed, the Bank held a security interest in the Forseed Pledged Funds, both when they were deposited into the 480 Account and then when the funds were invested in GICs. At all times, the Forseed Pledged Funds were held as security for the obligations owed to the Bank under the Guarantee. When the GICs generated interest and that interest was deposited in the 480 Account on Forseed’s instructions, those funds became part of the collateral as funds deposited to that account “at any time and from time to time”.

[101] Again, returning to context, it must be emphasized that the above events took place within completely consensual arrangements between the Bank and Forseed. At no time did the Bank have any intention of removing its security over the funds pledged by Forseed in the 480 Account, or its right to claim against the GICs as proceeds from the monies in the 480 Account. At all times, the Bank acted solely to accommodate Forseed’s requests in firstly, transferring Forseed’s notional interest in

the Original Pledged Funds into its own account (i.e. the 480 Account rather than in 110's account) and, secondly, in later allowing Forseed to purchase GICs so that it could earn interest on the funds while the funds were held by the Bank as cash collateral.

[102] In other words, I find that nothing in these arrangements was intended by the parties to alter the Bank's security position in Forseed's monies, in whatever form, as against the HTLP Loan.

[103] I find that, at all times, in accordance with the terms of the Guarantee, the Bank was enforcing its rights and remedies against the funds pledged by Forseed under the Cash Collateral Agreement [i.e. the Pledge]. The Bank did not breach any term of the Guarantee. In addition, the Bank did not breach any term of the Pledge by seizing the Forseed Pledged Funds as it did. There is no term in the Pledge that limited the Bank's rights to the Forseed Pledged Funds to the 480 Account balance, as excluding any proceeds.

[104] In summary, at all times, the Bank held valid security interests, enforceable against Forseed, as its debtor. The Bank's security interest was maintained, not only in the money, being the balances in the 480 Account, but also in the GIC accounts, both of which were seized in October 2023.

c) Did the Bank seize more monies than it was entitled to under the Guarantee?

[105] Assuming that the Bank had the right to seize the GICs, as I have found above, Forseed argues that the Bank was in breach of the Guarantee because the Bank seized funds in excess of $13.625 million (i.e. $55,993.15).

[106] Forseed argues:

> … On a commercially reasonable construction of the guarantee, the bank can go over $13.625 million if and to the extent there were legal or other costs, charges and expenses related to the enforcement activity on the guarantee and not otherwise recovered / recoverable from others. Put another way, a provision for legal and other costs in a limited guarantee does not permit the creditor to collect funds from the surety exceeding the financial

> limit stipulated in a guarantee to create a buffer for the legal or other costs related to the enforcement proceedings against the underlying debtor. Were it otherwise, the limit bargained for by the surety would risk becoming illusory. It is well within the bank's ordinary competence to stipulate what its legal and other enforcement costs on the guarantee are, as one would see in collection proceedings. …

[107] Forseed points to the original demand that it received from the Bank, dated August 29, 2023. The Demand was in respect of not only $13.625 million, but also in relation to interests on that amount "in accordance with the terms of the Guarantee", which referred only to the interest and costs related to starting an action for recovery. Forseed argues that there is no evidence that the Bank had legal and other costs, which could conceivably be said to be covered under the more general provision, as argued by the Bank. Forseed argues that it never agreed to guarantee any costs that the Bank may incur by reason of actions taken against HTLP.

[108] I agree with Forseed that the terms of the Guarantee itself restricted the Bank to recovery of only $13.625 million plus legal and other costs, charges and expenses.

[109] However, the Bank refers to other documentation to support that Forseed's liability for costs and expenses was not as limited as it suggests.

[110] Forseed became a party to the Loan Agreement as a "Guarantor" and a "Credit Party" by which, under section 5.01, it was required to, among other things, pay certain expenses of the Bank:

> (p) **Expenses** – pay all reasonable legal fees and disbursements in respect of the Facility, the preparation and issue of any of the Security and this Agreement, and the enforcement and preservation of the Lenders' rights and remedies, all reasonable fees and disbursements for appraisals, insurance consultation, credit reporting and responding to demands, of any government or agency or department thereof, and the fees and disbursements of the Lenders' cost consultant, whether or not the documentation is completed or any funds are advanced under the Facility;

[111] In addition, the Loan Agreement provided:

> **11.14 Inconsistencies with Security**
>
> To the extent that there is any inconsistency between a provision of this Agreement and a provision of any document constituting part of the Security, the provision of this Agreement shall govern. For greater certainty, a provision of this Agreement and a provision of the Security shall be considered to be inconsistent if both relate to the same subject-matter and the provision in the Security imposes more onerous obligations or restrictions than the correspondent provision in this Agreement.

[112] Accordingly, Forseed was obliged by the terms of the Loan Agreement (not the Guarantee) to pay all of the Bank's costs and expenses, subject only to the limits imposed by the Loan Agreement. That obligation was separate and apart from that under the Guarantee, and to the extent that it was inconsistent with the Guarantee, the former (and broader obligation) was to govern.

[113] I agree that Mr. Mullin's evidence was very general in the sense that the $55,993.15 was taken and applied to the Bank's Loan without details as to it being applied to any reasonable legal fees and disbursements, as Section 5.01(p) of the Loan Agreement allowed. I take Mr. Mullin's evidence as supporting that it was. That aside, the onus lies on Forseed to establish a breach and no evidence has been shown to establish any such breach.

E. IF THERE WAS A BREACH, WHAT REMEDY IF ANY IS APPROPRIATE?

[114] Arising from its breach arguments, the remedy that Forseed seeks is a declaration that the Bank is required to return the funds seized (or alternatively, damages for wrongful seizure). However, even if Forseed had succeeded in requiring that the Bank repay most or all of the $13,680,919.48 as being a breach of the Pledge, the Bank would just set-off that amount as against Forseed's obligation to pay under the Guarantee.

[115] Accordingly, Forseed only really succeeds in this action if it not only establishes a breach by the Bank, but *also* secures a release of its obligations under the Guarantee. As such, Forseed seeks a declaration that it is released from liability under both the Guarantee and the Pledge.

[116] Although not necessary given my findings above, I will deal with Forseed's argument in the alternative, and assume a breach or breaches on the part of the Bank.

[117] Forseed argues that the Bank's breach is so significant that it is entitled to a declaration that its obligations to the Bank under the Guarantee are discharged. Since this would mean that the Pledge no longer secured any obligation, Forseed would then be entitled to a return of the monies seized by the Bank free and clear of any requirement to pay the Bank under the Guarantee.

[118] The Bank argues that, if there was a breach of the terms of the Guarantee (which it denies), the breach was not sufficient to discharge Forseed from its obligations thereunder.

a) General Principles

[119] The law regarding guarantees and when obligations under a guarantee may be discharged is well-known and not controversial.

[120] The obligations of a guarantor arise out of contract but the rights of the guarantor are, in general, creatures of equity. Equity protects a guarantor by supplementing the contractual rights that the guarantor would in any event have at law: *Halsbury's Laws of England*, 5th ed, vol. 49 (London: LexisNexis, 2015), p. 573 para. 840.

[121] *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, 1996 CanLII 182 [*Conlin*] stands for the proposition that a surety is a "favoured creditor" in the eyes of the law:

> [10] …[T]his Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. This appears from the reasons of Davis J. in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165 at p 172:
>
> > A surety has always been a favoured creditor in the eyes of the law. His obligation is strictly examined and strictly enforced.
>
> He goes on to say:

> "It must always be recollected," said Lord Westbury in *Blest v. Brown* (1862), 4 De G.F. & J 367 at 376, in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement, you have no hold on him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement he entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say "The contact is no longer that for which I engaged to be surety; you have to put an end to the contract that I guaranteed, and my obligation, therefore, is at an end.
>
> …

[122] As can be seen from the above quote, given a guarantor's "favoured" status, an alteration that implicitly and negatively affects the obligation or risk assumed by the guarantor can result in the guarantor being entitled to a remedy. Generally speaking, the remedy for a departure by the creditor from the strict terms of the guarantee is discharge, because the guarantor can fairly be said not to have agreed to any other bargain than that described in the guarantee.

[123] To give rise to a discharge, a creditor's departure from the terms of the guarantee must generally not be "plainly insubstantial or trivial" nor "necessarily beneficial" to the guarantor: *Coast Mountain Aviation v. M. Brooks Enterprises*, 2012 BCSC 1440 at para. 48 [*Coast Mountain BCSC*], aff'd 2014 BCCA 133 [*Coast Mountain BCCA*]; Kevin McGuinness, *The Law of Guarantee*, 3rd ed, (Toronto: LexisNexis, 2013) [*McGuinness*] at §12.54.

[124] At §12.55, *McGuinness* describes further:

> Where in a particular case a departure by the creditor from the terms of the guarantee agreement is potentially substantial and material to the obligation of the surety, and has the effect of varying the risk to which the security is exposed… he will be discharged without further inquiry into whether the departure was in fact prejudicial in that case. However, where the departure could only have worked to the surety's benefit, the surety will not be discharged. To result in the discharge of the surety, the conduct of the creditor must amount to a repudiation of the terms of the guarantee agreement. ...
>
> [Emphasis added.]

[125] The remedy does not involve an investigation into whether the creditor's departure has in fact caused the guarantor damage; the focus is instead on the *potential* for a relevant, adverse impact on the guarantor. As stated in *McGuinness* at §12.54:

> In order to discharge the surety, the change must be relevant, meaning that it must not be of a trivial nature but must have a potentially substantial effect on the rights of the surety.
>
> [Emphasis added.]

[126] Also, it is not a question of assessing the degree of damage caused by the creditor's departure from the terms of the guarantee. A departure from the terms produces a discharge because the guarantor can fairly be said not to have agreed to any other bargain than that described in the guarantee, properly construed. It is not a question of assessing the degree of damage caused by the alteration; a remedy short of discharge would have the effect of forcing a new bargain on the surety.

[127] *McGuinness* states at §12.53:

> Where the effect of the breach is to alter the nature or extent of the risk that the surety has agreed to assume, monetary damages in compensation for the breach can scarcely be relevant … A more practical remedy (and one likely not only to compensate the surety adequately for the breach but also to deter creditors from committing such breaches) is for the surety to obtain a partial or full release from liability under the guarantee.
>
> [Emphasis added.]

[128] Lastly, when considering whether a discharge is appropriate, Canadian courts distinguish between accommodation sureties and compensation sureties.

[129] In *Citadel General Assurance Co. v. Johns-Manville*, [1983] 1 S.C.R. 513, 1983 CanLII 52 (SCC) [*Citadel*] at 521, cited in *Conlin* at para. 12, the Court described an "accommodation surety" as one who execute a guarantee:

> … in the expectation of little or no renumeration and for the purpose of accommodating others or of assisting others in the accomplishment of their plans.

[130] Accommodation sureties are protected by strictly construing their obligations and limiting those to the precise terms of the guarantee: *Citadel* at 521.

[131] A compensated surety (sometimes called a professional surety) is in the business of undertaking surety contracts for a profit and is in that way akin to an insurer. “Compensated sureties” are held to a higher standard and may be required to prove substantive prejudice to warrant release from its guarantee: *Coast Mountain BCSC* at paras. 56–63. Not every variation in the guarantee, however trivial, will allow the surety to escape liability: *Citadel* at 524.

b) Is a Discharge Appropriate?

[132] The Bank denies that its seizure of the Forseed Pledged Funds constituted a breach of the Forseed Guarantee. However, in the alternative, the Bank submits there is no basis to limit or avoid Forseed’s liability under the Forseed Guarantee. The Bank argues that Forseed i) was a compensation surety and that any changes made to the terms of the security were, ii) trivial, iii) effected with Forseed’s consent, and iv) made necessarily for Forseed’s benefit.

i. Was Forseed a compensation surety?

[133] The parties disagree as to whether Forseed was an accommodation surety (per Forseed) or a compensation security (per the Bank).

[134] Forseed argues that it provided the Guarantee “for little or no benefit”. Forseed further argues that the Bank advanced the loan proceeds and the Property was acquired a year before Forseed agreed to give the bank a guarantee. As such, Forseed argues that its situation is closer to that of an accommodation surety than a compensated surety.

[135] With respect, Forseed’s assertion is inaccurate at best. Well before the execution of the Guarantee and Pledge, Forseed had already invested substantial funds in this real estate venture and exposed itself to the risks and benefits associated with that investment.

[136] In August 2018, when the Credit Agreement was executed, Forseed was already involved. At that time, 110 had pledged $15 million, apparently funded to a large extent by Forseed through its loan to 110. On November 27, 2018, 110 executed a promissory note in favour of Forseed in respect of an advance of $13.625 million. On that date, Forseed acknowledged and agreed that 110 was allowed to give those monies to the Bank as part of the collateral security in respect of the Loan.

[137] The later 2019 amendments to the Credit Agreement essentially carried through those same arrangements, but with a more direct relationship between Forseed and the Bank, as was requested by Forseed. It was only at that time, and as a result of Forseed's request, that the Guarantee was executed. In addition, Forseed's interest in the project had become a 45% interest in HTLP.

[138] As Justice Fenlon, as she then was, stated in *Coast Mountain BCSC* at paras. 65–68, the description of a compensation surety goes beyond professional surety companies, and extends to parties who provide guarantees as security for business ventures in which they have an interest. She stated:

> [69] These cases suggest that compensated sureties include not only professional surety companies, which receive a fee in return for assuming the risk under the guarantee, but also guarantors who, by virtue of holding an interest in the debtor company or in the asset to which the loan is to be applied, receive a direct benefit from the funds advanced to the debtor company by the creditor.

[139] Also relevant is the decision of *Royal Bank of Canada v. Zuk*, 2017 BCSC 2069 at para. 58, referring to a compensation surety as those who "benefit from their guarantee by reaping future benefits flowing from the success of the principal".

[140] I have no hesitation concluding that Forseed is a compensation surety in the above circumstances.

[141] To summarize, as a unitholder in HTLP, and as a person who had already invested substantial funds in the venture, Forseed had every reason to cooperate in securing the Bank's ongoing support through the Loan. There can be no doubt that

all of the participants in this venture wished to maintain that support, so as to see the development concluded, at which time they anticipated reaping the financial benefits of the investment. The execution of the Guarantee by Forseed did not materially change the extent of its interest in the venture, since without the Guarantee, 110 would have continued to pledge the $15 million in favour of the Bank, which notionally included the funds ($13.625 million) advanced by Forseed to 110.

[142] It cannot be said that Forseed came into this project late in the day to accommodate or assist "others". Forseed was directly benefitting itself as an investor in this project.

ii. Was there a non-trivial departure from the terms of the security?

[143] I agree with the Bank that Forseed is not entitled to a discharge because the Bank in no way departed substantially from the terms of the Guarantee, let alone caused Forseed substantive prejudice. To the contrary, the alleged breach by the Bank was trivial or non-material since the alleged breach did not in substance alter or prejudice Forseed's position or increase its exposure under the Guarantee.

[144] There was no difference in the potential prejudice faced by Forseed under the Guarantee at any time. The funds were under the control of the Bank at all times, as intended by Mr. Wang when he referred to the GIC's providing "security". Indeed, even though the Bank seized the funds while they were still in the GIC accounts, it made little difference since the Bank could have easily deposited the proceeds back into the 480 Account before seizing them under the express provisions of the Pledge.

iii. Were any changes made consented to by Forseed?

[145] *McGuinness* at §12.56 emphasizes that if the surety consented to what happened, even if beyond the terms of the guarantee, a discharge may not be appropriate:

> The right of a surety to receive a discharge whether by way of the extension of time, improper dealing with security or the release of the principal will not apply where the surety has specifically or implicitly consented to what has

> transpired, and may be precluded by the express terms of the guarantee itself. In addition to an express provision in the guarantee contract waiving the surety's right to invoke defences, such a waiver may be implicit where the course of conduct or dealing is contemplated under the terms of the agreements between the parties. … [footnotes omitted]
>
> [Emphasis added.]

[146] As with the first issue, Forseed argues that the Bank "cannot – and, in justice, ought not to be able to – overcome the fact that [the Bank's] own employees identified in advance that [the Bank] did not have the contractual right to act as it did against Forseed", as supporting a discharge. As I discussed above, I do not interpret the communications about paperwork between the Bank's employees as supporting that contention.

[147] As I have found above, at the material times, both parties understood and agreed that the Forseed Pledged Funds were impressed with a security interest in favour of the Bank. The parties' agreement was intended to simply allow the funds to move temporarily into the GICs so that interest could be earned. Upon maturity, the parties agreed that the interest would be deposited back to the 480 Account (just as it was) and that upon maturity, the GIC principal would also be deposited back, subject to agreement on a later re-investment into other GICs. Forseed consented to any changes made—unsurprisingly, since these were to their benefit.

iv. Were any changes made necessarily for the benefit of Forseed?

[148] Even if, and to the extent that, the Bank departed from the terms of the Guarantee, a discharge is not warranted because such departure was necessarily to Forseed's benefit: *McGuinness* at §12.55.

[149] The movement of the funds to the GICs expressly benefitted Forseed, just as Forseed intended it would. The Bank only acted on Forseed's express request to move the funds to the GICs for investment purposes. As a result of the Bank's accommodation of Forseed, from November 2019–October 2023, Forseed earned approximately $975,000 in interest from the GICs, the majority of which Forseed received around the time of the maturity dates.

v. Conclusion

[150] A remedy in favour of Forseed as a result of the Bank's seizure of the GIC funds is wholly inappropriate. It would be contrary to not only the terms of the Guarantee, but also its spirit, to allow Forseed to benefit from a "breach" that it expressly sought from the Bank, and from which it gained substantial financial compensation.

[151] Further, if the Bank was in breach by taking $55,993.15, as being in excess of the limit in the Guarantee, I conclude that any such breach is trivial. At best, it would warrant an order that the Bank repay that small amount to Forseed.

F. IF THERE WAS A BREACH, IS FORSEED PREVENTED FROM ASSERTING ANY REMEDY BY REASON OF ESTOPPEL OR APPROBATION / REPROBATION?

[152] In any event, the Bank argues that Forseed is estopped or otherwise foreclosed from taking the position that the Bank was not entitled to seize the GICs and 480 Account balances and thereafter, apply those monies to the Loan.

[153] The Bank says that this position is inconsistent with an earlier position taken by Forseed in the Receivership, from which it benefitted.

a) The Receivership Hearing / Result

[154] As I have already recounted above, in October 2023, the Bank commenced the Receivership. Forseed's obligations under the Guarantee and Pledge were not raised in the petition. Rather, Forseed was named in respect of its interest in a second mortgage, ranking in priority after the Bank's mortgage.

[155] The relief sought by the Bank in the petition included what are ordinarily sought in foreclosure proceedings: namely, a declaration of the amount due under the Loan and judgment against HTLP, as debtor. This amount was stated to be $95,284,936.98 as of October 17, 2023. This was the balance of the Loan after the demands had been made and after October 11, 2023, when the Bank seized $1.375 million from an account held by 110 and applied that amount to the Loan balance.

[156] In the petition, the Bank also sought judgment against the other guarantors in various amounts.

[157] On December 14, 2023, Forseed, through its counsel, filed a Response to Petition (the "Response"). In the Response, Forseed opposed the declaration as to the amount owing under the Loan and the appointment of a receiver. In the Factual Basis and Legal Basis of the Response, in substance, Forseed objected to the appointment of a receiver, stating in part that "there is substantial equity in the property" and:

> There is a very good prospect that the [Bank] will be paid in full and redeemed by June 30, 2024, based on discussions presently underway.

[158] In the Response, Forseed indicated that it would rely on the Affidavit #1 of Kan Yu Canning Zou filed December 12, 2023. Mr. Zou was a representative of HTLP, and various guarantors, such as 110. In his affidavit, Mr. Zou confirms:

> 29. … the Bank has at all times required that the Stakeholders maintain cash collateral of not less than $15,000,000.
>
> 30 … at the time these proceedings were commence, the Bank had on deposit a total of $23,600,000 of pledged funds as cash collateral, including:
>
> a. $13,625,000 pledged by Forseed;
>
> …
>
> 31. I am advised that the Bank, either before or after the commencement of the proceedings, seized the sum of $15,000,000 from Forseed's and 1104's accounts, and that it has applied that amount to the outstanding Loan balance. …
>
> [Emphasis added.]

[159] Mr. Zou's statement in para. 31 was supported by an email dated December 6, 2023 that Forseed's counsel had received from the Bank's counsel confirming that the Forseed Pledged Funds had been applied to the Loan.

[160] On December 20, 2023, the Bank's counsel filed evidence confirming a principal balance due as of December 19, 2023 of approximately $78.3 million and accrued interest of $4 million, for a total amount owing of $82.25 million.

[161] As a matter of common sense, the difference between the original figure of $95.2 million and the later figure of $82.25 million is about $13 million, consistent with the Bank having applied the Forseed Pledged Funds to the Loan balance. These events were expressly acknowledged in the *RFJ* at para. 50–51.

[162] The hearing of the petition took place before me on December 22 and 28, 2023.

[163] During submissions, counsel opposing the receivership order, including Forseed's counsel, argued against the immediate appointment of a receiver and in favour of a redemption period of some months: *RFJ* at para. 66. The argument, in large part, relied on assertions that there was significant equity in the Property, as set out in the responses to petition, including the Response, and despite an initial indication that Forseed objected to the declaration and to the amount owing under the Loan. In making these arguments, HTLP's counsel and 110's counsel specifically noted that $15 million of cash collateral had been seized and applied by the Bank to the debt.

[164] No doubt emphasizing the fact of the seizure and application of the funds to the Loan, on December 22, 2023, Forseed's counsel also made submissions, stating directly that "the bank is owed at this point $82 million", resulting in the Bank being "adequately secured". Later still, on December 28, 2023, Forseed's counsel stated in part:

> This property's worth somewhere between 90 and $100 million based on the market in June, and the bank is owed somewhere around 85 and is not going to go any further in the hole.

[165] On January 11, 2024, I issued the *RFJ* and granted the receivership order, although the ability of the Receiver to begin sale efforts was delayed until after February 23, 2024 and any application to approve sale was delayed until after April 26, 2024.

[166] In the context of the facts accepted by all parties based on the evidence, particularly as to the seizure of the funds and that they were applied to the Loan, the

central issue addressed in the *RFJ* was whether the respondents, including Forseed, should be allowed further time to redeem (see paras. 77, 101–103). In that respect, I discussed the issue of risk to the Bank, in the context of what amount was owed to the Bank, as asserted and accepted by all parties (see paras. 117–118, 128–131).

[167] I specifically stated in the *RFJ*:

> [135] The CM Group and Forseed acknowledge that they have not made certain contributions to HTLP when required. They defend that position by pointing to the $15 million cash collateral that they provided to [the Bank], which has now been applied to the Debt.

[168] In the result, the delay in the powers of the receiver that I appointed was driven by my partial acceptance of the arguments advanced the respondents, including Forseed, that they should be allowed more time to attempt to refinance. That decision was based on the factual matrix before me, including the acceptance by all parties as to the amount owed to the Bank (see *RFJ* at paras. 162–164).

[169] Also, significant from the Bank's point of view is that, in para. 42 of the resulting order of January 11, 2024, I granted judgment in favour of the Bank against HTLP, HTGP and Harlow Holdings (as defined in the *RFJ*) in the amount of $82,724,911.24 (the "Judgment").

[170] As I set out above under "Agreed and Other Facts", the Bank recovered all of its outstanding debt under the Loan by either receipt of net sale proceeds from the Property, or by a later seizure of funds that 110 had pledged.

[171] Accordingly, as of September 2024, from the Bank's point of view, the Loan had been fully satisfied. Needless to say, no further actions were taken by the Bank as against the other guarantors and any collateral security held from those guarantors.

b) Estoppel by Convention

[172] The Bank contends that Forseed is estopped from claiming that the Bank wrongfully seized the Forseed Pledged Funds based on the equitable doctrine of estoppel by convention.

[173] This doctrine was discussed in *Ryan v. Moore*, 2005 SCC 38 [*Ryan*], as follows:

> 4 Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption, then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (G. S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).

[174] At para. 59, *Ryan* sets out the three criteria that form the basis of the doctrine of estoppel by convention:

> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).
>
> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presuming ed position.
>
> [Emphasis original.]

[175] Because it is grounded in a shared understanding between parties, an estoppel by convention often arises in the context of a contract or transaction. However, contrary to Forseed's assertion, "a contract is not a necessary pre-requisite" and estoppel by convention may "operate in the context of post-agreement situations", provided that it arises from the "parties dealings": Bruce MacDougall, *Estoppel*, 2nd ed (Toronto: LexisNexis, 2019) at §3.2 and 3.4; *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201 at paras. 206-207.

[176] The Bank submits that estoppel by convention arises on the facts of this case based on the circumstances leading to the receivership hearing, and the result, including the granting of the Judgment.

[177] With respect to the first element "Assumption Shared and Communicated", *Ryan* states that:

> 61 The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of "a like mind" …. The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity: ….
>
> 62 While it may not be necessary that the assumption by the party raising estoppel be created or encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other ... Mutual assent is what distinguishes the estoppel by convention from other types of estoppel (Bower, at p. 184). The courts have described communications complying with this requirement as "crossing the line". In *The "August Leonhardt"*, at pp. 34-35, Kerr L.J. held that
>
> > [a]ll estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. . . .
> >
> > There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that — across the line between the parties — his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that extent at least, therefore, the alleged representor must be open to criticism. [Emphasis added.]
>
> See also *The "Vistafjord"*, at p. 350. Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other (*The "Indian Grace"*, at p. 10). Further, the estopped party must have, at the very least, communicated to the other that he or she is indeed sharing the other

> party's (*ex hypothesi*) mistaken assumption (*John*, at para. 81; Bower, at p. 184).

[178] On the issue of "manifest representation", Forseed refers to *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499 at para. 56 in that the shared assumption must be "unambiguous and unequivocal".

[179] I agree with the Bank that, during the Receivership hearing, the Bank and Forseed (and other parties) conducted themselves on the basis of a shared understanding that the Forseed Pledged Funds had been validly seized and applied to the Loan. This was not an assumption by the Bank, but based on clear communications from Forseed and others to the Bank arising from their express position and materials. In particular:

a) The Bank and Forseed were both aware at the Receivership hearing that the Bank had seized $15 million in cash collateral, including the Forseed Pledged Funds;

b) In the Response, Forseed specifically relied on Mr. Zou's Affidavit #1, which exhibited an email exchange among counsel confirming the seizure of the Forseed Pledged Funds;

c) at the Receivership hearing, in relation to its application for judgment, the Bank relied upon a payout statement where the amount had been reduced from the amount set out in the Petition, implicitly reflecting the application of the Forseed Pledged Funds to reduce the Loan balance; and

d) at the Receivership hearing, Forseed opposed the application in part on the basis that the Bank was only owed approximately $82–85 million, an amount which was premised on the seizure and application of the Forseed Pledged Funds.

[180] This shared understanding among the parties at the Receivership hearing was a significant fact relevant to the issues being addressed by me and which

resulting in the granting of the Judgment in the amount asserted by the Bank, with which Forseed and others agreed.

[181] Forseed maintains that no common assumption was shared and communicated between Forseed and the Bank. Forseed attempts to suggest that it was unaware as to how the payout amount of $82.2 million was arrived at, as confirmed in the Bank's counsel's affidavit filed just in advance of the hearing.

[182] I would not accede to this argument. In the face of the evidence before the Court, including as advanced by Forseed itself, Forseed was well aware of the seizure of the funds and simple math would have been available to explain the $13 million or so drop from the amount claimed in the Petition. It is nonsensical for Forseed to suggest that they did not know that their funds had been seized and applied to the Loan balance.

[183] Equally without merit is Forseed's suggestion that they did not know of the Bank's "breach" by taking money from the GICs, as opposed to the 480 Account. However, Forseed certainly knew that its money had been invested in the GICs. I do not consider it relevant that Forseed was unaware that another bank account had been used to hold the GICs, which was simply an internal procedure by which the Bank tracked the investment separate from the 480 Account.

[184] It was this understanding upon which Forseed's counsel made submissions based in part on the amount he said was owing under the Loan.

[185] With respect to the second element "Detrimental Reliance", *Ryan* states:

> 69 Detrimental reliance encompasses two distinct, but interrelated, concepts: reliance and detriment. The former requires a finding that the party seeking to establish the estoppel changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his or her legal position. If the first step is met, the second requires a finding that, should the other party be allowed to abandon the assumption, detriment will be suffered by the estoppel raiser because of the change from his or her assumed position (see Wilken, at p. 228; *Grundt v. Great Boulder Proprietary Gold Mines Ltd.* (1937), 59 C.L.R. 641 (Austl. H.C.), at p. 674).

[186] The Bank must also prove detriment, although a change from the presumed legal position will facilitate the establishment of detriment: *Ryan* at para. 73.

[187] The evidence firmly establishes that the Bank acted in reasonable reliance on this shared understanding and as a result changed its legal position. In particular, the Bank sought judgment for the reduced amount at the Receivership hearing, resulting in the Judgment.

[188] In my view, the Bank has proven detriment, arising from the granting of the Judgment at that amount and from the fact that the Bank subsequently refrained from pursuing other guarantors of the Loan (the majority of which are unsecured).

[189] Forseed baldly asserts there is no detriment to the Bank. In my view, Forseed has failed to advance any credible argument as to the detriment or potential detriment arising from the fact that the Bank obtained the Judgment in an amount that was based in part of Forseed's stated position at the Receivership hearing. The only statement from Forseed is that the Bank has led no evidence to show that it faces a shortfall; however, no shortfall currently exists, but it certainly will if the Bank is required to repay the seized funds to Forseed.

[190] Finally, *Ryan* at para. 74 discusses the final and third requirement for this type of estoppel, stating that a person must prove:

> … that it would be "unjust", "unconscionable" or "unfair" to permit a party to resile from the mutual assumption (see, e.g., Bower, at p. 181; *John*; *The "Indian Grace"*; *The "Vistafjord"*). However, it may be preferable to refrain from using "unconscionable", in order to avoid confusion with this last concept which has developed a special meaning in relation to inequality of bargaining power in the law of contracts (where we speak of unconscionable transactions, for instance) (see *Litwin Construction*, at p. 468).

[191] In this case, I have no hesitation finding that it would be unjust and unfair to allow Forseed to resile from a position taken in the Receivership.

[192] The Bank relied on Forseed's stated position in obtaining the Judgment. Forseed benefited from communicating its position as to the amount owed to the Bank, by successfully using that fact to secure a position result in the Receivership

order—namely, a delay of some months before any sale of the project took place, as it sought. Forseed sought that equitable relief, in the form of a redemption period, and was granted that equitable relief.

[193] Clearly, Forseed considered it in its best interests to delay any sale by the receiver, presumably to explore other options to address the situation other than by realization proceedings.

[194] This action was only commenced in July 2024, many months after the Judgement was granted. The only other indication to the Bank of this potential argument was in June 2024, on the eve of the hearing of the application to approve the sale of the Property.

[195] If Forseed succeeded in obtaining a return of the Forseed Pledged Funds, the Bank would then stand in a very precarious position. As the Bank's notes, it is far from certain that there is any legal means by which the Bank might seek to amend the amount in the Judgment, which is a final judgment. At first blush, this is not a "slip rule" mistake and other arguments would have to be advanced. Certainly, other persons interested in that issue, such as the other guarantors, would be entitled to advance their position on the matter. Even if the Bank could succeed in revising the amount of the Judgment upward, a substantial amount of time has passed and the Bank will have lost valuable time in pursuing its alternative remedies, including enforcing unsecured guarantees and guarantees with collateral security.

[196] On the other hand, Forseed is not without its own remedy. Forseed has a claim for contribution arising from an indemnity agreement dated August 27, 2018 that it signed along with the other guarantors. Forseed asserts in its Amended Notice of Civil Claim that, via that agreement, the other guarantors, such as 110 and Terrapoint, agreed to share in any losses owing to the Bank proportionately in accordance with their share of the project.

[197] Therefore, assuming total payments by Forseed and 110 of approximately $17.3 million, Forseed may only ultimately be required to bear about $7.7 million (45%) of the Bank's shortfall, apparently consistent with its ownership of HTLP.

[198] Forseed suggests the Bank's conduct provides a reason for the Court to decline to exercise its equitable discretion. However, I see no reason to criticize the Bank's conduct in this matter. I have rejected Forseed's arguments to that effect in relation to the issue of the Bank's contractual rights, including its security interests, as above.

[199] To the contrary, I find Forseed's actions and arguments in this action to be highly questionable. Having now lost its investment in the venture, Forseed now has seized upon arguments that are based on the actions of the Bank (and arguments as to the Bank's failure to require Forseed to sign further documentation) that were taken as a result of Forseed's express request and for its own benefit. In my view, this action is nothing more than Forseed's attempt to avoid its losses and obtain a windfall at the Bank's expense, all because of the Bank's accommodation of Forseed, which resulted in it receiving substantial benefits in the form of interest. As the saying goes, "no good deed goes unpunished".

[200] In all of the circumstances, I am satisfied that the Bank has established that estoppel by convention can operate to prevent Forseed from resiling from its previous position as to validity of the seizure of the Forseed Pledged Funds.

[201] In light of my conclusions in relation to the Bank's estoppel argument, it is unnecessary to consider its alternate argument as to approbation and reprobation.

G. CONCLUSION

[202] Forseed's claims in its Amended Notice of Civil Claim filed October 17, 2024 are dismissed.

[203] In light of my conclusions above, I see no need to address the issues raised in the Bank's Counterclaim filed August 21, 2024.

[204] The Bank is entitled to its party and party costs on Scale B, to be assessed before the Registrar in the usual manner, failing agreement.

"Fitzpatrick J."