

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fox Island Development Ltd. v. Kensington Union Bay Properties Nominee Ltd.*,  
2026 BCSC 294

Date: 20260224  
Docket: S240493  
Registry: Vancouver

Between:

**Fox Island Development Ltd. and  
Advanced Venture Holding Co., Ltd.**

Petitioners

And

**Kensington Union Bay Properties Nominee Ltd. (formerly known as 34083 Yukon Inc.), Kensington Union Bay Properties Limited Partnership, Kensington Union Bay Properties GP Ltd., International Trade Center Properties Ltd., Sunwins Enterprise Ltd., Mo Yeung Ching also known as Michael Ching, Mo Yeung Properties Ltd., SFT Digital Holdings 30 Ltd., Hotel Versante Ltd., Beem Credit Union, Morteq Lending Corp., Chun Yu Liu, 1307510 B.C. Ltd., Jeffrey Rauch, Heung Kei Sung and RCC Holdings Ltd.**

Respondents

Before: The Honourable Madam Justice Fitzpatrick

## Reasons for Judgment

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Place and Dates of Hearing: Vancouver, B.C.  
December 9 and 11, 2025

Place and Date of Judgment: Vancouver, B.C.  
February 24, 2026

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**INTRODUCTION**

[1] This receivership proceeding involves a hotel property—the “Versante Hotel”—located in Richmond, BC and owned by the respondent International Trade Center Properties Ltd. (“ITC”).

[2] The ownership and management structure of the hotel property is complex, involving a myriad of companies owned and controlled by the person behind the development, Mo Yeung Ching (aka Michael Ching). Mr. Ching and many of his companies are named as respondents and I will collectively call them the “Debtor/Respondents”.

[3] This proceeding was commenced and a receiver appointed by this Court on application of the petitioners, who are the major secured creditors having a first secured position with respect to the hotel property (collectively, “Fox Island”).

[4] The hotel property includes 84 parking stalls in the parkade, which are used by hotel guests and others using the hotel property and services (the “P5 Parking Stalls”). Pursuant to certain agreements and a court order, the Court has settled the amount to be set aside and held in trust, representing the value of the P5 Parking Stalls.

[5] This application is brought to resolve the priority dispute in relation to the sale proceeds of the P5 Parking Stalls, as between Fox Island, pursuant to its security, and Bygenteel Capital Inc. (“Bygenteel”), who claims to have a leasehold interest in the P5 Parking Stalls. Bygenteel is owned and controlled by Mr. Ching’s daughter, Chung Lin Ching (aka Linda Ching).

[6] In advance of the hearing of this issue on its merits, I dismissed the application of Bygenteel and the Debtor/Respondents who sought to adjourn this application and have the Court direct a listing of documents and cross-examination on various affidavits. My reasons for doing so are addressed below.

**BACKGROUND FACTS**

[7] The “Versante Hotel” is part of a three-tower, mixed-use strata office, retail and hotel complex and development known as the International Trade Centre (the “Hotel”).

[8] The Hotel was built in 2018 and opened in 2021. It is described as a luxury boutique hotel comprised of 14-storeys, 100 guest rooms, event space, a restaurant, pool and penthouse lounge. Parking for the hotel includes the P5 Parking Stalls on Level 5 of the parkade that is shared by all users of the development.

[9] The Hotel property includes lands owned by ITC (the “Remainder Parcel”, which includes the parkade) and Air Space Parcel 2 (“ASP2”)(the Hotel itself) – collectively, the “Lands”, which are both owned by ITC.

[10] Pursuant to various loan agreements beginning in June 2021, Fox Island advanced monies to ITC to refinance existing loans that had been obtained for the construction of the Hotel which was underway. Fox Island initially registered mortgages at the Land Title Office (LTO) on October 10 and November 7, 2019. In September 2021, a later loan agreement (the “Loan Agreement”) was entered to and security granted by ITC in favour of Fox Island. Ultimately, Fox Island registered a mortgage and assignment of rents (collectively, the “Mortgage”) against the Lands at the LTO on September 29, 2021.

[11] Sometime in 2022/2023, ITC defaulted under the Loan Agreement. In February 2023, Fox Island and ITC and others entered in a forbearance agreement which also led to defaults. Despite extensions of the forbearance agreement in July and September 2023, further defaults followed.

[12] In December 2023, Fox Island made demand for repayment for the loan, which then was outstanding in the amount of approximately \$78.9 million.

[13] On January 24, 2024, Fox Island commenced this foreclosure proceeding. In the usual fashion, the named respondents included those persons who were the

debtors or guarantors under the loans and also, those persons who had subsequent registrations against the Lands ranking after Fox Island's Mortgage.

[14] On February 29, 2024, Associate Judge Robertson granted Fox Island an Order *Nisi*. No one appeared for the Debtors/Respondents on that application. The Order *Nisi* included relief normally seen in such an order, including:

- a) A declaration that the Mortgage was a charge on the Lands in priority to the claims, interests and charges in the Lands to the Debtors/Respondents;
- b) A declaration of default under the Mortgage and other security held by Fox Island;
- c) A determination of a redemption amount (approximately \$79.7 million);
- d) Judgment against the various Debtor/Respondents, including ITC, Hotel Versante Ltd. ("Versante Ltd.") (described as the Hotel's operator), Mr. Ching and various other companies owned or controlled by Mr. Ching; and
- e) An order that Fox Island was to have exclusive conduct of sale of the Lands, subject to court approval, although the Debtor/Respondents had liberty to apply to approve a sale of the Lands during the redemption period (set to expire August 29, 2024).

[15] In late February 2025, Fox Island applied for the appointment of a receiver, citing concerns as to its unsuccessful efforts to sell the Lands, said to have arisen at least in part by Mr. Ching's lack of cooperation. Fox Island also had concerns regarding the Hotel's management and operations and the disposition of its operating net income from revenues.

[16] On March 4, 2025, I granted a Receivership Order appointing Deloitte Restructuring Inc. as receiver of the Lands (the "Receiver"). Counsel for ITC and

Versante Ltd. attended the hearing. The Receiver was empowered to market and sell the Lands, subject to court approval.

[17] Shortly after the Receiver's appointment, Mr. Ching and ITC's counsel informed the Receiver that there may be potential issues regarding the use and availability of the P5 Parking Stalls. In its First Report dated March 31, 2025, the Receiver reported on these issues, including referring to a dizzying number of agreements that had come to the Receiver's attention relating to the P5 Parking Stalls (outlined at paras. 36-40). One of the parties to those agreements was RCC Holdings Ltd. ("RCC"), a company that entered into various lease and sublease agreements with ITC and Versante Ltd. in September 2021. I understand that RCC is not owned by Mr. Ching.

[18] On April 2, 2025, I granted an order to add RCC as a respondent and a "debtor" under the Receivership Order, arising from the Receiver's concerns that RCC had some interest in the Lands, the validity of which had to be addressed in the receivership with a view to selling the Hotel.

[19] In the next few months, the Receiver continued to investigate the various claims advanced in relation to the rights to and management of the P5 Parking Stalls. As a result of what it learned, the Receiver continued to be concerned about the ambiguity around various parties' rights in the P5 Parking Stalls and how that uncertainty could impact the marketing of the Lands.

[20] On July 11, 2025, in its Second Report, the Receiver summarized the various further agreements relating to parking rights on the Lands that had come to its attention (slightly edited and which I will collectively refer to as the "Bygenteel Agreements"):

- a) On or about May 30, 2019, ITC, as landlord, leased to 1212429 B.C. Ltd. ("121"), as tenant, all of the parking stalls located on the Remainder Parcel (the "Parking Head Lease");
- b) On or about November 5, 2019, 121, as assignor, assigned to Bygenteel, as assignee, a partial assignment of the Parking Head Lease (the "Bygenteel Assignment") in respect of the P5 Parking Stalls. The

foregoing assignment remains in effect so long as Bygenteel is the owner of Strata Lot 14, EPS5803, which the Receiver understands it continues to be;

- c) On or about July 1, 2021, Bygenteel, as landlord, leased to Club Versante Management Ltd. (“Club Versante”), as tenant the P5 Parking Stalls until June 30, 2026 (the “Club Versante Lease”). Club Versante has one option to renew the Club Versante Lease for an additional five (5) years from July 1, 2026 to June 30, 2031; and
- d) On or about August 15, 2021, Bygenteel, as vendor, entered into a purchase agreement with ITC, as purchaser, whereby Bygenteel agreed to transfer and assign and ITC agreed to accept such transfer and assume all of Bygenteel’s right and interest in and to the P5 Parking Stalls for the purchase price of \$6,000,000 (the “P5 Stalls Purchase Agreement”). The Receiver understands that this agreement never closed and the purchase price was not paid.

[21] To resolve the Receiver’s continuing concerns regarding the ownership of the P5 Parking Stalls, and the impact of any uncertainty in the context of a sale of the Lands, it entered into a settlement agreement with the various participants and claimants.

[22] On July 15, 2025, I approved a settlement agreement between the parties which, on the closing of any sale to a purchaser of the Lands, would result in:

- a) 121 and ITC entering into an assignment agreement (the “Assignment Agreement”) pursuant to which 121 assigned its rights to the P5 Parking Stalls under the Parking Head Lease to any successful purchaser of the Lands. Notwithstanding, 121 retained all rights and obligations under the Parking Head Lease other than those assigned to any purchaser pursuant to the Assignment Agreement;
- b) Bygenteel and 121 executing a termination agreement which terminated the Bygenteel Assignment. In addition, Bygenteel and Club Versante were to execute a termination agreement which terminated the Club Versante Lease (collectively, the “Termination Agreements”);
- c) The rights of Fox Island, Bygenteel, 121 and Club Versante being preserved in respect of any claims each party may have to the allocation

of net proceeds arising from a court approved sale of the Lands with respect to the value of the P5 Parking Stalls (the “Parking Stalls Net Proceeds”); and

- d) Any order approving a sale of the Lands was to include a term requiring that the Parking Stalls Net Proceeds be held and retained in trust by the Receiver pending further agreement of the parties with respect to the allocation of the Parking Stalls Net Proceeds or a further order of this Court for a distribution of the Parking Stalls Net Proceeds.

[23] At a contested hearing in October 2025, I settled the amount of the Parking Stalls Net Proceeds to be held upon any sale at \$4.2 million.

### **THE PRESENT APPLICATION / POSITIONS**

[24] On October 17, 2025, in advance of any sale of the Lands by the Receiver, Fox Island filed this application, seeking a declaration that Fox Island has valid and enforceable first priority security over the P5 Parking Stalls and the Parking Stalls Net Proceeds.

[25] Broadly speaking, Bygenteel takes the position that it is entitled to the Parking Stalls Net Proceeds and that Fox Island’s asserted priority is akin to an “equitable fraud” under s. 29(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250 [LTA]. Bygenteel also says that disregarding its interest in the P5 Parking Stalls in favour of Fox Island would be contrary to “common morality”.

[26] The Debtor/Respondents, being Mr. Ching and his various companies who are named as respondents, support Bygenteel in its arguments under s. 29(2) of the LTA.

[27] Fox Island takes the position that the evidence does not establish that it had notice of any interest held by Bygenteel prior to registering the Mortgage. Further, it says that no elements of equitable fraud arise on the clear facts of this case, such

that its prior registered security—the Mortgage—prevails over any interest held by Bygenteel in the P5 Parking Stalls.

### **THE RELEVANT LEGAL FRAMEWORK**

[28] The central issue to be decided concerns the application of the relevant *LTA* provisions in the context of the circumstances that existed when Fox Island was granted the Mortgage and registered it at the LTO.

#### **a) Legislative Framework**

[29] The validity and enforceability of the Mortgage is not in dispute. Indeed, the Order *Nisi* declares just that, and I am not aware that any appeal was filed to challenge that determination.

[30] In addition, there is no dispute that Fox Island’s initial Mortgage (September 2019) was registered against the Lands, prior to Bygenteel taking any purported interest in the P5 Parking Stalls pursuant to the Bygenteel Assignment (November 2021) or any other agreement.

[31] Section 26 of the *LTA* confirms the effect of Fox Island’s entitlement to the Lands under its prior registration:

**26** (1) A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.

(2) Registration of a charge does not constitute a determination by the registrar that the instrument in respect of which the charge is registered creates or evidences an estate or interest in the land or that the charge is enforceable.

[Emphasis added.]

[32] Section 20 of the *LTA* also makes clear that unregistered instruments have no effect to pass any estate or interest in lands, subject to an exception with respect to leases for a term of less than three years:

- 20 (1) Except as against the person making it, an instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land does not operate to pass an estate or interest, either at law or in equity, in the land unless the instrument is registered in compliance with this Act.
- (2) An instrument referred to in subsection (1) confers on every person benefited by it and on every person claiming through or under the person benefited, whether by descent, purchase or otherwise, the right
- (a) to apply to have the instrument registered, and
  - (b) in proceedings incidental or auxiliary to registration, to use the names of all parties to the instrument, whether or not a party has since died or become legally incapacitated.
- (3) Subsection (1) does not apply to a lease or agreement for lease for a term not exceeding 3 years if there is actual occupation under the lease or agreement.

[Emphasis added.]

[33] Section 1 of the *LTA* defines “instrument” as including “a document ... relating to the transfer, charging or otherwise dealing with or affecting land, or evidencing title to it ...”

[34] Finally, there is also no dispute that the Parking Head Lease (May 2019) and the Bygenteel Assignment (November 2019) and the further agreements that followed from it—including the Club Versante Lease (July 2021) and the P5 Stalls Purchase Agreement (August 2021)—were not registered in the LTO, either at the time the Mortgage was registered, the time those agreements were purportedly entered into, or at any other time.

[35] The central issue that arises on this application is set out in s. 29(2) of the *LTA*, which provides for certain exceptions to the registered priority of Fox Island’s Mortgage and which allows unregistered interests or instruments – such as are purported to be held by Bygenteel - to potentially stand in priority to the Mortgage:

- 29 (1) For the purposes of this section, **“registered owner”** includes a person who has made an application for registration and becomes a registered owner as a result of that application.
- (2) Except in the case of fraud in which the person has participated, a person contracting or dealing with or taking or proposing to take from a registered owner
- (a) a transfer of land, or

(b) a charge on land, or a transfer or assignment or subcharge of the charge,

is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or charge other than

(c) an interest, the registration of which is pending,

(d) a lease or agreement for lease for a period not exceeding 3 years if there is actual occupation under the lease or agreement, or

(e) the title of a person against which the indefeasible title is void under section 23 (4).

...

[Emphasis added.]

[36] The issue is whether the s. 29(2) exception arises here, where Bygenteel alleges that Fox Island had notice of Bygenteel's prior unregistered interest before registration of the Mortgage such that Fox Island's asserted priority over Bygenteel would amount to an equitable fraud.

### **b) Case Law**

[37] The case law arising under s. 29(2) of the *LTA* confirms that two requirements must be met to overcome a registered interest.

[38] Firstly, the person (here Bygenteel) must establish that Fox Island had notice of its interest prior to registration of the Mortgage. As s. 29(2) states, that notice may be "express, implied, or constructive".

[39] Secondly, more than knowledge of the unregistered interest is required; what must also be established is "equitable fraud". In *Vancouver City Savings Credit Union v. Serving for Success Consulting Ltd.*, 2011 BCSC 124 [VanCity], Justice Bracken considered the two competing lines of authority (whether notice alone was sufficient or not) and resolved that issue by stating at para. 70:

[70] A review of the authorities that rely on *Kearns*, satisfy me the line of authority reflected by [*Szabo v. Janiel Enterprises Ltd.*, 2006 BCSC 502], is correct. In my view, before a finding of equitable fraud can be made there must be evidence of actual notice coupled with some act of dishonesty or

deceit on the part of the person seeking the protection of s. 29 of the *Land Title Act*.

[40] The onus of establishing fraud in the context of s. 29(2) of the *LTA* is on the holder of the unregistered interest (here, Bygenteel). Fraud is never presumed, and it cannot be imputed in the absence of express notice: *VanCity* at para. 68, citing *Hudson's Bay Co. v. Kearns* (1895), 1896 CarswellBC 30, 4 B.C.R. 536 [*Kearns*] at para. 33 (B.C.C.A.).

[41] In *VanCity*, Bracken J. summarized his conclusions as follows:

[88] In my view the law requires more than simple notice of the respondents' unregistered interest in the property. Even if the respondents are able to prove the petitioners had full knowledge of the respondents' interest in the property at the time the mortgages were granted, that knowledge is not enough.

[89] To prove equitable fraud it must be established that the party acquiring a registered interest in land had sufficient actual knowledge of the conflicting interest in the property to cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument. In addition, there must be some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use the statute to defeat the respondents' interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection. Something more than simple knowledge is required. This interpretation seems consistent with the clear words of ss. 20, 29 and 30 of the *Land Title Act*.

[90] The passage, referred to above at para. 42 of *Kearns*, clearly contemplates something outside the normal course of business and, as was stated in *Stiles*, involves issues of "common morality".

[Emphasis added.]

[42] In *VanCity*, Bracken J. recognized that most cases addressing equitable fraud involve purchasers, as opposed to mortgagees, such as Fox Island. At para. 85 of *VanCity*, he stated that there was a considerable difference between the two circumstances, particularly where there is a request for funding and approval of loans and security based on due diligence, which is akin to what happened here. In other words, while equitable fraud may be found more easily in respect of an innocent purchaser, it may not be found more easily in respect of a *bona fide* lender

who gives substantial value in consideration of being granted the protection of security against lands.

[43] *VanCity* and the issue of the competing lines of authority have been the subject of comment by the BC Court of Appeal. In *Institutional Mortgage Capital Canada Inc. v. Plaza 500 Hotels Ltd.*, 2020 BCCA 193 at paras. 76–79, the court discussed *VanCity* and expressly acknowledged that it was the leading authority in this Court as to what was required to establish equitable fraud under s. 29(2) of the *LTA*. The court found that there was an arguable issue on the point raised in the appeal, however, it declined to revisit the issue of what constitutes equitable fraud: paras. 81–85.

[44] Similarly, in *Stratton v. Richter*, 2022 BCCA 337 at para. 107, the court stated that “the British Columbia Supreme Court appears to have now reached a consensus on what constitutes fraud for the purposes of s. 29(2)”, referring to *VanCity*.

[45] I agree with Fox Island that, for the purpose of this application, I am bound by the ruling in *VanCity*, on the basis of *Hansard Spruce Mills Limited (Re)*, [1954] B.C.J. No. 136, 1954 CanLII 253 (S.C.). It is pure speculation to suggest that the BC Court of Appeal might choose at some future time to revisit the conclusions from *VanCity*, let alone reverse or modify Bracken J.’s conclusions.

[46] In summary, to establish equitable fraud in relation to a lender/mortgagee, it must be shown that the lender had sufficient knowledge of the unregistered interest to cause a reasonable lender to make enquiries as to the terms and legal implications of the unregistered interests. In addition, the lender must act beyond what one might expect in the ordinary course of business or the lender must have a clear intention to defeat the unregistered holder’s interests contrary to common morality.

**THE BYGENTEEL AGREEMENTS**

[47] Before turning to the application of the relevant law to the issues, it is helpful to more fully describe the various agreements said to address ownership and management of the P5 Parking Stalls under the Bygenteel Agreements.

[48] As an overarching comment, these Agreements are all between non-arms length parties, being Mr. Ching, Ms. Ching (his daughter) and their various companies.

**a) Parking Head Lease**

[49] In May 2019, the Parking Head Lease was granted by ITC, as landlord, and 121, as tenant, for all of the parking stalls located on the Remainder Parcel. The document states that this transfer was “in furtherance of the development of the [Remainder Parcel]”.

[50] 121 is a company owned and controlled by Mr. Ching. He executed the Parking Head Lease on behalf of both parties.

[51] The Parking Head Lease is for a term of 99 years, barring dissolution of the various strata corporations or a cancellation of the strata plans in the LTO.

[52] The Parking Head Lease was never registered against the Remainder Parcel, which remained registered in ITC’s name. As such, it is an “unregistered instrument” under s. 20(1) of the *LTA*, particularly as it provides for a lease for a term exceeding three years.

[53] Mr. Ching states that the Parking Head Lease was to allow for individual strata lot owners and the strata lot owner associated with the Hotel’s operations to be assigned long-term parking interests within the Remainder Parcel (i.e. the parkade) although the Hotel was never stratified).

[54] Indeed, upon the sale of the strata lots, purchasers took assignments of the Parking Head Lease from 121. Accordingly, 121 holds the Parking Head Lease for

all of the parking stalls in the parkade, which includes the P5 Parking Stalls. All parties recognize that the Parking Head Lease must remain intact despite any sale of the P5 Parking Stalls to a new owner of the Hotel, so as to maintain the other parking rights in the development that arise under the Parking Head Lease and have been assigned to other users of the parkade.

**b) Bygenteel Assignment**

[55] On November 5, 2019, 121, as assignor, assigned to Bygenteel, as assignee, a partial assignment of the Parking Head Lease as it related to the P5 Parking Stalls. The Bygenteel Assignment states at the outset that the Assignment arises because Bygenteel is or will become the owner of Strata Lot 14, EPS5803 (“SL 14”) and is not effective until Bygenteel delivered a copy of this Assignment to the strata corporation for SL 14.

[56] The stated consideration for the Assignment is curious in that consideration is said to be the “covenants and agreements set forth in this Assignment”, yet the only agreement referenced is the Parking Head Lease which had been entered into months before.

[57] This Assignment is also curious in the sense that it is not clear why Bygenteel would be entitled to an assignment of 84 parking stalls, used by the Hotel, arising from its purchase of SL 14, one strata lot in another part of the development. This issue will be discussed in more detail below.

[58] In any event, the Assignment expressly provides that Bygenteel is only entitled to these rights for as long as Bygenteel is the owner of SL 14, which the Receiver understands it continues to be. The Assignment provides that in the event of a sale or disposition of SL 14, Bygenteel is to assign its rights under this Assignment in accordance with the Parking Head Lease. In other words, the entitlement to the P5 Parking Stalls is said to be tied in perpetuity (or 99 years) to whoever owns SL 14.

[59] The Bygenteel Assignment was never registered against the Remainder Parcel, which remained registered in ITC's name. As such, it is an "unregistered instrument" under s. 20(1) of the *LTA*, particularly as it provides for a lease for a term exceeding three years.

**c) Club Versante Lease**

[60] On July 1, 2021, Bygenteel, as landlord (under the Parking Head Lease and Bygenteel Assignment), leased to Club Versante, as tenant, the P5 Parking Stalls under the "Club Versante Lease".

[61] Club Versante is a company owned and controlled by Ms. Ching. She signed this Lease on behalf of both parties.

[62] The Lease provides for an initial term of five years to June 30, 2026, with Club Versante having one option to renew it for an additional five years to June 30, 2031.

[63] The stated consideration for the Lease is a one-time payment of \$10.00. No further consideration is owed for any renewal.

[64] Club Versante was allowed to sublease or transfer its leasehold interest to a third party provided it complied with the Lease and applicable strata corporation rules.

[65] The Club Versante Lease was never registered against the Remainder Parcel, which remained registered in ITC's name. As such, it is an "unregistered instrument" under s. 20(1) of the *LTA*, particularly as it provides for a lease for a term exceeding three years.

[66] For unknown reasons, Club Versante does not appear on this application, let alone assert that it holds any interest in the P5 Parking Stalls under the Club Versante Lease.

**d) P5 Stalls Purchase Agreement**

[67] On August 15, 2021, Bygenteel, as vendor, entered into a purchase agreement with ITC, as purchaser, under the P5 Stalls Purchase Agreement.

[68] The P5 Parking Stalls Purchase Agreement also has some curious features:

- a) At the outset, it states that Bygenteel holds the lease rights to the P5 Parking Stalls under the Parking Head Lease and the Bygenteel Assignment, which completely disregards the Club Versante Lease entered into only the month before. However, section 1.2 of the Agreement later states that this transfer is subject to Club Versante assigning the Club Versante Lease to ITC upon completion of the purchase; and
- b) It states that this Agreement is needed because ITC has expressed an interest in entering into a purchase agreement with RCC concerning a sale of the Hotel's property (including the parking stalls) and, in order to do so, ITC required "full and unrestricted usage rights of the P5 Stalls".

[69] It appears that later agreements were entered into between ITC and RCC in September 2021.

[70] The stated purchase price for this "repurchase" is said to be \$6 million.

[71] The Receiver understands that this Agreement never closed and the purchase price was not paid, which is perhaps the reason why ITC does not assert on this application that it holds any interest in the P5 Parking Stalls arising from the P5 Stalls Purchase Agreement. In her Affidavit, Ms. Ching confirms that the P5 Stalls Purchase Agreement did not close. In his Affidavit #3, Mr. Ching also confirms this fact.

[72] The only affidavit filed by Ms. Ching in this action is her Affidavit #1 sworn October 20, 2025, which was in support of the Receiver's application to determine the holdback amount for the Parking Stalls Net Proceeds.

[73] Beyond that, Mr. Ching and Ms. Ching have not provided any evidence as to the circumstances leading to the P5 Stalls Purchase Agreement.

[74] For that matter, Mr. Ching and Ms. Ching have not provided any evidence as to the circumstances leading to the Bygenteel Assignment or the Club Versante Lease beyond the fact that those agreements were entered into.

**e) Comments on the Bygenteel Agreements**

[75] Counsel agree that it is not necessary to determine the validity of any of the Bygenteel Agreements, including most notably the Bygenteel Assignment which is the primary basis upon which Bygenteel asserts priority over Fox Island.

[76] Nevertheless, questions arise that certainly raise suspicions. Those suspicions would include whether Mr. Ching and Ms. Ching enter into and assign various agreements at will depending on the circumstances and what interests are being served at any one time.

[77] As I have said, this is highlighted by the fact that Club Versante is strangely not asserting any claim to the P5 Parking Stalls. The opposition only comes from Mr. and Ms. Ching, acting in concert through their companies to benefit Bygenteel only.

[78] Questions also arise in respect of the lack of any substantial consideration being paid by either Bygenteel (to ITC) or Club Versante (to Bygenteel) under the Bygenteel Assignment and Club Versante Lease.

[79] To the contrary, Bygenteel's counsel emphasizes the substantial value of this asset—the P5 Parking Stalls—to his client that is alleged to have been acquired from ITC. In this respect, he also emphasizes the prejudice to his client if Bygenteel is unsuccessful in asserting priority over Fox Island. Ms. Ching's argument is that the P5 Parking Stalls have significant value, based on the substantial amount—\$6 million—that would have been payable to Bygenteel by ITC under the P5 Stalls Purchase Agreement if it had closed.

[80] Similarly, Mr. Ching in his Affidavit #3 (sworn in support of settling the amount of the Parking Stalls Net Proceeds) emphasized the value of the P5 Parking Stalls at \$6 million, said to arise in part from the amount ascribed to that part of the Hotel property in various offers to purchase the Hotel.

[81] In the same vein, in his Affidavit #4, Mr. Ching also provides further documentation as to the transactions by which Bygenteel agreed to purchase SL 14 and another strata lot, "SL 13", from ITC (although Ms. Ching, on behalf of Bygenteel, did not provide this evidence in her affidavit).

[82] In its application response at para. 15, Bygenteel states as follows:

Further, the consideration paid under the assignment and leases must be considered in the context of the other transactions in which they occurred. Bygenteel paid ITC a net sale price of \$4.2M for strata lots 13 and 14. The Parking Stall Assignment Agreements with 121 are expressly made in the context of Bygenteel becoming the owner of strata lots 13 and 14 under the terms of the Contract of Purchase and Sale.

[83] In his Affidavit #4, Mr. Ching attaches a purchase agreement dated August 26, 2019 by which Bygenteel agreed to purchase SL 13 and 14 from ITC (the "Bygenteel SL Purchase Agreement"). Based on that date, the Bygenteel SL Purchase Agreement was entered into after the Parking Head Lease and before the Bygenteel Assignment.

[84] Mr. Ching points out that the purchase price for the Strata Lots was \$5.2 million, with \$1 million being allocated to a tenant improvement allowance. Although it is unclear, Mr. Ching appears to be suggesting that the purchase price (net \$4.2 million) included, not only SL 13 and 14, but *also* 127 parking stalls (including the P5 Parking Stalls).

[85] However, the terms of the Bygenteel SL Purchase Agreement expressly state that "the Purchase Price shall not include any parking rights". Then, for some unknown reason, Bygenteel and 121 apparently executed an addendum on the same date as the Bygenteel SL Purchase Agreement which provides, among other

things, that 127 parking stalls are to be included in the sale transaction for Strata Lots 13 and 14, despite no increase in the purchase price.

[86] The closing documentation provided by Mr. Ching—including statements of adjustment and a direction to pay—simply refer to the purchase of SL 13 and 14, without any reference to the 127 parking stalls (and the P5 Parking Stalls).

[87] As set out above, the Bygenteel Assignment does not refer to the Bygenteel SL Purchase Agreement at all. The Bygenteel Assignment states “In consideration for the covenants and agreements set forth in this Assignment, the parties agree with each other as follows:...”. In other words, according to the terms of the Bygenteel Assignment, the assignment of the P5 Parking Stalls does not form part of the consideration of the Bygenteel SL Purchase Agreement; rather, the consideration for the assignment of the P5 Parking Stalls is contained wholly within the Bygenteel Assignment, which is nil.

[88] I agree with Fox Island’s counsel that these documents are questionable in terms of what Mr. Ching seems to be suggesting should be taken from them. They do not address the issue as to the lack of any substantial consideration in the Bygenteel Assignment or Club Versante Lease for the rights to this large number of parking stalls.

[89] Bygenteel argues that it was expressly contemplated in an “Amended Information Statement” dated December 14, 2016 (the “Statement”) that assignees of an interest in the Parking Head Lease would be entities related to ITC. However, the Statement refers to a “Parking Tenant”, which presumably became 121. The Statement also refers to the Parking Tenant granting partial assignments of the Parking Head Lease to “Strata Lot owners” to allow them to access and use the parking facilities.

[90] Even accepting the Statement upon which Bygenteel relies, the Hotel, contained in ASP2, is not a “Strata Owner”. Further, it is incomprehensible why Bygenteel, as the owner of SL 13 and 14, would be entitled to a lease of the P5

Parking Stalls which are for the exclusive use of the Hotel, which is a separate part of the development from SL 13 and 14. This strange situation is even more curious in light of Mr. Ching's assertions that it was not just the P5 Parking Stalls that were assigned to Bygenteel, but another 34 parking stalls, simply arising from Bygenteel's purchase of two Strata Lots under the Bygenteel SL Purchase Agreement.

[91] Fox Island's counsel asserts that it is unusual to allocate this amount of parking stalls (127) to SL 13 and 14 that have a combined area of 4,193 square feet. By comparison, the entire Hotel has a total floor area of 91,519 sq. ft.—more than 20 times the area of SL 13 and 14—yet was only allocated 84 parking stalls.

[92] There are many questions that arise in relation to the Bygenteel Agreements, however, no clear answers emerge.

[93] All that remains to be said about the Bygenteel Agreements is that they raise more questions than they provide answers as to their business purpose and efficacy and their validity. It is undeniable however, that the P5 Parking Stalls have considerable value, particularly to the Hotel in terms of providing what is a usual amenity for Hotel guests and other users of the Hotel property.

### **DISCUSSION AND ANALYSIS**

[94] The issues to be decided concern notice *and* whether Fox Island engaged in dishonest or deceitful conduct in relation to Bygenteel that amounts to fraud. Bygenteel must prove both to succeed.

[95] The evidence includes a number of Affidavits, including from Wen Yong Wang, a representative of Fox Island; from Shiu-Yuen Choi, a lawyer with Norton Rose Fulbright, solicitors for Fox Island; and Mr. Ching, who is the President and Chief Executive Officer of the Debtor/Respondents and 121.

#### **a) Did Fox Island Have Notice of Bygenteel's Interests?**

[96] The relevant timeframe is from 2019 to September 2021.

**i) Initial Discussions (Wang and Ching)**

[97] I will highlight at the outset that the evidence as between Mr. Wang and Mr. Ching is in conflict in certain respects on the issue of notice. It was this conflict that Bygenteel and the Debtor/Respondents argued gave rise to the need for an adjournment to conduct further document disclosure and cross-examinations, which I rejected.

[98] Mr. Ching's evidence is as follows.

[99] In his Affidavit #3, Mr. Ching says that Mr. Wang was introduced to him through a mutual friend in early 2019 as a person with access to private lenders for bridge loans for real estate projects.

[100] Mr. Ching says that Mr. Wang visited the offices of the respondent, Sunwins Enterprise Ltd. (a related company owned by Mr. Ching) ("Sunwins") around April 2019. Mr. Ching showed him the proposal for the ITC development project and another project. Mr. Ching says that he provided Mr. Wang with marketing materials for the commercial strata lot sales, which included the Statement.

[101] As described earlier, the Statement is dated December 14, 2016, over two years prior to this alleged meeting. In any event the Statement expressly provides that the Developer (ITC) has the right to make any changes to this document, including material changes. The Statement refers to the development that is not yet constructed. Mr. Ching relies on Section 3.6 of the Statement which addresses "Parking":

**Parking**

- (a) The parking facilities for the Development will be located within the [Remainder Parcel] (the "**Parking Facilities**").
- (b) Appropriate arrangements will be made to ensure that the owners of the Strata Lots will have the right to access and use the Parking Facilities on the [Remainder Parcel], subject to the terms of such arrangements (the "**Parking Arrangements**").
- (c) The Parking Arrangements may include legal agreements that are registered against title to the [Remainder Parcel], in order to ensure

that the Strata Lot owners have the right to access and use the Parking Facilities.

- (d) The Parking Arrangements may also specific how the costs related to the maintenance and repair of the Parking Facilities are shared among the users of the Parking Facilities.
- (e) The Developer contemplates that the Parking Arrangements will involve the following:
  - (i) The Developer plans to lease the Parking Facilities (or a portion thereof) to an entity related to the Developer, or such other third party as the Developer may determine in its sole discretion (the “Parking Tenant”), pursuant to a long term lease (the “Parking Lease”);
  - (ii) The Parking Lease may be registered against title to the Remainder, where the Parking Facilities are located;
  - (iii) The Developer intends that the Parking Tenant will control and administer the use of the Parking Facilities pursuant to the terms of the Parking Lease, and that the Parking Tenant will grant partial assignments of the Parking Lease to the Strata Lot owners, on the terms and for such consideration as the Parking Tenant may determine in its sole discretion, as may be necessary to grant the Strata Lot owners the right to access and use the Parking Facilities;
- (f) PROVIDED THAT if the Developer deems it more appropriate, at its option, the Developer may grant to the owners of the Strata Lots rights to access and use the Parking Facilities, which rights are substantially similar to the rights granted to them through the partial assignments of the Parking Lease as set out above, by the implementation of a different legal structure.

[Emphasis added.]

[102] Mr. Ching then states that, from April 2019 to November 2019 when various agreements were signed with Fox Island, he had many other meetings with Mr. Wang. He says that he provided “additional information” to Mr. Wang as to the project by printed copies and a USB drive. Mr. Ching has not produced any of this “additional information” that he says he provided, so the actual contents are unknown.

[103] On another contested point, in his Affidavit #3, Mr. Ching states that during his discussions with Mr. Wang, Mr. Wang was “at first” uncertain whether Fox Island should take security over the parkade at all. In his Affidavit #4, Mr. Ching states that during his initial discussions with Mr. Wang, Mr. Wang was told that the Remainder

Parcel was not offered as collateral and that it had “no value” to ITC since it had been leased to various parties.

[104] Mr. Ching then refers to the September 2019 agreements by which Fox Island loaned ITC \$16 million, which were later terminated. In November 2019, there were further agreements with Fox Island, by which Fox Island loaned ITC \$12 million loan to refinance existing loan facilities for the development and construction of the Hotel. As Mr. Ching acknowledges, both loan agreements refer to ITC being the sole legal and beneficial owner of the Remainder Parcel (and ASP2). The November 2019 loan agreement at Section 4.1(h) reads:

the Complex includes the ITC Remainder, which provides approximately 333 parking stalls, 84 of which will be for the exclusive use of the Hotel and its guests, located on Parking Level 5 of the Remainder;

[105] Mr. Ching states that the purpose of the Parking Head Lease was to allow for individual strata owners and the Hotel to be assigned long-term parking interests in the Remainder Parcel. Mr. Ching states that it is impractical to create a fee simple interest for individual parking stalls to sell to various strata lot purchasers. Accepting that was the case, there is no explanation as to why a separate entity—121, the “Parking Tenant”—was created for that purpose instead of using ITC (as may have been done as the “different legal structure” potentially contemplated under Section 3.6(f) of the Statement).

[106] Even accepting that Mr. Ching had decided upon a legal structure that included assigning all of the stalls, including the P5 Parking Stalls, to 121 as the “Parking Tenant”, there is no mention in the November 15, 2019 loan agreement of the Parking Head Lease, which ITC had entered into some months prior in May 2019 (which apparently was when the Air Space Parcel subdivision was completed).

[107] Mr. Ching is only able to baldly state that he “knew” that Mr. Wang was aware of the “leasehold parking arrangements” throughout the negotiation of these September and November 2019 loan agreements. He also baldly states, without any

details such as dates, that he repeatedly informed Mr. Wang as to the existence of, and necessity for, the Parking Head Lease.

[108] Mr. Wang (Affidavit #3) and Mr. Choi (Affidavit #1) has provided evidence, as follows.

[109] Contrary to Mr. Ching's evidence, Mr. Wang denies that they met in April 2019, and further denies that he met with Mr. Ching multiple times from April 2019 to the time later loan agreements were signed with Fox Island in late 2019. He makes no mention of having received any Statement in April 2019, although one might infer that from Mr. Wang's evidence. Mr. Wang takes the position that his first meeting with Mr. Ching was not in April 2019, but months later. In any event, Mr. Wang expressly denies having received any USB drive or printed materials from Mr. Ching in or after April 2019 that referenced any leases of the P5 Parking Stalls.

[110] Mr. Wang states that, on August 22, 2019, he met Mr. Ching for the first time to discuss the possibility of having Fox Island fund a loan to ITC for completing the construction of the Hotel.

[111] However, unlike Mr. Ching, Mr. Wang has produced contemporaneous reliable evidence to support his evidence and contradict that of Mr. Ching. Mr. Wang has produced a "WeChat" message between them dated August 22, 2019, which refers to Mr. Wang having "accepted" Mr. Ching's "friend request" and then describing to Mr. Ching a meeting between them "*this* afternoon".

[112] Mr. Wang's message is also telling from a number of other perspectives in relation to Mr. Ching's evidence:

- a) The message begins with Mr. Wang saying, "it was a pleasure meeting you", which strongly supports that their first meeting was on August 22, 2019, contradicting Mr. Ching's claim that they met months earlier in April 2019;

- b) In the message, Mr. Wang gave a brief summary of what they discussed in terms of the proposed loan, while Mr. Wang specifically asked Mr. Ching to correct anything unclear or inaccurate from that summary; and
- c) Mr. Wang summarized that the collateral to be provided to Fox Island as a first mortgagee was the Hotel and supporting facilities, which included “100 parking spaces” associated with the Hotel. To say the least, even accepting Mr. Ching’s evidence, as above, that Mr. Wang was “at first” ... “uncertain” whether to take security over the parkade, this was a clear indication that Mr. Wang did have that intention in late August 2019.

[113] Within a short period that same day on August 22, 2019, Mr. Ching replied to Mr. Wang in WeChat, stating that “The only inaccuracy in the summary is regarding the restaurants”. He goes on to provide some clarification, stating “The parking spaces were already built in Phase 1, about 90 spaces occupying the 5th floor”.

[114] In his WeChat reply, Mr. Ching made no mention of any lease regarding the P5 Parking Stalls, including referring to the Parking Head Lease that had been executed months before. In addition, Mr. Ching did not state that the P5 Parking Stalls cannot be included as collateral. Mr. Wang has reviewed other WeChat messages between himself and Mr. Ching from August-November 2021 and he did not find any mention of the Parking Head Lease, or further leases or assignments in the messages.

**ii) Due Diligence**

[115] Shortly after his initial discussions with Mr. Ching, in late August 2019, Mr. Wang, on behalf of Fox Island, retained Mr. Choi to represent Fox Island in respect of the loans to be advanced to ITC for the Hotel.

[116] At the time, ITC had retained Thomas Russell of Pryke Lambert Leathley Russell LLP (collectively, “Pryke”) to represent its interests in respect of the proposed loan.

[117] On August 27, 2019, Mr. Choi sent an email to Pryke requesting that ITC provide, among other things:

All agreements related to the ownership / use of (i) the ~100 parking stalls ... for the Hotel's exclusive use (85 parking stalls in p5 all in hotel parcel)

[118] On August 31, 2019, Mr. Choi provided a draft loan agreement to Pryke. In the covering email, Mr. Choi clarified that the easement against the Remainder Parcel in favour of ASP2 only provided for the exclusive use of 84 parking stalls, not 100 as their client (Fox Island) was originally told. I acknowledge that the draft is, as Mr. Ching argues, ambiguous about whether the P5 Parking Stalls are charged by the security.

[119] However, later events would clearly indicate that Fox Island intended to take security over the P5 Parking Stalls, even accepting what Mr. Ching contends was the substance of his earlier conversations with Mr. Wang.

[120] On September 5, 2019, Pryke responded to Mr. Choi by saying that they would review the easement and if necessary prepare an agreement to confirm the location of the parking stalls.

[121] On September 5, 2019, Mr. Choi emailed Pryke again, emphasizing the importance of Fox Island taking security against the P5 Parking Stalls, stating:

On a related point, given the critical role of the Remainder Lot 1 to the hotel's operation and the fact that Broadway Camera's 2nd mortgage also charges that parcel, I think it would be fair to include that parcel as part of the "Property" so that it is charged by our client's 1st mortgages. Could you pls have your client consider and let us know.

[122] Despite Mr. Choi's request to Pryke from August 27, 2019 for any agreements relating to the P5 Parking Stalls, at no time did Pryke provide him with any lease, sublease or any other similar agreement relating to the P5 Parking Stalls, including the Parking Head Lease.

[123] But Mr. Choi was persistent. On September 11, 2019, he again emailed Pryke about the current version of the loan agreement. At that same time, Mr. Choi stated:

I take it from your email that your client has agreed to include the Remainder Lot 1 as the “Property” to be mortgaged for this loan.

How about the remaining comments about 4.1(f), which your office is to find out more? (Excerpt below)

1.”Par. 4.1(f) (1) There are 84 parking stalls for the exclusive use of the Hotel. We will review the Easement and if necessary prepare an agreement to confirm the location of the parking stalls. ...

[124] Again, Mr. Choi received no response from Pryke concerning any agreements affecting the P5 Parking Stalls.

[125] Fox Island’s initial loan was ultimately advanced, but was terminated on November 7, 2019, at the request of ITC.

[126] Immediately following the termination of the initial loan, ITC and Fox Island entered into another loan agreement, but for the lesser amount of \$12 million (the “ITC2 Loan”). The ITC2 Loan was secured by a second ranking mortgage registered against, among other lands, the Remainder Parcel, which includes the lands upon which the P5 Parking Stall are situated.

[127] Both Mr. Wang and Mr. Choi’s evidence is to the effect that Fox Island having security over the P5 Parking Stalls was “critical” in the sense that parking was necessary for the Hotel’s business operations, despite the parking being situated in a separate structure from the Hotel itself.

[128] While one might quibble with how “critical” it actually was (as Bygnteeel does), in the sense that security could have been taken over just the Hotel itself, it belies common and commercial sense to think that a lender would not have a keen interest in what parking was available for hotel guests and carefully consider whether that amenity should be included in the security.

[129] Indeed, that is exactly what Fox Island required in its security and got in its security, supporting both Mr. Wang and Mr. Choi’s statement that it was “critical” from Fox Island’s perspective.

[130] Mr. Choi also refers to being involved in the later arrangements between Fox Island and ITC.

[131] Mr. Choi acted for Fox Island in respect of the Loan Agreement (June 2021), which is the relevant agreement which provided for the security including the Mortgage registered in September 2021. Like the earlier security granted to Fox Island in 2019, the Loan Agreement confirmed ITC's title to the P5 Parking Stalls and included ITC's representation and warranty that the "Complex" included the Remainder Parcel, which provides 84 parking stalls for the exclusive use of the Hotel and its guests on Level 5 of the Remainder Parcel.

[132] Throughout this entire period, Mr. Wang strenuously denies that he or Fox Island's solicitor, Mr. Choi, were ever advised or informed that the P5 Parking Stalls were subject to leases or assignments to other persons (i.e. the Parking Head Lease, the Bygenteel Assignment or the Club Versante Lease). Mr. Wang denies that he was ever advised as to the existence of these agreements, let alone provided copies of them.

***iii) Post-Security Dealings***

[133] For obvious reasons, the focus of the enquiry under s. 29(2) of the *LTA* as to what notice, if any, Fox Island had of 121 and Bygenteel's interests must be centred on the circumstances that existed at the time Fox Island was granted the Mortgage and registered it in September 2021: *VanCity* at para. 87.

[134] However, later events can also inform that issue, in terms of whether the actions and statements of the parties are credible in terms of asserting that Fox Island had knowledge of the various agreements at the time of the taking of the security (or if later, when).

[135] By January 2024, ITC had defaulted on the terms of the Loan Agreement. As a result, Fox Island was preparing the materials to commence a foreclosure proceeding in respect of the Lands. However, prior to doing so, on January 12,

2024, Mr. Wang sent an email to Rita Zhang, who was a Sunwins director, requesting documents that could assist Fox Island in evaluating the Hotel.

[136] On January 17, 2024, Ms. Zhang replied to Mr. Wang and attached, among other things, a parking lease and sublease between ITC, RCC and Versante Ltd. dated September 29, 2021 (the “RCC Sublease”).

[137] Mr. Wang states that this was the first time that he or anyone at Fox Island were provided with any information suggesting that the P5 Parking Stalls were subject to any form of lease or sublease agreement.

[138] Subsequently, in April 2024, Ms. Zhang provided a copy of what appeared to be the parking head lease to the RCC Sublease, which was also dated September 29, 2021 (the “RCC Parking Lease”). Although the existence of the RCC Parking Lease and the RCC Sublease surprised Mr. Wang, he was not concerned that these agreements could affect Fox Island’s security since neither pre-dated the Loan Agreement and the Mortgage.

[139] RCC has never asserted an interest in P5 Parking Stalls, nor does it assert a right to the Parking Stalls Net Proceeds. However, again indicative of the interconnectedness of Mr. and Ms. Ching with the various companies, Ms. Ching signed the RCC Parking Lease and the RCC Agreement on behalf of RCC, while also being the President and Director of Bygenteel.

[140] Throughout 2024, neither Mr. Ching nor Ms. Zhang forwarded to Mr. Wang copies of any other documents affecting the P5 Parking Stalls, including the Parking Head Lease, the Bygenteel Assignment, the Club Versante Lease or the P5 Stalls Purchase Agreement, despite all being in existence by that time (although it is possible that, by this time, the P5 Stalls Purchase Agreement had terminated on its terms since it had not closed within 12 months).

[141] Further, Mr. Wang states that at no time did Ms. Ching on behalf of Bygenteel advise Mr. Wang of the existence of the Parking Head Lease, the Bygenteel

Assignment, or the Club Versante Lease. It bears emphasizing that Ms. Ching was not just Mr. Ching's daughter; rather, she was clearly intimately involved in the development of the project and in the management and ownership of key aspects of the development, including the Hotel.

[142] Mr. Wang states that he only became aware that ITC and Bygenteel asserted an interest in the P5 Parking Stalls through the various agreements at the time of the receivership (May 2025). Similarly, Mr. Choi states that it was only sometime in 2024 when he became aware that ITC claimed to have leased the P5 Parking Stalls prior to entering into the initial loan agreement in late 2019.

[143] Mr. Wang states that, had he been made aware that the P5 Parking Stalls had been leased to another party (such as 121 or Bygenteel), he would have, as a prudent lender, required that those persons subordinate their interests in the P5 Parking Stalls in favour of Fox Island.

[144] I agree that the veracity of Mr. Wang's statement could be questioned, given that it is after the fact and made once this issue was joined. However, in the overall context of Mr. Wang's clear intention to obtain a first charge on the Hotel and its assets, as expressed to Mr. Ching in late August 2019, and Mr. Choi's efforts to obtain copies of all relevant agreements that might affect the P5 Parking Stalls, this statement rings true.

[145] Another question that arises—but is not answered—is why Club Versante does not advance a claim against the P5 Parking Stalls arising from the Club Versante Lease dated July 1, 2021, by which Bygenteel granted a lease of the P5 Parking Stalls to Club Versante for five years.

***iv) The Adjournment Application***

[146] Before turning to the application on the merits, I will address the adjournment application.

[147] In support of its adjournment application, Bygenteel, supported by the Debtor/Respondents, argued that Mr. Wang's Affidavit #3 and Mr. Choi's Affidavit #1 directly contradicted Mr. Ching's Affidavits #3 and #4. Counsel argued that a listing of documents by the parties and cross-examinations of the various Affidavits was required to resolve credibility issues between these two deponents.

[148] I will pause at this point to reinforce the rather unusual fact that the Debtor/Respondents are participating in this application to support Bygenteel. It is Mr. Ching, on behalf of the Debtor/Respondents, not Ms. Ching, who is leading the charge to recover the Parking Stalls Net Proceeds and providing the evidence for the most part. Indeed, it was counsel for the Debtor/Respondents who requested the adjournment, not Bygenteel's counsel.

[149] Ms. Ching has offered no evidence on the issue of notice to Fox Island of the various lease agreements, as relevant to Bygenteel's position which relies on the Parking Head Lease and the Bygenteel Assignment that Bygenteel says flows from that Parking Head Lease.

[150] It is unclear what interest the Debtor/Respondents are defending on these applications since they clearly acknowledged Fox Island's priority to the P5 Parking Stalls as against them as declared in the Order *Nisi*. Also, there will be a shortfall suffered by Fox Island regardless of whether Fox Island is entitled to the Parking Stalls Net Proceeds or not. I agree that one inference that arises is that Mr. Ching and his daughter are acting in concert in attempting to secure the Parking Stalls Net Proceeds.

[151] Leaving that possible inference aside, I do not consider that circumstance, if true, as relevant to a determination of the issues on their merits.

[152] In support of the adjournment application, the applicants refer to *Stephens v. Altria Group, Inc.*, 2021 BCCA 396, which addressed an appeal from a judge's

decision to order cross-examination on affidavits on a contested chambers hearing.

The court referred to the test as follows:

[5] Altria submits the correct test is that summarized by Justice W. Scarth in *Greenwood v. Greenwood*, [1999] B.C.J. No. 846 at para. 15, and cited in *Equustek Solutions Inc. v. Jack*, 2013 BCSC 882. The three factors to be considered are:

1. whether there are material facts in issue;
2. whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and
3. whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

Other cases have identified additional considerations such as whether the information sought is available through other means, and whether the cross-examination will produce unreasonable delay, or generate unreasonable expense: *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995.

[153] As Fox Island argues, the core dispute is what was communicated between Mr. Wang and Mr. Ching (or perhaps others) and when, in terms of whether Fox Island knew about these unregistered agreement(s) at a time before Fox Island registered the Mortgage and advanced funds.

[154] This priority dispute has been brewing for some time now and there is no doubt that Mr. Ching has been aware of it over that time and that he has had the opportunity to marshal evidence in support of his arguments (and bald assertions).

[155] I agree that Mr. Wang and Mr. Ching fundamentally disagree about when they met and what Mr. Ching told Mr. Wang in the period leading up to the first funding in November 2019.

[156] However, even taking Mr. Ching's evidence at its highest, in my view, it is not persuasive in the face of the considerable evidence provided by Mr. Wang, which includes not only his statement as to what he knew (or did not know), but also the considerable contemporaneous documentation that support his evidence.

[157] Mr. Ching's evidence in substance is that: a) he provided a 2016 Statement to Mr. Wang to early 2019 referring to "contemplated" agreements; and b) Mr. Wang

was told of the existence of the Parking Head Lease at some unidentified date and that it had been leased to “various parties”.

[158] Mr. Ching also states that he did not offer the P5 Parking Stalls as collateral. Yet, when the time came to confirm the terms of the funding by Fox Island in Fall 2019, and regardless of what Mr. Ching asserts may have been told to Mr. Wang earlier, this was not borne out in the actual transaction.

[159] Mr. Ching is entirely silent in the face of evidence that clearly contradicts his own, including his WeChat reply to Mr. Wang on August 22, 2019 that the “first” collateral offered to Fox Island would include the P5 Parking Stalls and which message made no mention of any other relevant agreements.

[160] Further, Mr. Ching offers no explanation why, in the face of Mr. Choi’s numerous requests to Pryke for information and documentation regarding the P5 Parking Stalls, neither he nor Pryke provided the Parking Head Lease in Fall 2019 when the first loan was funded. If by that time Mr. Wang had “forgotten” about being told about the Parking Head Lease or that he was provided a copy earlier, one would think that a normal response would be just that – and to provide another copy as Mr. Choi requested. No response whatsoever was provided.

[161] Mr. Ching offers no evidence or documentation from his solicitors, Pryke, on this subject, despite having ample time to do so. The clear inference is Mr. Ching has chosen not to introduce any evidence from Pryke as it relates to what happened in the face of Mr. Choi’s numerous requests for documentation and that such evidence would not support Mr. Ching’s arguments.

[162] Not every controversy found in the evidence merits the delay and expense of allowing cross-examinations. I accept here that the evidence goes to a material issue and a relevant issue. However, I do not agree that cross-examinations here will serve a useful purpose in terms of eliciting evidence that would assist in determining the facts and issues.

[163] In *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2015 BCSC 1995 [Cowichan], Justice Pearlman stated:

[29] Minor discrepancies in the evidence, or conflicts that may be resolved by reference to documentary evidence will not warrant the exercise of the court's discretion. However, where there is conflicting evidence on a material fact in issue which would result in the inability of the judge hearing the petition to decide the case, cross-examination will be ordered: *Morlacci v. British Columbia Energy, Mines and Petroleum Resources*, [1994] B.C.J. No. 3300 at paras. 8 -11 (S.C.); *Cadboro Investments Ltd. v. Canada West Insurance Co.* (1987), 18 B.C.L.R. (2d) 352 (B.C.C.A.).

To similar effect, see *Ibrahim v. Hashemi*, 2024 BCCA 383 at paras. 34–38.

[164] I see little or no utility in allowing Bygenteel to cross-examine Mr. Wang on the issues when Mr. Ching's evidence fails to address the above points. I see nothing coming from those cross-examinations beyond denials of any contrary position put to the affiants, and the Court being left with duelling transcripts similar to what now exists in the various duelling affidavits: *Cowichan* at para. 31.

[165] More significantly, there are contemporaneous documents which record communications between Mr. Wang and his solicitor and Mr. Ching and his solicitor, accompanied, of course, by complex financing documentation as to what the parties agreed to and on what terms.

[166] Even accepting that a conflict exists in Mr. Ching's evidence as opposed to Mr. Wang's evidence in the April–November 2019 timeframe, I conclude that I am in a position to resolve the contradictions in the evidence based on the entire body of evidence, including relevant documentation.

[167] I am also not persuaded that there is any need to delay the matter to allow a listing of documents.

[168] Mr. Ching and Mr. Wang frequently communicated through the mobile app "WeChat" from the time that they first met on August 22, 2019. Mr. Wang has reviewed those messages from August 22, 2019 until November 17, 2022. During that time, Mr. Wang says at no time in those WeChat messages did Mr. Ching

mention the Parking Head Lease, the Bygenteel Assignment, the Club Versante Lease or any assignment or sublease of the P5 Parking Stalls any other third party.

[169] Again, all parties have had months to scour their records to adduce relevant documentation and attach it to affidavits. Mr. Ching specifically refers to not being able to recover any WeChat messages between himself and Mr. Wang prior to November 2021. However, he only recalls communicating with Mr. Wang by WeChat in 2019 and thereafter, but makes no mention of these messages even supporting his argument that he gave notice to Mr. Wang of the Parking Head Lease (or any other lease or agreement affecting the P5 Parking Stalls).

[170] Even so, if such messages had been sent, I conclude that they are of little persuasion in the scheme of things. This is since any such discussions were decisively overcome by the actual terms of the agreements between ITC and Fox Island as recorded in the various loan agreements – which refer to Fox Island being granted a first ranking charge against the Hotel, including the P5 Parking Stalls. In addition, any such communications are refuted by the fact that, before the security was taken, Mr. Ching’s counsel was specifically asked to provide such documents and nothing was said about it. Mr. Ching is unable to reconcile how he could have possibly been telling Mr. Wang in WeChat messages about certain agreements, while also failing to respond at all to Mr. Choi in the course of Fox Island’s due diligence.

[171] As I will describe more fully below, even if a conflict exists on the notice issue, the evidence as to Fox Island’s intentions and motivations in obtaining the Mortgage and the ordinary manner in which it set about obtaining the security after appropriate due diligence is such that no issues arise as they relate to the equitable fraud aspect of the test. I cannot see that any amount of discovery will assist the Debtor/Respondents or Bygenteel in that respect: *VanCity* at paras. 93–95.

[172] For the above reasons, I dismissed the application for the adjournment on December 9, 2025 and turned to the merits of the application, which all parties then addressed in substance.

**v) Conclusion re Notice**

[173] Having considered all of the evidence, I find as a fact that at no time prior to the registration of the Mortgage did Mr. Wang on behalf of Fox Island have any notice, express or implied, of the existence of the Bygenteel Agreements.

[174] As I have stated above, Mr. Ching is unable or unwilling to produce any communication to Mr. Wang by which the existence of the Bygenteel Agreements was ever raised, let alone any communication by which copies of those Agreements were provided to Mr. Wang.

[175] Even assuming that Mr. Wang had a copy of the Statement, the one document that Mr. Ching was able to produce, it was dated years before Mr. Wang even met Mr. Ching and only referred to agreements that ITC “contemplated”.

[176] To the contrary, Mr. Wang has produced credible contemporaneous documentation that records an early conversation with Mr. Ching. This communication included not only Mr. Ching’s confirmation about what collateral was being offered to Fox Island (i.e. the P5 Parking Stalls), but also mentioned nothing about the existence of the Parking Head Lease.

[177] During the involvement of Mr. Choi in 2019, as Fox Island’s solicitor doing due diligence on the issues, Mr. Ching and his solicitors remained entirely silent about the existence of the Parking Head Lease. Even years later, when the 2021 lending arrangements were being made, leading to the registration of the Mortgage, there is no evidence of any communication from either Mr. Ching or his solicitors to Mr. Choi about either the Parking Head Lease, or the other agreements that followed from it – being the Bygenteel Assignment and the Club Versante Lease.

[178] For all intents and purposes, when the various mortgages were registered, all Fox Island knew was that ITC was the registered owner of the P5 Parking Stalls and held the entirety of the legal interests that related to that asset.

[179] I do not accept Mr. Ching's bald assertions that he told Mr. Wang about the Bygenteel Agreements, which directly contradict the reliable evidence produced by Mr. Wang and Mr. Choi.

[180] To the extent that there is a conflict in the evidence as between Mr. Wang and Mr. Ching, I accept the evidence of Mr. Wang as more credible and reliable.

[181] The entire course of events, as recorded in the documentation, is that ITC was offering Fox Island a first ranking mortgage against not only the Hotel, but also the P5 Parking Stalls. There can be no doubt that Mr. Ching was well aware of Fox Island's intention from the outset, particularly from the WeChat message above.

[182] At any point in the initial discussions or the due diligence period, Mr. Ching and Pryke (if they knew), had ample opportunity to raise the issue of the existence of the Bygenteel Agreements. They did not.

[183] I accept Mr. Wang's evidence that, had he been informed that the P5 Parking Stalls were subject to any of the Bygenteel Agreements, as a prudent lender, Fox Island would have sought to address any interests held by 121, Bygenteel and Club Versante in some fashion. In that case, I also accept Mr. Wang's evidence that Fox Island would likely have sought subordination of these interests as a condition to advancing any loans to ITC.

[184] Indeed, the Court questioned counsel for the Debtor/Respondents as to why both Mr. Ching and Pryke failed to provide the Parking Head Lease to Mr. Wang or Mr. Choi in late 2019 when the initial loans were being arranged. Counsel's candid response was that they were not told because it would jeopardize the funding from Fox Island. That response rings true, and very much supports Mr. Wang's evidence about how Fox Island would have reacted upon being told of such agreements.

[185] In this regard, Mr. Ching's version of events does not make logical sense. It is commercially irrational for a lender to require a borrower to provide a first ranking charge against collateral to secure repayment of a significant loan, all the while

knowing of prior claims to that same collateral by third parties related to the borrower, without first obtaining written confirmation from those related third parties that they agree to subordinate their interests to the lender's security. Fox Island is not a novice lender; rather, Fox Island is a sophisticated lender who retained reputable legal counsel to conduct due diligence with respect to their loans to ITC to properly record and protect their secured interests.

[186] In short, the clear inference that arises is that Mr. Ching did not want Mr. Wang or Mr. Choi to know about the Parking Head Lease, since he knew that it was very likely that ITC and 121 would be required to subordinate any interests arising under the Parking Head Lease in respect of the P5 Parking Stalls to Fox Island's security, failing which ITC would not receive the funding. The same can be said for the later funding arrangements in 2021 in relation to a potential subordination by Bygenteel and Club Versante.

[187] There is simply no reliable evidence that Mr. Ching disclosed the existence of the Bygenteel Agreements to Mr. Wang or Mr. Choi prior to the commencement of these receivership proceedings.

[188] I find as a fact that Mr. Ching at no time gave notice to Mr. Wang of the Bygenteel Agreements. In that regard, Bygenteel has failed to meet its onus under s. 29(2) of the *LTA* to prove otherwise.

**b) Did Fox Island engage in equitable fraud?**

[189] In order for the Debtor/Respondents and Bygenteel to succeed, they must not only prove that Fox Island had notice of the Bygenteel Agreements, but they must also prove that Fox Island participated in some form of equitable fraud by registering its Mortgage to secure repayment of its loan in order to take advantage of the *LTA* priority regime as against Bygenteel.

[190] Having found as a fact that Fox Island did not have notice of any of the Bygenteel Agreements prior to registration of the Mortgage, it is not necessary to consider this second requirement. However, if I am in error on the first issue by

reason of the conflicting evidence preventing such a finding of fact, or if Mr. Wang indeed gave notice by Mr. Ching as he alleges, I will consider the second requirement that arises under s. 29(2) of the *LTA*.

[191] I have already described the evidence in detail above in relation to how Mr. Wang approached the matter of loaning funds to ITC and how, having agreed to do so, Fox Island then set about confirming the nature and extent of the collateral and the development of substantial loan documentation after due diligence by its solicitor, Mr. Choi.

[192] In my view, there is nothing to suggest that Fox Island acted in any manner other than as a normal lender in the ordinary course of its business. The overwhelming evidence is that, consistent with the agreement with ITC, Fox Island set about securing a first mortgage position with respect to the Lands to secure the substantial loans that ITC had requested and Fox Island had agreed to advance on those terms. The Mortgage was registered and the later title search would have confirmed that no other registration existed to displace that first position that Fox Island was to receive and did receive prior to any advance of funds.

[193] As above, I accept Mr. Wang's evidence that he did not even know about the existence of the Bygunteel Agreements, let alone register the Mortgage in an attempt to defeat any interests they held contrary to common morality: *VanCity* at para. 91.

[194] The Debtor/Respondents argue that even a "minimum amount of due diligence" would have revealed the leasehold nature of the parking or at least required further enquiry.

[195] They refer to the Statement, which I have already addressed above, which refers to a "contemplated" agreement to an entity related to ITC, but does not refer to 121. They also refer to an agreement with the City of Richmond and a draft loan agreement, which also refers to a "separate written agreement", but only by reference to ITC as the "Remainder Owner". Neither document contains any

reference to a related third party such as 121 being the “Parking Tenant”, so as to affect ITC’s registered interest in the P5 Parking Stalls. There is absolutely no reference whatsoever in any of these documents to a later lease in favour of another related party, such as Bygenteel or Club Versante.

[196] It is perplexing how Fox Island could have understood the issue in terms of its security and how it might be affected by these unregistered agreements, without being provided a copy of those documents. For example, Fox Island would not even have known if these lease agreements were for terms in excess of three years, which would be highly relevant to any consideration of the impact of s. 29(2)(d) of the *LTA*.

[197] The Debtor/Respondents argue that a title search would have revealed a “potential leasehold” if not the Parking Head Lease. I have reviewed the title and no such interests arise on the basis of that review. This argument is surprising given the acknowledged fact that none of the Bygenteel Agreements were registered at the LTO.

[198] This argument as to due diligence is met in any event by the fact that Fox Island did undertake due diligence by the efforts of Mr. Choi in making reasonable enquiries of Pryke. As I have stated above, Mr. Choi asked a number of times for Pryke to send over any relevant documents relating to the P5 Parking Stalls. There is no direct evidence as to the title searches done at the time of the registrations at the LTO (only an October 2025 title search produced by Mr. Choi). However, one of the conditions precedent to funding was a title search to confirm ITC’s registered interest (as owner) of the Lands (which includes the P5 Parking Stalls) and all encumbrances affecting it. As such, it can be inferred that this condition precedent was fulfilled before funding, and that the title confirmed Fox Island’s first position on the title, since this clearly occurred.

[199] It hardly lies in the mouth of the Debtor/Respondents to complain about Fox Island’s due diligence when Mr. Ching (and his counsel if they knew) remained completely silent in the face of Mr. Choi’s specific requests. This is particularly so

when, on August 22, 2019, Mr. Ching himself confirmed that Fox Island was to receive a first charge on the Lands and also, the accuracy of Mr. Wang’s description of the collateral that was to be secured.

[200] The simple and straightforward question that Mr. Ching has failed to answer is this – if the Statement he says he provided to Mr. Wang advised of the possibility of a further agreement to lease the P5 Parking Stalls (and other parts of the parkade), then why did he and Pryke fail to provide the Parking Head Lease to Mr. Choi as he requested a number of times?

[201] Mr. Ching’s silence is telling.

[202] The Debtor/Respondents and Bygenteel argue that Fox Island acted in a dishonest manner by seeking to register against the Lands “at the very last moment, presumably to defeat any interest under the [Parking Head Lease]”. Bygenteel also argues that dishonest actions and/or intent on the part of Fox Island arise because Fox Island charged exorbitant interest rates and fees over the later years.

[203] These arguments are unpersuasive.

[204] Firstly, the premise of the argument – that the security was only requested at the “eleventh hour” or “last minute” is factually incorrect. Mr. Wang confirmed from the very beginning—via the WeChat messages in August 2019—that Fox Island sought to include the P5 Parking Stalls as collateral.

[205] Secondly, I fail to see how Fox Island charging high interest rates and fees constitutes evidence of an improper motive in these circumstances. The interest rate and fees have little to do with what collateral is secured. It is more likely indicative of the risk involved in the loan and the value of the security. Further, ITC’s acceptance of these interest rates and fees likely says more about ITC’s lack of financing choices in terms of resolving their need for the money than Fox Island’s intentions and motivations. Lastly, I understand that some of these fees and interest rates were

said to arise in the “coming years” and cannot inform Fox Island’s intentions at the time the Mortgage was granted and registered.

[206] As above, fraud is never presumed, and cannot be imputed in the absence of direct notice: *VanCity* at para. 68. Here, no evidence, direct or otherwise, arises other than that Fox Island was securing exactly what it had agreed with ITC would be the collateral for the loan.

[207] Thirdly, if Fox Island’s motivation was to obtain priority over the Bygenteel Agreements, they could have easily requested that 121 and Bygenteel execute subordination agreements as a condition of advancing funds to ITC. As above, I have accepted Mr. Wang’s evidence that, had he known about the Bygenteel Agreements prior to advancing the initial loan, he would have done exactly that. I agree with Fox Island that such a request would have been entirely appropriate in the circumstances since both 121 and Bygenteel are non-arm’s length parties to ITC and the P5 Parking Stalls were considered by Fox Island to be critical to the Hotel operations and use.

[208] In my view, the evidence establishes conclusively that Fox Island was only acting as a lender in the normal course of business by securing repayment of a loan with a first mortgage, as it agreed with ITC.

[209] There is no evidence to support that Fox Island’s actions rose to the level of equitable fraud or that enforcement of its Mortgage in priority to the interests of Bygenteel is contrary to common or commercial morality.

[210] To the contrary, the inference that emerges is that Mr. Ching expressly decided not to inform Mr. Wang of the Parking Head Lease, the Bygenteel Assignment and the Club Versante Lease because it served his interests at the time to ensure that nothing stood in his way of receiving the funding from Fox Island. It would only be years later in the lender/debtor relationship—after enforcement proceedings had begun—that Mr. Ching chose to advise Fox Island of these

interests, again for his own purposes, in relation to attempting to secure the Parking Stalls Net Proceeds.

**CONCLUSION**

[211] I find that Bygenteel has failed to satisfy its onus to prove the notice/equitable fraud exception under s. 29(2) of the *LTA*. The evidence establishes that Fox Island had no notice whatsoever of any interest of Bygenteel. Further, and in any event, even if some notice was provided to Fox Island, I cannot see any support for the argument that Fox Island acted other than in the normal course as a lender and without any dishonest or deceitful intent or actions.

[212] I grant the declaration sought by the petitioners in that they have valid and enforceable first priority security over the P5 Parking Stall and the Parking Stalls Net Proceeds, as defined in my Order of July 15, 2025.

[213] Costs are awarded in favour of the petitioners against all of the Debtor/Respondents, on a joint and several basis, on a full indemnity basis in accordance with section 7(h) of the Mortgage.

[214] In addition, costs are awarded in favour of the petitioners against Bygenteel on a party and party basis, which is to be joint and several with the cost award against the Debtor/Respondents.

“Fitzpatrick J.”