

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pillar Capital Corp. v. Horseshoe Valley Ranch Ltd.*,
2025 BCSC 1171

Date: 20250625
Docket: H220064
Registry: Vancouver

Between:

Pillar Capital Corp.

Petitioner

And

**Horseshoe Valley Ranch Ltd.,
Elvern Kenneth Esau, Stacy Elvern Esau,
and Leanne Alma Esau**

Respondents

Before: The Honourable Justice Loo

Reasons for Judgment

Counsel for the Petitioner:	J.B. Ross
Counsel for the Respondents:	B. La Borie
Place and Date of Hearing:	Vancouver, B.C. May 20, 2025
Place and Date of Judgment:	Vancouver, B.C. June 25, 2025

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Introduction

[1] On November 16, 2022 (the “Prior Hearing”), the petitioner, Pillar Capital Corp., sought an *order nisi* in respect of collateral mortgages granted by the respondents over several parcels of land in the Peace River district of British Columbia and judgment on a debt alleged to be in excess of \$1 million. In my reasons dated January 19, 2023, indexed at 2023 BCSC 82 (the “Prior Reasons”), the factual background is set out in greater detail.

[2] The respondents raised a number of defences to the petitioner’s debt claim and sought an order that the proceeding be referred to the trial list pursuant to Rule 22-1(7)(d) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [the “Rules”].

[3] In the Prior Reasons, I found that two of the defences advanced by the respondents – based on the doctrine of improvident realization and allegations of a criminal interest rate – as well as the calculation of the amount owed by the respondents to the petitioner raised triable issues that precluded the granting of an *order nisi* at the Prior Hearing.

[4] However, I also held that it was not necessary to refer the proceeding to the trial list. In accordance with the Court of Appeal’s decision in *Cepuran v. Carlton*, 2022 BCCA 76, I ordered that the triable issues did not require pleadings and discovery to resolve, and could be fairly determined by use of a more limited process. I held that hybrid procedures within this petition proceeding would be suitable and sufficient to determine the issues, and that in particular:

- a) in relation to the improvident realization issue, I granted the parties leave to exchange further affidavits, including affidavits containing

expert evidence, and to conduct cross-examination on those affidavits;
and

- b) in relation to the criminal interest rate issue, I granted the parties leave to exchange expert evidence and to conduct cross-examination on that evidence.

[5] I held that once those processes were completed, either party would be at liberty to apply to the Court for a determination of whether the amount owed ought to be adjusted as the result of either or both of these defences. Absent a resolution between the parties at that stage, the matter would be referred to the Registrar for determination of the amount owed.

The evidentiary record

[6] The petitioner has now applied to have the issues relating to improvident realization and criminal interest rate determined. However, the parties have not, for the most part, taken advantage of the hybrid processes offered to them.

[7] Since the issuance of my Prior Reasons, the parties have filed:

- a) an affidavit of a legal assistant to counsel for the petitioner that exhibits correspondence between counsel;
- b) an affidavit of a legal assistant to counsel for the respondents that exhibits a letter from an appraiser, G. Blake Joiner;
- c) an affidavit of Mr. Joiner that exhibits the same letter attached to the affidavit of the legal assistant; and
- d) an affidavit made by Melanie Harmon, a senior manager with the respondent, Horseshoe Valley Ranch Ltd. (“Horseshoe”). Her affidavit was not referred to during argument and is not directly relevant to either of the two defences.

[8] There has been no further cross-examination. Apart from the letter from Mr. Joiner, whose evidentiary value will be discussed below, neither party has advanced any expert evidence.

[9] I have considered the possibility that the Court is in no better position to determine the improvident realization and criminal interest rate issues than it was in 2023, and that I ought to dismiss this application on the basis that the issues raised with regard to the two defences cannot be resolved on the evidence before the Court. However, I have concluded that this would not be an appropriate course.

[10] In this regard, it is useful to recall the following passage from *Cepuran*:

[160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[Emphasis added.]

[11] The parties were given a further opportunity “to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding.” Although that opportunity was, for the most part, not taken, the parties have advanced some new evidence.

[12] Regardless of what new evidence was advanced by the parties, it was always possible that the respondents, despite their best efforts, would be unable to meet their evidentiary burden in respect of the two defences. If the respondents’ evidence on this hearing is insufficient to meet that burden, it would be unfair to the petitioner to permit the respondents to rely on their own failure to be given another chance to adduce further evidence.

Determination of the two defences

[13] In light of the foregoing, I will assess the defences of improvident realization and criminal interest rate as contemplated in my Prior Reasons, on the basis of the evidence filed for the Prior Hearing and the four new affidavits described above.

Improvident realization

Factual background

[14] The equipment which is the subject of the improvident realization defence was scheduled to be sold beginning on April 11, 2019, by auction sale through Ritchie Brothers Auctioneers Ltd. (the “Auctioneers”). Prior to the sale, the respondents advised the petitioner that some of the equipment was not advertised properly because the listings did not contain registration information for the equipment. The auction listings in question stated “no registration available.” On April 10, 2019, the day before the auction sale, most of the listings were updated to include the relevant registration information.

[15] The petitioner does not dispute that several listings stated “no registration available” until the day before the auction sale, or that some equipment was marketed for approximately one month without the registration information. However, the petitioner denies that the listings of equipment without registration information negatively impacted the realizations at auction. It argues out that the listings were almost all corrected prior to the auction, and that any effect on price resulting from the prior lack of registration information was immaterial.

[16] The petitioner also disputes the number of listings that remained uncorrected by the auction date. The petitioner’s position appears to be that only one listing remained uncorrected by the time the auction was held, while a representative of the Auctioneers deposes that three units sold in two lots, 514 and 988, were sold without registration information. Given the conclusions I have reached below, it is not necessary to resolve this point.

Legal principles

[17] The law in respect of the doctrine of improvident realization was summarized by Justice Fenlon (then of this Court) in *HSBC Bank Canada v. Kupritz*, 2011 BCSC 788, as follows:

[35] The question in each case is whether the secured party took all reasonable steps to obtain the best price for the collateral: *Greyvest*, at para. 45. A debtor alleging failure of a secured party to deal with collateral in a commercially reasonable manner bears the burden of proving not only that the manner of selling the collateral was improvident, but also that the failure to act in a commercially reasonable manner resulted in recovery of less money (and therefore an increased deficiency) than would otherwise

have been the case: *J. & W. Investments Ltd. v. Black* (1963), 38 D.L.R. (2d) 251 (B.C.C.A.) at 264.

[36] In practical terms, this onus of proof requires the debtor to establish both that the secured party departed from industry norms, and that a higher price would have been obtained if the secured party had done what is considered to be reasonable in that particular sector or industry. Generally, meeting that burden will require the debtor to provide expert evidence on the industry standard against which the debtor's allegation of substandard conduct can be measured. However, it will not always be the case that expert evidence is required; in some cases the conduct of a secured party may so obviously depart from commercial common sense that evidence of what was done alone will suffice ...

[18] As stated in this passage, the debtor bears the burden of proving “both that the secured party departed from industry norms, and that a higher price would have been obtained if the secured party had done what is considered to be reasonable in that particular sector or industry.”

Assessment of the respondents' evidence

[19] In seeking to meet these burdens, the respondents rely on the letter prepared by Mr. Joiner, described above, and evidence regarding the realized values of the equipment at auction compared to estimated or appraised values for that equipment.

Mr. Joiner's letter

[20] Mr. Joiner's letter is dated December 17, 2024, and is addressed to counsel for the respondents. In my view, it is of limited assistance, for several reasons.

[21] First, although copies of the letter are attached to an affidavit made by Mr. Joiner as well as to a legal assistant's affidavit, Mr. Joiner deposes simply that “attached and marked as Exhibit A is a true copy of a letter I provided to Bridgehouse Law LLP on December 17, 2024.” The affidavit does not state that the facts set out in the letter are true, and, as a result, the letter is not admissible for the truth of its contents.

[22] Second, even if the respondents can overcome the issue of the letter's admissibility, its contents are not particularly helpful to the determination of the issues before the Court. The first sentence of the letter provides:

In reviewing the files that you sent to us ... we are not able to comment on the appropriate conduct of [*sic*] the actions of the parties involved.

[23] Therefore, the letter offers no evidence that the petitioner or the Auctioneers departed from industry norms.

[24] Regarding whether a higher price would have been obtained but for the impugned conduct, Mr. Joiner's letter states:

The one question posed in our discussion was, if in a scenario where a piece of equipment was sold without a registration document, whether it be auction or otherwise, would the seller expect to get near market value? As we have been in the business of selling equipment by industrial auction for 47 years, our experience is that without a registration, equipment has not sold near the market value. Without registration, which gives the buyer the ability to register in their name, the equipment could not be used off-road or for parts and not in the fashion it was designed for on public roads. We cannot give you a percentage reduction from market value as it happens infrequently, especially for roadworthy equipment which we understand was the condition of the equipment in this court case.

[Emphasis added.]

[25] There are at least two points to be taken from this passage.

[26] First, Mr. Joiner's letter does not account at all for the fact that the appropriate registration information was corrected for most of the equipment lots the day before the auction sale. Rather, Mr. Joiner refers to equipment which was "sold without a registration document." Therefore, his opinion is of very limited relevance in the circumstances of this case.

[27] Second, Mr. Joiner concedes that he cannot provide any opinion regarding the percentage reduction from market value for equipment sold without registration information. Therefore, even if the Court were persuaded that the petitioner had departed from industry norms and that this departure negatively affected the realization values, it would be left with no evidence from Mr. Joiner regarding the quantum by which the debt owed by the respondents to the petitioner ought to be reduced.

Estimated or appraised values compared to sales prices

[28] In support of their argument that a higher price would have been obtained for the equipment if the equipment listings had contained registration information from the outset, the respondents rely on a table set out in their Amended Application Response, which compares "appraised values" of 14 lots of equipment to the values realized for those lots at the auction sale.

[29] The document from which these figures are drawn refers to “estimated values,” not “appraised values.” In any event, the table in the Amended Application Response purports to show a shortfall between the “appraised values” in 2019 and the realized values, which totals \$123,750 over the 14 lots. However, the table suffers from at least two flaws.

[30] First, \$70,000 of the alleged shortfall relates to an entry in the table which was demonstrated by the petitioner to be erroneous. The entry attributes a realization value of zero to a piece of equipment which was sold together with another piece of equipment for \$81,000. When that sum is added to the other realization values in the table, the shortfall is reduced to \$42,750.

[31] Second, the respondents ask the Court to infer, without any independent or expert evidence, that any shortfall between the “appraised values” and the realized values was caused by the fact that the equipment was marketed without registration information (and sold, perhaps in two instances, without any registration information at all).

[32] The petitioner refers to eight other units sold by the petitioner at auction, for which there was no issue regarding registration information, and observes that seven of those units were sold at less than their estimated price. Therefore, there were similar shortfalls both for equipment subject to the registration information issue and equipment not subject to that issue. That fact is persuasive evidence that the inference that the respondents ask the Court to draw is not a reasonable one. I am unable to find, on the basis of the evidence before the Court, that any shortfall in realization values was caused by the registration information issue.

Conclusion regarding improvident realization

[33] For the reasons stated, the defence of improvident realization has not been made out by the respondents. They have not proven either that the secured party departed from industry norms, or that the secured party would have obtained higher prices for the equipment absent such a departure.

Criminal interest rate

[34] Neither party advanced any expert evidence or, indeed, any independent evidence, with regard to the criminal interest rate issue, either at the Prior Hearing

or at the hearing of this application.

[35] At the Prior Hearing, the respondents advanced an analysis prepared by Stacy Esau, a director of Horseshoe, that purported to show that the required payments under the Loan Agreement between the parties would result in the charging of a criminal interest rate under s. 347(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as it read at the relevant time.

[36] However, at this hearing, the respondents abandoned that position and instead submitted as follows in their Amended Application Response:

The Respondents concede that the Loan Agreement on its own, including the Monitoring Fee, is not an agreement to enter into an agreement with a criminal rate of interest. However, the Respondents say, as above, that if improvident sale is proven, and the amounts owed at May 2, 2019 were adjusted significantly above, it would offend the *Criminal Code* if Pillar were entitled to receive those interest amounts after that date.

[Emphasis added.]

[37] The petitioner raises issues regarding the calculations advanced by the respondents at this hearing and the period over which that calculation is performed, but it is not necessary to address those issues. The respondents' position at this hearing is that a criminal interest rate would result *if* an improvident sale is proven and the amounts owed are adjusted significantly.

[38] As set out above, the respondents have been unsuccessful in proving an improvident sale and there has been no adjustment to the amount owed. Therefore, the respondents' defence of criminal interest rate is not made out.

Conclusions and remedy

[39] The respondents have not made out the defence of improvident realization or the defence of criminal interest rate. The next task on this petition is to determine the amount owed by the respondents to the petitioner, without any adjustment for those defences.

[40] As noted in my Prior Reasons, the respondents state that they have been unable to reconcile the loan balances supplied by the petitioner. Further, the respondents submit that there are discrepancies within the petitioner's own affidavit evidence in these proceedings. In particular, the respondents allege that

for the date March 31, 2019, the petitioner has provided different balances owing for both loan facilities in the affidavits of Steve Dizep, the petitioner's president, and Keaton O'Brien, vice-president of the petitioner:

Date	Facility	Source	Amount
March 31, 2019	1	Affidavit of S. Dizep #2 Ex. "A"	\$848,227.30
		Affidavit of K. O'Brien Ex. "N"	\$850,345.02
	2	Affidavit of S. Dizep #2 Ex. "C"	\$634,821.50
		Affidavit of K. O'Brien Ex. "O"	\$648,070.57

[41] The discrepancies between the evidence of Mr. Dizep and Mr. O'Brien are not significant: they are approximately \$2,000 for facility 1 and less than \$14,000 for facility 2. As a result, it is hoped that the parties will be able to determine the amount owing without the Court's assistance. However, if it is necessary, the amounts owed by the respondents to the petitioner under facility 1 and facility 2 shall be referred to the Registrar for determination, pursuant to R. 18-1 of the *Rules*.

[42] For convenience, I repeat here the paragraphs from my Prior Reasons relevant to this reference to the Registrar:

[81] Pursuant to R. 18-1(3), I direct that the result of the assessment or accounting be certified by the Registrar.

[82] Pursuant to R. 18-1(5), the Registrar will be able to define the issues, order production of documents, and to hear evidence as she sees fit. If an issue arises which is beyond the jurisdiction of the Registrar to determine, the issue can be referred back to me pursuant to R. 18-1(10).

[83] Pursuant to para. 2.5 of the Loan Agreement, Pillar's calculations should be the starting point, and should be departed from only if the Respondents can demonstrate "manifest error" in those calculations.

[84] Once the Registrar's certificate is in hand, I expect that I will be in a position to provide a decision in respect of the Orders sought on the petition. If further submissions are required at that time, counsel will be advised.

[43] Paragraph 2.5 of the Loan Agreement, referred to in para. 83 of my Prior Reasons as set out above, provides as follows:

The Borrower acknowledges that the recording by the Lender of any Advance and any principal, interest, fees, payments or other amounts owing or received under this Agreement in an account opened and maintained by the Lender in respect thereof shall constitute, in the absence

of manifest error, conclusive evidence of the Borrower's indebtedness and liability at any time and from time to time under this Agreement ...

Costs

[44] The determination of costs will await the final hearing or Order on the petition.

“The Honourable Justice Loo”