SUPREME COURT OF NOVA SCOTIA

Citation: *Meadow Ridge Estates Inc. v. Moskowitz Capital Mortgages Fund II Inc.*, 2018 NSSC 330

Date: 20181224
Docket: Hfx No. 453470
Registry: Halifax

Between:

Meadow Ridge Estates Inc., Shirestone Developments Ltd., Kurt Repchull, Shelly Repchull, James Jonasson, and Natalie Jonasson

Applicants

v.

Moskowitz Capital Mortgages Fund II Inc.

Respondent

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	May 28, 29, 30 and 31, 2018, in Halifax, Nova Scotia
Date of Decision:	December 24, 2018
Counsel:	W. Harry Thurlow and Jacob Che (Articled Clerk), for the Applicants Adam Crane and Jennifer Singh (Articled Clerk), for the Respondent

By the Court:

Introduction

[1] Pursuant to amended Notice of Application in Court filed on August 11, 2017, the Applicants, Meadow Ridge Estates Inc. ("Meadow Ridge"), Shirestone Developments Ltd. ("Shirestone") et al. seek an order:

> "Declaring that the Respondent has repudiated the term sheet and mortgage executed by the parties and, as such, is not entitled to the interest and fees charged in relation thereto.
>
> 2. Awarding the Applicants:
>
> a. damages;
>
> b. interest; and
>
> c. costs.
>
> 4. Directing that any amounts due by the Applicants to the Respondent pursuant to the term sheet and the mortgage be set-off against a corresponding portion of damages awarded to the Applicants;
>
> 5. In addition, or alternatively, awarding judgment to the Applicants for reimbursement of any amounts determined to be an overpayment by the Applicants to the Respondent;
>
> Any such further and better relief as this Honourable Court deems just.

[2] Within this context, the Applicants make a number of serious allegations against the Respondent, Moskowitz Capital Mortgages Fund II Inc ("Moskowitz"). The following are not exhaustive but they include (all references are to the corresponding paragraph of the amended Notice of Application):

> 14. … Moskowitz has never advanced the hard cost facility [portion of the loan] instead …[it] has demanded increasingly unreasonable information …from Meadow Ridge as a justification for not advancing the hard cost facility, and for charging interest on amounts not advanced.
>
> 22. The Plaintiffs (sic) state that there is no reasonable justification for Moskowitz to withhold the balance owing under the term sheet…further more the

> Plaintiffs (sic) state that Moskowitz's refusal to honour the term sheet was perpetrated under the guise of false concerns over the stability of the project or document disclosure…
>
> 23. In addition to the foregoing and in further bad faith, Moskowitz has conducted and continues to conduct this litigation in an abusive manor (sic) by stifling the project in order to pressure the Applicants to withdraw the application or otherwise cause injury to the Applicants.

[3] The Applicants then go on to allege six specific examples of Moskowitz "bad faith" actions.

[4] The Applicants state that the total cost to borrow in relation to the actual funds advanced by Moskowitz was unduly onerous. In fact, they say that it was unconscionable. They go on to allege that the effective interest rate on the funds advanced by the Applicants was contrary to s. 347 of the *Criminal Code* and, thus, usurious. They also plead relief under the *Unconscionable Transactions Relief Act* R.S., c. 481, s. 1. and the *Money-Lenders Act* R.S., c. 289, s. 1.

[5] The Respondent, Moskowitz, has filed an amended Notice of Contest on October 16, 2017. Among other things, the Respondent contests allegations of bad faith and states that it, at all times, had justifiable reasons for any of the actions that were or were not undertaken. For example, it states that it was justified under the terms of the parties' contract to refrain from advancing funds on those occasions of which the Applicants have complained. It alleges that the Applicants failed to meet the terms and conditions specified in the term sheet and mortgage. Alternatively, it argues that the Applicants created a change in risk with respect to the loan as a result of their actions or inactions (*amended Notice of Contest, paras. 28 and 29).*

[6] Moreover, they allege that Meadow Ridge (on July 7, 2016) intentionally defaulted under the provisions of the term sheet and mortgage by refusing to make its interest only payment, which was due on that date. (*amended Notice of Contest, para. 25*)

[7] In addition to the affidavits that have been filed in this proceeding, the court heard from Kirk Repchull, Dr. James Jonasson, Natalie Jonasson, Shelley Repchull, Bryan Jaskolka and Paul Conrad (actuary), all on behalf of the Applicants.

[8] Brian Moskowitz and Kelly McKeating (actuary) testified on behalf of the Respondent.

[9] Twenty-four exhibits were tendered in total. These exhibits included affidavits on behalf of the witnesses who testified and other materials. They are enumerated as follows:

Exhibit No.	Date	Tendered By	Description of Exhibit
1	28-May-18	A.	Affidavit of Kurt Repchull sworn Oct. 11, 2016 (marked as Exhibit 1 – Volume 1 and Exhibit 1 – Volume 2)
2	28-May-18	A.	Affidavit of Kurt Repchull sworn Jul. 4, 2017
3	28-May-18	A.	Supplementary Affidavit of Kurt Repchull sworn Apr. 6, 2018
4	28-May-18	R.	Email from Bryan Jaskolka to Kurt Repchull dated Sep. 9, 2015
5	28-May-18	R.	Email from Bryan Jaskolka to Kurt Repchull dated February 3, 2016
6	28-May-18	A.	Affidavit of James Jonasson filed on Oct. 11, 2016
7	28-May-18	A.	Affidavit of Natalie Jonasson filed on Oct. 11, 2016
8	28-May-18	A.	Affidavit of Shelly Repchull filed on Oct. 11, 2016
9	29-May-18	A.	Affidavit of Bryan Jaskolka – Oct. 13, 2016 (marked as Exhibit 9 – Volume 1 and Exhibit 9 – Volume 2)
10	29-May-18	R.	Email from K. Repchull to Bryan Jaskolka dated Feb. 23, 2016
11	29-May-18	R.	Letter to Adam Crane from McKeating Actuarial Services dated May 25
12	29-May-18	A.	Affidavit of Paul Conrad filed on Jan. 31, 2018
13	29-May-18	R.	Report of Kelly McKeating filed on Apr. 5, 2018
14	29-May-18	R.	Affidavit of Brian Moskowitz filed on Dec. 2, 2016
15	29-May-18	R.	Supplementary Affidavit of Brian Moskowitz filed Apr. 10, 2018
16	30-May-18	A.	Email string from Stern enclosing budget beginning Feb. 18, 2016
17	30-May-18	A.	Email string Jul. 2, 2015, attaching cost breakdown
18	30-May-18	A.	Email from Isabelle to Suri attaching construction checklist dated Jul. 9, 2015

19	30-May-18	A.	Isabelle to Stern dated Sep. 17, 2015
20	30-May-18	A.	Appraisal Report prepared by John Ingram dated Sep. 25, 2015
21	30-May-18	A.	Email from Isabelle to Stern dated Sep. 17, 2015
22	30-May-18	A.	Loan summary for Meadow Ridge Estates dated Nov. 24, 2015
23	30-May-18	A.	Documents provided to Ms. McKeating by Respondent (partial list)
24	30-May-18		Printed material from Moskowitz website – Let our track record speak for itself

[10] The facts as established will be set forth initially at a "2000 foot level". Additional attention will be given to certain of them further on in these reasons, to the extent necessary to illustrate the conclusions at which I have arrived.

[11] First, I will introduce the principal non-corporate participants in this matter:

A. Kurt Repchull – Mr. Repchull is the President of the Applicant Companies, Meadow Ridge and Shirestone Developments Limited ("Shirestone");

B. Shelley Repchull, James Jonasson and Natalie Jonasson – Ms. Repchull is the wife of Kurt Repchull. Ms. Jonasson is Kurt Repchull's sister. Dr. Jonasson is her husband. All were passive investors in the project with limited involvement. Of the three, Ms. Repchull was the most involved, as she provided occasional bookkeeping/secretarial services for Meadow Ridge in what amounted to approximately one day per week;

C. Brian Moskowitz ("Mr. Moskowitz") is the President of the Respondent Company, "Moskowitz";

D. Andrew Stern ("Mr. Stern") is an employee of Moskowitz and had dealings on behalf of the Respondent with the Applicants at various times throughout the relevant time periods;

E. Brenan Isabelle ("Mr. Isabelle") is an employee of Moskowitz and had dealings on its behalf with the Applicants at various times throughout the parties' dealings with one another;

F. Jenny Comia ("Ms. Comia") is an employee of Moskowitz and also had dealings on its behalf with the Applicants at various times throughout the relevant time period;

G. Bryan Jaskolka ("Mr. Jaskolka") is a friend of Mr. Repchull. He is also the Chief Operating Officer and Vice-President of Canadian Mortgages Inc. ("CMI") the company which brokered the financing of the project by Moskowitz Capital, and is a minority investor in Meadow Ridge through Canadian Lending Inc. ("Canadian Lending" or "CLI") which in turn is a company related to CMI because it acts as CMI's underwriter;

H. Nanit Suri ("Mr. Suri") was an employee of CLI/CMI and had involvement in negotiating the term sheet and corresponding with various individuals at Moskowitz Capital and the Applicants throughout the relevant time period.

Background

[12] The antecedents to this application have been provided in the various affidavits of Messrs. Repchull, Joskolka, and Moskowitz. Briefly put, the Applicant, Meadow Ridge, conceived of a relatively small project which involved the development of some real estate in Upper Sackville, Nova Scotia. The parties have referred to this as the "project" and I will also do so in these reasons. As noted earlier, Mr. Repchull was the President of both the Applicant Meadow Ridge and the Applicant Shirestone. The latter corporate entity was to act as the project manager.

[13] On or about August 31, 2015, Meadow Ridge and Moskowitz entered into an agreement whereby the latter would finance the project in the total principal amount of $1,120,000.00. The deal was brokered by Mr. Jaskolka's company, CMI. Mr. Repchull and the remaining Applicants agreed to act as guarantors of the loan. Pursuant to their agreement, significant security was required of the Applicants, including a first mortgage over the project itself, and mortgages against some of their individually owned real properties.

[14] The nuts and bolts of the agreement were embodied in a "term sheet". This term sheet has been reproduced at least twice in the materials filed by the parties.

One such instance occurs in the affidavit of Kurt Repchull *(Exhibit 1, volume 1)* sworn October 11, 2016 (*tabs c and e).*

[15] The date of the term sheet is August 31, 2015. It defines the purpose of the loan to Meadow Ridge as such:

> To provide construction financing on a cost to complete basis for road construction and site servicing of 26 building lots at Sackville Drive, Upper Sackville, Nova Scotia (PID #41164039).
>
> [Emphasis added]

[16] There is no record of any discussion between the parties as to the meaning of "cost to complete basis" prior to February of 2016. I will return to this point later in these reasons.

[17] The term sheet provided, *inter alia*, for the following (it is convenient to quote from para. 6 of the Applicant's pre-hearing brief in this respect):

> 6. The terms and conditions of the financing were embodied in a term sheet executed August 31, 2015 and Mortgage executed September 28, 2015 which are found at tabs "C' and "E" of the Affidavit of Kurt Repchull filed October 12, 2016 respectively. The relevant terms include:
>
> (a) Pursuant to the term sheet:
>
> (1) Moskowitz agreed to finance the Project for a total principal amount of $1,120,000.00 (the "Principal");
>
> (2) The term was 12 months;
>
> (3) Interest was the greater of 11% or the TD Canada Trust prime rate plus 8.3%, compounded daily;
>
> (4) Payments were due monthly, not in advance, and were interest-only;
>
> (5) The Principal could be repaid at any time during the term with 30 days written notice plus three months' interest, provided the funds for repayment came from Project unit sales (failing which the term was closed);
>
> (6) Moskowitz required a satisfactory appraisal report;

(7) Meadow Ridge needed to have equity of at least $500,000.00 prior to the first advance, and at least $560,495.00 prior to the second advance;

(8) The Principal was divided into two facilities:

(a) $250,000.00 for "land and closing costs" (the "Land Cost Facility"); and

(b) $870,000.00 for the hard cost facility (the "Hard Cost Facility).

(c) The following draws on the Hard Cost Facility were mandated:

(d) $200,000.00 by November 1, 2015;

(e) $300,000.00 by January 1, 2016 (for a total of $500,000.00); and

(f) $370,000.00 by March 1, 2016 (for the full $870,000.00)

(9) If such amounts were not drawn, interest would accrue on those amounts as if they had been advanced. In addition, "standby fees" of $10,000 per month would apply…

(10) Several collateral agreements were required as security (the "Collateral Security"). The Collateral Security included, among other agreements:

(a) A first mortgage on the Project (PID 41164039);

(b) A first mortgage on three other Shirestone properties (16, 22, and 31 Shire Lane in Upper Sackville, Nova Scotia);

(c) A second mortgage on the home of Dr. and Ms. Jonasson;

(d) A second mortgage on the home of Mr. and Ms. Repchull;

(e) A second mortgage on each of two properties owned jointly by Mr. Repchull, Ms. Repchull, Dr. Jonasson, and Ms. Jonasson (1 and 3 Connolly Road in Middle Sackville, Nova Scotia), which were both executed on September 28, 2015; and

(f) General security agreements against Meadow Ridge, Shirestone, Mr. and Ms. Repchull, and Dr. and Ms. Jonasson (the "GSAs").

> (11) To secure the debt under the term sheet, Meadow Ridge, Shirestone, and Moskowitz executed the mortgage on the Project on September 28, 2015 (the "Mortgage"). Shirestone, Mr. and Ms. Repchull, and Dr. and Ms. Jonasson also executed their respective mortgages on September 28, 2015. Moskowitz registered financing statements pursuant to the GSAs on October 9, 2015. (emphasis added)

[18] As noted above, the stand-by fee ($10,000.00) was stated to be due and payable in the event that $250,000.00 of the committed funds (the land cost facility, or "LCF") was not drawn by the Applicants on or before September 18, 2015. If the Applicants failed to do so by this date, the Respondent could elect to cancel the agreement. However, if not cancelled, and in consideration of each monthly extension granted by the Respondent, a further stand-by fee of $10,000.00 was due and owing. The first stand-by fee payment was due and owing on September 19, 2018, and similar payments every 30 days thereafter, "in order to hold funds for this transaction" (*Exhibit 1, volume 1, tab c., p. 3 of 7).* In the evidence of Mr. Moskowitz, once the funding was approved, the total $1,120,000.00 was "set aside" – it was "tied up" in the sense it could not be used for any other purpose.

[19] The terms also provided for a commitment fee of $33,600.00 payable to Moskowitz, a broker fee of $11,200.00 payable to CMI, and a non-refundable deposit of $7,500.00. The three latter payments were all to be payable out of the LCF, which was to be the first installment of funds drawn down by the Applicants.

[20] The term sheet also contained a section called "special mortgage conditions". The conditions set out in the term sheet are as such (it is convenient to quote from the pre-hearing brief of the Respondent, at pp. 3 to 5 in this respect):

> a) Subject to receiving a satisfactory appraisal report on the subject property addressed to Moskowitz Capital Management Inc. confirming an "as is" value of $500,000 and an "as complete" value of $1,950,000.
>
> b) The Borrower's equity must be not less than $500,000 prior to the first advance and $560,495 prior to the second advance.
>
> c) Subject to meeting the conditions herein, the following amounts in aggregate are to be drawn from the Hard Cost Facility by the following dates:
>
> i) $200,000 November 1, 2015;
> ii) $500,000 January 1, 2016; and
> iii) $870,000 March 1, 2016.

> failing which interest will start to accrue and become payable as part of the monthly interest payment as if the funds were advanced. This clause is for the benefit of the Lender to insure that the Project is moving forward and the Borrower(s)/Guarantors(s) is utilizing the committed funds set aside specifically for the Project.
>
> The dates for the Land Cost Facility and Hard Cost Facility set out in the term sheet and in any subsequent documentation are considered to be "on or before dates" where it is anticipated that the borrower draws on the funds on or before the date specified, with the specified date being the worst case scenario.
>
> Schedule "B" of the term sheet (Pg. 7 of Exhibit "5" of Affidavit of Brian Moskowitz, sworn on December 2, 2016) is entitled "Required Documentation" and sets out the documentation that Moskowitz Capital required the Applicants to provide before the Land Cost Facility would be advanced. Moskowitz Capital required this documentation in order to conduct the necessary loan underwriting and due diligence. Some of the important documents that Moskowitz Capital required the Applicants to provide are as follows:
>
> | | |
> |---|---|
> | Item #2 | An appraisal of PID 41164039, Upper Sackville, NS accompanied by a letter of transmittal from the appraiser, reflecting a minimum "as is" value of $500,000 and a minimum "as complete" value of $1,950,000 based on a 180 day marketing period. |
> | Item #10 | Full set of working drawings, stamped by engineer, for the project. |
> | Item #11 | Final construction budget for the Project. |
> | Item #14 | All municipal applications relating to the construction. |
>
> Item #3 of Schedule "B" of the term sheet stipulated as one of the Required Documentation items "Any other reasonable documentation requested by the Mortgagee(s) and / or its solicitor."
>
> [Emphasis added]

[21] The provisions of the term sheet were secured by a first mortgage over the project between the Applicant, Meadow Ridge, and the Respondent, Moskowitz, dated September 28, 2015. It is attached as Exhibit “E” to the affidavit of Mr. Repchull sworn October 11, 2016 *(Exhibit 1, volume 1).* The mortgage confirmed that the Respondent was to finance the project for a total principal amount of

$1,120,000.00 over a 12 month term to begin on December 1, 2015, and end on December 1, 2016. It was to bear interest at a rate the greater of 11% or the TD Canada prime rate plus 8.3%, with interest only payments due on the first of every month. The principal amount could be repaid at any time with 30 days written notice plus three months interest, provided that the funds for repayment came from the project unit sales. All monies secured by the mortgage would become immediately due and payable upon an event of default, including failure to make an interest payment.

[22] The Applicants did not actually receive the land cost facility draw from the Respondent until November 24, 2015. It will be recalled that the deadline in the term sheet specified for this draw was September 18, 2015. The reason for this delay is one of many things that are contested between the parties.

[23] It is a fact that there were various emails and other pieces of correspondence flowing between these two dates from Messrs. Suri, Isabelle, Stern, Repchull and Moskowitz relating to various items of "due diligence" specified in the term sheet and/or the mortgage. The seeds of the suspicion and mistrust that grew between the parties were planted during this time, and, as will be seen, reached full maturity not many months later.

[24] When this land cost facility ("LCF") was advanced on November 24, 2015, it was, for our purposes, in the net amount of $186,045.10. This consisted of the specified amount ($250,000.00) less a number of expenses. *(Affidavit of Brian Moskowitz, Exhibit 14, para. 112)*

[25] After the net amount shown above was reduced by a further "600.00 for registration costs and $4,800.00 for legal fees", the final amount made available to the Applicants by the Respondent was $180,645.10. The Applicants, nonetheless, accept (for the purposes of this application) that LCF proceeds of $186,045.10 were advanced to them on November 24, 2015.

[26] The hard cost facility ("HCF"), however, which was contemplated in the term sheet and in the mortgage was never released. In fact, the Applicants never received any further funds from Moskowitz after November 24, 2015.

A closer look: What preceded the advance of the LCF on November 25, 2015.

[27] First, we note the following fees that were paid out of the LCF advance:

HRM taxes (secured land, 53 Cavalier Drive):	$754.29
HRM taxes (secured land, Sackville Drive):	$476.10
HRM tax certificates:	$600.00
Title insurance:	$1,402.00
Release of mortgage recording fee:	$100.00
Commitment fee:	$33,600.00
Standby fee ($10,000/month x 2 months)	$20,000.00
Appraisal fee:	$5,692.50
Insurance review fee:	$400.00
Wire fee:	$35.00
Per diem (11% interest/day x 7 days)	$527.40
Broker fee (CMI):	$11,600.00
Recording fee:	$600.00
Moskowitz's legal fees:	$4,800.00
Meadow Ridge legal fees:	$5,957.00
Total:	**$86,544.29**

[28] It will be recalled that the term sheet included a requirement that Meadow Ridge was to draw down the land cost facility by September 18, 2015. The failure to do so brought with it the requirement to pay a "standby fee" to the Respondent of $10,000.00 per month of delay ($10,000.00 x 2 = $20,000.00) as noted above.

[29] It would appear that the required documents (opinion letter, collateral mortgages, general security agreements and other documents required) ancillary to the principal and collateral security to be provided by the corporate Applicant, Meadow Ridge, and the Guarantors, was not provided by the Respondent's counsel to counsel for the Applicants until September 18, 2015, at 3:15 p.m.

[30] As a consequence, the documentation itself was not executed until September 28, 2015. On October 5, 2015, Mr. Jaskolka wrote to Mr. Moskowitz by way of email intending to share "…some concerns to this point and how your company has handle [sic] this financing…" (*affidavit of Kurt Repchull, October 12, 2016, Exhibit O*). The email goes on to indicate:

> …I need to understand as do my partners if your company is planning on delivering on the commitment it has written. Brennan [Isabelle] promised, in writing, to Kurt [Repchull] a copy of the appraisal report and now is refusing to provide it until after closing. At the same time, there seems to be confusion regarding if your company is even planning to fund this as the last we heard, there was still "unspecified" delays on your end with no timetable set. …we do intend to conclude this transaction but are stating [sic] to wonder if your company is going to honour the terms of its commitment. (*affidavit of Kurt Repchull, October 12, 2016, Exhibit O*)

[31] Meanwhile, Moskowitz was alleging delay (and, in some instances, failure) on the part of Meadow Ridge to comply with the obligations as stipulated in the commitment letter. Moskowitz says that these unfulfilled loan terms were the fault of the Applicant, Meadow Ridge.

[32] First, the Respondent points out that the term sheet itself was not executed until August 31, 2015 and that the Applicants' shortcomings in this respect affected everything else, beginning with the date of the LCF advance. In fact, it contends that the failure to execute the term sheet earlier than August 31, 2015 was caused by drawn-out responses to earlier drafts of the term sheet that had been sent out by the Respondent, and that the first such draft was provided on August 10, 2015.

[33] Moreover, as we have seen, Moskowitz indicates that once the term sheet was executed, the company set aside $1,120,000.00 which was earmarked to fund the project. Once these funds were set aside, Moskowitz Capital says that it became unable to utilize the money for anything else (*affidavit, Brian Moskowitz, December 2, 2016, paras. 39 and 40).*

[34] Mr. Moskowitz goes on to point out that it was not until August 31, 2015 that the Applicants even provided his company with the name of their counsel. The Respondent contends that, given this, it was actually a very quick turnaround between the execution of the term sheet and the provision of the loan documents on September 18, 2018. He contrasts this with the behaviour of the Applicants, who he says "were very slow in providing the required documentation to the terms

which Moskowitz Capital required before funding the loan" (*affidavit of Brian Moskowitz, para. 51).*

[35] Mr. Moskowitz goes on to point out that the Respondent's legal counsel sent to the Applicants (in care of their counsel) a letter dated September 18, 2018, which was intended to remind them of the documentation which was required of the Applicants in order to advance the funds LCF. The letter included, *inter alia*, the following:

> …In order to facilitate our preparation of this documentation, please provide:
>
> 1. The full legal names of all borrowers and guarantors in accordance with Regulation 20 of the *Personal Property Security Act* (Nova Scotia) together with:
>
>   A. Copies of a birth certificate and driver's license for each borrower or guarantor; or
>
>   B. In the case of a corporation other than a Federal or Nova Scotia Company, the full legal name as it appears on the certificate or articles of incorporation;
>
> 2. Written confirmation of:
>
>   A. The marital status of any individual borrower or guarantor;
>
>   B. The full legal name of the spouse of each individual; and
>
>   C. Whether any spouse has a matrimonial interest in a property to be mortgaged pursuant to this transaction.
>
> We have set out the more common requirements of this loan below. Any additional requirements of the Commitment Letter must be honoured prior to funding. As noted above, we will provide all necessary security and transaction documents for this transaction. You will be required to complete any land registrations. We will be completing any necessary PPSA searches and registrations.
>
> In addition to the identification documents and ultimately signed original documentation, we will require your office to provide us with:
>
> 1. Tax certificates for each mortgaged property;
> 2. Zoning confirmation for each mortgaged property, if available;
> 3. Current location certificates or surveys for each mortgaged property;
> 4. Commercial title insurance from Stewart Title or First Canadian Title in respect of each mortgaged property naming Moskowitz Capital Mortgage Fund II Inc. as loss payee and, if applicable, containing construction loan, potable water or sewage endorsements;
> 5. An original signed copy of the commitment and any amendments;

6. A void cheque from the borrow (to accompany the pre-authorized payment form); and
7. In the event the Lender has agreed to take other than a first position, written confirmation from each existing lender of the outstanding balance of the loan and confirmation that the loan is in good standing.

Please forward these items as soon as possible…

[36] Mr. Schwartz (counsel for the Respondent) also pointed out that the funds necessary to fund the loan had been "set aside" and that a $10,000.00 standby fee would be owed as of September 19, 2015 (*affidavit of Brian Moskowitz, December 2, 2016, paras. 52 – 55).*

[37] It will be recalled that the Applicants collectively and individually executed a number of collateral security documents on September 28, 2015, including the mortgage over the project property executed by Meadow Ridge, a mortgage executed by Shirestone in favour of Moskowitz Capital over 16 Shire Lane, 22 Shire Lane, 31 Shire Lane, as well as lots 6, 7 and 8, a mortgage over Mr. and Ms. Repchull's personal real property at 53 Cavalier Drive, Lower Sackville, a mortgage executed by the Repchulls and the Jonassons over 1 Connolly Road, Middle Sackville, and 3 Connolly Road, Middle Sackville and a mortgage executed by the Jonassons over 515 Voyager Way, Hammonds Plains, Nova Scotia. The mortgages on 515 Voyager Way, 53 Cavalier Drive, 1 and 3 Connolly Road, were to be second mortgages.

[38] These documents were all signed on September 28, 2015. As of October 1, 2015, the Respondent says that the outstanding loan documentation required of the Applicants still included title insurance, solicitor's undertaking, solicitor's opinion, Director's Resolutions of Meadow Ridge, Certificate of Officer from Meadow Ridge and a preauthorized payment form (*affidavit of Mr. Moskowitz, December 2, 2016, para. 68*).

[39] Further emails and letters were sent by Moskowitz Capital and/or counsel on its behalf requesting the further documents noted above. On October 7, 2015, Mr. Stern sent an email to Messrs. Repchull and Suri with respect to the due diligence items (*affidavit of Mr. Moskowitz, December 2, 2016, paras. 68 – 70*).

[40] It is very evident at this time that the patience of each side was wearing thin. Mr. Repchull responded on or about October 8, 2015 (*affidavit of Mr. Moskowitz,*

December 2, 2016, Exhibit 15). His views of the Respondent's continuing requests may be gleaned from these portions of it:

> All of this information has already been provided and questions answered.
>
> An explanation of the below is quite simple, these are residential homes, not commercial manufacturing facilities. They are not located in areas of manufacturing or zoned for such activities. There are no commercial or environmental risks, no underground storage tanks…as for the $140,000.00 on the 2014 Shirestone Development financial statements – this was a demand loan when we built the properties on Connolly Road. The balance was paid in full upon closing on May 21, 2014…I have included a copy of the closing documents from the lawyer…which shows [the outstanding balance including interest] was paid to the Royal Bank of Canada…these [property tax statements on Meadow Ridge, Shire Lane lots and 515 Voyager Way] have already been emailed, also on September 17, 2015. Tax certificates are also going to be available on closing and will be ordered two days prior to closing…what are the terms and conditions on the $150,000.00 from Canada Lending found in Meadow Ridge Estates Inc.?
>
> Bryan, you can answer this…We were told a month ago when we set this up that this [proof of insurance on Meadow Ridge Estates and Shire Lane with Moskowitz Capital Mortgage Fund II Inc. listed as additional insured] was satisfactory. Has something changed? …Dr. James Jonasson has told me that this [mortgage statement on 515 Voyager Way] was already sent. I can only assume someone has it.

[41] The above correspondence was sent by Mr. Repchull at 11:06 a.m. on October 8, 2015. Later that day, at 9:23 p.m., counsel for Moskowitz Capital wrote to counsel for the Applicants indicating, *inter alia*:

> I understand this loan is now ready to proceed with respect to the land advance as quite sometime has passed the mortgage needed to be amended to reset the interest adjustment date and payment dates. A copy has been attached. I also understand that it has been agreed the first mortgage can be postponed rather than paid out. In this regard I attach:
>
> 1. A revised mortgage; and
> 2. A comparison version for your review; and
> 3. A postponement agreement to be executed and recorded instead of paying out the prior existing mortgage.
>
> I acknowledge receipt and satisfaction with the title insurance.
>
> We will require:

1. Executed copy of the postponement and an undertaking to record it to the parcels;
2. Solicitor's undertaking;
3. Solicitor's opinion;
4. Director's Resolution of Meadow Ridge;
5. Officer's Certificate of Meadow Ridge; and
6. Preauthorized payment form with void cheque.

These items must be received and reviewed prior to funding.

[42] On October 15, 2015, counsel for the Respondent had occasion to write to counsel again for the Applicants:

> I am writing to follow up on Jared's [lawyer, Jared Schwartz] email…Please let us know if you have questions or concerns. Otherwise, we will keep an eye out for your documents which we hope to receive shortly.

[43] On behalf of the Applicants on October 19, 2015, Mr. Suri wrote to Messrs. Isabelle and Stern as follows:

> Hi Brenan/Andrew,
>
> Apologize for not being able to get back to you yesterday, but as per our earlier discussion working with the lawyer to get you the information.
>
> Would want to clarify a few things from your end as well:
>
> 1) Due to the delay in closing, can you send me some new draw dates that would work; the client suggests the following after the first advance (as aggregates to be drawn against the hard facility):
> Dec 1st
> Feb 15th
> April 15th
>
> 2) Can you please also send a detailed requirement of the conditions precedent to the draws against the hard costs, the commitment letter does no [sic] detail them.
>
> Thanks & Regards,
> Nanit Suri

[44] Moskowitz Capital responded through Mr. Stern the same date:

> Hi Nanit,
>
> 1) We will honor the requested draw dates below.
>
> 2) We require the following prior to any hard cost advances. They are the original conditions from the term sheet we are waiving for the land advance.
>
> - Full set of working drawings, stamped by engineer, for the Project.
> - Final Construction Budget (including schedule) for the Project.
> - Municipal Approval
>
> Have the clients signed all legal documents? We attempted to contact their law firm regarding timelines however haven't heard back.
>
> We still require insurance in order to proceed on the land advance. Kurt was looking into this however I haven't heard back.
>
> Lastly, for ease of tracking, I'll state here we also require the terms of the postponed mortgage.
>
> Thanks,
> Andrew

[45] The foregoing communications were being held in tandem with some others. For example, we have already seen the email from Mr. Jaskolka to Mr. Moskowitz dated October 5, 2015. On October 7, 2015, Mr. Jaskolka wrote again:

> …please call me.
>
> Need to understand where we are with interest reserve, or no reserve. This has been mentioned on and off periodically. Need definitive answer on this.
>
> Further some of this information has already been provided and answered, but we will do so again.
>
> Before we jump through anymore hoops we would like verification that there will be no other requests and changes to terms.

[46] The first draw with respect to the hard cost facility was scheduled for December 1, 2015, the second ($300,000.00) was scheduled for February 15, 2016, and the third ($370,000.00) was now scheduled for April 1, 2016.

[47] As previously discussed, the land cost facility (LCF) itself was not advanced until November 25, 2015.

Aftermath of the LCF advance

[48] One of Meadow Ridge's subcontractors working on the project, in fact the largest one, was All Terrain Contracting Inc. ("All Terrain"). All Terrain invoiced Meadow Ridge $174,966.75 on December 29, 2015.

[49] On January 4, 2016, Meadow Ridge paid $4,251.45 in interest to Moskowitz Capital. This was calculated on the basis of $450,000.00 in Moskowitz loan advances even though only $250,000.00, the land cost facility (net –$186,045.10) had actually been advanced. This process was repeated on February 1, 2016. Payments were made to Moskowitz Capital via automatic debit from Meadow Ridge's account.

[50] On February 3, 2016, Allan Stern wrote to Mr. Repchull indicating that the "full set of working drawings" noted in his email of October 16, 2015, to Mr. Suri, remained outstanding. He also added the following:

> The budget provided Monday is not at a level of typical detail. I also noticed that the All Terrain price of the roads doesn't match the contract. Can you please provide an accurate detailed budget so we can confirm the detailed costs match our expectations as well as it will assist in monitoring the project…provide a construction timeline for the project to correlate the budget to…development agreement received and under review. Waste water permit to be provided please provide the status.

[51] Mr. Stern then indicated:

> This draw is still capturing items typically covered in the initial loan due diligence, since we waived them in order to expedite the land advance. Going forward, draws will likely only require site inspections by an engineer verifying work in place and may require invoices as backup support.

[52] Meanwhile, Mr. Jaskolka was attempting "damage control". On February 4, 2016, he emailed Kurt Repchull to indicate:

> Hi Kurt
>
> Nanit has spoken with Andrew at length today and has some more clear action items. Nanit and I discussed and both feel what they are looking for is not unreasonable and other lenders would want the same or equivalents.

> So we need to focus I think on complying and producing what is missing rather than being aggravated, and it will result in a much better experience with the lender, combined with if we are then missing something at the end its much easier for us to ask for a waiver or a deferral of that one missing item after having been co-operative on the other points.
>
> I have asked Nanit to call you to explain what we should focus on immediately and what I believe are relatively fast and easy action points I'd like to try and cover off today and tomorrow, at which point, we will review what we CANNOT (if anything) comply with or mostly comply, and then once its down to just a few items (or ideally one) we will try and get an exception on that one item or sort it out.
>
> I've also instructed him to carry out the full actions to get what is missing, if you like, to assist you if you want that help.
>
> We do not believe that they are intentionally trying to do anything other than manage the loan in accordance with their loan policies which look reasonable to us.
>
> Bryan Jaskolka

[53] Mr. Jaskolka testified at the time that he wrote this he was beginning to become concerned about what he felt were the increasing demands by Moskowitz Capital, and the effect that this was having on the ability of Meadow Ridge to continue with the project as it has been doing. He gave evidence to the effect that he was attempting to be a peace maker and assure Mr. Repchull that these demands were not anything that should cause him to get further upset.

[54] His views soon changed, however, as did the tone of his correspondence with Moskowitz Capital. On February 23, 2016, he said the following:

> Hi Brian
>
> We have provided everything your people asked, including providing them contacts to WSP.
>
> Please release our 2nd draw. Kurt is getting very upset at this point and there is just really nothing else to be provided. Even WSP is at a loss for what else your people could want.
>
> They have gone very detailed, your people keep complaining its high level. It's a fixed price contract anyway and a lot of the work is already done.

> We are paying you interest already on this money as well.
>
> The only item left on the while project missing is the septic system numbers and it was discussed that could very reasonably be made a condition of the third draw, without any risk to your security. There is no problem with that, as by then it will be finalized. Its well underway already.
>
> Please release my funds, or call my ASAP if there is still an issue. 647-558-3893.
>
> Andrew keeps saying he's "reviewing" but they've had almost everything for weeks now and there's really not that much to review, its all approved by HRM and it was just the budget they said they needed it was sent on Thursday. Everything else should have already been reviewed.
>
> Please advise.
>
> Bryan Jaskolka

[55] The above was sent at 1:47 p.m. The next email that day was sent by Mr. Jaskolka moments later.

> This is now causing project damage as well. We were hoping to use this supplier [All Terrain] for other matters and Kurt doesn't think they are going to want to work with us anymore as they don't have confidence in the project's financier.

[56] At 4:28 p.m. that day there was a response from Moskowitz Capital in the form of an email from Mr. Isabelle who said the following:

> Thank you for providing the budget from WSP we have reviewed and discussed with WSP and with Brian. After inputting the updated data and the likely timeline of sales, we believe there will be a funding shortfall. Since the financing is on a cost to complete basis the requested draw cannot be provided at this time. Further work must be in place before drawing the hard cost facility. Please review the attached and let us know if there is any discrepancies.

23-Feb-16	
Land and Hard Cost Budget	1,711,923
Commitment Fee, Broker Fee & Closing Costs	50,800
Estimated Interest to Loan Retirement	148,011
Estimated Borrower Cash Flow from Personal Sources	(79,544)
Estimated Renewal Fee (December 2016)	11,200
Total Project Costs	**1,842,390**
Land and Hard Cost Work Completed to Date	877,203
Commitment Fee, Broker Fee & Closing Costs Paid	50,800
Cost to Date	**928,003**
Cost to Complete	**914,387**
Total Term Sheet Principal Amount	**1,120,000**
Cost to Complete	914,387
Available for Gross Advance	**205,613**
Previous Loan Advances	250,000
Available for Net Advance	**(44,387)**

- Provided from WSP February 18, 2016
- Actual Paid to Date
- Assuming 8 lots sold per year at the appraised price of $72,500 plus additional repayment of profit of 10% of h
- Borrower NOA income less standard living expenses. These funds will partially go towards interest expesne.
- 1% of Loan Amount - May be lower should the principal amount be lower as of the renewal date.
- **A**

- Provided from WSP February 18, 2016
- Actual Paid to Date
- **B**

- **C=A-B**

- **D - From Term Sheet**
- C (restated from above for clarity)
- **E=D-C**
- F - Actual current principal balance
- **E-F**

(*Affidavit of Brian Moskowitz, Exhibit "14", Tab 38)*

[Emphasis added]

[57] At 4:56 p.m. Mr. Moskowitz added the following comments in his email to Mr. Jaskolka:

> Bryan, we are funding in a cost to complete basis as per the loan agreement. We have put the numbers on paper so you can have the facts.
>
> I'm in NB and NL until Thursday. We can speak about it tomorrow. I am heading into a meeting now.

(*Exhibit "14", Tab 39*)

[Emphasis added]

[58] However, that did not end the discussion between the parties that day. At 5:06 p.m. Mr. Jaskolka sent another email to Mr. Moskowitz. The following has been excerpted therefrom:

> Brian, you are coming back with the costs to complete concerns but there has been no material changes to the cost to complete.
>
> This is not in keeping with the commitment letter.
>
> Furthermore, the entire last three weeks we have been discussing this matter with your people, at no time did they take ANY ISSUE with the figures. They in fact stated they were fine, but they just wanted a further level of detail…
>
> If you weren't going to advance you should have said that three weeks ago, not send my people and Kurt on a wild goose chase about "additional detail level" that even WSP didn't know what else you could possibly want.
>
> I don't see the issue other than that we are about to have a very angry road contractor and a project you are going to push up our costs and timeline…
>
> Seems rather self serving and to only give us a few days notice as well about that…
>
> The work has been done and the contractor should be paid so we can continue with our work and connect the road to the city streets and move on to marketing the project…
>
> Please call me when you get out of your meeting I prefer to speak with you this evening as we really cannot afford any further delays at this point.
>
> [Emphasis added]

[59] Then, Mr. Stern entered the discussion at 6:21 p.m. emailing Mr. Jaskolka and indicating the following:

> It was the "percentage of work completed" and "percentage of work paid for" that they only provided at the end of last week. The budget provided previously was not helpful in calculating the "cost to complete" and therefore that was the cause of the delay. The major discrepancy is not the changes to WSP budget or the increased interest costs, it is the amount of progress to date. I have reattached the

> Excel breakout using the figures provided from WSP, which arrives at $914,387.00 of work to complete and thus the funding shortfall. The source of interest payments is important, as when reviewing the personal net worth statements and guarantor sources of income, we do not see sufficient means to make the mortgage payments and therefore need to account for those upfront. This is no different than any construction project financed by industry standards.
>
> The amounts paid to date where also less than we expected. Of the $877,202.00 of WSP work completed, they have only paid invoices for $734,116.00 (of which they used our $250,000.00). Further equity will be required to trigger the hard cost facility.
>
> (*Exhibit "14", Tab 40*)
>
> [Emphasis added]

[60] At 7:52 p.m. the same day Mr. Jaskolka responded:

> I'm sorry but your comments do not meet the terms and conditions of the mortgage loan agreement.
>
> There is no condition for income, interest reserve, absorption studies, cost-based draw analysis, or any of what you refer to below.
>
> The items regarding what is outstanding, you have been provided the final budget by WSP, you have been provided the municipal permits, and drawings. The item outstanding, re: treatment plant, you already advised was OK to get on the third draw, but more to that point, that's not really the issue you are taking up below or any of your other emails.
>
> Seems to be a bit of an afterthought excuse now.
>
> The only actual condition that I see, is a verification of owner's equity in excess of $560K ~ which was satisfied on the day of closing, since the initial draw required owners equity of $500K and we already exceeded that.
>
> As such, in accordance with the MLA, the next draw is due and we are paying for it.
>
> The MLA also contemplates 100% of the road work being financed by the project.
>
> As there have been no project cost overruns, or project cost increases of any significance, there's really no basis for withholding at this point.

> Obviously, I'm not going to be adding hundreds of thousands of cash to the project interest free while you are charging us interest on money we deserve to have access to without any real legal basis for withholding.
>
> SO if you are having remorse about funding this project and will not honor your MLA and keep this project funded, we'll be looking for a credit of the lender and legal fees on your end along with no prepayment penalty, and I will look for another funder and we can part company as friends.
>
> Otherwise, this matter must be immediately addressed as we do not have time for multiple week delays and shifting objectives anymore.
>
> I look forward to a call from Mr. Moskowitz in the morning to address this matter.
>
> [Emphasis added]

[61] On February 26, 2016, Jaskolka sent to Mr. Moskowitz the following email from WSP (it should be noted that WSP was the project manager and Ryan Barkhouse the project engineer). Mr. Barkhouse had indicated in the email which was originally sent to Mr. Suri:

> I understand that there is some question regarding the project's timeline with respect to schedule.
>
> My thoughts on that question, with respect to the work we have designed and tendered and based on my experience as a professional engineer who has worked on and completed numerous residential land development projects, it is my opinion that the project is on schedule, if not slightly ahead of schedule.
>
> [Emphasis added]

[62] Meadow Ridge paid All Terrain $25,000.00. All Terrain was owed, as indicated, much more than that but the Applicants (not having received advances under the HCF) had no further funds with which to provide the balance. A further invoice was issued by All Terrain on February 29, 2016, for $84,818.25. On that date further correspondence between Mr. Jaskolka and Mr. Moskowitz ensued.

[63] Earlier, on February 26, 2016, Moskowitz had indicated that it had adjusted the cost to complete assumptions and would advance $35,280.00. The precondition, however, was that Meadow Ridge must invest $94,909.00 of its own funds in order to cover future interest. Meadow Ridge regarded this as an "interest reserve" which had not been included in either the term sheet or the mortgage.

[64] Meadow Ridge wrote on February 29, 2016 indicating its view that they were entitled to an advance of $112,000.00 (even on the basis of the way that the Respondent had indicated that they were interpreting "cost to complete"). It further reiterated that the method of accounting that Moskowitz was putting forward was not (so the Applicants say) discussed at any time in the financing negotiations. The Applicants argued therein (and in this Application) that what the Respondent said (in particular, in Mr. Stern's email at 6:21 p.m. on February 23, 2016) constituted a "new method of accounting" and a "reinterpretation" of the meaning of "cost to complete" in the term sheet (*Jaskolka affidavit, October 11, 2016, para. 32 and Exhibit "5"*).

[65] The Applicants contend that the meaning of the phrase "cost to complete" was never discussed or mentioned before February 23, 2016. They say that they reasonably interpreted it to mean that the outstanding amount of the loan to be advanced would equal the cost of the project to be completed. This would be consistent (they argue) with the equity requirement of $560,000.00 which was needed to bring the total costs at the beginning of $1,680,000.00 down to the intended loan amount of $1,120,000.00. All of this would mean that it was the lender's money which would be used to complete the project.

[66] The effect of what the Respondent was saying in Mr. Moskowitz's email of February 23, 2016, was that the funding formula contemplated by "cost to complete basis" meant that the unfunded portion of the loan always had to equal or exceed the cost of completing the project. The implication of this was that no advance would be made unless the Applicants first paid an equivalent amount into the project from their own resources and subsequently sought reimbursement by way of a funding advance.

[67] Mr. Moskowitz confirms that the above interpretation is correct in his affidavit filed April 10, 2016:

> 9. An example of cost to complete method with respect to a hypothetical loan for an amount of $300,000 with three anticipated draws of $100,000 each under the loan is as follows:
>
> a) In order to draw the first $100,000, which would leave the remaining unfunded loan amount of $200,000, the remaining cost to complete the project would have to equal $200,000.
>
> b) To draw the next $100,000 leaving the unfunded loan amount of $100,000, the remaining cost to complete the project would have to equal $100,000.

> c) To draw the remaining $100,000, the remaining cost to complete the project would have to be $0. To do this, the final work must be completed and paid for by the borrower then receive reimbursement from the lender or the lender would directly pay the specific contractor(s).
>
> d) If the remaining amount of the loan was $100,000, but there was $150,000 worth of work to complete the project, there would be a funding shortfall of $50,000, which would either have to be funded by the borrowers or more work would have to be completed so that the cost to complete the project would be $0 after the final advance of $100,000, before the final draw would be advanced.
>
> [Emphasis added]

[68] On March 1, 2016, April 1, 2016, and June 1, 2016, respectively Meadow Ridge paid the Respondent interest of $5,289.05 (as though the amount of $750,000.00 had been advanced by the latter), $7,006.85 (again on $750,000.00) and $10,463.57 (on the full $1,120,00.00, even though none of the hard cost facility had been advanced to that point).

[69] In March 2016 further developments were occurring. These led Meadow Ridge to consider other expedients. First, on March 2, 2016, Mr. Jaskolka corresponded with Mr. Repchull indicating that he (through CMI) could provide interim financing interest-free for the first 30 days, so that Meadow Ridge could pay All Terrain and the project could continue (*Repchull affidavit, October 2, 2016, para. 50*). This enabled Meadow Ridge to pay the balance (then) still owed to All Terrain ($83,317.50) on March 22, 2016.

[70] As this was going on, Mr. Moskowitz's affidavit outlines what was happening from the Respondent's perspective (*affidavit, December 2, 2016*):

> 142. Mr. Jakolka [sic] sent me an email on February 23, 2016 requesting that Moskowitz Capital let the Applicants out of the Loan/Mortgage on the following basis "we'll be looking for a credit of the lender and legal fees on your end along with no prepayment penalty".
>
> 143. On or about February 24, 2016, I sent an email to Mr. Jaskolka indicating that Moskowitz Capital is considering the Applicants request to amend the term of the Loan to exit without a penalty. Attached as Exhibit "41" is a copy of the email from Mr. Jaskolka on February 23, 2016 and my response on February 24, 2016.

144. In response to paragraphs 32-34 of the Affidavit of Brian [sic] Jaskolka, I emailed Mr. Jaskolka on February 29, 2016 indicating that "Based on the numbers provided, and the concessions we provided on Friday, the formula provides for a draw figure of $112M". Attached as Exhibit "42" is a copy of my email to Mr. Jaskolka and a revised copy of the Cost to Complete calculations.

145. In my email to Mr. Jaskolka, I requested that the Applicants provide the cancelled cheques for which WSP had been paid to date.

146. Moskowitz Capital requested the cancelled cheques from the Applicants for both the confirmation of the validity of the contracts and for proof that the suppliers were being paid.

147. Cancelled cheques are a normal request as part of a quantity surveyor's (cost consultant) report. We requested that WSP provide the cancelled cheques but they did not do so. As a result, Moskowitz Capital asked the Applicants and Mr. Jaskolka to provide them.

148. As of February 29, 2016, Moskowitz Capital was trying to reduce the costs for the Applicants by conducting an internal review instead of having the Applicants hire a cost consultant.

149. It was Moskowitz Capital's understanding that suppliers were not being paid, through the actions of the Applicants who told us that Allterrain was not paid and providing us with unpaid invoices.

150. Unpaid invoices have an impact on the cost to complete the Project and could cause potential damage to the Project such as builders' liens.

151. My email to Mr. Jaskolka was partially in response to an email from him where he alleged that Moskowitz Capital slipped clauses into Schedule B without discussion with the Applicants or Mr. Jaskolka.

152. I indicated in my email to Mr. Jaskolka that he was incorrect with this allegation. The Applicants and Mr. Jaskolka had an opportunity to obtain legal advice and had time to review the documentation.

153. I also indicated to Mr. Jaskolka that I never offered the Applicants a credit. I wrote in my email that:

> What I said was that if you need time to arrange new financing I would postpone the interest on unadvanced funds. If this is something you are interested in then we can amend the loan. We are prepared to provide relief for 90 days while you arrange new financing. No

> further funds will be advanced after this. Again both parties would have to agree to an amendment…
>
> [Emphasis added]

[71] The Applicants respond by saying, in effect, "of course, All Terrain (and other suppliers) had not been paid. This was because none of the HCF had been advanced by the Respondent". The Applicants argue that the Respondent created the problem with unpaid suppliers (that Mr. Moskowitz pointed out above) then relied on that "problem" to justify further funding delays. It was not until March 2, 2016 that interim funding became available to the Applicants (through Mr. Jaskolka's company, CMI) to pay All Terrain and some other costs.

[72] Anyway, Mr. Moskowitz continues the narrative:

> 156. Despite the difficulties that Moskowitz Capital was having with the Applicants throughout the Loan, Moskowitz Capital was still willing to work with the Applicants in relation to the anticipated advances under the Hard Cost Facility.
>
> 157. Throughout a construction loan, Moskowitz Capital or any other lender has to continuously review the progress of the borrower and their financial situation.
>
> 158. Moskowitz Capital had some level of comfort regarding the balance associated with the budget and finances of Meadow Ridge because we understood that WSP was preparing the budgets for the Applicants.
>
> 159. Moskowitz Capital understood, based on representations made by the Applicants, Mr. Jaskolka and Mr. Suri that the budget for the Project was prepared by WSP. Attached as Exhibit "43" are copies of the various correspondence that we received from the Applicants, Mr. Jaskolka and Mr. Suri which Moskowitz Capital relied upon.
>
> 160. By the end of February, 2016, Moskowitz Capital discovered that the budget was not prepared by WSP but it was prepared by Mr. Repchull, which caused Moskowitz Capital concern as we had lost confidence in Mr. Repchull's reporting and ability to bring the Project to completion.
>
> 161. On or about March 1, 2016, I sent an email to Mr. Jaskolka and Mr. Repchull indicating that Moskowitz Capital wanted a cost consultant to report on the operations of Meadow Ridge before proceeding with an advance under the Hard Cost Facility. In my email, I stated that:

> We have decided not to move forward with the advance until we have a cost consultant report to verify the work to date, work paid for and cost to complete. You represented that the budget and costs to date were from WSP but we have learned they are not from WSP. Rather the numbers are from Kurt. We don't have confidence in your reporting.

[Emphasis added]

162. Attached as Exhibit "44" is a copy of the email I sent to Mr. Jaskolka and Mr.
Repchull.

163. On or about March 2, 2016, Mr. Jaskolka sent me an email indicting [sic] the following:

> **If a cost consultant is required to remedy this situation, then lets [sic] do that immediately. I'm working on the other spreadsheet as we assemble all the source date [sic].**
>
> If that doesn't resolve the impasse, then I would like the right to exercise my buyout clause in the 2nd mortgage postponement, and/or the mortgage to be open and interest only payable on the $250k advances, and we will work to pay you out.

164. Attached as Exhibit "45" is a copy of the email from Mr. Jaskolka.

165. As an alternative to proceeding with a cost consultant and with the funding of the Hard Cost Facility, Moskowitz Capital presented the Applicants with an amended term sheet that would reduce the principal of the loan to the $250,000 that was already advanced, change the maturity date to May 31, 2016, open up the prepayment of the Loan, and remove the Hard Cost Facility funding.

[Emphasis in original]

[73] Then at paras. 167 to 171:

167. Mr. Jaskolka followed up with another email on March 2, 2016 indicating that the Applicants were agreeable to proceeding with a cost consultant, indicating that "This had never before been requested, but is a fair and reasonable approach." Attached as Exhibit "47" is a copy of the email from Mr. Jaskolka.

> 168. In that same email, Mr. Jaskolka indicated that should the cost consultant process fail, then he would "forward this amendment to the project lawyer and my ILA and upon their recommendation we will accept and work on facilitating a payout."
>
> 169. The Applicants chose to proceed with the cost consultant instead of proceeding with an amendment of the term sheet/mortgage.
>
> 170. On or about March 3, 2016, Mr. Jaskolka sent me an email indicating that "Regarding your amending offer, we're happy to proceed with the cost consultant at this time." Attached as Exhibit "48" is a copy of the email from Mr. Jaskolka.
>
> 171. On or about March 11, 2016, I sent an email to Mr. Jaskolka indicating that they should engage either Hanscomb Loan Monitoring Inc. ("Hanscomb") or Altus Group as the cost consultant to monitor the Project on a cost to complete basis as per the term sheet/mortgage. Attached as Exhibit "49" is a copy of the email to Mr. Jaskolka.
>
> [Emphasis added]

[74] Mr. Jaskolka and Mr. Moskowitz had discussed in prior email correspondence the fact that he felt that even on Moskowitz's version of the "cost to complete" formula, the Applicants own calculations indicated that they were entitled to a draw in the amount of at least $112,000.00. Jaskolka goes on to explain in paras. 39 to 45 of his affidavit (*filed on October 14, 2016*):

> 39. … on March 3, I emailed Moskowitz and agreed to appoint the cost consultant. I decided not to execute the mortgage amending agreement because I was hopeful the cost consultant would resolve the problems with Moskowitz, and the Project could continue as planned. That email is attached as Exhibit "Y".
>
> 40. On March 4, 2016, I emailed Mr. Moskowitz and Mr. Stern a budget and a supporting documentation package, and explained that all outstanding invoices would be paid within the week. Based on the emails at the time, I expected that this was all the additional information Moskowitz needed to see. That email is attached as Exhibit "Z".
>
> 41. On March 11, 2016, Mr. Moskowitz asked that I engage Hanscomb Loan Monitoring Inc. ("Hanscomb") or the Altus Group as the cost consultant on a "cost to complete" basis. That email is attached as Exhibit "AA".
>
> 42. I emailed Hanscomb that same day, and after receiving their proposal I engaged them on March 21, 2016. My email is attached as Exhibit "BB".

> 43. On April 1, 2016 Hanscomb provided its initial project review. That document is attached as Exhibit "CC".
>
> 44. During April and May I do verily believe that Mr. Repchull was working hard to make as initial report in hand, its report on the First Draw imminent, and with so much progress being made, Moskowitz would finally advance the overdue Draws.
>
> 45. On May 30, 2016 Hanscomb provided its report on the First Draw, recommending that Moskowitz advance $190,382.00. That document is attached as Exhibit "DD".
>
> [Emphasis added]

[75] Hanscomb Loan Monitoring Inc. ("Hanscomb") had earlier provided an initial project review on April 1, 2016. It was prefaced by an email from Amanda White of Hanscomb to Andrew Stern for the Respondent, and said, *inter alia*:

> Andrew, attached the initial project report for your review. If you require anything further please let us know.
>
> We will be preparing the advance report to follow the initial report this week. To ensure that we have everything that is required please let us know when a good time would be to discuss this or if you have a standard list of requirements please provide them for our reference at your earliest convenience.

[76] Copies were sent to Messrs. Repchull and Jaskolka on behalf of the Applicant.

[77] As was seen, Hanscomb was one of the two cost consultants from whom the Respondent had advised the Applicant that it would accept a report. The Applicants were required to pay the cost of this report. At p. 4 of the initial report (in the final two paragraphs of the executive summary) Hanscomb advises (*affidavit, Bryan Jaskolka, October 14, 2016, volume 2, Tab cc*):

> 11. Subject to our recommendations contained in this report and all legal and security matters being in order, we believe the subject property satisfies conditions precedent to the advance of funds.
>
> 12. From our review of the project plans and specifications we have determined the project budget that has been developed to be a fair and adequate budget for completing the project scope in accordance with provided plans and

> specifications, with the exception of the contingency reserve. Please see section 8 on page 13 for details. Consideration has also been given to applicable codes and permits required and it has been determined that the budget adequately reflects these requirements as well. Review of contracts and accepted quotes currently in place has also been done.
>
> [Emphasis added]

[78] At para. 5, p. 10 (of the initial report) we find as follows:

> 5. **CONTRACT DOCUMENTATION**
>
> **Main Contract**
>
> **Shirestone Developments Ltd.** will be acting Project/Construction Managers on the project. All contracts with the contractors and sub-contractors will be with **Meadow Ridge Estates Inc.**

Contractors	Description of Work	Value (Excl. HST)
Allterrain Contracting Inc.	Road & Services Contract	$ 448,000.00
Allterrain Contracting Inc.	Waste Water Treatment Plant	$ 275,000.00
Brewster Well Drilling	Potable Water Wells	$ 129,600.00
Total fixed price contracts / quotes received		**$ 852,600.00**
Total project hard cost value		**$ 872,600.00**
Percentage of Fixed Price Contracts or Accepted Quotes in place		**97.7%**

[79] Contingencies (as earlier mentioned in the executive report) were dealt with on p. 13 of the initial report in para. 8(6):

> Contingencies: A contingency of $15,967.00 remains in the budget to cover variances between bids received and for unforeseen changes within the design documents and the actual construction. This contingency was not included in the original budget provided, however is the difference (savings) between the current budget and the original budget as provided in the Lender term sheet. Typically, we would recommend a contingency in the range of 3% - 5% for this type of project. However it is our understanding that any increase in the project budget will be added to the Developer's equity when incurred. Therefore reducing any progress claim/advance by the same amount.

[80] At para. 7 the author goes on to conclude:

> Conclusion: We conclude that the overall total should be adequate and cost distribution reasonable based on the form of construction and type of project, with exception of the Contingency.

> The project monitoring cost schedule presented in Appendix B will be used as a frame of reference for on-going cost monitoring of the project development and to assist in evaluation of costs to complete at each review stage.

[81] Hanscomb provided its (final) report on the first draw (from the HCF) on May 30, 2016. Central to that report was its recommendation that Moskowitz advance $190,382.00 to the Applicant. Included in this report was the following:

> 1. PROJECT MONITORING CONSULTANTS REPORT
>
> …
>
> 4. Equity & Payments Review:
>
> Confirmation of the Borrower's Equity requirement of $566,393.00 is required before the … advancement of funds. According to our review of the invoices and cancelled cheques, an equity amount of $574,218.65 (excluding HST) has been paid to date by the Borrower, which exceeds the equity required. Therefore based on the information we have received to date, the equity requirement has been achieved. Please see the following breakdown of equity values reviewed:
>
> | | | |
> |---|---|---|
> | a) | Land Value | $223,688.00 |
> | b) | Hard Costs & Soft Costs Paid to Date | $600,530.65 |
> | c) | Less: Advancements Made by Lender To Date | $250,000.00 |
> | d) | **Equity Value Paid to Date**: | $574,218.65 |
>
> …
>
> 7. Progress of the Work:
>
> Allterrain Contracting Costs are approximately 74% complete:
>
> - Mobilize - 100% complete
> - Cut Trees -100% complete
> - Grubbing - 100% complete
> - Excavate & Import Fill-100% complete
> - Sanitary Services-100% complete
> - Storm Services - no claim
> - Type 2 -100% complete
> - Type 1 - 100% complete
> - Asphalt - no claim
> - Landscape -no claim
> - Signs -no claim
> - Guardrail - no claim
> - C0#1 -Over Excavation - no claim
> - C0#2 - Wastewater Treatment Plant & Construction - 11 % complete
> - C0#3 -Additional Blasting - 100% complete.
>
> …

9. Schedule:

The Developer has not provided a construction schedule to HLMI. Construction began in November 2015 and the project is expected to be completed by July 2016 for a total construction period of approximately 7 months.

At the time of our current site visit the progress of the work appears to be progressing as planned.

Please refer to photographs taken of the construction progress during the period of this advance request in Appendix B.

…

13. In my/our opinion, as of the date hereof, the figures set forth below accurately reflect the Project costs or work completed on the Project and the costs of the remaining work required completing the Project in accordance with the plans and specifications. A report setting out in greater detail those elements comprising the figures set out below is attached hereto and forms part of this Certificate.

1.	Project Costs of Work Completed to Date:	$1,043,850.00
2.	Project Costs of Remaining Work:	$642,543.00
3.	Total Project Costs (1+2):	$1,686,393.00
4.	Original Total Project Contract Value:	$1,680,495.00
5.	Amount of Additional Costs, if any (3-4):	$5,898.00

…

15. Budget Movements:
The current budget is $1,686,393.00 which has increased by $5,898.00 from the original budget of $1,680,495.00. Please refer to Section 3 for a detailed breakdown of the current budget.

(*Bryan Jaskolka affidavit, sworn October 13, 2016, tab DD)*

[82] The report concluded on page 6 by providing a summary of total project costs:

Cost to Complete Calculation:

(A) Total Project Budget	$1,686,393.00
(B) Approved Loan for Project	$1,120,000.00
(C) Equity Requirement	$566,393.00

Original Project Budget	$1,680,495.00
Additional Project Costs	$5,898.00
Current Project Budget	$1,686,393.00
Less Equity Component	$566,393.00
Less Net Lien Retention	$37,075.00
Less Amount of Previous Advances	$250,000.00
Less Amount of Current Advance	$190,382.00
Project Costs Completed to Date	$1,043,850.00
TOTAL COST TO COMPLETE PROJECT:	$642,543.00

Draw Calculation:

Total Project Cost	$1,686,393.00
Less Equity Component	$566,393.00
Sub-Total (Approved Loan for Project)	$1,120,000.00
Less cost to complete Project	$642,543.00
Net Costs Incurred to Date	$477,457.00
Less Gross Lien Retention	$37,075.00
Plus Lien Retention Released to Date	$0.00
Less Previous Advancements made by Lender	$250,000.00
TOTAL HARD & SOFT COSTS PAYABLE THIS DRAW:	$190,382.00

This valuation is given in connection with the 1st Advance under the loan agreement with **Meadow Ridge Estates Inc.** and subject to your confirmation of legal issues; you may rely on it in making such advance.

Date: May 26, 2016

CONSULTANT:

Amanda White

Amanda White, PQS
Hanscomb Loan Monitoring Inc.

[83] The total first advance of the HCF recommended by Hanscomb was $190,382.00 as indicated.

[84] On June 1, 2016, Mr. Moskowitz provided confirmation that he had received the Hanscomb report. The Applicants' representative requested that if he had any further questions he put them in writing so that everything would be clear.

[85] Up to this point, some sense of how Meadow Ridge was financing the project, and how the project ended up being in the shape that was reported by Hanscomb, notwithstanding the fact that the Respondent still had not provided any of the HCF funding, may be gleaned from Mr. Repchull's affidavit. Although he also provided *viva voce* evidence on the topic, his affidavit evidence was more concise:

> 55. By this time [April 1, 2016] the Project was in desperate need of cash, and Moskowitz was still refusing to advance any of the overdue Draws. Instead,

> Meadow Ridge executed a Grid --- Promissory Note (the "Grid Note") with Canadian Lending on April 14, 2016. A copy of the Grid Note is attached as Exhibit "00". Under its terms, all amounts are charged 18% interest (calculated semi-annually, not in advance).
>
> 56. Meadow Ridge had to add most of its expenses on the Project to the Grid Note, since we couldn't get any money from Moskowitz. The amounts on the Grid Note relating to the Project are:

March 4, 2016	All-Terrain (subcontractor)	$109,966.75
March 22, 2016	All-Terrain (subcontractor)	$83,317.50
March 29, 2016	(lawyer) Pat Cassidy (bare land condo service)	$5,750.00
April 7, 2016	Meadow Ridge	$10,000.00
April 8, 2016	Meadow Ridge	$10,000.00
April 10, 2016	Meadow Ridge	$10,000.00
April 30, 2016	All Terrain (subcontractor)	$40,623.75
June 29, 2016	All Terrain (subcontractor)	$10,350.00
June 29, 2018	All-Terrain (subcontractor)	$151,627.50
July 12, 2016	Moskowitz (payment into court)	$322,535.75
Total:		$838,989.50

> [Emphasis added]

[86] On June 1st, 2016 after receiving the Hanscomb report which recommended a draw on the hard cost facility in the amount of $190,382.00, Mr. Stern contacted Mr. Jaskolka and indicated as follows (*affidavit of Jaskolka, October 14, 2016, volume 2, tab ff*):

> As part of each draw we do for our clients we do a spot review of the progress on the project.
>
> For our discussion the general questions we will be asking are:
>
> - What is the current status of the sales and marketing initiatives?
> - What has [sic] the source of mortgage payments to date and in the future?

[87] In response, Mr. Jaskolka replied on June 10th, 2016 to both Messrs. Moskowitz and Stern (*affidavit, volume 2, tab gg*):

> The source of mortgage payments to date has been the shareholders of the corporation, and in the future we anticipate mortgage payments being made from the same source…

[88] Mr. Jaskolka also reported that the company's marketing initiatives had consisted of a website, the receipt of free publicity from The Chronicle Herald, and that Meadow Ridge had been in receipt of regular contact with agents and direct consumers with some interest in the seniors community. He provided a design for the project entry signage, and reported that site work was ongoing with respect to the sewage treatment plant. Then he added:

> Once we are receiving our financing draws in a timely fashion, we will be in a position to turn our attention to sales and marketing instead of our financing, something that we thought was dealt with in November 2015 when your mortgage was put in place…if there are additional requests for information beyond what we have already provided to date, we also ask that you identify where in the loan documents the requested information is required as a conditional of advancing funds.
>
> The only specific concerns that you have raised relate to verification of work completed to date, the work paid for to date, and the project costs to complete. The Hanscomb report addressing these issues has been in your hands for almost a month with no further concerns raised by you. The Hanscomb report recommends an advance, and clearly you have taken no objection to the recommendation…
>
> We consider all conditions now satisfied for a further advance.

[89] On June 14, 2016 Mr. Jaskolka followed up with an email to Messrs. Moskowitz and Stern pointing out that he had not received a reply to his email of June 10, and that he anticipated "your confirmation of release of funds by no later than the end of day tomorrow, Wednesday, June 15".

[90] What happened next has been the subject of comment in the affidavits of Messrs. Jaskolka, Repchull and Moskowitz.

[91] First, Mr. Repchull (*affidavit, filed October 12, 2016*):

> 64. On June 14, 2014 Mr. Moskowitz called me to ask how Meadow Ridge was paying its subcontractors (since he hadn't advanced any of the Draws). As I recall, at one point in the conversation Mr. Moskowitz threatened to recall the Mortgage entirely. I was surprised by that call.

65. That same day, Mr. Jaskolka forwarded me an email with Mr. Moskowitz's version of the call I had with him. Mr. Moskowitz's comments were not correct based on my recollection of that call. I emailed Mr. Jaskolka and told him that I had repeatedly told Mr. Moskowitz that the source of payments were shareholder loans, and that Mr. Moskowitz had never said that the information he needed was a "status update" before the release of funds.

66. Allterrain issued invoices 2964 and 2965 on the Project on June 16 and 17, 2016, for $38,812.50 and $124,319.02, respectively. A copy of those invoices are attached as Exhibit "XX" and Exhibit "YY".

67. On June 23, 2016 I received another email from Ms. Comia, attaching an invoice for the interest due on the Mortgage as of July 1, 2016. The invoice charged interest as if the full $1,120,000.00 had been advanced by April 15, 2016; it had not. Moskowitz had still only advanced $250,000.00. A copy of that email and statement are attached as Exhibit "ZZ".

68. At this point we had been waiting almost 8 months for money on a 12 month mortgage. It was clear to me that Moskowitz just wanted to collect his interest and was never going to advance any more funds for the Project. We desperately needed to find money somewhere else in order to keep the Project going. After speaking with Mr. Jaskolka and with my lawyer, I told my staff to cancel the automatic debit of the Moskowitz interest payment which was due July 4, 2016.

69. On July 7, 2016, I received a Demand Letter and Notice of Default from Moskowitz. A copy of that letter is attached as Exhibit "AAA".

70. On July 15, 2016, I received four letters entitled "Notice of Intention to Enforce Security (Sec.244(1)) of the *Bankruptcy and Insolvency Act*, RSC 1985, c 8-3". They were addressed to Shirestone, Meadow Ridge, me (in my personal capacity), and my wife, respectively. A copy of these documents are attached as Exhibit "BBB".

71. Shirestone, Meadow Ridge, and I are first-time developers, a fact which I told Moskowitz many times. We are a small, family-owned development company, and Moskowitz had advertised that fact on their website. We relied on Moskowitz to fund our project; we don't have the money ourselves, and this is why we sought financing in the first place.

[Emphasis added]

[92] Next, Mr. Jaskolka (*affidavit filed October 14, 2016*):

> 51. On June 14, 2016, Mr. Moskowitz emailed me stating that he had spoken to Mr. Repchull by phone in order to check whether there was "a material change in risk and if payments [could] be made". He said that Mr. Repchull had not yet provided a "status update". Finally he requested a schedule of shareholder loans to Meadow Ridge so that Moskowitz could understand how payments were being made. This email is attached as Exhibit "II". This was not a requirement of either the term sheet or the Mortgage.
>
> 52. Mr. Repchull replied to me a half hour later and said he had told Mr. Moskowitz the source of payments several times, contrary to Mr. Moskowitz's earlier email. Mr. Repchull also told me that Mr. Moskowitz never told him he required a "status update" before the release of funds, and that Mr. Moskowitz had actually threatened to recall the loan…

[93] Mr. Jaskolka concludes by describing unsuccessful attempts that the parties made to resolve their differences at this juncture.

[94] Finally, Mr. Moskowitz's perspective is provided in his affidavit of December 2, 2016:

> 183. On or about May 30, 2016, Hanscomb provided Moskowitz Capital with the first advance report ("First Advance Report")...
>
> 184. Upon our review of the First Advance Report, Moskowitz Capital determined the amounts for interest, taxes and other timing related amounts used in Hanscomb's calculations were too little.
>
> 185. For example, Hanscomb included interest costs of $56,000, of which they indicated that $29,797 was already paid, leaving $26,203.00. In reality, the potential interest costs remaining were approximately double the amount based on the time remaining to complete the Project and for the sale of units. Other factors such as potential extra property taxes should have also been considered.
>
> 186. On or about June l, 2016, I sent Mr. Jaskolka an email to set up a phone call to discuss the First Advance Report.
>
> 187. Mr. Jaskolka responded to my email stating "Please email us any questions you have so that we can conclude the pending draw." Attached as Exhibit "56" is a copy of my email to Mr. Jaskolka and his reply email.
>
> 188. I spoke with Mr. Jaskolka after receiving his email and attempted to arrange a teleconference between Moskowitz Capital, Mr. Jaskolka and Mr. Repchull.

189. On or about June 1, 2016, Mr. Stern sent Mr. Jaskolka an email indicating that as part of each draw for client, Moskowitz Capital does a spot review of the progress on the project. Mr. Stern set out some general questions that Moskowitz Capital was looking for answers on, including:

What is the current status of the sales and marketing initiatives?
What has the source of mortgage payments to date and in the future?

…

191. If the Applicants were unable to begin paying down the principal balance of the Loan with the sale of units or pay out the Loan upon the ending of the term, the Applicants would have been exposed to having to pay extra interest costs, further increasing the cost to complete.

192. As a result of these concerns, Moskowitz Capital inquired about the status of the sales and marketing initiatives, as well as the source of the mortgage payments to date and in the future.

193. Despite our attempts to discuss the timing of the Project and other issues with respect to the Project with the Applicants and Mr. Jaskolka, the Applicants and Mr. Jaskolka stonewalled our attempts.

…

195. After further delay by Mr. Jaskolka and the Applicants, on June 10, 2016, Mr. Jaskolka sent me an email with copy to Mr. Stem in response to Mr. Stem's email from June 1, 2016. Mr. Jaskolka indicated that "The source of mortgage payments to date has been the shareholders of the corporation, and in the future we anticipate mortgage payments being made from the same source".

196. Mr. Jaskolka also outlined the various marketing efforts being made by the Applicants. A copy of Mr. Jaskolka's email is contained as Exhibit "GG" to the Affidavit of Bryan Jaskolka.

197. On or about June 14, 2016, I spoke with Mr. Repchull by telephone to obtain an update from him prior to proceeding with the first advance under the Hard Cost Facility. I wanted to inquire about whether there was a material change in risk and if monthly payments could be made.

> 198. Mr. Repchull refused to provide me with a status update. During the call, I recall saying to Mr. Repchull, something to the effect that, "if you aren't going to provide the information, what other option do I have but to call the loan."
>
> 199. After not receiving any information from Mr. Repchull, I attempted to call Mr. Jaskolka and then sent Mr. Jaskolka an email requesting that he provided me with a schedule of shareholder loans into Meadow Ridge in an effort to understand how monthly payments were being made. Attached as Exhibit "59" is a copy of my email to Mr. Jaskolka.
>
> 200. The Applicants and Mr. Jaskolka did not provide the requested schedule of shareholder loans.
>
> [Emphasis added]

[95] The parties could not even agree on how to end their relationship. The Applicants realized that they would need an alternative source of funding, both to pay out CMI's interim funding to date, and for the remainder of the project. The alternative lender would require security similar (if not identical) to that already held by the Respondent, Moskowitz. The Applicants contacted a lawyer and made a proposal to repay the principal amount actually advanced ($250,000.00):

> 1. …less all fees and interest paid to date under the loan documents. No prepayment penalty shall be applied.
> 2. Moskowitz will execute the necessary documents to release its security.
> 3. The parties shall execute a binding mutual release.
>
> (*affidavit of Brian Moskowitz, December 2, 2016, para. 201*)

[96] Moskowitz Capital refused that offer and countered by suggesting that an amended term sheet be executed which would provide the Applicants "…with the ability to just pay interest only on the amount advanced ($250,000.00) so that the Applicants could pay out the mortgage without triggering the prepayment clause" (*Moskowitz affidavit, December 2, 2016, para. 207).* No credit for interest or penalties paid on unadvanced funds was included.

[97] The Applicants say the "writing was on the wall". It was (they say) clear to them that the Respondent would never release the HCF. They sought legal advice, and thereafter accepted what they say was the Respondent's repudiation of their contract. They intentionally withheld the "interest only payment" due July 7, 2016.

[98] The Applicants say that when the Respondent attempted to foreclose on the project and on the security that each of the Applicants had put up, they were forced to bring this application to court. Moreover, they had to seek and obtain "permanent" (as opposed to interim) alternative financing. They obtained it from CLI one of the two companies with which Mr. Jaskolka is associated as indicated earlier.

[99] Meadow Ridge sought to pay money into Court in exchange for a release of all of the security held by Moskowitz, so they could provide adequate security to the new financier. The Respondent did not agree. The parties ended up in Court.

[100] The hearing took place on September 8, 2016, before Justice James Chipman. The decision is reported as *Meadow Ridge Estates Inc. v. Moskowitz Capital Mortgage Fund II Inc.*, 2016 NSSC 261.

[101] Therein, Justice Chipman provided an overview:

> 3. ...The Applicants allege that Moskowitz has unreasonably and intentionally refused to advance the hard cost facility, has deprived Meadow Ridge of substantially the entire benefit of the term sheet and related security documents, and has therefore repudiated both.
>
> 4. On July 7, 2016, Meadow Ridge accepted Moskowitz's alleged repudiation and cancelled automatic mortgage payments. Moskowitz immediately provided the Applicants with a Notice of Default demanding payment of $322,535.75. The Notice of Default gave the Applicants until July 15, 2016 to pay the entire amount claimed. On that day, pursuant to s. 244(1) of *The Bankruptcy and Insolvency Act*, Moskowitz sent the Applicants its Notices of Intention to Enforce Security.
>
> 5. On July 15, 2016, the Applicants filed a Notice of Application in Court alleging that Moskowitz repudiated the term sheet and mortgage. In their Notice, the Applicants seek damages, interest and costs, along with a direction that the Applicants set off any damages against any amounts due to Moskowitz pursuant to the term sheet and mortgage.
>
> 6. On August 5, 2016, Moskowitz filed a Notice of Contest alleging 30 grounds as the basis that the Application should be dismissed.
>
> 7. By Amended Notice of Motion filed July 20, 2016, the Applicants moved for an order permitting them to pay into court $322,535.75; i.e., the precise amount demanded by Moskowitz in their Notice of Default issued July 7, 2016. Upon

> such payment into court, the Applicants request that the term sheet, mortgage and collateral security be immediately discharged.

[102] In dismissing the application, Justice Chipman explained, *inter alia*:

> 48. … the relative unfairness to the parties is a significant factor. In my view, the prejudice faced by the Applicants should be measured, not based on the prejudice that the registered mortgage is causing, but the prejudice that would exist if they were made to pay the amounts directly to the Respondent. As they are capable of paying that amount into court, there should be no financial prejudice to the Applicants. As well, there is no evidence to suggest that there would be any difficulty executing any resulting damages or overpayment against the Respondent following judgment. The Applicants would arguably be in the same position whether they paid the money into court or to the Respondent. By way of contrast, the mortgagee faces prejudice in that they are deprived of these funds in the interim, which would not be the case if the Applicants paid them directly. As well, while the security continues in the funds as they are held by the court, they will have lost an important aspect of the security, which is an incentive to have the payment returned as quickly as possible.
>
> [Emphasis added]

[103] In his affidavit of July 4, 2017, Mr. Repchull has indicated that the Applicants had agreements in place to sell two lots. Closing dates for both were scheduled to be July 21, 2017. The Respondent was impeding this (in Mr. Repchull's view) by refusing to provide a consent to complete the condominium conversion and refusing to provide partial discharges of the two lots subject to the Moskowitz first mortgage on the project.

[104] This conduct on the part of the Respondent is argued by the Applicants to have resulted in the following:

> Moskowitz indicated that it would not grant partial discharges for the two lots then subject to sales agreements nor would it discharge the Security in exchange for a complete pay out. In addition, despite reviewing and approving a plan to convert the land to a bare-land condominium corporation at the outset of the project, Moskowitz refused a request to sign a consent form to allow the conversion to proceed and demanded additional costs and fees to do so. Without Moskowitz's consent to proceed with the condominium conversion, none of the planned development, including the lot sales, could proceed. Moskowitz's bad faith refusal necessitated the filing of an emergency motion to seek an injunction. In the face of the proposed injunction, Moskowitz relented, but would only consent to removal of the mortgage if the Applicants paid a list of fees and charges as well as interest calculated as if the entire $1,120,000 had been

> advanced - as opposed to $186,000. Accordingly, the Applicants paid $457,341.05 to Moskowitz on a without prejudice basis in exchange for removal of the mortgage and various security instruments (Affidavit of Kurt Repchull filed April 6, 2018). Although the amount extracted by Moskowitz was exorbitant, the Applicants had no choice but to pay in order to avoid failure of the Project (*affidavit of Kurt Repchull filed July 4, 2017*).
>
> [Emphasis added]

[105] The Respondent has provided a breakdown of the funds which were required by it to discharge its security on the project as follows:

Principal	$	1,120,000.00
Interest (June 1, 2016 thru July 4, 2017)	$	145,159.02
Fees and disbursements	$	22,868.08
Legal fees (billed to date)	$	38,529.59
Less: Committed funds held for Project	$	(870,000.00)
Total amount due to Lender on July 4, 2017	**$**	**456,556.69**
ALL PROCEEDS VIA BANK CERTIFIED CHEQUE OR WIRE to MOSKOWITZ CAPITAL MORTGAGE FUND II INC.		
Per diem: First Day starts on July 5, 2017, after 1:00 pm (ADT)	$	392.18
Funds must be received at Lender's office in Toronto by 1:00 pm (ADT) the day of close or per diem applies		

[106] It continues:

> On or about July 6, 2017, the Applicants paid the amount of $456,556.69 which was the balance due as of July 4, 2017. Since the Applicants paid out the Loan on July 6, 2017, two days of per diem interest accrued in the amount of $392.18 per day for the total amount of $784.36.
>
> This amount was paid out of funds previously provided to our counsel by counsel for the Applicants, which were being held in trust by Patterson Law. The total amount paid by the Applicants in exchange for a discharge of the security was $457,341.05 .
>
> (*Respondent's brief, p. 11*)

[107] The project has been completed, albeit at the cost of a significant amount of angst. The Applicants seek to recover the following amounts:

76. … due to its [Moskowitz'] breach of the term sheet and the Mortgage, Meadow Ridge has incurred the following costs:

(a) Interest on the unadvanced $870,000 of the Mortgage;

(b) The standby fee charged by Moskowitz;

(b) Duplication of interest on the Grid Note, where it was used to pay expenses which should have been paid by the Mortgage;

(c) Duplication of interest on the New Mortgage, where it was used to pay expenses which should have been paid by the Mortgage;

(d) Fees associated with the New Mortgage; and

(f) Legal fees in pursuing this Application.

Issues

[108] I must determine the following issues:

A. Did the Respondent, Moskowitz Capital, breach or repudiate its contract with the Applicants?

B. In addition, or in the alternative, should the transaction be set aside:

i. On the basis of a violation of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46;

ii. On the basis of violations of the *Money Lenders Act*, R.S.N.S. 1989, c. 289 ("*MLA*"); or

iii. On the basis of violations of the *Unconscionable Transactions Relief Act*, R.S.N.S. 1989, c. 481 ("*UTRA*")?

C. What are the damages (if any) to which the Applicants are entitled as a result of my findings with respect to issues A and B?

D. Did the Respondent act in bad faith and, if yes, should punitive damages be assessed as well?

Analysis:

A. Did the Respondent, Moskowitz Capital, breach or repudiate its contract with the Applicants?

Conduct Prior to February 23, 2016

[109] It is uncontested that the Applicant, Meadow Ridge, was seeking to develop a piece of land to the point where the lots could be sold. Although one of the Applicants, Bryan Jaskolka, was an experienced financier, and had been involved in the financing of the development of properties in the past, his actual experience in land development projects was limited. The remainder of the Applicants were practically novices in this area. Indeed, it is uncontested that the Respondent, in its advertising literature, had referenced this project as an example of the fact that it was prepared to extend financing to small and "family held" developers (*affidavit, Repchull, para. 71).*

[110] What were the reasonable expectations of the parties upon entering into the commitment letter to which earlier reference has been made? At its most basic level, the expectation of the Applicants was that they were obtaining financing for their project, and the expectation of the Respondent was that it would provide this financing.

[111] It is clear that the term of the loan was to be one year, and that there were to be two components to the loan, the land cost facility (which, as the name implies, would cover the purchase of the land and associated expenditures) and the hard cost facility (which would be used to finance the improvements to get the project to the point where the individual lots could be sold).

[112] The Applicants would have also been aware that funding does not occur in a vacuum. The lender has expectations which are intended, among other things, to both secure its investment and provide for profit upon it. We have already considered the principal security required of the corporate Meadow Ridge, and the collateral security which was to be provided by the other (corporate and non-corporate) Applicants.

[113] A useful starting point then, is to consider the definition of the purpose of the loan to Meadow Ridge as embodied in the term sheet itself. That term sheet is dated August 31, 2015. It says that its object is "to provide construction financing on a cost to complete basis for road construction and site servicing of 26 building lots at Sackville Drive, Upper Sackville, Nova Scotia (PID #41164039) (the "project")" (*affidavit of Kurt Repchull, tab C, p. 2 of 7*).

[114] Also, it will be recalled that the land cost facility "LCF" was advanced on November 24, 2015, after some exasperation evidenced in the emails flowing from the representatives of each of the parties to the transaction. Merely one example, is provided by the concerns noted in Mr. Jaskolka's email to Mr. Moskowitz of October 5, 2015 (*affidavit of Kurt Repchull, October 12, 2016, Exhibit "O"*) which prompted the response from Mr. Moskowitz that the Applicants were "very slow in providing the required documentation to the terms which Moskowitz Capital required before funding the loan" (*affidavit, para. 51*). Also, I have already referred to the particulars in the affidavit of Mr. Moskowitz, December 2, 2016, particularly paras. 68 to 70, and Mr. Repchull's response as embodied in the affidavit of Mr. Moskowitz dated October 8, 2015, at Exhibit "15" thereof.

[115] I have concluded that prior to February 23, 2016, neither side lived up to what the strict wording of the contract would have required of them on several occasions. Each time, however, the contract itself provided a remedy, or, if (arguably) a breach had occurred, the parties elected to waive it by their subsequent conduct and/or communication. True, the Applicants had been somewhat dilatory in complying with many of the requirements of the Respondent to that point. The Respondent itself contributed to the delay in many respects by incomplete or somewhat careless statements of what it would require prior to funding advances.

[116] Both parties contributed to the delay in the funding of the land cost facility and in subsequent other occurrences into February 2016. However, I have concluded that each had (grudgingly) elected to "live with" the perceived transgressions of the other side, up to that point.

[117] For example, the terms of the parties' agreement provided what was to happen in terms of cost to the borrower in the event that advances were delayed. Delays in funding (either with respect to the LCF or HCF) at least up to February 2016, were consequently not of the nature which would constitute terminal or fundamental breaches of the contract between the parties. Rather, the contract itself provided for what was to ensue in the event of delays and these were specified in the amount of monetary penalties.

[118] I pause to note that I make the above observation separate from the analysis which will later be conducted as to whether, in light of the total amount ultimately advanced, such "penalties" should be treated as additional interest on the funds thus advanced, when s. 347 of the *Criminal Code* (and the associated

considerations under the Provincial legislation upon which the Applicants rely) are dealt with.

[119] On February 23, 2016, a paradigm shift in the parties' relations occurred. This is the date upon which the Respondent explicitly stated to the Applicants the manner in which it would be interpreting the words "cost to complete basis" as expressed in the term sheet, when future advances under the HCF were considered.

[120] I will segue briefly to examine more closely some of the events leading to February 23, 2016, and the law bearing upon the interpretation of the phrase.

A Closer Look - December 1, 2015, to February 23, 2016

[121] It will be recalled that Meadow Ridge was billed on December 29, 2015 by its largest subcontractor, All Terrain, in the amount of $174,966.75. All Terrain was paid $40,000.00 by the Applicants on January 26, 2016, and on January 29, 2016, All Terrain billed the project another $83,317.50. The Applicants made other payments to All Terrain and provided cancelled cheques to Mr. Moskowitz in late February 2016. Around this time the Respondent, through Mr. Isabelle, was alleging that it was now concerned there would be a funding shortfall.

[122] On February 3, 2016, the outstanding items (from Moskowitz's perspective) were the requirement for a full set of working drawings stamped by the engineer for the project, a final construction budget, including schedule for the project. Subsequently, Moskowitz alleged (on February 23, 2016) that the Applicants had not provided a budget at a "level of typical detail". Finally, Moskowitz required municipal approval: "Waste water permit to be provided. Please provide the status" (*affidavit of Kurt Repchull, October 12, 2016, volume 2, Exhibit BB*).

[123] The above had just come on the heels of the Respondent's advice (in the aforementioned emails of February 23, 2016, from Messrs. Isabelle and Stern – *Moskowitz affidavit, Tabs 38 - 40*) as to how the Respondent proposed to calculate "cost to complete" basis for the purpose of HCF advances. It would appear that the greater part of the problem which the Respondent was now citing with the Applicants' budget was based upon the way that Mr. Stern explained (in that email, and for the first time on behalf of the Respondent) how the Respondent was interpreting "cost to complete basis". Since this issue permeates most of the discussions that occurred thereafter, I will now deal with it.

"Cost to Complete Basis" – The Parties' Positions

[124] In a nutshell, the Applicants point out that these words are not defined in the term sheet or in any of the other subsequent documentation with which they were provided by the Respondent. In fact, they say, it was not until February 23, 2016, that it was brought to their attention how the Respondent was interpreting these words.

[125] The Applicants say that the words should be given their ordinary meaning. They say the meaning is that the funds should be exhausted by the completion of the project, and each draw should be sufficient to fund the work for which the funds are to be used. The Applicants put it this way in their brief:

> 32. As noted above, the Respondent announced on February 23, 2016 (5 months after the mortgage was executed) that the term sheet and underlying loan was to be distributed on a "cost to complete basis" and that this was intended and agreed to mean that funds could not be advanced unless the unfunded portion of the loan always exceeded the cost of work left to be completed on the project. In other words, the Applicants were not entitled to draw on the loan unless they first self-funded an amount equivalent to what they wished to draw.
>
> 33. Under the Moskowitz re-interpretation, if, for example, $100,000 remained unfunded under the loan when there was $100,000 worth of work left to complete on the project, the Applicants would have been required to self-fund the $100,000 worth of work remaining and only then request an advance under the loan to reimburse what they had paid out of pocket. They would have to pay for the work first and then seek an advance from the loan to cover the cost. If they were not in a position to do that, there would be no draw. They would be financing the project only to turn around and pay interest and fees to Moskowitz.
>
> 34. The Applicants adamantly deny that this is what was intended and agreed to. They say they never would have agreed to such an agreement where they had to pay for work first and then seek reimbursement from the Respondent. This would be commercially unreasonable and defeats the purpose of seeking financing.

[126] The Respondent, on the other hand, argues that "cost to complete" means (in effect) that the Applicants are to fund each individual stage of the work themselves, and then obtain reimbursement for these expenses from the advance itself.

[127] We have earlier seen the example provided by Mr. Moskowitz in his affidavit with respect to how a hypothetical loan of $300,000.00 would work based on that method. He elaborates upon this at para. 8 of his affidavit of April 6, 2018:

> In a loan that is done on a cost to complete basis, the remaining funds left to draw (the unfunded portion of a loan) must be equal the amount of the cost to complete the project. If the unfunded portion of the loan is less than the amount of the cost required to complete a project, there would be a funding shortfall and the funds would not be advanced by the lender unless the borrower came up with the funds to cover the shortfall or performed more work to reduce the cost to complete to the point of being equal with the unfunded portion of the loan.
>
> The analysis of the cost to complete basis is a fluid analysis that requires a cost to complete analysis to occur in the due diligence phase prior to the advancement of the loan and also throughout the course of the loan before any subsequent advances are to occur. It is important to continue to monitor all aspects of a project to ensure that there are no funding shortfalls, especially prior to draw advances.

[128] To support its argument, the Respondent (in its brief, pp. 21-22) refers to the mortgage which was actually executed between Meadow Ridge and the Respondent to secure the term sheet, and points out that the terms of Schedule "B" thereto provide, *inter alia*:

> In the event the loan pursuant to the Commitment Letter is a construction loan, the following additional conditions and/or terms must be satisfied by the Borrower under the loan facility prior to any advance of funds and remain as conditions during the term of the loan. Specifically, the Borrower covenants to meet the following conditions:
>
> 1. Prior to each advance of funds the Borrower will provide to the Lender a Statutory Declaration confirming that all trades have been paid to date for the work completed to date. All funds are to be used for construction of the project as set out in the Commitment Letter and without prior written consent of the Lender, funds are not be used for any other property or project.
>
> …
>
> 3. **Prior to each advance of funds, the Borrower will, at the Lender's option and at the Borrower's sole expense, provide a quantity surveyor's Work Progress Advance Report, in form satisfactory to the Lender, to the Lender confirming the work has been completed in**

> **accordance with the project budget, confirming the work in place, and showing the cost to complete the project.**
>
> 4. The Borrower shall provide to the Lender upon the first construction advance applicable Building Permits confirming the ability to construct the project as outlined.
>
> 5. Prior to each advance the Lender will perform a site inspection, which site inspection must be to its satisfaction or funds will not be released. The Lender's then current inspection and advance administration fee will be charged per advance.
>
> 6. **The Borrower covenants to pay all cost overruns (including monthly interest cost/payments) from their own resources on a consolidated project basis whereby the <u>un-advanced funds equal the cost to complete the project</u>.**
>
> [Emphasis in Respondent's brief]

[129] The Respondent concludes, (brief, p. 22) that, therefore:

> The Applicants position that Moskowitz Capital reinterpreted the term sheet and that the Applicants did not agree to the loan proceeding on a cost to complete basis where the unadvanced funds must equal the cost to complete the project before any funds would be advanced by Moskowitz Capital is baseless.

[130] The Respondent argues that its interpretation of "cost to complete basis" is consistent with industry norms. However, it does not point to a document in which its explicit interpretation of that phrase was explained to the Applicants or any of their representatives, nor does it contend that a discussion with respect to the meaning of this term ever arose prior to that which was initiated as a result of the email exchanges on February 23, 2016. No expert testimony was provided as to the meaning of that phrase, in the industry parlance, or how that phrase is generally interpreted within the industry. We simply have the Respondent's assertions in that regard.

[131] Obviously, this is not a circumstance in which judicial notice may be taken of the correctness of the position of either party on the point. What then, should I consider when dealing with the phrase?

"Cost to Complete Basis" – The Law

[132] The modern approach to the interpretation of contracts has been summarized quite well in the words of G.H.L. Fridman, *The Law of Contract in Canada*, 6th

edition (Toronto: Carswell 211). In the following sections taken from p. 440 and pp. 442 to 443 respectively, the author says:

> The fundamental rule is that if the language of the written contract is clear and unambiguous then no parol exigent evidence may be admitted to alter, vary or interpret in any way the words used in the writing…There are some real exceptions, by virtue of which a party introducing such evidence is that one time is one and the same thing upholding validity of the written contract yet attempting to have its meaning understood in a certain way.
> . . .
>
> First, where the contract is written as ambiguous, exigent evidence may be admitted to resolve such ambiguity. But the court should not strain to create an ambiguity that does not exist. It must be an ambiguity that exists in the language as it stands, not one that is created by the evidence that is sought to be educed.

[133] Next, in *Eli Lilly and Company v. Nova Farm Ltd*., [1998] 2 S.C.R. 129, Justice Iacobucci stated as follows:

> 54. The trial judge appeared to take *Consolidated-Bathurst* to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> 55. Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. City of* Quebec (1920), 54 D.L.R. 344 (P.C.), at p. 350:
>
> > . . . the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself .... [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses. . . ."
>
> 56. When there is no ambiguity in the wording of the document, the notion in *Consolidated-Bathurst* that the interpretation which produces a "fair result" or a

> "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words. This is consistent with the following dictum of this Court, in *Joy Oil Co. v. The King*, [1951] S.C.R. 624, at p. 641:
>
> > . . . in construing a written document, the question is not as to the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer.

[134] I then consider Justice Rothstein's explanation of the process of contractual interpretation in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:

> 60. The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.
>
> 61. Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

[135] The process of contractual interpretation has attracted comment by our courts on many occasions. For example, in *Canadian National Railway Company v. Halifax (Regional Municipality)*, 2014 NSCA 104, Justice Fichaud, speaking for the Court of Appeal, summarized the effects of both *Eli Lilly* and *Sattva Capital* as follows:

> 40. In short, my view is this. The text of article 2.2, read in the context of the entire written Agreement, supports the judge's interpretation. Evidence of the parties' purely subjective intentions cannot alter the parties' mutual intentions that are objectively manifested by the contractual wording of their written and signed Agreement. The surrounding circumstances comprise the objective evidence of the background facts, either known or which reasonably ought to have been

> known to both parties at or before the contract's signature. That evidence was properly admitted before Justice LeBlanc. The judge did not rely on that evidence. But the consideration of those surrounding circumstances supports the judge's interpretation of article 2.2.

[136] In *Hefler Forest Products Ltd. v. MCAP Leasing Inc. et al.*, 2011 NSSC 505, Justice Murphy put it this way:

> 19. The object of contractual interpretation is to give effect to the parties' objective intentions, as determined by the words used in the contract and occasionally by the factual matrix present when those words were chosen (*Eli Lilly & Co. v Novopharm Ltd*, [1998] 2 S.C.R. 129, 161 D.L.R. (4th) 1); *Ryan v. Sun Life Assurance Co. of Canada*, 2005 NSCA 12, 230 N.S.R. (2d) 132).
>
> 20. Absent ambiguity in the contract, extrinsic evidence is not admissible (*Hawrish v. Bank of Montreal*, [1969] S.C.R. 515). This does not mean that the Court must interpret the contract in a vacuum; the Court may look at the "surrounding circumstances" or "factual matrix" in its objective interpretation of the contract (*Hill v. Nova Scotia (Attorney General***)**, [1997] 1 S.C.R. 69).

[137] Then we have Justice LeBlanc in *Sparks v. Nova Scotia (Assistance Appeal Board),* 2016 NSSC 201, who summarized the exercise very succinctly when he said:

> 48. Accordingly, I am to examine the words of the [contract] considered in the context of the document as a whole, giving those words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time.

[138] The phrase "cost to complete" has appeared sporadically in caselaw, although there appears to have been little specific focus upon its meaning. For example, in *914041 Ontario Inc. v. Standard Trust Co.*, [1995] O.J. No. 1622 (General Division), the issue was whether the Defendant was bound to advance further funds under a mortgage. The court stated:

> 24. Standard denies that the terms of the agreement, and specifically those words found in paragraph 4(a) "all conditions have been satisfied or waived" required it to fulfil its commitment under the mortgage without any discretion for any reason and, specifically, because of its requirement that all advances thereunder were to be made on a "cost to complete basis."
>
> …

> 26. Counsel proceeded on the basis that the determination of whether Standard could advance on a cost to complete basis following the agreement was significant to the position of both sides and for this reason much time and effort was spent dealing with this issue during the course of the trial. There was no dispute that apart from the agreement itself the mortgage and the letters of commitment gave Standard the right to advance on a cost to complete basis and therefore a discretion whether to advance all or any funds. Those documents provide that such discretion was to be exercised on the basis of the input of a construction consultant as to the degree of completion of the project and whether the funds remaining to be advanced would be sufficient to cover the cost of completion.
>
> 27. This, in fact, was the basis upon which all advances had been made to the time of the agreement. The evidence suggests that advances being made on a cost to complete basis is consistent with the practice generally followed at the relevant times for making advances under building mortgages and there is no real disagreement between the parties on this point.
>
> …
>
> 40. In my opinion, the position of Standard must prevail. Under the circumstances here it makes no sense commercially speaking or otherwise that Standard would be required to advance funds notwithstanding that the cost to complete work yet to be performed would not be covered by that which remained to be advanced under the mortgage. I cannot conclude that the word "condition" as it is found in paragraph 4(a) applies to Standard's right to advance funds on a cost to complete basis.
>
> [Emphasis added]

[139] *National Trust Co. v. Saks*, [1994] O.J. No. 2488 (Ontario), also merits reference. Therein, a loan was advanced on a cost to complete basis. The agreement defined "cost to complete" as "the portion of the project costs not yet incurred" (para. 59). The court described this approach would be premised upon "an opinion of an architect that the un-advanced portion of the credit facility is adequate to pay the cost of completing the project" (para. 88).

[140] Similar to the case at bar, *National Trust* involved unilateral action by the lender and a refusal to make advances based upon "concerns" about the viability of the project. National Trust became concerned about the possibility that the property would not lease as quickly as originally estimated, leading to the potential for additional interest requirements outside the term of the loan. National Trust requested that the Defendants (the developer, Orle, and its representative and

guarantor, Saks) provide a capital injection. These latter denied the alleged cost overruns and refused to comply (*National Trust, paras. 37 – 44*).

[141] National Trust also claimed that the credit agreement required the borrower to provide an equity injection if it appeared (to National Trust):

> "That the aggregate of the un-advanced portion of the credit facility allocated to pay development costs was insufficient to complete construction..."

[142] In that event, the developer would be required to inject cash "in an amount equal to the deficiency" (*National Trust, para. 45*).

[143] The trial judge concluded that National Trust was motivated by market conditions and consequential leasing problems. He said:

> 47. … It appeared unlikely that at the end of the loan the project would be earning sufficient revenue to obtain "take out" financing to enable Orle to repay the loan. Orle would be unable to refinance the project until it was fully leased. If the loan continued past its term than the interest budget would prove inadequate. This is why National was demanding the $2,000,000 equity injection from Orle in an effort to reduce the amount of interest that was acute relating on the advances…

[144] National Trust's officials gave evidence to the effect that "the equity injection was not required to enable Orle to complete construction of the project, but was for the purpose of enabling National to carry the project to the point where it could be refinanced to enable Orle to repay the loan" (*National Trust, para. 53*).

[145] The alleged "cost overrun" was:

> 75. …in respect to interest of $2,750,000, which was one of the categories in the "soft cost" portion of the construction budget and which, on the evidence, would not have occurred until after the 3 year term of the loan on the assumption that Orle would have been unable to repay on the loan at its maturity…

[146] National maintained that this allowed it to demand payment on the basis of an anticipated cost overrun. The trial judge concluded that National had changed its own explanation over the course of discussion with the Defendants, moving:

> 76. …from the position of a cost overrun or created by an alleged deficiency in the interest budget to an equity injection due to an insufficiency in the un-advanced portion of the credit facility to enable Orle to complete the construction of the project...

[147] Yet there was no evidence to support either assertion, the court observing:

> 76. ... As of the respective dates the amount allocated for interest had not been exceeded as only $1,100,000 of the 2,750,000 interest budget had been utilized and the un-advanced portion of the credit facility was sufficient to enable Orle to complete the construction of the project.
>
> [Emphasis added]

[148] In addition to finding that National Trust had no right to make the demands it did, the trial judge held that it had acted in bad faith:

> 81. Although discussions had commenced between Mr. Saks and National in the winter of 1991 in respect to capping the loan, paying a cost overrun and making a cash equity injection, when National wrote to Mr. Saks on May 7, 1991 its major concern was the number of construction liens which had been registered against the project. It was in this letter that National said that it was its intention to work closely with Mr. Saks "to ensure completion and lease up of the project" and "to again emphasize that we want to work with you ... to ensure the success of this project". It would appear that National's concept of co-operation was to demand that Orle pay a cost overrun of $2,000,000 to which it was not entitled. Earlier, when I reviewed the evidence of Mr. McCurdy and Mr. Lovett I emphasized that they felt the terms of the loan agreement did not permit National to cap the loan, obtain payment of a cost overrun or obtain a cash equity injection. In my view, based on the facts and a proper interpretation of the loan agreement National's attempt to cap the loan and its demands for the payment of $2,000,000 - in the guise of a cost overrun or an equity injection - culminating in the calling of the loan were spurious and were motivated by National's desire to protect its investment at any price. In my view, the only reasonable conclusion to draw is that National was acting in bad faith.
>
> [Emphasis added]

[149] It followed that National had breached the loan agreement. The Ontario Court of Appeal affirmed the trial decision: *National Trust Co. v. Saks,* [1998] O.J. No. 2335.

"Cost to Complete Basis" - Application of Facts to Law

[150] So what do the actual documents say in this case? Well, the Applicants, as we have seen, point to Mr. Jaskolka's view with respect to the manner in which the Respondent had advised that it was calculating the interest as expressed in both

affidavit and *viva voce* evidence. For example, in para. 33 of his affidavit, filed October 14, 2016, Mr. Jaskolka stated:

> The problem with the way Moskowitz was now accounting for the project is that it would require Meadow Ridge to complete the entire project before it would ever be eligible for all of the contemplated draws. This is impossible for most small developers to accomplish, and defeats the whole reason they finance projects; because they need the money up front to pay subcontractors…and as Moskowitz's spreadsheet…shows, it now included a calculation for the amount of future interest owing – this is an interest reserve, which Moskowitz had declined. Moskowitz's "do the work first, then we will reimburse you" method of accounting did not reflect the term sheet and the mortgage, which contemplated scheduled draws so that Meadow Ridge could keep paying the subcontractors and keep the project moving.

[151] As we have seen, the Respondent has placed emphasis upon some of the provisions of Schedule "B" of the mortgage and, in particular, paras. 3 and 6 therefrom, as noted earlier. The Respondent urges that these terms buttress its position, and that as a consequence the Applicants' contentions on this point are completely without substance. In particular, it stresses para. 6 of Schedule "B" to the mortgage which, as we have seen, reads as follows:

> The Borrower covenants to pay all cost overruns (including monthly interest costs/payments) from their own resources on a consolidated project basis whereby the un-advanced funds equal the cost to complete the project.
>
> [Emphasis in original]

[152] The first difficulty with the Respondent's argument is that if this is the interpretation which was to apply to the meaning of the phrase "cost to complete basis" embodied in the term sheet, why is that definition referenced nowhere in the term sheet? More to the point, why is it referred to in the above excerpt from Schedule "B", (to the mortgage) para. 6 as an example of funding on a "consolidated project basis"?

[153] The second problem with the submission is that if "cost to complete basis" was to be interpreted by the parties in the manner urged by the Respondent, why was only this one specific instance cited in any of the documents (that being when "cost overruns" are incurred)? Nowhere else is it maintained that there was specific reference to the methodology by which "cost to complete basis" is to be interpreted.

[154] Moreover, the interpretation of this phrase asserted by the Respondent is completely contrary to the manner in which the parties themselves had calculated the conditions precedent to the advance of the land cost facility (which, to repeat, and as it turns out, was the only money that was ever provided by the Respondent). For example, the loan amount that was agreed to between the parties was $1,120,000.00. The Applicants were entitled to draw the land cost facility ($250,000, $186,045.10 of which was actually advanced upon confirming owner equity of $560,495.00 - as per the term sheet). With the total budget cost of the project pegged at $1,680,00.00, this $560,495.00 of owner equity would be what was needed merely to lower the remaining project costs to the original loan amount per the term sheet. Yet the land cost facility was advanced (eventually).

[155] The Applicants note:

> 41. … If the Respondent's position were correct, the unfunded loan value would have had to equal the remaining cost of work after an advance was made.
>
> 42. If the Respondent's re-interpretation was correct, the owner equity requirement would have necessarily been $1,010,495, not $560,495. That is because $560,495 of owner equity would be needed to lower the remaining project cost to the original loan amount per the term sheet ($1,120,000) and then an additional $450,000 would have been needed immediately thereafter to allow access to the land cost facility of $250,000 and the first hard cost facility draw of $200,000. These were supposed to be the two initial advances. Therefore, this loan would have been unworkable from the beginning if the Respondent's re-interpretation is correct. It is hard to believe that nobody on behalf of the Respondent mentioned a requirement to immediately inject $450,000 into the project (over and above the $560,000) at the time the loan agreement was made – or written it into the term sheet – if this was truly intended by the Moskowitz.
>
> (*Applicant's brief, paras. 41 -42*)

[156] Not so, says the Respondent:

> In actuality, there are a number of scenarios that could occur, if [for example] there was $100,000 worth of work to complete the project and a unfunded loan amount of $100,000:
>
> > 1. The borrower could have had the $100,000 worth of work completed and paid the contractor(s), then seek an advance of the $100,000 for reimbursement; OR

> 2. The borrower could have had the $100,000 worth of work completed, obtain the invoice for the completed work from the contractor(s) and provide same to Moskowitz Capital to get an advance of the $100,000 to pay the invoice; OR
>
> 3. The borrower could have had the $100,000 worth of work completed, obtain the invoice for the completed work from the contractor(s) and provide same to Moskowitz Capital, then Moskowitz Capital could pay the contractor(s) directly.
>
> Moskowitz Capital was entitled to rely on Article 11 of the Mortgage and were not bound or obligated to advance funds to Meadow Ridge, and the advancement of funds was within its complete discretion. As a result, Moskowitz Capital did not breach a term of the contract by refusing to advance funds to the Applicants.
>
> (Respondent's brief, p. 24)

[157] However, this argument overlooks the fact that the Applicants attempted to pursue expedients number 2 and 3 above when All Terrain was not paid. Rather than accept that the work had been completed on the basis of the invoices with which they had provided by February 29, 2016, and simply advance funds to pay for it (the road work) either to the Applicant or to All Terrain directly, the Respondent refused to do either. Instead, it elected to treat the fact that the Applicants had not paid its (most significant) supplier and alleged concerns with the budget as a pretext for further concern. Moskowitz used this fact as a basis to further delay a vitally needed advance, even in the face of All Terrain's ongoing preparations in late February – early March 2016 to lien the project.

[158] In reality, there was no action that would have satisfied the Respondent (in March 2016) other than for the Applicants to pay out of pocket, then claim reimbursement from the Respondent. Toward the end of the parties' relationship, even this expedient did not suffice. Indeed, after the Hanscomb Report (more of which will be said in a moment) one of the bases upon which the Respondent relied in refusing to advance funds in respect to what was (by June 2016) project at least 60% complete and self-funded, was an alleged insufficiency of details as to where the shareholders had come up with the money to fund the project in the face of the Respondent's refusal to advance any of the HCF.

[159] Simply put, when the term sheet was put in place, the intent was, all along, for the Applicants to develop the land to a point where individual lots could be sold. There was no revenue anticipated until this happened and, as a consequence,

no corresponding ability on the part of the Applicants (could have been expected) to enable them to pay for the ongoing work first out of their own resources.

[160] As previously noted, I have been provided with absolutely no evidence from either party as to the industry standard, if there is one, when it comes to interpreting the phrase "cost to complete basis". The Respondent merely asserts that its interpretation of the phrase is consistent with such a standard.

[161] While such a requirement may make perfect sense in the specific context of a cost overrun (see para. 6 of Schedule B of mortgage), where an injection of the owner's capital may be necessary in order to bring the project back within the confines of the original budgeting estimate, it has nothing to commend it when the argument is that this was to be the basis upon which all HCF draws were to be predicated. This is particularly so where the project costs incurred appear to have been, at all material times, essentially within the budget with which the Respondent had been supplied, and the project, itself, on time.

[162] The Applicants were, for the most part, inexperienced land developers. They conceived of a relatively small development project. The fact that the Applicants' were a small family held company was a fact noted by the Respondent in some of its advertising literature, as mentioned previously. Known to be in need of financing to complete this project, it could not have been anticipated by anyone that they should be required to first turn to secondary sources to obtain interim financing between draws or come up with the needed funds out of their own resources, pay the development expenses first, then seek reimbursement from the Respondent only thereafter. In fact, the comprehensive nature of the security obtained by the Respondent from the corporate Applicants, as well as the remaining (Applicant) shareholders of Meadow Ridge, would have been practically inimical to their ability to obtain secondary financing, if needed, in any event. As it turns out, the availability of CMI in March, 2016, (through the intercession of Mr. Jaskolka) and (later) that of CLI, to the Applicants was very fortuitous, and could not have been anticipated, much less relied upon, by the parties when the term sheet was executed.

[163] I find that this need for the Applicants to either self fund or turn to secondary interim financing before qualifying for advances under the HCF was neither contemplated by either the Applicants or the Respondent nor is this interpretation supported when the wording of the term sheet, as a whole, and all the surrounding circumstances known to the parties at the time of execution is considered. Since

that is the practical effect of the interpretation of the phrase "cost to complete basis" advocated by the Respondent, it breached the contract when it took that position, for the first time, on February 23, 2016.

Aftermath of February 23, 2016

[164] Although the Respondent breached the contract on the basis of its "cost to complete" interpretation on February 23, 2016, the Applicants were in no position to do much about it. This is because they were heavily invested in the project by this time. Their only available avenue was to borrow from a secondary source on an interim basis (with Mr. Jaskolka's help, first, from CMI on a 30 day interest free loan, then, later through CLI, "grid note financing" on April 14, 2016) to pay the road contractor and for some of their other ongoing work. The position taken by the Respondent left them with no other choice.

[165] So, too, the Applicants attempted, at this time, to negotiate a suitable "exit strategy" which would have involve a release of the security held by Moskowitz Capital and enable the Applicants to deal freely with other potential financiers. They could not do so.

[166] The Applicants were now backed into a corner. They needed to pay off their (interim) secondary financier CMI. They were making interest payments to the Respondent on money they had not received. The parties' agreement contemplated (para. 3, Schedule B of the mortgage) the possibility of the use of a cost consultant. The Applicants agreed to the engagement of one, at the Respondent's insistence. Moreover, they were left with no option but to agree to do so on the basis of the Respondent's definition of "cost to complete".

[167] Had they elected to do so, I am satisfied that the Applicants could have accepted Mr. Moskowitz' definition of "cost to complete basis" (as aired for the first time on February 23, 2016) as tantamount to a repudiation of the contract. However, as we will discuss below, repudiation requires acceptance by the "innocent" party in order to crystallize.

[168] Whether because of the overwhelming "cash crunch" urgency, or the fact that essentially all of their available security was leveraged by the Respondent, the Applicants did not treat the contract as having been repudiated. Whether their inability to do so (due to circumstances created by the Respondent) should be held against them in this context is a matter which I do not have to decide. It is

rendered moot by the subsequent actions and inactions of the Respondent, in any event.

[169] I find that the parties agreed to proceed with future advances under the HCF on the basis of Mr. Moskowitz's email of March 1, 2016. This is to say (using the Respondent's definition of "cost to complete") on the basis of the recommendation of a quantity surveyor or cost consultant after receipt of a "report to verify the work to date, work paid for, and cost to complete". Parallel to this, (through CMI and CLI) the Applicants had acquired the interim financing (early in March 2016 and on April 14, 2016) to pay their expenses, until (so they thought) the anticipated HCF advances from the Respondent came along. These advances would then be used to repay their interim or "bridge" financing.

[170] Everything should still have been salvageable, even at this point.

Enter Hanscomb

[171] We have seen that the background to the retention of Hanscomb to act as cost consultant or "quantity surveyor" arose on March 1, 2016. Mr. Moskowitz sent Messrs. Jaskolka and Repchull an email indicating that the Respondent wanted a cost consultant to report on the operation before proceeding under the hard cost facility. In his email, Mr. Moskowitz noted, *inter alia*:

> We have decided not to move forward with the advance until we have a cost consultant report to verify the work to date, work paid for and costs to complete. You represented that the budget and costs to date were from WSP (supervising engineer) but we have learned that they are not from WSP. Rather the numbers are from Kurt. We don't have confidence in your reporting. (*affidavit of Bryan Jaskolka, December 2, 2016, para. 161)*
>
> [Emphasis added]

[172] The Applicants, who had very little option but to agree, by this point (March 1, 2016), indicated (through Mr. Jaskolka) that same day:

> "If a cost consultant report is required … then lets [sic] do that immediately …
>
> (Moskowitz, December 2, 2016, para. 163)

[173] By virtue of their already heavy investment in the project by March 1, 2016, the Applicants acceded to the use of Hanscomb (one of two choices provided by

Moskowitz) as a way to break the "impasse". They felt that even on the basis of Moskowitz's "new" definition of "cost to complete basis", they were entitled to a draw of at least $112,000.00 (*affidavit of Bryan Jaskolka, October 14, 2016, para. 32).*

[174] Both parties agree that the potential cost consultants names were provided by Moskowitz. The Respondent gave the Applicants two choices, either Hanscomb Loan Monitoring Inc. ("Hanscomb") or The Altus Group. The Applicants agreed to go with the former and were required to pay the costs of Hanscomb's involvement.

[175] The possibility of a consultant or a quantity surveyor being involved was set out in Schedule "B(3)" to the mortgage, as previously noted. It will be recalled that this paragraph reads (*Respondent brief, p. 22):*

> 3. Prior to each advance of funds, the Borrower will, at the Lender's option and at the Borrower's sole expense, provide a quantity surveyor's Work Progress Advance Report, in form satisfactory to the Lender, to the Lender confirming the work has been completed in accordance with the project budget, confirming the work in place, and showing the cost to complete the project.

[176] Hanscomb was retained on March 21, 2016, and provided its initial project review on April 1, 2016. Again, although it is clear that the Applicants bore the cost of Hanscomb's retention, the tenor of their reports (both initial and final), as well as clause "B(3)" were such that they were, in fact, retained for the benefit of the lender, which is to say, the Respondent.

[177] We have earlier considered some of the conclusions at which Hanscomb arrived in both of those reports. Included, *inter alia*, were the following:

i. Initial project review – April 1, 2016 (*Joskolka affidavit, Exhibit CC*)

   a. Project budget developed by WTC and Applicants "fair and adequate", with the exception of the contingency reserve.

   b. "A contingency of $15,967.00 remains in the budget to cover variances between bids and … unforeseen changes within the design documents and the actual construction …" (*para. 8(6)*)

ii. Final Report – May 30, 2016 (*Jaskolka affidavit, Exhibit DD*)

a. All Terrain work approximately 74% complete (*para. 7*)

b. Project essentially on time, with $5,898.00 in costs overruns (*para. 13*)

c. First advance of HCF recommended - $190,382.00 (*p. 6*)

[178] The above was recommended to Moskowitz by Hanscomb. It bears emphasis that this recommendation was made upon the basis of the Respondent's own interpretation of the phrase "cost to complete basis", which I have found imposed upon the Applicants a much "steeper hill to climb" than the requirements of the actual contract between the parties would have required. Compounding the irony, Hanscomb recommended a first advance of the HCF which exceeded the minimum of $112,000.00 to which the Applicants had earlier estimated that they were entitled.

[179] The Respondent decided that it would not follow Hanscomb's recommendations despite the conclusions of the initial and final reports. It chose, instead, to now take issue with Hanscomb's own calculations, claiming that in its (Final) Report "…the amounts for interest, taxes, and other timing related amounts used in Hanscomb's calculations were too little" (*Moskowitz, December 2, 2016, para. 184*).

[180] Yet this is not what the Respondent communicated to the Applicants. Instead, on June 1, 2016 (one day after receipt of Hanscomb's final report), Mr. Stern (for the Respondent) sent an email indicating that as part of each draw for client, Moskowitz does a "spot review" of the progress on the project. Mr. Stern sent out some general questions to which Moskowitz Capital was seeking answers, including:

> What is the current status of the sales and marketing initiatives? What was the source of the mortgage payments to date and in the future? (*Moskowitz, December 2, 2016, para. 189*).

[181] Mr. Jaskolka attempted to answer the questions on June 10, 2016 (*Jaskolka affidavit, Tab GG*). Mr. Moskowitz next raised concerns about WSP and the Applicants' "numbers" and a loss of confidence in same, including the possibility of a shortfall (See for example, paras. 159, 160, 161 of his affidavit).

[182] I have concluded that the Respondent, having professed longstanding concerns about the budgets with which it had been provided, and having (up to this

point) withheld HCF advances, due in large part to budgeting "deficiencies" (which only arose out of its erroneous interpretation of "cost to complete basis") was taken aback by the Hanscomb report, which depicted the project to be in quite good shape after all. It does not appear that the Respondent anticipated such a favourable report from its cost consultant.

[183] To put a finer point upon it, by insisting on a funding formula that was not contemplated by the contract itself (as I have found), the Respondent had placed the Applicants at risk of defaulting upon their creditors – the very people engaged in the work of developing the land – principally, All Terrain. This forced the Applicants to desperately cast about for other sources of funding to keep the project going. It fortuitously came in the form of a loan obtained via Mr. Jaskolka himself (he is also a shareholder in Meadow Ridge) which he was able, in turn, to obtain through his company, CMI. This loan later blossomed into "the grid note" with CLI on April 14, 2016. Without this interim financing, the project itself would not have been able to continue.

[184] The Respondent insisted "post Hanscomb", upon disclosure of the source of funding to date. Its voiced concern was (in paraphrase):

> How can the project be in such good financial shape? It couldn't be – we haven't funded it.

[185] The answer to that question was, of course, that the project was in this "shape" because of the interim funding provided by CMI and later, CLI through Jaskolka. It was provided on the basis of the Applicant's (as it turns out, reasonable) expectation of advances under the HCF from the Respondent "post Hanscomb", which would have been used to pay off this interim financing.

[186] Thus, the expedient to which the Applicants were driven by the Respondent (on March 2, 2016) to obtain further interim financing to keep the project afloat while awaiting advances under the HCF approved by Hanscomb, became the next *causus belli* between the parties. I find that it was this, rather than the concerns which Mr. Moskowitz raised with the calculations in the Hanscomb report, that had become the real difficulty once the latter's final report had been provided.

[187] So by June, 2016, among other things, Moskowitz Capital had the benefit of Hanscomb's final report (upon which it had insisted as a pre-condition for an advance under the HCF). This brought confirmation that All Terrain had been paid and that the budget was essentially within $6,000.00 of what the Applicants had

been telling the Respondent all along, and that the project (valued at $1,700,000.00 when completed) was between 60% to 70% complete, and was on schedule. The Respondent had only advanced $186,000.00 by this point, was possessed of extensive security over the project itself (first mortgage) and also had the benefit of the collateral security provided by most of the other corporate and non-corporate Applicants. Yet it balked at advancing the further sum of $190,882.00 as recommend by Hanscomb.

[188] I find that the Respondent repudiated the contract by its failure to follow the recommendations continued in the Hanscomb report, and to provide the advance recommended pursuant thereto, in these circumstances. Its refusal signalled that it had no intention of ever living up to its funding commitment.

[189] In *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, Saunders, J.A. provided a helpful review of some of the important concepts to bear in mind in this context:

> 88. Repudiation occurs where a party intimates by words or conduct that he does not intend to honour his obligations when they fall due. Repudiation can be either explicit or implicit. It is implicit "where the reasonable inference from the defendant's conduct is that he no longer intends to perform his side of the contract." *Furmston*, *supra*, at p. 522.

[190] Earlier, he had noted:

> 74. Repudiation has two parts: an unambiguous demonstration by one party that it intends to default, and a clearly communicated acceptance of that default by the innocent party. If either element is missing, repudiation has not been made out. It is a well recognized principle that if a repudiation has occurred, the non-defaulting party must indicate acceptance of that repudiation in order to treat the contract as at an end. Thus, if there had been a repudiation of the agreement by EBF, White was required to indicate his acceptance of that repudiation in order to treat their contract as terminated. *Canada Egg Products Ltd. v. Canadian Doughnut Co.*, [1955] S.C.R. 398.

[191] Saunders, J.A. continues at para. 90 :

> In order for repudiation to be established there must be acceptance. As Fridman points out in *The Law of Contract in Canada*, *supra*, at pp. 647-648:
>
> > "An unaccepted repudiation" said Asquith L.J. in one English case, "is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind." Although this graphic expression has said

> to be limited by the facts of the case in which it occurred, the phrase does have some merit, and does put succinctly an important aspect of the law relating to discharge by repudiation or anticipatory breach. Such repudiation will not effectively terminate the contract unless the innocent party does accept the repudiation, and is prepared to treat the contract as ended. The innocent party, in effect, has an election whether or not to treat the contract as continuing or as ended, once the party has committed an act which, in accordance with what has been said above, can be regarded as repudiating the contract. (emphasis added)

[192] Here it is beyond question that the Applicants, accepted what they (rightly) perceived to be the Respondent's repudiation of the contract. They stopped making their interest only payments when the July 7, 2016 payment fell due. By this point, as we have seen, the Applicants were paying interest to Moskowitz as though the entire $1,120,000.00 had been advanced, rather than merely the $186,000.00 which they had actually received.

[193] Moskowitz repudiated the contract. The Applicants accepted it on July 7, 2016. Repudiation is established.

B. In addition, should the transaction be set aside:

i. On the basis of a violation of s. 347 of the Criminal Code, RSC 1985, c.46?

A. Section 347 - Generally

[194] Section 347(1) of the *Criminal Code* states as follows:

> 347(1) … everyone who enters into an agreement or arrangement to receive interest at a criminal rate, or receives a payment or partial payment of interest as a criminal rate is guilty of:
>
> (a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (b) guilty of an offence punishable on summary conviction and liable to a fine not exceeding $25,000 or to imprisonment for a term not exceeding six months or to both.

[195] Also of note are some of the of the definitions included in s. 347(2). For example:

> "Criminal rate" means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;
>
> "Interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;
>
> "Required deposit balance" means a fixed or an ascertainable amount of the money actually advanced or to be advanced under an agreement or arrangement that is required, as a condition of the agreement or arrangement, to be deposited or invested by or on behalf of the person to whom the advance is or is to be made and that may be available, in the event of his defaulting in any payment, to or for the benefit of the person who advances or is to advance the money.

B. The common law doctrine of illegality

[196] *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 has been referenced by the parties. In *Garland*, the court observed:

> …At common law, interest is a charge for the use or retention of money which accrues day by day; it does not include penalties. See *Tomell Investments Ltd. v. East Marstock Lands Ltd*., [1978] 1 S.C.R. 974, at p. 983; *Immeubles Fournier Inc. v. Construction St-Hilaire Ltée,* [1975] 2 S.C.R. 2, at pp. 10-11; *Attorney-General for Ontario v. Barfried Enterprises Ltd*., [1963] S.C.R. 570

[197] However, as we have seen, this is subject to s. 347 of the *Code*, which defines interest to expressly be:

> "the aggregate of all charges and expense <u>whether in the form of a fee, fine, penalty, commission or other similar charge of expense in any other form</u>.
>
> [Emphasis added]

[198] Earlier at para. 23 – 24 the court noted in *Garland*:

> 23. …The current provision goes far beyond the scope of the *Small Loans Act*, both by criminalizing a particular interest rate for the first time, and by imposing a generally applicable ceiling on all types of credit arrangements without regard to the sophistication of the parties or the amount in issue.
>
> 24. Under s. 347, an effective annual rate of interest which exceeds 60 percent of the credit advanced under an agreement or arrangement is a criminal interest rate. The statute creates two offences with regard to such interest. Section 347(1)(a) makes it illegal to enter into an agreement or arrangement to receive interest at a criminal rate. Section 347(1)(b) makes it illegal to receive a payment or partial payment of interest at a criminal rate. The scope of the language in s. 347 is extremely broad. Interest is defined, with the exception of six specific items, as the aggregate of all charges and expenses, in any form, that are paid or payable for the advancing of credit under an agreement or arrangement. The definition of credit is similarly expansive. It includes the aggregate of the money and the monetary value of any goods, services or benefits advanced under an agreement or arrangement, minus any fees, commissions or similar charges incurred by the creditor.

[199] At para. 25 the court continued:

> 25. The ostensible purpose of s. 347 was to aid in the prosecution of loan sharks. See *House of Commons Debates*, 1st Sess., 32nd Parl., vol. III, July 21, 1980, at p. 3146; Thomson, supra, at p. 549. However, it is clear from the language of the statute -- e.g., its reference to insurance and overdraft charges, official fees, and property taxes in mortgage transactions -- that s. 347 was designed to have a much wider reach, and in fact the section has most often been applied to commercial transactions which bear no relation to traditional loan-sharking arrangements. Although s. 347 is a criminal provision, the great majority of cases in which it arises are not criminal prosecutions. Rather, like the case at bar, they are civil actions in which a borrower has asserted the common-law doctrine of illegality in an effort to avoid or recover an interest payment, or to render an agreement unenforceable. For this reason, the provision has attracted criticism from some commercial lawyers and academics, and calls have repeatedly been made for its amendment or repeal. See, e.g., J. S. Ziegel, "*The Usury Provisions in the Criminal Code: The Chickens Come Home to Roost*" (1986), 11 C.B.L.J. 233; "Section 347 of the *Criminal Code*" (1994), 23 C.B.L.J. 321. Nevertheless, it is now well settled that s. 347 applies to a very broad range of commercial and consumer transactions involving the advancement of credit, including secured and unsecured loans, mortgages and commercial financing agreements.

[200] The issue under s. 347 is whether the charge in question "constitutes, in substance, a cost incurred by customers to receive credit under an arrangement

with the lender" (*Garland*, para. 30). The Applicants identify the following amounts as “interest” on the advance of $186,000:

Deposit:	$7500.00
Standby charges:	$20,000.00
Interest paid	$166,203.41
Commitment fee:	$33,600.00
Legal fees:	$44,529.59
Disbursements:	$22,868.08
Total	**$295,101.08**

[201] The Applicants submit, on the basis of actuarial evidence, that this amounts to an effective interest rate of 83.79%, based upon a principal advance of $186,000.00.

[202] Each party filed an actuarial report in this matter. The Applicants filed the report of Paul Conrad, of Grant Thornton on January 31, 2018 (Exhibit “12”). The Respondent filed that of Kelly McKeating of McKeating Actuarial Services Inc. dated May 23, 2018 (Exhibit “11”) and an earlier one dated April 4, 2018 (Exhibit “13”). The former was actually Ms. McKeating's response to a series of questions posed by counsel for the Applicants after having perused what became, in effect, Exhibit “13”.

[203] Having considered the qualifications of each expert (which were admitted by consent), and having heard from each, I much preferred the evidence of Mr. Conrad to that of Ms. McKeating. The latter expressed various opinions throughout the course of her reports and in her *viva voce* evidence which were based, in part, upon some erroneous assumptions made by her, as she forthrightly acknowledged during cross-examination. Most fundamentally, she appears to have accepted or assumed (incorrectly) that the entire amount of $1,120,000.00 had actually been advanced by the Respondent to the Applicant. It was upon this error that she premised much of her report.

[204] Mr. Conrad, on the other hand, expressed no opinions as to whether particular individual charges were or were not "interest" within the meaning of any of the relevant legislation. Rather, he simply provided the court with tables incorporating calculations fixing "the effective rate of interest" depending on what findings were made. For example, if the court agreed with the amounts contended by the Applicants to be interest (see para. 200 above), Mr. Conrad's calculations indicate that this would amount to an effective interest rate of 83.79% based upon a principal advanced of $186,000.00.

[205] In *Olympic Enterprises Ltd. v. Dover Financial Corp.*, [1995] 147 N.S.R. (2D) 121, the Plaintiff took out a "wrap mortgage" with a face amount in the vicinity of $1.8 million, $50,000.00 of which was actually advanced. Justice Tidman considered the meaning of "credit advanced" under section 347:

> 42. The court held that the amount of the letter of credit was not "credit advanced" as defined by s. 347 of the *Criminal Code* and, therefore, the effective interest rate should be calculated on $1m as being the amount of "credit advanced" and not on the face amount of the mortgage. Their reasoning is set out at pp. 278 and 279:
>
> > Thus the letter of credit in this appeal may be treated as an irrevocable promise to advance funds in the future. Under the letter of credit, the lender, in essence, promised on May 2, 1989, to pay $421,830 to S & M Investments Ltd. on behalf of the borrower on January 8, 1990.
> >
> > According to accepted accounting and actuarial principles, if two parties enter into an agreement today for future financing, the effective interest rate is calculated on the basis of the amount of time the actual funds of the promisor are held by or for the benefit of the promisee. For instance, if one party enters into an agreement with another to borrow a sum of money for a term beginning one year in the future, the interest under the agreement does not begin to accumulate until after the money is advanced by the lender to the borrower, or at least until the money is no longer under the control or use of the lender. The fact that there is an agreement to advance the funds one year before the funds are actually advanced is irrelevant to the interest rate calculation.
> >
> > Applying this reasoning, it is apparent that the letter of credit was not "credit advanced" at all as at May 2, 1989. It was credit advanced as of January 1990. So regarded, on the evidence, the application of generally accepted actuarial practices and principles yields an effective interest rate of 149.29 per cent. For these reasons I arrive at the same point as the chambers judge: the effective annual rate of interest is in excess of that allowed by law.

[206] As Justice Tidman concluded in para. 43 of *Olympic Enterprises*:

> ... the general principle in lending law [is] that interest on borrowed funds is chargeable only for the time period during which either the borrower enjoys the benefit of the funds or the lender has lost the benefit of the funds.
>
> [Emphasis added]

[207] In *C.A.P.S. International Inc. v. Kotello*, 2002 MBQB 142, the Plaintiff issued the Defendant a promissory note with a face amount of $1200.00 at an annual interest rate of 46.8% and a six month term. The Plaintiff advanced $1,475.00, from which it deducted $275.00 as an administration fee. The matter was heard as an appeal by trial *de novo* from the Small Claims Court decision:

> 9. ... Under the "credit advanced" definition noted above, the $275 is deducted to determine the actual credit advanced to the defendant. Therefore, the credit advanced by the plaintiff was the $1,200. The administration fee falls within the wide definition of "interest" [see, for example, *William E. Thomson Associates Inc. v. Carpente*r, [1989] O.J. No. 1459 (Ont. C.A.); leave to the Supreme Court of Canada denied, [1989] S.C.C.A. No. 398, which held that a facility fee fell within the definition of interest]. Under s. 347, it is not the stated interest rate that is important but rather the effective annual rate of interest of the transaction.

[208] The court accepted an accountant's evidence that the effective annual interest rate was 80.05% (para. 10) and held that, as a consequence, the Plaintiff was "not entitled to the court's assistance in any way to enforce the promissory note" (para 36) [Emphasis added].

[209] In *Canadian Business Centre Ltd. v. Bridge Holdings Ltd.*, 2007 BCCA 277, the borrower applied for a loan of $250,000.00. The lender agreed to loan an amount of $400,000.00, of which $150,000.00 would be held in an interest-bearing account to the borrower's credit, from which the lender withdrew payments under the loan. The trial judge held that the full advance was 400,000.00, of which $150,000.00 was a "required deposit balance" as defined in s. 347(2). A required deposit balance is one of the exclusions from the definition of "credit advanced." Accordingly, the trial judge held that interest should be calculated on the $250,000.00 actually advanced, not the $400,000.00 produced by including the required deposit balance. As a result, the rate charged was criminal. The British Columbia Court of Appeal affirmed the trial decision saying:

> 21. I conclude then there was no error on the part of the judge in his determination that clause 6 of the Deposit Agreement had the effect of rendering $150,000 of the $400,000 loan a "required deposit balance" as that term is defined in s. 347(2) of the *Criminal Code*. It follows that he was correct in deducting that amount for the purpose of calculating the rate of interest agreed and in concluding that it was in the result a criminal rate.

[210] I conclude, therefore, that the calculation of interest rates under s. 347 should include those amounts of "credit advanced" that were actually provided to the borrower, or of which the lender lost the control or use.

[211] I acknowledge that the respondent claims to have "lost the benefit" of funds earmarked for the hard cost facility (HCF) that were never advanced to the Applicant. It extrapolates from this that those amounts should be included in the total advance upon which interest is properly calculated (*Respondent's brief, para. 28*).

[212] With respect, I am unable to see the basis for this assertion, beyond Mr. Moskowitz's bare contention to the effect that "upon the execution of the term sheet, Moskowitz Capital set aside $1,120,000.00 which was earmarked to fund the project...". Once these funds were set aside, Moskowitz Capital contends that it was unable to utilize this money for other investments/loans (*Moskowitz affidavit, paras. 39 – 40*).

[213] I observe that there is some onus upon a lender advancing such a claim to lead evidence as to how, or in what way, these funds were set aside. For example, where or how were they set aside? In what way did the lender "lose control" of them? Were they placed in a separate account? If so, was it an interest-bearing account? On the other hand, were there any charges to which the set aside fund was subjected while thus segregated?

[214] These are merely the obvious questions. Beyond the bare assertion, absolutely no evidence was led by which the court could draw any conclusions as to the actual or residual degree of control able to be exercised by the respondent over the funds in question (if any). This is to say that, there was no evidence upon which the court could conclude that these funds were treated any differently by the Respondent than all of the other funds at its control or disposal. A lender in these circumstances must adduce at least some evidence to support the conclusionary statement that it has made, and at least provide some means by which the court may examine the factual edifice which (allegedly) supports that assertion.

[215] Ironically, what (little) evidence we do have touching upon this issue points in the opposite direction. For example, when the concern was raised by the Applicants at one point that the Respondent may not have even had sufficient funds at its disposal to advance the monies due to the Applicants under the HCF, Mr. Moskowitz responded thus:

> 51. In regards to the allegation that Moskowitz Capital did not have sufficient funds to advance the hard cost facility, from the time period following the advance of the $250,000 land cost facility up until after the Applicants defaulted in payment under the Loan, Moskowitz Capital had sufficient funds available at any point to advance the hard cost facility in the amount of $870,000.
>
> 52. Attached as Exhibit "7" is a copy of the Daily Cash Available balance sheet for Moskowitz Capital, showing that there were sufficient funds to advance the hard cost facility.
>
> (*Affidavit filed April 10, 2018, paras. 51 – 52*)
>
> [Emphasis added]

[216] How much easier it would have been for the Respondent to simply have disclosed the balance of the "segregated" or "set aside" account into which the funds specific to this transaction had been placed, if such a differentiated fund actually existed? Instead, at Exhibit "7" of his affidavit, Mr. Moskowitz provided the Balance Sheet "Daily Cash Available" for the entire company for each day from November 1, 2015 (balance $18,923,923.09) to July 31, 2016 (balance $5,023,064.33). No reference appears therein to any differentiated or "set aside" funds specific to this transaction.

[217] Moving on, the Respondent agrees that some of the amounts identified by the Applicant's do constitute "interest" under s. 347 but it denies that the rate, overall was criminal. Among other things, however, it specifically denies that the legal fees which it subsequently incurred as a "result of the default by the Applicants" (and for which it charged the Applicants in the payout on July 6, 2017) are included in that definition.

[218] There is some authority for such a proposition. For example both *C.M.T. Financial Corp. v. McGee*, 2015 ONSC 3595 and *914151 Ontario Limited v. McDonald*, 1999 Carswell ONT 1475 (Ontario Superior Court of Justice) involved defaults by borrowers. In *CMT* the court noted at para. 48:

> … A party is entitled to seek to enforce its security and, if successful, is entitled to be indemnified for its costs by the unsuccessful party. It is the borrower who, by their default, has caused the lender to have resort to the Courts. The borrower should not then be entitled to rely on the costs occasioned by their default to claim that the lender is in violation of the *Criminal Code* and to have the transaction set aside. This is particularly true in a case such as this where the borrower has

> caused the costs to escalate significantly by raising additional legal issues of dubious merit.

[219] The Respondent therefore says that $38,529.59 of its total legal fees of $44,529.59 (“to date”) should be deducted from whatever calculation of "interest" the court should employ.

[220] In this case, however, the circumstances are quite different (from *McGee, supra*.). I found earlier that the Respondent had repudiated the agreement, and the Applicants accepted the repudiation. Primarily, Moskowitz cannot exclude legal fees which it claims to have expended while purporting to enforce its rights under that (repudiated) agreement. Secondarily, it has provided no information as to how such fees were incurred, and/or their reasonableness, in any event.

[221] By the same reasoning, its disbursements as claimed ($22,868.08) should not be deducted from the calculation either. In any event, I have similarly been provided with no information as to the specifics of these disbursements either.

[222] Finally, the Respondent contends that the insurance review fee ($400.00) and "official fees for the registration of the mortgages and postpone agreement ($700.00)" should be deducted from the interest amount (*Respondent's brief para. 30*).

Findings - s.347 *Criminal Code*

[223] We start, therefore, with the indication by the Applicants that:

> For the purposes of this application, the Applicants accept that $186,045.00 was "dispersed" to them. This was the only money that they ever received. (*Applicant's brief, para. 7*).

[224] What did the Applicants pay over the entirety of the parties' dealings? To start with, $457,341.05 was paid by the Applicants to the Respondent on July 6, 2017, as a precondition to the Respondent's release of Meadow Ridge’s (first mortgage) security provided over the project and the various collateral securities provided by the remaining Applicants.

[225] In addition, the Applicants paid $40,260.03 in interest prior to what the court found to be the acceptance by the Applicant of the repudiation of the term sheet, which occurred on July 7, 2016. This is explained more completely in the report of

Paul Conrad, to which earlier reference has been made. So, as we see at pp. 2 – 3 thereof:

> With respect to a loan amount of $186,000, you [counsel for the Applicant's] have asked that I determine the interest rate charged on the loan based on various amounts that were paid being considered interest. The charges that are considered in the interest rate calculation were part or all of the following:

Nature of Charge	Amount
Deposit	$7,500.00
Standby Charges	20,000.00
Interest Paid	166,203.41
Commitment Fees	33,600.00
Legal Fees	44,529.59
Disbursement	22,868.08
Insurance Fees	400.0
	$295,101.08

> Of the amount referenced as interest, $40,260.03 was paid over several dates in late 2015 and early 2016. For simplicity, I have assumed those payments were made on the end date of the loan. This has the effect of understating the effective annual interest rate I calculated for the loan. Except for the deposit, which was made on September 1, 2015, all of the charges against the loan, including the principal repayment, were paid on the end date of July 6, 2017. In the first scenario on the next page, all of the payments referenced above were considered interest and the total amount repaid was $481,101.08.
>
> In this scenario, I have determined the effective annual rate of interest to be 83.79%. This is a criminal rate of interest. The table below shows the amortization schedule for the loan.

Amortization of Loan –Scenario - 1						
End Date	Duration In Years	Opening Balance	Advances	Payments	Interest	Ending Balance
1-Sep-15	0.00	0.00	0.00	-$7,500.00	0.00	-7,500.00
24-Nov-15	0.23	-7,500.00	186,000.00	$0.00	-1,127.60	177,372.40
6-Jul-17	1.84	$177,372.40	$0.00	-$473,601.08	$296,228.68	$0.00
			$186,000.00	-$481,101.08	$295,101.08	

> If the interest rate charged against the loan was 11.0%, the final payment would be $262,577 less than the amount shown in the table above.
>
> [Emphasis added]

[226] Mr. Conrad then proceeded to outline eight other (different) possible scenarios, complete with interest calculation tables, compatible with various findings which could be made on the basis of the payments made to the Respondent, and whether or not they were considered to be "interest" by the court. In all but three of these possible scenarios, the effective interest rate charged was criminal.

[227] Of note is the fact that Mr. Conrad's calculations were premised upon an advance of $186,000.00, whereas the actual advance to the Respondent was $186,045.10. For the purposes of the calculations to be undertaken, and the amortization of the loan, that difference is negligible. It is outweighed to a significant degree by Mr. Conrad's assumption (very favourable to the Respondent) that interest of $40,260.03, which was (in actual fact) paid over several dates in late 2015 and early 2016, was not made until the end date of the loan on July 6, 2017, in one lump sum (*Conrad report, p. 2*).

[228] I conclude that interest charged will be calculated by reference to the funds actually received by the Applicant: $186,045.10, rounded to $186,000.00. Assuming that the closing date of the loan was July 6, 2017 when actual payout was achieved, which produces a 1.84 year amortization, the sum total of all charges noted by Mr. Conrad at p. 2 of his report was $295,101.08. Under the applicable "scenario" (which I conclude to be "scenario 1") the effective annual interest rate is therefore 83.79%. This easily exceeds the rate stipulated by s. 347 of the *Criminal Code*. It is thus usurious.

[229] I note that some of the authorities canvassed suggest that when an usurious rate of interest has been found, the effect is that the court may decline to enforce the agreement at the instance of the lender (see *Rotello, supra*, for example). The difference here, of course, is that the Applicant has brought action against the Respondent lender. Under these circumstances, and as I will examine further when damages are dealt with, I do not take this as a pretext to excuse the Applicants from paying interest upon the funds actually advanced. This is similar, in approach, to that adopted by this court in *Olympic Enterprises, supra*.

B. In addition, should the transaction be set aside:

ii. On the basis of violations of the Money Lenders Act, SNS 1989, c. 289 ("MLA")

[230] The operative portion of this legislation is as follows:

> 4. Where in any action or proceeding in the Supreme Court or in the county court in respect of any loan from a money-lender, the court finds that the amount of the charges for commission, expenses, inquiries, fines, bonus and renewals in respect of which the Legislature has power in this behalf, and any other such charges, together with the amount of the interest, exceeds the amount of the interest calculated at the rate permitted, or that any conveyancing in connection therewith was unnecessary, or the charges therefor excessive, or that insurance other than that reasonably proper for security for the loan was required by the money-lender, the court shall have jurisdiction and power to:
>
> (a) reopen the transaction and take an account between the creditor and the debtor;
>
> (b) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the debtor from payment of either the whole or any part of any sum in excess of the sum adjudged by the court to be due for principal and interest;
>
> (c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor; or
>
> (d) except in respect of interest, set aside, either wholly or in part, or revise or alter any security given or agreement made in respect of the loan and, if the creditor has parted with the security, order him to indemnify the debtor. R.S., c. 289, s. 4.

[231] Relevant definitions are provided in s. 2:

> 2. In this Act,
>
> (a) "interest" includes discount and also includes charges in respect of which the Legislature has not power in this behalf;
>
> (b) "loan" includes money advanced on account of a person in any transaction which, whatever form it takes, is substantially a loan to such person, or one securing the repayment by such person of the money advanced;
>
> (c) "money-lender" includes any person carrying on a loaning business, and any person who engages in any transaction referred to in clause (b) and any person

> who carries on the business of money-lending, or advertises or announces himself or holds himself out in any way as carrying on that business, and who makes a practice of lending money at a higher rate than ten per cent *per annum*, but does not include a registered pawnbroker or a bank;
>
> (d) "rate permitted" means a rate that is a legal and valid rate in respect of the loan and is not in contravention of any Act heretofore or hereafter enacted by the Parliament of Canada. R.S., c. 289, s. 2.

[232] The effect of this section is relatively straightforward. Perhaps because of this, there is a dearth of reported case law respecting it. In *Ferguson v. Amiro*, 2011 NSSC 416, the court concluded:

> 15. The Court in *Olympic Enterprises Ltd. v. Dover Financial Corp.*, 1995 CarswellNS 208 (N.S.S.C.), at paragraphs 8 and 9, compared what was required for relief under the *Unconscionable Transactions Relief Act*, R.S.N.S. 1989, c. 481, with that under the *Money-lenders Act*, as follows:
>
> > "The issue under the *Unconscionable Transactions Relief Act* is whether or not the transaction is unconscionable. Under the *Money-lenders Act*, the issue is whether the interest rates charged are in excess of rates permitted under any *Act* of Parliament, in this case the *Criminal Code*. Plaintiff's counsel argue that the interest rate charged under the plaintiff's mortgage exceeds the rate permitted under the *Criminal Code* and, therefore, the plaintiff has breached the provisions of the *Money-lenders Act*.
> >
> > As can be seen from the provisions of the *Unconscionable Transactions Relief Act* and the *Money-lenders Act*, the relief under both *Act*s is similar. Under the former, the plaintiff must show that the attacked transaction is unconscionable while under the later the plaintiff must simply prove that the interest rate charged violated a federal *Act*, in this case the *Criminal Code*."
>
> 16. The Court in *Olympic Enterprises* found that the charges and interest constituted a criminal interest rate. Therefore, it did not have to determine whether the charges were excessive, nor whether the transaction was unconscionable. However, in comparing the two *Acts*, the Court did not mention that excessive loan charges, short of amounting to a criminal interest rate, would also constitute a prerequisite to relief. The failure to mention that, though unnecessary given the factual finding indicated later in the decision, is some indication that the Court in *Olympic Enterprises* interpreted section 4 of the *Money-lenders Act* as requiring the loan charges, with interest, to amount to a criminal interest rate before relief could be granted.

[233] The effective rate of interest charged by the respondent in this case exceeds that permitted by the *Criminal Code* by a wide margin, so it clearly renders the transaction susceptible to the remedies specified in s. 4 of the *MLA*.

B. In addition, should the transaction be set aside:

iii) On the basis of violations of the Unconscionable Transactions Relief Act, RSNS 1989, c. 481?

[234] Sections 2 to 4 of this legislation read as follows:

> 2. In this Act,
>
> (a) "cost of the loan" means the whole cost to the debtor of money lent and includes interest, discount, subscription, premium, dues, bonus, commission, brokerage fees and charges, but not actual lawful and necessary disbursements made to a registrar of deeds, a prothonotary, a clerk of a county or city court, a sheriff or a treasurer of a city, town or municipality;
>
> (b) "court" means a court having jurisdiction in an action for the recovery of a debt or money demand to the amount claimed by a creditor in respect of money lent;
>
> (c) "creditor" includes the person advancing money lent and the assignee of any claim arising or security given in respect of money lent;
>
> (d) "debtor" means a person to whom or on whose account money lent is advanced and includes every surety and endorser or other person liable for the repayment of money lent or upon any agreement or collateral or other security given in respect thereof;
>
> (e) "money lent" includes money advanced or credit granted to or on account of any person in any transaction that, whatever its form may be, is substantially one of money-lending, credit granting or securing the repayment of money advanced or extended in the way of credit and includes a mortgage of real or personal property or both. R.S., c. 481, s. 2.
>
> 3. Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable, the court may:
>
> (a) re-open the transaction and take an account between the creditor and the debtor;

(b) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken and relieve the debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal and the cost of the loan;

(c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor;

(d) set aside, either wholly or in part, or revise or alter any security given or agreement made in respect of the money lent and, if the creditor has parted with the security, order him to indemnify the debtor. R.S., c. 481, s. 3.

4. The powers conferred by Section 3 may be exercised:

(a) in an action or proceeding by a creditor for the recovery of money lent;

(b) in an action or proceeding by the debtor, notwithstanding any provision or agreement to the contrary and notwithstanding that the time for repayment of the loan or any instalment thereof has not arrived;

(c) in an action or proceeding in which the amount due or to become due in respect of money lent is in question. R.S., c. 481, s. 4.

[235] Based upon an analysis of all of the circumstances ancillary to this transaction, including the margin by which the effective rate of interest exceeds that specified by s. 347 of the *Criminal Code*, I have no hesitation in concluding that the transaction was both "harsh and unconscionable" within the meaning of s. 3 of *UTRA*.

[236] The remedies in both of the above pieces of Provincial legislation are essentially the same. I shall consider this in my determination of the remedies and/or damages to which the applicant's are entitled as a result of my findings herein.

C. What are the damages (if any) to which the Applicants are entitled as a result of my findings with respect to issues A and B?

[237] Repudiation (or anticipatory, or fundamental breach) gives rise to a right of election. The law is not controverted in that respect. For example, Justice Moir

elaborates upon these concepts in *Think Kitchen Cabinets Ltd. v. Harborvista Apartments Ltd.* 2014 NSSC 28, at para. 42:

> Repudiation, or anticipatory breach, is the tails side of a coin that has, for the face, termination for breach. Justice Saunders makes the coin analogy at para. 87 of [*White, supra*]… A fundamental breach gives rise to a right of election. The innocent party may elect to hold the party in breach to further future performance and sue for damages arising from the breach or to terminate further future performance and sue for damages arising from the breach and from the loss of future performance. The intention to elect one or the other has to be communicated.
>
> [Emphasis added]

[238] The Applicants have chosen the latter remedy. Although entitled to relief (alternatively) under the Provincial legislation noted above, calculation of damages on the basis of a repudiation is, in my view, the fairest way to proceed in the circumstances of this case.

[239] Damages, of course, must be proven like every other aspect of the Applicants' case. To ease in the calculation of same, I am satisfied with the manner in which the charges set forth in the central table, which appears at page 2 of Mr. Conrad's report (Exhibit 12) in the total amount of $295,101.08, have been characterized.

[240] So what is the relief to which the Applicants are entitled? As they would have it:

> 23. The Applicants also say that the entire transaction with Moskowitz should be set aside pursuant to the powers granted by this Court under the *Unconscionable Transaction Relief Act* [Authorities, Tab 2] and/or the *Money-Lenders Act* [Authorities, Tab 3]. The term sheet is illegal and unconscionable. The numerous fees imposed by Moskowitz during the term of the transaction were in fact interest. The fees charged after July 2016 (when the mortgage was either repudiated or went into default) are in fact illegal penalties bearing no connection whatsoever with any potential loss to which Moskowitz might be exposed. The actual interest rate on this transaction is usurious and far exceeds the illegal rate of interest as stipulated by s. 347 of the *Criminal Code of Canada* [Authorities, Tab 4]. On this basis the transaction should be set aside in its entirety.
>
> 24. The Applicants are therefore seeking reimbursement of all interest and fees charged in relation to the Moskowitz financing on the basis that they were substantially denied the benefit of the agreed financing, or alternatively on the

> basis that the transaction led to an arrangement which is unconscionable at best and illegal at worst. The amount of the reimbursement can be calculated by subtracting $186,000 from the $457,341.05 paid in July 2017, plus $40,260.03 paid as interest prior to the July 2016 repudiation. The requested reimbursement is therefore $311,601.08.
>
> (Applicant's brief, May 8, 2018)

[241] As such, the Applicants seek a reimbursement calculated on the basis of the $457,341.05 paid on July 6, 2017 in order to secure release of the security over the project held by Moscowitz, as well as the individual securities provided as collateral by the other Applicants. Their position is that from this figure should be subtracted $186,000, and then $40,260.03 added to the result to arrive at a figure of $311,601.08 representing overpaid interest and fees.

[242] Therefore, the Applicants break down the total damages claimed thus:

(a) overpaid interest and fees - $311,601.08

(b) increased lender commitment fee – $11,900.00

(c) increased broker fee – $13,400.00

(d) interest differential on new financing of 1% (12% as opposed to 11% per annum) – $1,120,000.00 x 1% per year x one year = $11,200.00

(e) borrower legal fees thrown away on Moskowitz financing $6,467.00

(f) 3 additional months of management fees brought about by refusal Moskowitz to advance funds – $7,590.00

(g) 3 additional months of interest payments on new financing – $39,000.00

Total - $401,158.08

Analysis

a) Interest and fees

[243] With respect to these amounts, I am unable to agree completely with the Applicants. In my view, to require repayment of the entire $40,260.03 paid prior to the July 7, 2016 repudiation would be inappropriate in this case.

[244] The Applicants did have the use of $186,000 of the Respondent's money to assist with this project. Obviously, this is far less than what Meadow Ridge et al

had a right to expect would be forthcoming. However, they should pay interest on those funds which they actually received, at the rate at which they had contracted, up to the date at which they actually repaid those funds. Any other result would amount to a windfall, in the circumstances of this case.

[245] Prior to repudiation, the Applicants paid $40,260.03 in interest. At 11%, calculated from the date of the advance (November 24, 2015) to date of repudiation (July 7, 2016) this would yield the following calculation of interest actually owed:

$186,000.00 x 11% = $20,460.00 per year in simple interest.

$20,460.00 per year x 0.6 years = $12,276.00 simple interest owed to date of repudiation (July 7, 2016).

[246] "Simple interest" is appropriate in this case because of the manner in which accrual is expressed in the mortgage itself, and the fact that the payments made by the Applicants were monthly in nature and calculated on the basis of the interest accrued since previous payment. The amount of interest actually owed by the Applicants to the Respondent prior to repudiation therefore amounts to $12,276.00.

[247] But the analysis does not end there. The $186,000.00 (actually, the $186,045.10) was not repaid to the Respondent until July 6, 2017. Interest at 11% for the year July 7, 2016 to July 6, 2017 = $186,000.00 x 11% = $20,460.00. Total interest owed, therefore, from November 24, 2015 to July 6, 2017 = $20,460.00 + $12,276.00 = $32,736.00.

[248] On this basis, the overpayment of interest and fees for which the Applicants is entitled is to be reimbursed is calculated on the basis of ($457,341.05 - $186,000) + ($40,260.03 - $32,736.00) = $278,865.08.

(b) Lender Commitment Fee, (c) Increased Broker Fee, and (d) Interest Differential on New Financing

[249] These amounts admit of ready calculation. Under the terms of the contract with the Respondent, Meadow Ridge was bound to pay a commitment fee of $33,600.00. It did so out of the proceeds of the land cost facility, on November 24, 2015. While this amount is included in the figure noted in “(a)” above, the fact remains that the Applicants have lost the value of that price, and were required to pay a commitment fee to CLI in the amount of $45,500.00 (*see affidavit, Repchull,*

October 12, 2016, exhibit CCC). The difference was an extra $11,900.00. I say the same with respect to the brokerage fees and allow the claim for the increase necessitated when CLI entered the picture ($13,400.00).

[250] With respect to the interest differential, again reference is made to the mortgage loan commitment from CLI dated August 10, 2016 (*Repchull affidavit exhibit CCC*) which was taken out on the heels of the acceptance of Moskowitz repudiation on July 7, 2016. The Applicants were eventually required to take out a mortgage at 12% for 12 months. I conclude that the need for the Applicants to obtain financing from CLI (to pay out the prior interim financing with CMI and "grid loan" with CLI) was causally related to the repudiation by the Respondent of their obligations to the Applicants. The interest differential in the amount claimed ($1,120,000.00 x 1% times one year = $11,200.00) is allowed.

(e) Borrower Legal Fees Thrown Away

[251] Dealing now with the amount claimed for borrower (Applicants') legal fees "thrown away on Moskowitz financing – $6,467.00". I accept that this was paid premised upon expected total advances of $1,120,000.00. I have found that the Applicants actually had received the benefit of only $186,045.10 for a period of 7.2 months prior to repudiation, and 12 months after that. The amount ultimately paid for legal fees seems rather high when regarded from this point of view. The Applicants had to pay yet more legal fees when the replacement financing with CLI came to fruition. I allow $3,500.00 for duplicated or thrown away legal fees.

(f) 3 Additional Months of Management Fees and (g) 3 Additional Months of Interest Payments on New Financing

[252] The mortgage with Moskowitz was to run from December 1, 2015, to December 1, 2016. The only money that was ever advanced pursuant to it was $186,045.10, and the contract which the mortgage purported to secure was repudiated on July 6, 2016. By virtue of the awards earlier made, the Applicants will receive compensation for all excess interest paid to the Respondent pursuant to its terms. Effectively, the only interest which they will have paid is on the $186,045.10 up to and including July 6, 2017 (the actual date of payout). Meadow Ridge et al. will also have been compensated for the differential 1% extra incurred on the CLI financing. When this is considered, I fail to see the basis for the management fees ($7,500.00 per month) and interest payments ($13,000.00 per

month) on the “CLI money” for the three month overlap with the Moskowitz mortgage (September 1, 2016 to December 1, 2016).

[253] Accordingly I disallow the claims for the 3 months each of management fees and interest payments on new financing.

Bad faith

[254] There is considerable authority for the proposition that punitive damages are an available remedy in the event that bad faith is established. This does not make such an award mandatory, in circumstances where such conduct is found to have occurred. Our Court of Appeal in *TDC Broadband Inc. v. Nova Scotia (Attorney General)* 2018 NSCA 22 recently reviewed the applicable principles at para. 60:

> 60 In *National Bank*, Saunders, J.A. highlighted the principles to be considered firstly to determine whether an award of punitive damages was warranted and, secondly, the assessment of the award itself. With respect to whether punitive damages ought to be awarded, he wrote:
>
> > [438] The legal principles to be considered when deciding whether to award punitive damages may be gleaned from a series of cases from the Supreme Court of Canada starting with *Whiten v. Pilot Insurance Co.*, 2002 SCC 18; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30; and *Honda Canada Inc. v. Keays*, 2008 SCC 39.
> >
> > [439] From these and other leading authorities we know that the discretion to award punitive damages "should be most cautiously exercised" and courts "should only resort to punitive damages in exceptional cases". Punitive damages require proof of conduct that amounts to "an independent actionable wrong", typically seen as so shocking as to "depart markedly from ordinary standards of decency ... so malicious and outrageous (to be) ... deserving of punishment on their own". Punitive damages "are directed to the quality of the defendant's conduct, not the quantity (if any) of the plaintiff's loss". The aim of punitive damages "is not to compensate the plaintiff, but rather to punish the defendant". They are "the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant". Punitive damages are intended to punish the wrongdoer, express the court's clear denunciation and serve as a deterrent not only to the wrongdoer, but others who may be inclined to follow the same example.

[255] In a similar vein, Oland, J.A. in *Plazacorp Retail Properties Ltd. v. 2502731 Nova Scotia Ltd. (c.o.b. Mailboxes Etc.)*, 2009 NSCA 40 explained:

> 57. A very high threshold must be met before an award of punitive damages is merited. In *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, Justices McLachlin and Abella, writing for the Court, explained:
>
> > 62. By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency -- the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196; *Whiten*, [2002] 1 S.C.R. 595 at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten*, at para. 36, "punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

[256] Therefore, whether I consider it from the vantage of "bad faith" or "lack of good faith" (some of the existing authorities, often in relation to insurance claims, have used both references) the conduct which actuated the respondent (post February 23, 2016) left a lot to be desired. It essentially deprived the Applicants of most of the benefit of the contract, and would, but for the fortuitous availability of CMI and CLI through Mr. Jaskolka, have led to the ruination of the project.

[257] I have concluded, however, that (to borrow the language of *Fidler*) while the conduct of the Respondent in this case is deserving of perhaps more than the "…usual opprobrium that surrounds breaking a contract", it did not amount to a sufficiently marked departure "…from ordinary standards of decency" as to merit an award of punitive (non-compensatory) damages.

[258] Moreover, since aggravated damages are a species of compensatory damages, they are not triggered either. Indeed, I am satisfied that adequate compensation for the Applicants may be achieved by the aforementioned assessment of damages and prejudgment interest.

Conclusion

[259] In summary, the Applicants shall have judgment against the Respondent in the amount of $318,865.08, together with prejudgment interest from July 6, 2017. I request that counsel provide a submission as to applicable rate, and calculation of same, or agreement with respect thereto. The Applicants shall also receive their

costs. If the parties are unable to agree as to quantum of costs, I will receive (short) written submissions within 30 days.

Gabriel, J.