Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

DEBT LITIGATION

Michael G. Tweedie

Release No. 9, December 2025

Debt Litigation is a comprehensive work dealing with default and summary judgments relating to debtor-creditor law and practice. It includes annotations and commentary on topics such as the fiduciary duties of solicitors, including negligence and conflict of interest, spoliation of evidence and e-discovery and conventional mortgages and guarantees.

What's New in This Update

The author has added new commentary and case law regarding Mortgages, Guarantees, Procedure, Evidence, Defences, Lender Liability, Settlement, Enforcement, Fraudulent conveyances, Bankruptcy. Notable cases are summarized below.

Thomson Reuters®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
E-mail CustomerSupport.LegalTaxCanada@TR.com

Highlights

[Mortgages 2:3]

Section 8 of the *Interest Act,* R.S.C. 1985, c. I-15 forbids any increase in interest charges on mortgage arrears, although higher interest rates on overdue loans are common and legitimate in commercial settings, but not for mortgages, which are treated differently under the law. Parliamentary intention protects real estate owners from excessive charges which might result in foreclosure and consequential loss of equity. A violation of s. 8 of the *Act* occurs where a mortgage imposes a higher rate of interest on arrears such that increased rate functions as a penalty for non-performance; a court will order that interest accrue only at the original rate and rule the increased rate unenforceable under s. 8: *Vant Geloof v. Grewa*l, 2025 BCSC 1576 (B.C. S.C.).

The core principle of section 8 of the *Interest Act* is that it prohibits lenders from charging a higher interest rate on arrears (missed payments) secured by real property than on principal not in arrears. The section applies to mortgages and hypothecs on immovable property; higher interest on arrears is typical in commercial lending but prohibited in real property mortgages; the purpose is to protect borrowers from losing equity or suffering foreclosure. "Arrears" includes the entire mortgage in default. Both penalty clauses and discount structures that result in higher interest on arrears breach s. 8: labels like "reward" or "penalty" are irrelevant. Legal contrivances such as penalties and discounts, as these may also violate s. 8 if they increase charges on arrears and even well-intentioned clauses are invalid if they breach s. 8. Interest increases due to time passage are allowed; those due to default are not: there is a four-part test to engage s. 8:

1. There must be a fine, penalty, or interest rate.
2. It must relate to arrears secured by mortgage.
3. It must increase the charge beyond the normal rate.
4. The arrears must be secured by real property.

For the purposes of s. 8 there is a meaningful distinction between renewal, which is treated as a new contract and therefore valid if entered freely, even with a higher interest rate and variation, which alters an existing contract, and which, if triggered by default, may violate s. 8: *Five Peaks Capital Ltd. v. Global City Properties (Cottonwood) Ltd.,* 2025

BCSC 1726 (B.C. S.C.).

[Mortgages 2:8]

Courts have consistently treated premature issuance of a statement of claim as a technical error, not a substantive one and if it does not prejudice the mortgagor(s) (or guarantor(s)), such a technical error can be corrected by a *nunc pro tunc* (retroactive) order, giving validity and effect to the claim: *1000005996 Ontario Ltd. v. Virk*, 2025 ONSC 5013 (Ont. S.C.J.).

[Mortgages 2:32]

A third party who pays off a mortgage is presumed to intend the mortgage to remain alive for their benefit; equity treats them as having an assignment of the original creditor's rights. Subrogation is a restitutionary remedy to redress unjust enrichment and does not require the plaintiff's intention to gain security; there need be no contractual intention for subrogation to operate. A proprietary interest in the funds isn't necessary if the defendant is enriched at the claimant's expense; courts focus more on preventing unjust enrichment than on the claimant's intentions or formal security arrangements. This furnishes a principled framework and allows defenses like change of position and limitation: *Gable Insurance AG v. Dewsall & Ors,* [2025] EWHC 2280 (Ch).

[Guarantees 3:1]

Any claim pursuant to a "see to it" guarantee e sounds in damages, not debt: *Dunn v. Kazolides,* [2025] EWHC 2212 (Ch), citing *Moschi v. Lep Air Services Ltd.,* [1973] A.C. 331 (U.K. H.L.).

[Guarantees 3:8]

A guarantee may be void, or alternatively the guarantor may be entitled to a set-off, where there has been a breach of the main agreement to transfer $5.9 million in accounts receivable. Such an accounts receivable defence raises a genuine issue requiring trial where there is evidence suggesting that the guarantor relied on representations about these accounts when granting the guarantee and the principal agreement is ambiguous. However, the claim for set-off does not raise a genuine issue requiring trial: *Oldcastle Building Envelope Canada, Inc. v. Antamex Industries ULC et al,* 2025 ONSC 4751 (Ont. S.C.J.).

[Evidence 5:5]

Courts must prioritize the actual wording of the contract; commercial common sense and context are relevant, but these should not override the language chosen by the parties, who had control over it and likely focused on the issue when

drafting. Clarity matters: where the contractual language is clear, it's difficult to justify any deviation but poorly drafted or ambiguous language may allow more flexibility. Courts must not improvise "flaws" through hindsight bias just to reinterpret the text; commercial common sense must be assessed as of the time the contract was made, not based on the result of performance and an unfortunate outcome for one party doesn't justify reinterpreting the contract. Proper judicial restraint dictates that even where a term seems unwise or unfair, courts should resist rewriting the contract; the proper judicial role is to determine what was agreed, not what should have been agreed: *Singh & Ors v. Singh & Anor,* [2025] EWHC 2275 (Ch).

At 5-15 [Evidence 5:9]

There is a lack of corroborating evidence where there is:

- No written communication or receipts
- No banking records
- No affidavit from the Defendant herself

and a court will consider undocumented evidence of a cash payment suspicious: *1000005996 Ontario Ltd. v. Virk,* 2025 ONSC 5013 (Ont. S.C.J.) and see § 2:2. "Conventional and Collateral", above, establishing that the lack of electronic evidence surrounding an alleged oral contract can significantly weaken its credibility and may lead courts to reject it outright. Courts are increasingly skeptical of claims based solely on oral agreements, especially where large sums of money are involved; there is a legitimate expectation that meaningful business dealings leave behind some form of electronic communication such as texts, emails and digital records. There is considerable English and Canadian authority that the absence of any electronic footprint can undermine the credibility of such claims, as it is rare it is for oral contracts to exist without digital traces.

[Defences 6:47]

Pao On v. Lau Yiu remains the foundational decision on economic duress - there is a proposed broader test focusing on lack of genuine consent but this has not been universally adopted. There remains a need for illegitimate pressure and the test is based on three elements:

1. Threats were made
2. Threats were wrongful
3. Agreement was induced by overriding free will

Economic duress is assessed in light of the following factors:

- Protest by the coerced party
- Availability of legal alternatives

- Access to independent legal advice (a highly relevant factor)
- Prompt action to repudiate the contract once duress ended

"A lack of consideration may support a finding of duress, but its presence does not defeat it. Delay or silence may weaken the claim": *Five Peaks Capital Ltd. v. Global City Properties (Cottonwood) Ltd*., 2025 BCSC 1726 (B.C. S.C.).

[Defences 6:55]

The legal test for equitable set-off bifurcates into (a) a connection test, requiring a sufficiently close relationship between the transactions and (b) a fairness test, which considers whether would be manifestly unjust to enforce the main claim without considering the cross-claim. If successful, it prevents a creditor from recovering the full amount claimed, where a valid set-off exists but it cannot eliminate liability unless agreed by both parties or determined by a court or tribunal. However, an equitable set-off of costs against damages is more contentious and not automatically justified: *Michael Wilson & Partners Ltd v. Emmott,* [2025] EWHC 747 (Comm).

[Lender Liability 8:19]

Absolute privilege protects lawyers (and their clientele) from liability when acting in their clients' interests during litigation, including spoken words during legal proceedings, documents properly used or prepared for proceedings and preparatory steps taken in anticipation of litigation. Emails debating the proper service of documents are routine in litigation and are protected by this sort of privilege. Requiring a formal court motion instead of resolving issues via email would be inefficient, costly and contrary to the justice system's best interests. The court will take an expansive approach to determining whether absolute privilege has been pleaded; should this fail, the defendant may be granted leave to amend their pleadings: *Avidar v. Block et al.*, 2025 ONSC 4885 (Ont. S.C.J.).

[Settlement 9:1]

A settlement agreement requires both a mutual intention to create a legally binding agreement and agreement on all essential terms (not necessarily every detail); parties don't need to agree on such incidental matters as method of payment or exchange of releases. Disputes over performance of the contract don't invalidate the settlement if essential terms are agreed upon: *Acorn Development v. Sabounchi,* 2025 ONSC 5015 (Ont. S.C.J.).

[Settlement 9:5]

While determining whether a contract is too vague is an enquiry entirely distinct from assessing the parties' intent to

create legal relations, these investigations are linked: the less certain the terms, the less likely the parties intended legal enforceability. Where there is intent to be bound and the parties have acted accordingly, courts are hesitant to dismiss agreements as too vague. Commercial realism dictates that business agreements may be informally or imprecisely worded and these are interpreted broadly and pragmatically, aiming to uphold rather than defeat them the agreement; parties can still form a binding contract even where some terms remain to be agreed later, provided the agreement is workable and not fatally uncertain: *Perelman v. Kerr,* [2025] EWHC 2331 (Comm). The "co-operation implied term" doctrine provides that a contract contains an implied duty of cooperation between the parties. Where a contract requires joint action to be effective, each party is implicitly obliged to do what's necessary to carry it out. This duty of cooperation is implied when contract performance depends on both parties but only if it's necessary to make the contract workable, not simply because it seems reasonable. The implied term must not frustrate the agreement settlement of the SPA. Such an obligation is implicit in the agreement and must be necessary for business efficacy; further, it must be obvious, since the transaction's completion depends on mutual cooperation *Perelman v. Kerr,* [2025] EWHC 2331 (Comm).

[Settlement 9:7]

Hong v. Moose Jaw Publications Ltd. Partnership, 2025 SKKB 119 (Sask. K.B.) concludes that a *Pierringer* agreement is valid where the three legal criteria (from *Cadieux v. Cadieux,* 2025 ONCA 405 (Ont. C.A.)) are present:

- Plaintiff's claims were limited to the non-settling defendants' several liability.
- Settling defendants were barred from seeking contribution or indemnity.
- Settling defendants were indemnified against claims from non-settling defendants.

Concerns that the amended pleadings unfairly imposed all damages to non-settling defendants may be answered by establishing that:

- The pleadings acknowledged the settling defendants' involvement.
- The trial judge would be vested with a discretion to apportion liability fairly.
- The non-settling defendants wouldn't be held responsible for the settling defendants' share.

The benefits of *Pierringer* agreements include that:

- They promote settlement, reduce litigation costs and ease court burdens.
- Any potential prejudice to non-settling defendants was speculative and outweighed by public interest.
- Such agreements are deemed fair and protective of all parties.

Pierringer agreements facilitate settlement in multi-party litigation by limiting the settling defendants' liability to their agreed share of fault and protecting them from future contribution or indemnity claims by non-settling defendants. Encouraging settlements in complex cases serves the public interest, especially where the claims of prejudice by non-settling defendants are speculative. Essential terms are:

1. Plaintiff limits claims against non-settling defendants to their several liability.
2. Settling defendant waives contribution and indemnity claims.
3. Plaintiff indemnifies the settling defendant against crossclaims.

[Enforcement 10:3]

Pursuant to Subrule 60.07(6), a writ of seizure and sale is valid for six years; after that, Subrule 60.07(2), court approval is required to issue a new (alias) writ. These enforcement tools may be deemed necessary to prevent further frustration of justice and ensure effective enforcement of the judgment. Subrule 60.07(10) allows creditors to seek changes to a writ of seizure and sale without notice if a debtor has changed their name, uses an alias, or varies the spelling of their name. Rule 2.03 permits flexibility in applying rules when justice demands it. An *alias* writ becomes effective upon issuance and does not impact third-party rights that arose in the interim. The standard for granting leave requires that:

- The plaintiff must explain the delay and show they haven't waived their rights or accepted non-payment.
- The evidentiary threshold is very low, and refusals are rare.
- Evidence of any enforcement efforts, "even if the plaintiff was not proactive or was not specific with regard to the steps taken to enforce the judgment" is sufficient.
- Inquiries into the debtor's location also support the plaintiff's position.

Where the plaintiff meets the threshold, the defendant may argue that enforcement would be inequitable. Accordingly, alias

orders may be issued without prejudice to the defendant's right to challenge them later. The writ and garnishment orders will include all known aliases of the debtor: *Robert R. Ng v. Hao Ji Tang, formerly known as Joseph Hokai Tang*, 2025 ONSC 4740 (Ont. S.C.J.).

[Enforcement 10:7]

Where there has been an adjudication pursuant to s. 13.5 of the *Construction Act*, R.S.O. 1990, c. C.30, the adjudicator's decision is binding and enforceable under the *Act* unless formally stayed or set aside by the Divisional Court. Accordingly, if the debtors failed to seek judicial review or a stay and the court couldn't indirectly stay the decision *via* a garnishment motion, the creditor is entitled to payment which was not contingent on the project's overall progress or the debtors' bank financing, as the contract didn't require bank approval. The adjudicator's ruling does not depend on the creditor continuing work. The *Construction Act* shields against double recovery and can adjust lien security for amounts already paid through garnishment. Importantly the creditor enjoys concurrent remedies and can pursue both garnishment and lien remedies simultaneously: *Integricon Construction Inc. v. Stevens et al*., 2025 ONSC 4688 (Ont. S.C.J.).

[Fraudulent Conveyances 11:5]

Fraudulent conveyance legislation applies to any transfer of property that both(1) intends and (2) results in impairing a creditor's ability to collect its debt. Such statutes are to be interpreted broadly and the provision "disposition of property" has been interpreted to include

- Adding a spouse to property title to shield assets
- Transferring business rights to related entities
- Swapping assets for restricted shares if the design is to protect assets from creditors

As to the intent requirement, the transfer must be made with intent to hinder, delay or defraud creditors and even those transfers made in good faith can be fraudulent if the intent to hinder creditors exists. This is factual issue and may be proven by direct evidence or inferred from circumstances, often in reliance on the badges of fraud and the totality of the circumstances, when direct evidence is lacking: *Nextgen Energy Watervliet TWP, LLC v. Bremner,* 2025 BCSC 1670 (B.C. S.C.).

[Fraudulent Conveyances 11:12]

In *Crowe Soberman Inc. v. Noir Property Management Ltd.*, 2025 ONSC 4954 (Ont. S.C.J. [Commercial List]) a sham mortgage was deemed a fraudulent conveyance under the

Fraudulent Conveyances Act where it was granted by an insolvent mortgagor, for no fresh consideration and resulted in preferential treatment of the applicant over other creditors and the applicant was aware of the mortgagor's financial troubles intended to prioritize their claim. The mortgage also constituted an unjust preference under the *Assignments and Preferences Act* for largely the same reasons.

[Bankruptcy 12:3]

'Cascading' consumer proposals are permissible under the *BIA;* there is no prohibition of filing a second proposal while a first remains operative. The annulment of the first proposal can occur simultaneously with the approval of the second, under s. 66.3(1)(b) of the *BIA*. This approach aligns with the BIA's purposes of debtor rehabilitation and equitable distribution of assets, while maintaining the integrity of the bankruptcy: *Minister of National Revenue v. Cameron Okolita Inc.*, 2025 SKKB 114 (Sask. K.B.).

[Bankruptcy 12:21]

Section 178(1)(d) of the *BIA* provides that a debt "arising out of . . . defalcation while acting in a fiduciary capacity" is not released by a discharge from bankruptcy. Defalcation requires wrongful financial conduct by a fiduciary; breaching a non-compete clause cannot constitute defalcation, as this does not involve mishandling money. Courts favour a narrow interpretation of discharge exceptions and reject any broad definitions of "defalcation" or "fraud" (under section 178(1)(e) of the *BIA*) to preserve the fresh start principle in bankruptcy: *Wild Rose Meats Inc v. Andres,* 2025 ABKB 487 (Alta. K.B.).

[Bankruptcy 12:23]

The court will prioritise the integrity of the bankruptcy system over the bankrupt's personal interests. Where the Registrar finds misconduct and dishonesty by the bankrupt (concealing income, submitting false financial data and failing to cooperate with the Trustee) they may conclude that the bankruptcy process has been compromised and that delays have been caused. Applying subsections 173(1)(a) and (e) of the *BIA* and considering that the bankrupt's

- assets were worth significantly less than 50 cents per dollar of unsecured debt, and that her
- financial troubles stemmed from reckless spending and neglect of her financial responsibilities,

a lenient discharge would undermine public trust and accordingly a conditional discharge may be imposed to deter future misconduct and uphold the credibility of the bankruptcy framework: *Riemer, Re,* 2025 SKKB 137 (Sask. K.B.).