



No. S-240493
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

FOX ISLAND DEVELOPMENT LTD. and ADVANCE
VENTURE HOLDING CO., LTD.

PETITIONERS

AND:

KENSINGTON UNION BAY PROPERTIES NOMINEE LTD. (FORMERLY
KNOWN AS 34083 YUKON INC.), KENSINGTON UNION BAY
PROPERTIES LIMITED PARTNERSHIP, KENSINGTON UNION BAY
PROPERTIES GP LTD., INTERNATIONAL TRADE CENTER
PROPERTIES LTD., SUNWINS ENTERPRISE LTD., MO YEUNG
CHING ALSO KNOWN AS MICHAEL CHING, MO YEUNG PROPERTIES
LTD., SFT DIGITAL HOLDINGS 30 LTD., HOTEL VERSANTE LTD.,
BEEM CREDIT UNION, MORTEQ LENDING CORP., CHUN YU LIU,
1307510 B.C. LTD., JEFF RAUCH, RCC HOLDINGS LTD. AND HEUNG KEI SUNG

RESPONDENTS

APPLICATION RESPONSE

Application Response of: Fox Island Development Ltd. and Advance Venture Holding Co., Ltd. (collectively "**Fox Island**").

THIS IS A RESPONSE TO the Notice of Application dated October 17, 2025 of Kensington Union Bay Properties Nominee Ltd., Kensington Union Bay Properties Limited Partnership, Kensington Union Bay Properties GP Ltd., International Trade Centre Properties Ltd., Sunwins Enterprise Ltd., Mo Yeung Ching, Mo Yeung Properties Ltd., SFT Digital Holdings 30 Ltd., and Hotel Versante Ltd. (the "**Applicants**").

The application respondents estimates that the application will take half day.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in paragraphs **NONE** of Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in **ALL** of the paragraphs of Part 1 of the notice of application.

Fox Island seeks an adjournment generally of this application on the grounds that practically the application does not need to be heard at this time and may never need to be heard given the circumstances surrounding this foreclosure and insolvency of the Applicants.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in **NONE** paragraphs of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. Capitalized terms used herein have the same meaning as in the Notice of Application filed by the Applicants, unless otherwise defined.
2. Fox Island admits paragraphs 1, 2, 5 – 9, and 13 of the Notice of Application.
3. Fox Island admits paragraphs 40—42 of the Notice of Application regarding the Applicants' commencing a new action, BC Supreme Court, Vancouver Registry, File No. S-255651 (the "**New Action**"), which relates to, among other things, allegations that the loans and forbearance agreements that are the subject of the within proceeding, provide for interest that exceeds the maximum allowable amount under section 347(2) of the *Criminal Code* (the "**Interest Rate Issue**").
4. The Original Senior B Loan Agreement provides as follows:

11. CRIMINAL INTEREST RATE

Notwithstanding anything contained in this Agreement or any other Loan Documents, the parties hereto agree that no "interest" shall be paid or payable to the Lenders in connection with the "credit advanced" in respect of the Loan at an annual rate of interest greater than that rate which is one (1%) percent per annum less than the "criminal rate" of interest (the "**Maximum Rate**")

It further provides that any interest is received that exceeds the maximum allowable amount, such interest received will be applied against the principal amount owing.

13.7 Severability

If any provision of this Agreement is determined to be invalid or unenforceable by a court of competent jurisdiction from which no further appeal lies or is taken, that provision shall be deemed to be severed herefrom, and the remaining provisions of this Agreement shall not be affected thereby and shall remain valid and enforceable.

Affidavit #1 of Mo Yeung (Michael) Ching, dated October 15, 2025
at Exhibit A, pp. 46-47, 49 [**Ching Affidavit**]

5. The Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement each contained terms that:

- (a) Confirmed that each of the Applicants:
- (i) fully understood the terms of the agreements and the consequences of the execution and delivery of the agreements;
 - (ii) had an opportunity to have the agreements reviewed by legal counsel; and
 - (iii) entered into the agreements on their own free will without threat, duress or other coercion of any kind by any person; and
- (b) Provided broad releases in favour of Fox Island in respect of any claims or defences **known or unknown**, both at law or in equity, that the Applicants **may now or later have or claim against Fox Island** by reason of any circumstance, action, cause or thing in relation to, or in any way in connection with the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement or their associated loan documents. (emphasis added)

Ching Affidavit at Exhibits E, pp. 149-150 & Exhibit F, pp 175-176

6. The Forbearance Extension Agreement terms were the subject of lengthy negotiations as between Fox Island via its counsel, Norton Rose Fulbright LLP and the Applicants via their counsel, which initially was Pryke Lambert Leathley Russell LLP and for some matters was Fasken LLP.
7. During the initial stages of this foreclosure leading into the Order Nisi being granted on February 29, 2024, the Applicants continued to be represented by Fasken LLP. Mr. Kibben Jackson of Fasken LLP took no position on the Order Nisi so long as the Hotel and lands were sold first under the conduct of sale order granted to Fox Island.

Ching Affidavit at Exhibits I, pp. 224-225

8. In the Forbearance Extension Agreement, the Applicants acknowledged the debt due to Fox Island under the Senior Loan B loan was \$42,710,052 as at April 30, 2023, plus all other, interest (accruing at that time at 30% per annum), fees, costs, expenses and other charges.

Ching Affidavit at Exhibits E, pp. 133-134.

9. The alleged Interest Rate Issue arises after July 30, 2023. It concerns certain fees (the Additional Forbearance Fee, the Additional Commitment Fee, the Equivalent Interest Payment, the Interim Loan Commitment Fee, and the Interim Loan Usage Fee) all of which arise in the Forbearance Extension Agreement or the Forbearance Extension Supplemental Agreement (the "**Fees**").
10. As such, even assuming there was no further interest costs or fees allowed by the Court after that date, at least \$43 million is undisputed in this matter notwithstanding the Interest Rate Issue and the Fees ("**Undisputed Loan B Amount**").
11. Fox Island has also advanced monies for the receivership under a Receiver's Borrowing loan which currently exceed a total of \$750,000 and this will increase under the

receiver's recent application to increase the borrowings (the "**Undisputed Receiver's Borrowing Loan**").

12. The Undisputed Loan B Amount and Undisputed Receiver's Borrowing Loan would total at least \$44 million being due to Fox Island without addressing any of the allegations made by the Applicants on the Interest Rate Issue (the "**Total Undisputed Hotel Secured Debt**").
13. The total amount due to Fox Island under the Order Nisi in various scenarios assuming there was some variation made to the Order Nisi (all of which are of course disputed by the Petitioners and these calculations are provided only for demonstrative and practical purposes only) are set out below:
 - (a) if section 13.7 of the Original Loan Agreement was invoked and the Fees were simply severed, the secured debt would be a total of \$79,386,763.69 due and owing as at October 31, 2025, together with a per diem of \$42,896.31;
 - (b) If section 11 of the Original Loan Agreement was invoked and the interest rate was reduced down to 59% per annum, the secured debt would be a total of \$122,239,667.59 due and owing as at October 31, 2025, with a per diem of \$97,585.32.
14. The current sale of the Hotel proposed for approval by the Receiver in these proceedings will not result in a distribution to Fox Island beyond the Total Undisputed Hotel Secured Debt. Even under the absolute best case scenario for the Applicants, the total debt due to Fox Island would not be reduced below the Undisputed Hotel Secured Debt plus the Undisputed Receiver's Borrowing Loan amount expected to exceed \$1.0 million upon completion of the receivership.
15. In addition to the Hotel, Fox Island also has collateral security from the Applicants on the Union Bay Development on Vancouver Island (the "**UB Collateral**"). However, the UB Collateral has been the subject of numerous foreclosures with many other secured creditors obtaining Order Nisi judgments for substantial amounts in priority to Fox Island's UB Collateral.
16. Fox Island itself, under a foreclosure of a different loan secured against the UB Collateral, obtained Order Nisi on August 8, 2025 (including undisputed judgments against Mr. Ching and many of the Applicants) for the amount of \$28,327,425.46 Canadian Dollars and \$8,568,730.66 US Dollars.

Part 5: LEGAL BASIS

Adjournment Generally

1. Fox Island seeks an adjournment of this application generally on the practical basis that the distribution proposed by the Receiver to Fox Island should the current Hotel sale proposed be approved and close would not be affected even in the Applicants' best-case scenario under this application to vary the Order Nisi.

2. Indeed, the application might become moot and never need to be heard at all given the circumstances surrounding this foreclosure and insolvency of a number of the Applicants, including Michael Ching, as well as some challenges facing the realization of the UB Collateral.
3. In addition, while Fox Island has provided the calculations of potential results, it would like the opportunity to obtain an actuary to test the calculations of the Applicants.

Sophisticated Commercial Parties / No Coercion

4. This situation involves two sophisticated commercial parties entering into a legitimate real estate financing arrangement with competent legal counsel with substantial experience in real estate advising each of them.
5. The Applicants understood the risks before entering the agreements and took no position on the Order Nisi. Fox Island did not coerce the Applicants into the agreements or the Order Nisi result and Fox Island was still issuing further loans as part of the forbearance in an effort to try and see a work out.
6. Even if there was any criminal rate issue determined by the Court to be included in the application of the Fees, at best the interest rate would be read down to 60% thereby respecting s. 347's purpose without granting an unjustified windfall (paras. 52–59, 71).

Forjay Management Ltd. v. 625536 B.C. Ltd., 2020 BCCA 70 at paras. 52-59, 71.

Reliance

7. The Applicants were represented by competent and capable legal counsel at all times prior to entering all the loan and security agreements in question. All the parties have relied upon these documents for over two years after execution before this issue was raised.
8. The Forbearance Extension Agreement, which is the primary subject of attack by the Applicants was the subject of lengthy negotiations as between Fox Island via its counsel, Norton Rose Fulbright LLP and the Applicants via their counsel, which initially was Pryke Lambert Leathley Russell LLP and for some matters was Fasken LLP.
9. During the initial stages of this foreclosure leading into the Order Nisi being granted on February 29, 2024, the Applicants continued to be represented by Fasken LLP and specifically Mr. Kibben Jackson. Mr. Jackson is well known to this Court as competent insolvency counsel and he took no position on the Order Nisi for which variance is now sought, so long as the Hotel and lands were sold first under the conduct of sale order granted to Fox Island.
10. If the Forbearance Extension Agreement and the Order Nisi were illegal in nature, one would expect that issue to be raised by the Applicants and their legal counsel at the time this Forbearance Extension Agreement was entered, and at the very least prior to the Order Nisi being made based upon all this loan and security.

Contract Reliance / Releases Provided

11. Fox Island relies on the general principles of contract law.
12. Pursuant to the terms of the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement, the Applicants have released Fox Island from any liability in respect of the relief they seek in this Application. As a result, they have no cause of action against Fox Island regarding the Interest Rate Issue.

Ching Affidavit at Exhibits E, pp. 149-150 & Exhibit F, pp 175-176.

13. The Applicants represented to Fox Island that they each (a) understood the terms and the consequences of the execution and delivery of the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement, and (b) had an opportunity to have the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement reviewed by legal counsel.
14. Mr. Ching states that in around mid-March 2025, he first learned of the Interest Rate Issue. This statement contradicts the representation he made to Fox Island that he understood the terms and the consequences of the execution and delivery of the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement. As a result (assuming the Applicants' allegations regarding the Interest Rate Issue are valid, which is not admitted and is expressly denied) either:
 - (a) Mr. Ching is being untruthful that he first learned of the Interest Rate Issue around mid-March 2025; or
 - (b) Mr. Ching (and the rest of the Applicants) made a material misrepresentation to Fox Island when they executed the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement, since they did not, in fact, understand the consequences of the execution and delivery of those agreements despite their opportunity to obtain legal counsel to review those agreements.
15. In either case, the Applicants ought not be entitled to any relief.

This Application is an abuse of process

16. Once a judgment is entered the court is *functus officio* and its judgment can be set aside or varied only in a fresh action brought for that purpose. The Applicants have done that, by commencing the New Action. The facts and substantive relief sought in the New Action are largely co-extensive with those in this Application. Accordingly, this Application is an abuse of process.

Long v. Red Branch Investments Limited, 2018 BCCA 115 at para 45.

No Miscarriage of Justice

17. In any event (assuming the Applicants' allegations regarding the Interest Rate Issue are valid, which is not admitted and is expressly denied), there is no miscarriage of justice that merits the court engaging its inherent jurisdiction to amend or vary the Order Nisi. Amendments to the *Criminal Code* came into effect on January 1, 2025 that exempt certain loan from the scope of s. 347.

18. Those exempted loans include loans for which (i) the borrower is not a natural person, (ii) the borrowing is for a business or commercial purpose, and (iii) the amount of credit advanced exceeds \$500,000. The loans advanced by Fox Island to the Applicants, and which are the subject of this Application, satisfy all three of these criteria.

Criminal Interest Rate Regulations: SOR/2024-114, s. 1.

19. Parliament has amended the *Criminal Code* such that Interest Rate Issue would not be illegal if the Senior B Loan Agreement were executed today rather than between 2021 – 2023.
20. As a result, there would be no miscarriage of justice if the relief sought by the Applicants is dismissed. Rather, dismissing the Applicants' relief would align with the present-day framework established by Parliament when it amended the application of s. 347 of the *Criminal Code*.

The fees and interest are not "criminal"

21. Fox Island denies that the Fees (Additional Forbearance Fee the Additional Commitment Fee, the Equivalent Interest Payment, the Interim Loan Commitment Fee, and the Interim Loan Usage Fee) or any of them, are "interest" within the definition of section 347(2) of the *Criminal Code*.

In the Alternative the Fees were determined to offend 347(2)

22. In the alternative, if the Fees, or any of them, are "interest" within the definition of section 347(2) of the *Criminal Code*, which is expressly denied, then the Defendants deny that it received interest at an unlawful rate.
23. In the further alternative, if the Defendants did receive interest at a criminal rate, which is expressly denied, the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement provide that all obligations, covenants, agreements, provisos, stipulations, conditions, powers and matters and things whatsoever that are contained in the Original Senior B Loan Agreement continue to be in full force and effect.
24. As a result, one of the following would apply:
 - (a) section 11 of the Original Senior B Loan Agreement, which addresses the application of interest received in excess of the Maximum Rate, applies to the Forbearance Extension Agreement and the Supplemental Forbearance Extension Agreement, and in accordance therewith, any interest collected by Fox Island that is in excess of the Maximum Rate is automatically applied to the indebtedness owing under the Senior B Loan Agreement, and was deemed to not have been collected as interest. This would leave the Fox Island secured debt totalling \$122,239,667.59 due and owing as at October 31, 2025, together with a per diem of \$97,585.32; or
 - (b) section 13.7 of the Original Senior B Loan Agreement, which addresses a scenario where a Court determines there is something unlawful (i.e. the Fees) within the loan, then that aspect of the loan would be severed and the balance of the Original Senior B Loan terms would remain in place. This would leave the Fox

Island secured debt totalling \$79,386,763.69 due and owing as at October 31, 2025, together with a per diem of \$97,585.32.

25. In the case of *Hybrid Financial*, the Ontario Court of Appeal held that agreements that include a clause limiting interest to the maximum permitted by law should be enforced according to that clause where both parties are sophisticated and legally advised.

Both parties are sophisticated in commercial matters and were assisted by lawyers. They must have recognized that there was a risk that payments under the Agreement could run afoul of s. 347 of the Criminal Code so they included a contractual term to deal with that possibility. There is no reason why they should not be held to their agreement.

Hybrid Financial Ltd. v. Flow Capital Corp., 2022 ONCA 820 paras 43-44.

Part 6: MATERIAL TO BE RELIED ON

1. The 1st Affidavit of Mo Yeung (Michael) Ching, made the 15th day of October, 2025;
2. The 1st Affidavit of Ashley Kumar, made October 21, 2025

X The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Date: October 21, 2025



Signature of lawyer for Application Respondent
Colin D. Brousson

THIS APPLICATION RESPONSE was prepared by Colin D. Brousson, of the firm of DLA Piper (Canada) LLP, whose place of business and address for delivery is 1133 Melville St Suite 2700, Vancouver, BC V6E 4E5, Tel: 604 643 6400; email: colin.brousson@ca.dlapiper.com