Court File No. CV-23-00701672-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

and

CONACHER KINGSTON HOLDINGS INC. and 5004591 ONTARIO INC.

Respondents

RESPONDING RECORD

December 2, 2024

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TAB 1

Court File No. CV-23-00701672-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CAMERON STEPHENS MORTGAGE CAPITAL LTD.

Applicant

and

CONACHER KINGSTON HOLDINGS INC. and 5004591 ONTARIO INC.

Respondents

AFFIDAVIT OF VINCENT ZHANG

I, Vincent Zhang, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a legal assistant with Starkman Lawyers, lawyers for the Defendant, as such, have knowledge of the matters contained in this Affidavit. Information I have obtained from others I verily believe to be true.

2. A copy of the letter from Mr. Starkman to Jeffery Larry dated November 28, 2024 is attached hereto as **Exhibit "A".** Mr. Larry did not respond to this letter.

SWORN BEFORE ME at the City of Markham, in the Regional Municipality of York on December 2, 2024.

Commissioner for Taking Affidavits
(or as may be)
YI CHEN ZHANG

VINCENT ZHANG

These are Exhibits "A" to the Affidavit of
Vincent Zhang sworn **December 2, 2024**

Commissioner for Taking Affidavits (or as may be)

YI CHEN ZHANG

STARKMAN LAWYERS
CREATIVE LEGAL SOLUTIONS

November 28, 2024

Via Email - jeff.larry@paliareroland.com

Jeffery Larry
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Dear Mr. Larry:

Re: 2478659 ONTARIO LTD. v. Conacher Kingston Holding Inc.
Our File No.: 24-0029

I am writing on behalf of 2478659 Ontario Ltd., the third mortgagee, regarding Cameron Stephens' claim for an over holding fee in addition to regular interest.

According to the mortgage statement dated November 22, 2024, Cameron Stephens is claiming an over holding fee of $494,356.16 for the period from January 1, 2023 to November 25, 2024, calculated at 200 basis points on top of the regular interest rate.

We submit that this over holding fee constitutes a prohibited penalty under Section 8 of the Interest Act. The Supreme Court of Canada in ***Krayzel Corp. v. Equitable Trust Co.*** confirmed that Section 8 precludes any charge that has the effect of imposing a higher rate on arrears than on principal money not in arrears, regardless of how the charge is labeled.

More recently, in ***Greenpath Capital Partners Inc. v. 1903130 Ontario Ltd.***, the Ontario Court of Appeal affirmed that additional fees must represent actual costs incurred by the mortgagee to be enforceable. There is no evidence that the claimed over holding fee corresponds to any actual costs or damages suffered by Cameron Stephens.

The over holding fee appears to be purely punitive in nature, designed to increase the effective interest rate on arrears. This is precisely what Section 8 aims to prevent, as it serves the protective purpose of preventing charges that would make it impossible for owners to redeem or protect their equity.

We therefore request that the over holding fee be removed from Cameron Stephens' payout statement, and that any proposed distribution exclude this amount. We reserve our rights to raise this issue before the Court if necessary.

Please let me know if you would like to discuss this matter further.

Yours truly,
STARKMAN LAWYERS

Paul Starkman

TAB 2

Krayzel Corp. v. Equitable Trust Co.

Ontario Real Estate Law Guide

Supreme Court of Canada

Before: McLachlin C.J., Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, and Brown JJ

Decision: May 6, 2016.

File No. 36123

2016 OREG para. 59,164 | *[2016] S.C.J. No. 18* | *2016 SCC 18*

Krayzel Corporation v. The Equitable Trust Company (now continued as Equitable Bank); Lougheed Block Inc., Neil John Richardson, Hugh Daryl Richardson and Heritage Property Corporation v. The Equitable Trust Company (now continued as Equitable Bank)

Case Summary

Mortgages — Interest rate — Appellant mortgagor granted mortgage to respondent mortgagee — Parties extended mortgage term, setting out interest rate as prime plus 3.125 per cent over first six months and 25 per cent over seventh month — Under second renewal agreement, "interest rate" was 25 per cent — Difference between amount payable at 25 per cent and amount payable at lower rate was to accrue and would be forgiven if there was no default — Mortgagor defaulted and mortgagee demanded repayment at 25 per cent — Master found renewal agreement offended s. 8 of Interest Act, chambers judge reversed decision, and Court of Appeal upheld it — Mortgagor appealed — Appeal was allowed — Court found s. 8 applies to both discounts and to penalties for non-performance when effect is to increase charge on arrears beyond interest rate payable on principal — Rate increase triggered by passage of time alone does not infringe s. 8 but rate increase triggered by default does — Twenty-five per annual of interest under second renewal agreement was void — Court set interest rate in force as higher of 7.5 per cent and prime plus 5.25 per cent — Interest Act, *RSC 1985, c. I-15, s. 2*, 8

Facts: The appellant mortgagor Lougheed Block Inc. ("Lougheed") granted a mortgage to the respondent The Equitable Trust Company ("ET") to secure a $27 million loan. The interest rate was prime plus 2.875 per cent per annum. The mortgage matured in June 2008 and the parties extended the mortgage term. The first renewal agreement, effective August 2008, set out the interest rate as prime plus 3.125 per cent over the first six months and 25 per cent over the seventh month. The parties extended the term again. The second renewal agreement, effective February 2009, provided a per annum "interest rate" of 25 per cent. Lougheed was to make monthly interest payments at the "pay rate" of either 7.5 per cent or prime plus 5.25 percent, whichever was greater. The difference between the amount payable at the stated interest rate of

25 per cent and the amount payable by Lougheed at the lower rate was to accrue to the loan, and the accrued interest would be forgiven if there was no default.

Lougheed defaulted and ET demanded repayment at the rate of 25 per cent. A Master found that the renewal agreement offended section 8 of the *Interest Act* (the "Act"), which precludes a mortgagee from imposing terms that have the effect of charging a higher rate of interest on money in arrears than that charged on principal money not in arrears. A chambers judge reversed the decision. The Court of Appeal upheld the finding that the renewal agreements complied with section 8. Lougheed appealed.
HELD: The appeal was allowed.

In interpreting the ordinary language of section 8, together with section 2 of the Act, the majority of the Court found that section 8 applies to both discounts, which are incentives for performance, and to penalties for non-performance when their effect is to increase the charge on the arrears beyond the interest rate payable on principal money not in arrears. A rate increase triggered by the passage of time alone does not infringe section 8; a rate increase triggered by default, however, does infringe section 8, irrespective of whether the impugned term is cast as imposing a higher rate penalizing default, or as allowing a lower rate by way of a reward for the absence of default.

The effect of the scheme under the second agreement was to reserve a higher charge on arrears -- namely 25 per cent -- than on principal money not in arrears -- 7.5 per cent, or prime plus 5.25 per cent. The labelling of one charge as an "interest rate" and the other as a "pay rate" was of no consequence, the Court found, as section 8 is explicitly concerned with substance not form. The 25 per cent per annum rate of interest set by the second renewal agreement was void. The Court set the interest rate in force under the second renewal agreement as of February 2009 as at the higher of 7.5 per cent and prime plus 5.25 per cent.

Counsel

G.S. Watson and M.V. Stoker for the appellants; F. Price, QC, and D. Young for the respondent

The judgment of McLachlin C.J. and Cromwell, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

BROWN J.

I. Introduction

1 Section 8 of the *Interest Act*, *R.S.C. 1985, c. I-15* precludes a mortgagee from imposing terms that have the effect of charging a higher rate of interest on money in arrears than that charged on principal money not in arrears. This appeal requires the Court to consider, for the first time, whether this section is offended by terms of a mortgage agreement imposing an "interest rate" that takes effect only where the mortgagor falls into default by failing to make prescribed

payments at a lower "pay rate" of interest or by failing to pay out the loan upon maturity. At stake is the significance, for s. 8's purposes, of the putative distinction between (1) terms imposing, by way of penalty, a higher rate in the event of default, and (2) terms reserving, by way of discount, a lower rate in the event of no default. While the master in chambers concluded both sorts of arrangements offend s. 8, the chambers judge and the majority at the Court of Appeal of Alberta concluded that the latter sort of arrangement does not.

2 This appeal also invites the Court to consider whether mortgage terms providing for a higher interest rate triggered solely by the mere passage of time offend s. 8.

3 For the reasons that follow, I conclude that a rate increase triggered by the passage of time alone does not infringe s. 8. That said, a rate increase triggered by default does infringe s. 8, irrespective of whether the impugned term is cast as imposing a higher rate penalizing default, or as allowing a lower rate by way of a reward for the absence of default. I would therefore allow the appeal.

II. Overview of Facts and Proceedings

A. *Background*

4 From 2003, the appellant Lougheed Block Inc. owned an office building in Calgary against which it had registered various mortgages, including mortgages granted to the appellant Krayzel Corporation and to Heritage Capital Corporation. Then, on November 8, 2006, Lougheed granted a mortgage to the respondent Equitable Trust Company, through its agent Trez Capital Corporation, to secure a loan of $27 million. The prescribed interest rate was agreed at the prime interest rate plus 2.875 percent *per annum*.

5 Lougheed was unable to pay out the Equitable mortgage when it matured on June 30, 2008. Equitable agreed to extend the mortgage term by seven months. The resulting agreement, registered on title to the property (the "First Renewal Agreement"), was made effective August 1, 2008 and carried a *per annum* interest rate of the prime interest rate plus 3.125 percent over the first six months and then 25 percent over the seventh month. Both Krayzel and Heritage Capital agreed to postpone their rights under their respective mortgages in favour of Equitable's interest under the First Renewal Agreement.

6 When the First Renewal Agreement matured on March 1, 2009, Lougheed again failed to pay out. On April 28, 2009, it entered into a second mortgage amending agreement with Equitable (the "Second Renewal Agreement"), made effective February 1, 2009 (that is, retroactive to a month prior to the expiration of the First Renewal Agreement). By its terms, the Second Renewal Agreement provided:

1. a *per annum* "interest rate" on the loan of 25 percent;
2. Lougheed was required to make monthly interest payments *not* at the stated *per annum* rate of 25 percent, but rather at the "pay rate" of either 7.5 percent or at the prime interest rate plus 5.25 percent (whichever was greater);

3. the difference between the amount payable at the stated interest rate of 25 percent and the amount payable by Lougheed at the lower rate would accrue to the loan; and

4. if there were no default by Lougheed (whether on monthly payments or on the principal and on any other outstanding costs and fees payable upon maturity), the accrued interest would be forgiven. In other words, were Lougheed to make all payments in full and on time and to pay out the loan when due, it would be excused from paying the amount representing the difference between interest payable at 25 percent and interest actually paid in accordance with the lower rate.

7 On May 15, 2009, Lougheed defaulted on the first payment due under the Second Renewal Agreement. Equitable demanded, *inter alia*, repayment of the loan at the stated rate of 25 percent.

B. *Statutory Provisions*

8 The relevant provisions of the Act are:

> **2.** Except as otherwise provided by this Act or any other Act of Parliament, any person may stipulate for, allow and exact, on any contract or agreement whatever, any rate of interest or discount that is agreed on.
>
> **8.** (1) No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.
>
> **(2)** Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

C. *Judicial History*

(1) Court of Queen's Bench of Alberta (Master Hanebury) -- *2011 ABQB 193*, *512 A.R. 136*

9 While noting that a mortgage that on its face violates s. 8 could be saved if the transaction revealed a *bona fide* business reason for the increased rate (thereby invoking the "legitimate commercial purpose test", to which I shall return below), the master found that both renewal agreements offended s. 8 of the Act. No legitimate commercial purpose justified the increased interest rate in either agreement. While Lougheed was a sophisticated borrower, it was in a vulnerable position, which was exacerbated by the renewal agreements. For the offending rate of 25 percent, the master substituted the "pay rate" of the greater of 7.5 percent and the prime interest rate plus 5.25 percent.

(2) Court of Queen's Bench of Alberta (Romaine J.) -- *2012 ABQB 411*, 550 A.R. 316

10 The chambers judge reversed the master's decision, finding that both renewals complied with s. 8. Unlike the master, she saw no relevance in the commercial purpose underlying the renewal agreements. In her view, being an exception to the general rule of freedom of contract

preserved by s. 2, s. 8 ought to be "strict[ly] or narrow[ly]" construed so long as such an interpretation does not frustrate or impair the Act's purpose (para. 45). Here, a sophisticated borrower chose to adhere to the renewal agreements, "gambling with the chance that it would be able to obtain alternative refinancing if given another year and a half to do so" (para. 59). This was not, she concluded, an instance of the sort of abusive lending practice which s. 8, strictly construed, is intended to capture.

11 With specific regard to the Second Renewal Agreement, the chambers judge also specifically rejected Heritage Capital's submission, drawing from the decision of Henry J. in *Re Weirdale Investments Ltd. and Canadian Imperial Bank of Commerce* *(1981), 32 O.R. (2d) 183* (H.C.J.), that the enactment of s. 8 had abolished "the prior equitable rule" that prohibited penalties by way of increased interest rates on default, but allowed for discounts if the loan is paid punctually (para. 18). While s. 2 allows parties to negotiate any "rate of interest or discount" in a mortgage agreement, she observed that s. 8 is silent with respect to discounts. It followed, therefore, that s. 8 could not be used to strike out discounts freely agreed upon between the parties. The effect of the impugned provision of the Second Renewal Agreement was merely to allow Equitable to give a benefit to Lougheed in the event of debt repayment in accordance with the terms of their agreement, and not to penalize Lougheed in such a manner as to trigger the application of s. 8.

(3) Court of Appeal of Alberta (Hunt J.A. and Nation J. (*ad hoc*), and Berger J.A. (Dissenting)) -- *2014 ABCA 234*, *577 A.R. 179*

12 The Court of Appeal was unanimous in finding that the First Renewal Agreement did not offend s. 8. They also agreed with the chambers judge that the lender's motives and the borrower's level of sophistication are irrelevant to determining whether a term offends s. 8.

13 Where the Court of Appeal diverged was on the Second Renewal Agreement. For the majority, Hunt J.A. agreed with the chambers judge that it complied with s. 8, considering herself bound by *Dillingham Construction Ltd. v. Patrician Land Corp.* *(1985), 37 Alta. L.R. (2d) 193* (C.A.). As she read it, *Dillingham* confirmed that s. 8 is directed at penalties for non-performance, not at incentives for punctual payment. In the result, an agreement to reduce the amount owing by the difference between the stated *per annum* interest rate of 25 percent and the stated "pay rate" which the mortgagor was actually required to pay was a permissible incentive.

14 In dissent, Berger J.A. said that s. 8 prohibits non-penal as well as penal devices where their effect is to impose a rate of interest upon default that is greater than the rate payable over the term of the mortgage prior to default. *Dillingham*, he said, is distinguishable (since in that case *no* interest was payable except upon maturity and after default). And, while recognizing s. 2's preservation of freedom of contract, the Second Renewal Agreement remained by s. 2's very terms subject to what was otherwise provided by the Act (including s. 8) or any other Act of Parliament. On this understanding of s. 8's scope and of its operation relative to s. 2, Berger J.A. concluded that, when Lougheed defaulted and Equitable called the loan, it relied on a term of the Second Renewal Agreement which had the effect of increasing the charge on the principal

money in arrears beyond the rate of interest otherwise payable on principal money not in arrears. This, he held, "runs afoul" of s. 8 (para. 74).

III. Analysis

A. *Section 8 of the Interest Act*

15 Statutory interpretation entails discerning Parliament's intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's schemes and objects: *Rizzo & Rizzo Shoes Ltd. (Re)*, *[1998] 1 S.C.R. 27*, at para. 21. Throughout, it must be borne in mind that every statute is deemed remedial and is to be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, *R.S.C. 1985, c. I-21, s. 12*.

16 As to the purpose of s. 8, the appellants' principal argument is that, by enacting the predecessor provision to s. 8 in 1880 (*An Act relating to Interest on moneys secured by Mortgage of Real Estate*, S.C. 1880, c. 42, s. 3), Parliament intended to abolish an equitable rule which allowed for discounts in the form of reduced interest rates for timely performance of a mortgagor's obligations, but which also prohibited penalties in the form of increased interest rates in the event of default. The appellants say that s. 8 therefore precludes *both* discounts and penalties. The respondent says that this argument runs counter to the presumption, rebuttable only by statutory language of "irresistible clearness", that Parliament does not intend to depart from established principles, policies or practices: *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, *2003 SCC 42*, *[2003] 2 S.C.R. 157*, at para. 39, citing *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, *[1956] S.C.R. 610*, at p. 614.

17 The equitable rule, which appears to have originated in the late 17th century (A. C. Meredith, "A Nicety in the Law of Mortgage" (1916), 32 *L.Q.R.* 420), was summarized by Lord Hatherley in *Wallingford v. Mutual Society* (1880), 5 App. Cas. 685, at p. 702:

> The other question which was much argued before your Lordships was the question of penalty. I apprehend that there again the case is quite clear. The illustration of the form adopted in mortgages is a very good illustration, I think, of what the true principle is. The form adopted long since -- I do not know whether it is still continued or not -- in mortgages, was when you wished to reserve in reality interest at 4 per cent., to reserve the interest by contract at 5 per cent., but to mitigate the severity of that contract in the event of the money being paid by a certain day. It is not a penalty on non-payment (though it seems a fine distinction) when you say that your contract shall be made for interest at 5 per cent. to be reduced, in the event of your punctual payment, to 4 per cent; but it is a relaxation of the terms of that original contract, not taking it by way of penalty at all, but a relaxation of your contract which you would merit and purchase by paying at a definite and fixed time. [Emphasis added.]

18 Lord Hatherley's observation of the rule resting upon "a fine distinction" suggests that its continuing validity was not unquestioned. As Finch C.J.B.C. explained in *Reliant Capital Ltd. v. Silverdale Development Corp.*, *2006 BCCA 226*, *270 D.L.R. (4th) 717*, at paras. 38-39, the rule had already fallen into disfavour as early as 1802. While he also observed (at para. 39) that "[s]ubsequent cases ... appear to have recognized the distinction previously described", it

appears that only one decision issued prior to the original enactment of s. 8 relied upon the rule: *Thompson v. Hudson* (1869), L.R. 4 H.L. 1.

19 This oscillating English caselaw seems a frail basis for finding that the equitable rule identified by the parties subsisted in Canadian law at the time of s. 8's original enactment. Nor does s. 8's legislative history or the jurisprudence clarify whether it applies to both penalties and discounts. As Professor Waldron has observed, "[l]ike many sections of the *Interest Act*, the primary purpose of section 8 is somewhat obscure" (M. A. Waldron, *The Law of Interest in Canada* (1992), at p. 86). In *Reliant Capital* (at para. 48), Finch C.J.B.C. examined the parliamentary debates leading to s. 8's enactment in 1880, and observed that its origins arose from a concern that farmers were at that time becoming "trapped" by loans carrying fines for arrears that were unknown or unclear.

20 This led Finch C.J.B.C. to state the purpose of s. 8 in these terms:

> Parliament has singled out mortgages on real estate for special treatment, or at least treatment that differs from loans that are not secured on real property. I infer that at least one legislative purpose was to protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem, or to protect their equity. If an owner were already in default of payment under the interest rate charged on monies not in arrears, a still higher rate, or greater charge on the arrears would render foreclosure all but inevitable. [Emphasis added.]
>
> (*Reliant Capital*, at para. 53)

21 I agree with Finch C.J.B.C. that the purpose of s. 8 is to protect landowners from charges "that would make it impossible for [them] to redeem, or to protect their equity". This understanding of s. 8's purpose also conforms to the recent jurisprudence: *P.A.R.C.E.L. Inc. v. Acquaviva*, *2015 ONCA 331*, *126 O.R. (3d) 108*, at para. 51.

22 On its own, this purpose does not support drawing a distinction between a higher interest rate cast as a penalty for default, and a discounted interest rate for punctual payment. In both cases, the effect is to impose a higher rate of interest on arrears of interest or principal than that payable on principal money not in arrears, thereby making it more difficult for borrowers who are already in default to redeem or protect their equity.

23 Nor does the posited distinction between penalties and discounts survive a review of the ordinary sense of the words chosen by Parliament in s. 8, read together with s. 2 and in light of the Act's objects.

24 Section 8(1) identifies three classes of charges -- a fine, a penalty or a rate of interest -- that shall not be "stipulated for, taken, reserved or exacted" if "the *effect*" of doing so imposes a higher charge on arrears than that imposed on principal money not in arrears. Section 8(2) affirms that subs. (1) does not prohibit a contract from requiring payment of interest on arrears of interest or principal at a rate equivalent to or lower than that payable on principal money not in arrears.

25 Had Parliament intended to prohibit only penalties (and not discounts), it would not have included a "fine" or a "rate of interest", in addition to a "penalty", as a type of charge that might also be prohibited: *Immeubles Fournier Inc. v. Construction St-Hilaire Ltée*, [1975] 2 S.C.R. 2, at p. 16; *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, [1978] 1 S.C.R. 974, at pp. 983-84 and 987, per Pigeon J., and p. 977, per Laskin C.J. Further, by directing the inquiry to the *effect* of the impugned mortgage term, Parliament clearly intended that mortgage terms guised as a "bonus", "discount" or "benefit" would not as such comply with s. 8. Substance, not form, is to prevail. What counts is how the impugned term operates, and the consequences it produces, irrespective of the label used. If its effect is to impose a higher rate on arrears than on money not in arrears, then s. 8 is offended: Waldron, at p. 86; *Halsbury's Laws of Canada -- Mortgages; Motor Vehicles* (2011), "Mortgages", contributed by J. E. Roach, at para. HMO-198; *Re Weirdale Investments Ltd.*, at p. 190; *Beauchamp v. Timberland Investments Ltd.* (1983), 44 O.R. (2d) 512 (C.A.), at p. 516.

26 Section 8 must also be read in light of, and harmoniously with, s. 2. As the chambers judge pointed out (at para. 35), s. 2 preserves a general right of freedom to contract for "any rate of interest or discount", with the *caveat* that such freedom is subject to what is "otherwise provided by this Act or any other Act of Parliament". Section 2 is therefore subject to the restriction imposed by s. 8 upon the rate of interest on a loan secured by a mortgage: *Tomell Investments*, at p. 983; *Reliant Capital*, at paras. 34 and 37; *P.A.R.C.E.L.*, at para. 51.

27 Both the chambers judge and the majority at the Court of Appeal read Parliament's inclusion of "discount" in s. 2, and its omission of the same term in s. 8, to mean that the restrictions in s. 8 do not apply to discounts. In other words, s. 8 confirmed in their view the equitable rule prohibiting penalties for non-performance while allowing for discounts. I disagree. By targeting charges, including rates of interest, that are "*reserved*" for the event of default, s. 8 casts at least as broad a net as s. 2. Given that language, Parliament had no need to specifically mention "discounts" in s. 8 in order to include them within its ambit.

28 My colleague relies upon s. 97 of *The Canada Joint Stock and Companies' Act, 1877*, S.C. 1877, c. 43, in support of her view that some discounts are permitted under s. 8. That statute, however, was a distinct enactment imposing a narrower set of restrictions upon a broader range of transactions. It applied to all loans, not just to loans secured by a mortgage. Section 8 of the *Interest Act*'s focus on real estate lending makes it difficult to trace its legislative purpose along a straight line to the protections contained in s. 97. Moreover, s. 97 prohibited only the imposition of a "fine" or a "penalty" on money in arrears, whereas s. 8 adds "reserv[ing]" a "rate of interest" to the classes of prohibited charges. Although s. 97 does refer to discounts, its narrower set of restrictions, when contrasted with s. 8, does not support the notion that some discounts are permitted under s. 8.

29 Nor does the majority of the Court of Appeal's reliance upon *Dillingham* support a conclusion that s. 8 is directed solely at penalties for non-performance (and not at incentives for performance). In *Dillingham*, Stevenson J.A. (as he then was) found that a mortgage term setting interest at 14 percent upon default and after maturity where no other rate was stipulated did not offend s. 8. While Stevenson J.A. stated that s. 8 implemented the equitable rule ("[i]n

my opinion the section is directed towards implementing the equitable principle against penalties for non-performance" (p. 196)), he added:

> A stipulation for an increased rate of interest is, prima facie, such a penalty. It is something which, on the face of it, is held in terrorem over a defaulting debtor. So an increase from any stipulated amount of interest falls foul of the principle and the statute. Here, in a transaction which is not a commercial lending transaction, common sense dictates not that the transaction has a nil interest rate, but that it has made unspecified provisions for interest. I say this because it is inconceivable that in entering into this transaction the parties did not appreciate, and make some allowance for, the cost of money in arriving at the terms. It is possible, for example, that the mortgagee, as vendor, made a precise calculation based on the amount payable at maturity. I cannot say that the stipulation for interest at maturity has the effect of increasing the interest component. I am unable to conclude that the particular provision is penal and cannot, therefore, say that it comes within the principle which the section embodies. [p. 196]

30 The reason why the arrangement in *Dillingham* conformed to s. 8 was not that it took the form of a discount, as opposed to a penalty. Rather, it was because the parties were taken to have agreed to fold the cost of borrowing into a single rate of interest (14 percent), to be applied upon default or maturity. So understood, Stevenson J.A.'s reasoning illuminates his concluding reference to whether the provision was "penal". Again, rather than confirming a putative distinction for s. 8's purposes between penalties and discounts, he was simply referring to (in s. 8's language) the *effect* of the impugned term: Waldron, at p. 90. It was not "penal" because its effect was not to impose a higher charge on arrears than that imposed on principal money not in arrears.

31 In sum, the ordinary sense of the words that Parliament chose to include in s. 8, read together with s. 2 and considered in light of the Act's objects, support the conclusion that s. 8 applies both to discounts (incentives for performance) as well as penalties for non-performance whenever their effect is to increase the charge on the arrears beyond the rate of interest payable on principal money not in arrears. To that extent, I find myself in respectful disagreement with the majority at the Court of Appeal and with the chambers judge.

32 I agree, however, with the chambers judge's refusal to consider whether the impugned arrangements had an underlying "legitimate commercial purpose" (para. 61). It is understandable that courts would develop such a technique to infuse s. 8 with what they might see as reflecting reasonable commercial expectations: M. A. Waldron, "The 'Legitimate Commercial Purpose' Test Revisited -- Case Comment on *Reliant Capital Ltd. v. Silverdale Development Corporation*" *(2008), 41 U.B.C. L. Rev. 101*; *TD Trust Co. v. Guinness (1995), 12 B.C.L.R. (3d) 102* (S.C.), at paras. 17-21; *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, *2000 BCCA 365*, *140 B.C.A.C. 182*, at paras. 95-96. Doing so is, however, incompatible with s. 8. Part of the difficulty with the legitimate commercial purpose test is that, as Finch C.J.B.C. observed in *Reliant Capital* (at para. 87), it leads to commercial uncertainty and to s. 8's arbitrary application. More fundamentally, inquiring into the "legitimacy" of the purpose underlying an arrangement that offends s. 8 *not* by its *purpose* but by its *effect* undermines Parliament's clearly expressed intent. The same objection also applies to any attempt, whether achieved by "strict" construction or by focusing on other irrelevant considerations under s. 8 such as the relative

degrees of sophistication or bargaining power between the parties, to derogate from the purely results-oriented focus that s. 8 expressly requires. This Court has recently observed that it cannot "do by 'interpretation' what Parliament chose not to do by enactment": *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, [2015] 3 S.C.R. 615, at para. 53. But the converse is also true: courts may not *un* do by "interpretation" what Parliament chose *to do* by enactment. If s. 8 reflects bad or outdated public policy, the remedy lies with Parliament, not with the courts.

B. *Application to the First and Second Renewal Agreements*

33 I am content to dispose of this appeal by considering the Second Renewal Agreement alone, since its operation was made retroactive to the date (February 1, 2009) on which the rate increase under the First Renewal Agreement took effect. That said, an interest rate increase triggered by the mere passage of time (and not by default), such as that imposed under the First Renewal Agreement, clearly does not offend s. 8.

34 My colleague and I part company on the significance of the terms of the Second Renewal Agreement. She takes 25 percent to be the effective interest rate thereunder because it was "to be paid each month" (para. 45). She also points to the accrual of the difference between the pay rate and the interest rate as indicative of an effective rate of 25 percent, since this rate "was not to be 'taken, reserved or exacted' in the event of default" (para. 45).

35 I disagree. Article 1 of the Second Renewal Agreement sets the interest rate at 25 percent per annum. Article 3 sets the "pay rate" (being the *per annum* rate applicable to the monthly interest payments Lougheed was required to make) at the greater of 7.5 percent and the prime interest rate plus 5.25 percent. By operation of articles 4 and 5, the difference between the interest rate of 25 percent and the pay rate accrues to the principal of the loan, but would be forgiven in the event of no default and repayment in full upon maturity. The effect of this scheme is therefore to reserve a higher charge on arrears (25 percent) than that imposed on principal money not in arrears (7.5 percent, or the prime interest rate plus 5.25 percent). The labelling of one charge as an "interest rate" and the other as a "pay rate" is of no consequence, given s. 8's explicit concern for substance over form.

36 My colleague also relies on a reading of the relationship between ss. 2 and 8 in concluding that the latter must be read narrowly to allow for some discounts -- specifically, "a discount ... to provide relief from a higher rate of interest for which payment is already due" (para. 54). She cites *North West Life Assur. Co. of Can. v. Kings Mount Hldg. Ltd.* (1987), 15 B.C.L.R. (2d) 376 (C.A.), in support.

37 While I agree that the arrangement provided in *North West* does not run afoul of s. 8, it is distinguishable from the Second Renewal Agreement. The arrangement in *North West* imposed an initial rate of 19 percent. When the borrower defaulted, the parties extended the term and allowed for a reduced rate of 13 percent were the loan paid on time. In the instant case, however, the interest rate escalated over the course of the loan to 25 percent, followed by "relief" under the Second Renewal Agreement amounting to a conditional reduction to an interest rate that was still *nearly three times the originally agreed-upon rate*.

IV. Conclusion and Disposition

38 I would allow the appeal with costs in this Court and in the courts below. Section 8 of the *Interest Act* applies with equal force to mortgage terms imposing by way of penalty a higher rate in the event of default, and reserving by way of discount a lower rate in the event of no default. It follows that the 25 percent *per annum* rate of interest set by the Second Renewal Agreement is void. The interest rate in force under the Second Renewal Agreement as of February 1, 2009 shall be set at the higher of 7.5 percent and the prime interest rate plus 5.25 percent.

The reasons of Abella, Moldaver and Côté JJ. were delivered by

CÔTÉ J. (dissenting)

I. Introduction

39 I part ways with my colleague Brown J. because I am of the view that the "rate of interest payable on principal money not in arrears" under the Second Renewal Agreement is actually 25 percent. As a result, the Second Renewal cannot be said to have had the "effect" of increasing the charge on arrears, which means that s. 8 of the *Interest Act*, *R.S.C. 1985, c. I-15*, is not engaged. This ground alone provides a sufficient basis for dismissing the appeal.

40 In any event, I am of the view that s. 8 of the *Interest Act* does not prohibit a "forgiving discount" -- that is, a discount which provides the borrower with some relief from a rate of interest that is chargeable under an agreement. Section 2 of the *Interest Act* states the general rule that "any rate of interest or discount that is agreed on" is permitted. As an exception to this foundational rule, s. 8 should be read narrowly and its application limited so as to fulfill its purpose of protecting struggling mortgage debtors. In the instant case, the Second Renewal Agreement provided Lougheed Block Inc. with a less onerous path to fulfill its payment obligations and protect its equity. As a result, the Second Renewal Agreement does not offend s. 8.

II. The Second Renewal Agreement Did Not Have the "Effect" of Increasing the Charge on Arrears

41 In my colleague's view, the only question that needs to be answered when applying s. 8 is whether the impugned provision had the "effect" of increasing the charge on arrears. Before answering that question, however, we must first determine what the "rate of interest payable on principal money not in arrears" is.

42 In my view, the answer is straightforward. The provisions of the Second Renewal Agreement are crystal clear. The "rate of interest payable on principal money not in arrears" was set at 25 percent throughout the entire term of the agreement, and was to be applied consistently to both principal money not in arrears and principal money or interest in arrears.

43 The Second Renewal Agreement provides as follows:

1. Interest shall be calculated, on the full outstanding Loan balance, at the rate of 25% per annum, compounded monthly, from February 1, 2009 until the date of repayment in full.

...

3. [Lougheed] shall be required to make monthly payments, on or before the 15th day of each and every month starting May 15, 2009 and ending January 15, 2010, in an amount equal to the greater of 7.5% per annum, compounded and payable monthly, and Equitable Trust Company Prime Rate + 5.25% per annum, compounded and payable monthly (the "Pay Rate").
4. The difference between the interest payable on the loan, in accordance with paragraph 1 and the interest actually paid at the Pay Rate shall accrue to the Loan (the "Accrued Interest").

...

By signing this letter, you also hereby acknowledge that:

...

2. The interest rate payable is 25% per annum, calculated and payable monthly; [Emphasis added.]

44 By the express terms of the parties' agreement, the interest rate payable was 25 percent. This rate was not to be triggered by default or maturity; rather, it was effective throughout and had to be paid on a monthly basis, through actual disbursements and additional financing from the lender. The amount to be paid as actual disbursements was defined in clause 3 as the "Pay Rate". The remainder -- that is to say, the difference between the 25 percent interest rate and the Pay Rate -- was to be added each month to the principal of the loan pursuant to clause 4. In other words, it was to be paid monthly through additional interim financing. I stress that interest charges calculated on the basis of the 25 percent rate were to be paid monthly, and not simply "taken, reserved or exacted" in the event of default. According to the clear wording of the Second Renewal Agreement, interest was to be charged each month on the *entire* principal of the loan, which included the amounts added to the principal as interim financing to cover the difference between the agreed interest rate of 25 percent and the Pay Rate.

45 My colleague finds that in its "effect", the Second Renewal Agreement reserved a higher charge on arrears (25 percent) than the one imposed on principal money not in arrears (the Pay Rate). I respectfully disagree. The 25 percent rate was not to be "taken, reserved or exacted" in the event of default; it was to be paid each month throughout the entire term of the Second Renewal Agreement. That is the way it was booked and that is the way the parties understood it. The possibility of having a portion of these interest payments forgiven does not have the "effect" of reducing the interest that was to be paid monthly on principal money not in arrears. Consequently, s. 8 is not engaged. I would dismiss the appeal on the basis of this ground alone.

III. Section 8 Does Not Prohibit All Discounts

46 Alternatively, I find that the appeal could also have been dismissed on the basis that s. 8 does not prohibit discounts designed to provide relief from a higher rate of interest payable, as is the case for the Second Renewal Agreement.

47 As I mentioned above, my colleague is of the view that the only question to be asked when applying s. 8 is whether the impugned provision had the "effect" of increasing the charge on arrears. According to him, there is no room for commercial context in this analysis. I agree with my colleague that courts should not take it upon themselves to tailor s. 8 to modern commercial preferences; that is the role of Parliament. However, a purposive and contextual analysis of s. 8 requires that the commercial context be considered. In the instant case, the impugned discount, viewed in light of the circumstances in which it was agreed upon, provided Lougheed with a less onerous path to fulfill its payment obligations that were then due under the First Renewal Agreement. Holding that the 25 percent interest rate provided for in the Second Renewal Agreement is invalid would not give effect to Parliament's protective purpose, as my colleague understands it. Rather, it would reward Lougheed with an unmerited windfall.

48 Section 2 of the *Interest Act* affirms freedom of contract in the law of lending and, in so doing, expressly permits discounts: "... any person may stipulate for ... any rate of interest or discount that is agreed on". Section 8 sets out an exception to the foundational principle of freedom of contract by prohibiting increased charges on arrears. However, as my colleague observes, it does not expressly prohibit discounts. The absence of the term "discount" from s. 8 -- and its corresponding presence in s. 2 -- must inform our interpretation, since every word of a statute must be found to have a meaning and a function (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 211; *Communities Economic Development Fund v. Canadian Pickles Corp.*, *[1991] 3 S.C.R. 388*, at p. 408) and since it is settled law that each provision of a statute is presumed to have been drafted with the others in mind (Sullivan, at pp. 211 and 405-6; *Inland Revenue Commissioners v. Hinchy*, [1960] A.C. 748, at p. 766, per Lord Reid).

49 In this regard, the legislative history of the *Interest Act* is telling. The earliest incarnation of what are now ss. 2 and 8 of the *Interest Act* -- s. 97 of *The Canada Joint Stock Companies' Act*, *1877*, S.C. 1877, c. 43 -- expressly mentioned and prohibited discounts which have the effect of increasing charges on arrears:

> **97.** The Company may stipulate for, take, reserve and exact any rate of interest or discount that may be lawfully taken by individuals, or in the Province of Quebec by incorporated Companies under like circumstances, and may also receive an annual payment on any loan by way of a sinking fund for the gradual extinction of such loan, upon such terms and in such manner as may be regulated by the by-laws of the Company: Provided always, that no fine or penalty shall be stipulated for, taken, reserved or exacted in respect of arrears of principal or interest, which shall have the effect of increasing the charge in respect of arrears beyond the rate of interest or discount on the loan.

50 Given that s. 8 establishes an exception to the general rule that discounts are permitted, it must be read narrowly and limited to what is necessary to fulfill its purpose: *Air Canada v. British*

Columbia, [1989] 1 S.C.R. 1161, at p. 1207; see also *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, at para. 39.

51 In the context of the case at bar, this narrow reading is appropriate. As Professor Ruth Sullivan points out, "[i]t is impossible for drafters to spell out every qualification or limitation that might appropriately apply in a given set of circumstances", which means that it may be appropriate to narrow the application of a legislative provision in order to remain faithful to the legislature's intent: pp. 195-96; *Apotex Inc. v. Merck & Co. Inc.*, 2009 FCA 187, [2010] 2 F.C.R. 389, at paras. 88-89. Such an approach appears to have been followed by this Court: *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533.

52 The purpose of s. 8 can be gathered from the legislative history and the debate that led up to the enactment of the *Act relating to Interest on moneys secured by Mortgage of Real Estate*, S.C. 1880, c. 42. In *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226, 270 D.L.R. (4th) 717, Finch C.J.B.C. stated the following at para. 48:

> Throughout much of the debate, money lenders were viewed in an unfavourable light and were held largely responsible for the ruin of many farmers and the resulting exodus of farmers from Canada to the United States. Members expressed concern that the real rates of interest were often not clear to borrowers; that the rates of interest were exorbitant; that the fines for arrears were often unknown to or not present in the minds of borrowers; and that borrowers were often trapped by long loans.

53 Some of these concerns were addressed in various provisions of the resulting Act. For present purposes, there appears to have been one principal mischief which prompted Parliament to introduce s. 3 of that Act, whose wording survives substantially into modern times as s. 8 of the *Interest Act*. Namely, it was considered an abusive practice for lenders to impose a higher fine, penalty or interest rate on defaulting debtors who were already having difficulty meeting their payment obligations. The drafters appear to have been concerned that such higher charges would make it all but impossible for debtors to repay their debts, protect their equity and avoid foreclosure: *Reliant Capital*, at paras. 48-55; *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108, at para. 51; T. G. W. Telfer, "Preliminary Background Paper on the Canada Interest Act" (online), at para. 31, citing *Debates of the House of Commons*, vol. VIII, 2nd Sess., 4th Parl., March 31, 1880, at p. 963; M. A. Waldron, "The Federal Interest Act: It Sure is Broke, But is it Worth Fixin'?" (1997), 29 *Can. Bus. L.J.* 161, at pp. 164-65.

54 My colleague Brown J. concludes that discounts will generally have the "effect" of increasing charges on arrears, but I would note that not *all* discounts, viewed in their commercial context, will undermine the intended protection for struggling debtors. In some cases, a discount may be introduced in a renewal agreement to provide relief from a higher rate of interest for which payment is already due. Such an agreement can hardly be said to be unfair or tainted by abuse, coercion, intimidation or penalty: *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365, 140 B.C.A.C. 182, at para. 100; *York Ventures Ltd. v. 0775740 B.C. Ltd.*, 2015 BCSC 1105, at para. 43 (CanLII).

55 The British Columbia Court of Appeal considered one such discount in *North West Life Assur. Co. of Can. v. Kings Mount Hldg. Ltd.* *(1987), 15 B.C.L.R. (2d) 376*. In that case, an initial mortgage agreement provided for a 19 percent rate of interest. The borrower had difficulty meeting its payment obligations, and a renewal was agreed to. That renewal agreement stipulated a 19 percent interest rate -- continuing the rate applicable under the parties' initial agreement -- but provided a discounted 13 percent interest rate in the event of timely payment. The Court of Appeal concluded that it was "not persuaded that the provisions of benefit by way of forgiveness for timely payment of the mortgage debt offends the statute": (p. 380). While my colleague Brown J. insists that s. 8 prohibits discounts "whenever their effect is to increase the charge on the arrears" (para. 31) and that a focus on the commercial context derogates from the "purely results-oriented focus that s. 8 expressly requires" (para. 32), he nevertheless concludes that the relieving discount in issue in *North West* did not offend s. 8.

56 In the end, these kinds of "relieving" or "forgiving" interest rate discounts will generally make it easier for struggling mortgage debtors to meet their payment obligations. At worst, they will simply leave debtors in the same situation they found themselves in under the terms of their initial agreement. If s. 8 is interpreted as prohibiting discounts of this nature, lenders could in the future be discouraged from relieving the interest burden on struggling debtors, a disturbing irony given the purpose for which s. 8 was enacted.

57 Moreover, my colleague's emphasis on a "purely results-oriented focus" means that borrowers in similar circumstances will benefit from a discounted interest rate regardless of the terms of their agreement or whether they pay promptly, while lenders will be deprived of the amounts a borrower had previously agreed to pay even though they have not benefited from timely payment. Concerns such as these led the courts of equity to uphold certain discounts in the 17th and 18th centuries despite the prohibition on imposing higher charges on arrears in mortgage loans: Lord Keeper Somers in *Strode v. Parker* (1694), 2 Vern. 316, 23 E.R. 804; Lord Keeper Wright in *Jory v. Cox* (1701), Prec. Ch. 160, 24 E.R. 77; quoted in A. C. Meredith, "A Nicety in the Law of Mortgage" (1916), 32 *L.Q.R.* 420, at pp. 421-22.

58 The Second Renewal Agreement is the kind of "relieving" or "forgiving" discount I have discussed. As Justice Romaine found, at the end of the First Renewal Agreement, Lougheed was not in a position to repay the loan principal, which was then subject to a 25 percent interest rate (*2012 ABQB 411*, 550 A.R. 316). While this 25 percent rate under the First Renewal Agreement was subsequently challenged, a unanimous Court of Appeal found it to be valid and my colleague supports this conclusion. Lougheed, a sophisticated borrower, could have consented to foreclosure, but instead negotiated the Second Renewal Agreement on the chance that its situation would improve. Equitable Trust Co. agreed to forbear enforcement and extended the term of the loan in return for interest payments at the 25 percent rate already due pursuant to the First Renewal Agreement. On the condition of consistent monthly payments and payment of the principal at maturity, Equitable agreed to give Lougheed a chance to relieve some of its interest burden. All in all, the Second Renewal Agreement provided Lougheed with a less onerous path to fulfill its payment obligations and protect its equity.

59 For all relevant purposes, the Second Renewal Agreement is indistinguishable from the

interest rate discount that was upheld in *North West*, an arrangement that my colleague accepts "does not run afoul" of s. 8 (para. 37). In that case, as here, a renewal agreement provided some relief, on the condition of prompt payment, from a rate of interest that had previously been payable and due. We all agree that the 25 percent interest rate that was payable and due at the time of negotiation of the Second Renewal Agreement was valid. The Second Renewal Agreement was therefore genuinely relieving. To complain of the difference between the original interest rate and the discounted rate under the Second Renewal Agreement is to disregard the fact that the interest rate had been validly increased to 25 percent during the last month of the First Renewal Agreement.

IV. Conclusion and Disposition

60 In sum, if the Second Renewal Agreement's 25 percent interest rate is held to be invalid, Lougheed will benefit from an undeserved windfall, while Equitable will be denied the interest charges due to it under its agreement even though it has not benefited from prompt payment. Section 8 cannot be applied to produce a result that is so foreign to its original purpose of protecting struggling debtors.

61 For these reasons, I would dismiss the appeal.

Appeal allowed with costs, ABELLA, MOLDAVER and CÔTÉ JJ. dissenting.

TAB 3

Greenpath Capital Partners Inc. v. 1903130 Ontario Ltd.

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

A.L. Harvison Young, J.A. Thorburn and L.G. Favreau JJ.A.

Heard: September 18, 2023.

Judgment: January 19, 2024.

Docket: COA-23-CV-0060

[2024] O.J. No. 335 | *2024 ONCA 42* | *2024 A.C.W.S. 315* | *492 D.L.R. (4th) 126* | *57 R.P.R. (6th) 48* | *2024 CarswellOnt 657*

Between Greenpath Capital Partners Inc., Applicant (Respondent), and 1903130 Ontario Ltd., Filbitron Marketing Corporation 2018 Ltd., Diamantino Silva, Jacinta Silva, Tina Betti, Sergio Molella, Frank Greco, Amond Management Inc., G.A.P. Farms Inc., Pierina Pizzardi and Trilend Inc., Respondents (Appellants) And between 1903130 Ontario Ltd., Filbitron Marketing Corporation 2018 Ltd., Diamantino Silva, Jacinta Silva, Tina Betti, Sergio Molella, Frank Greco, Amond Management Inc., G.A.P. Farms Inc., Pierina Pizzardi and Trilend Inc., Applicants (Appellants), and East Sovereign GP Inc. and Blake Andrew Wyatt, Respondents (Respondents)

(40 paras.)

Case Summary

Appeal From:

On appeal from the order of Justice Marvin Kurz of the Superior Court of Justice, dated December 28, 2022, with reasons reported at *2022 ONSC 7316*.

Counsel

Kevin Sherkin, for the appellants.

Bryan Rumble and Julien Bonniere, for the respondent Greenpath Capital Partners Inc.

Wojtek Jaskiewicz, for the respondents East Sovereign GP Inc. and Blake Andrew Wyatt.

The judgment of the Court was delivered by

A.L. HARVISON YOUNG J.A.

1 The dispute at the heart of this appeal concerns the proceeds of a power of sale which was exercised with respect to certain property, namely 125, 126 and 128 East Street and 2286, 2296, and 2298 Sovereign Street in Oakville, Ontario (collectively referred to as the "properties"). The appellants, other than the broker Trilend Inc. ("Trilend"), are an investment syndicate (the "First Mortgagees") who held a first mortgage over the properties, which was owned by the respondent East Sovereign GP Inc. ("East Sovereign"). This first mortgage secured a principal sum of $7,182,000 for a one-year term commencing March 1, 2020. The respondent Blake Andrew Wyatt is the principal of East Sovereign and the guarantor of the first mortgage.

2 The respondent Greenpath Capital Partners Inc. ("Greenpath") registered a second mortgage against the properties, securing a principal sum of $700,000 for the same one-year term as the first mortgage.

3 The First Mortgagees appeal from the application judge's order holding that they do not have priority over the Greenpath mortgage to collect certain disputed amounts ($283,508.64) from the proceeds of sale. They also appeal from the dismissal of their application to recover the disputed amounts from East Sovereign. The application judge held that the disputed amounts were not enforceable because they violate s. 8 of the *Interest Act*, *R.S.C. 1985, c. I-15*.

4 At the conclusion of the hearing, we dismissed the appeal with reasons to follow. These are the reasons.

Background

5 East Sovereign fell into arrears on payments under the first mortgage well before the maturity date. East Sovereign, Wyatt, the First Mortgagees, and Trilend (the broker) entered into a forbearance agreement (the "Forbearance Agreement") dated January 1, 2021. Greenpath was not a party to the Forbearance Agreement.

6 Under the Forbearance Agreement, East Sovereign and Wyatt agreed to pay the First Mortgagees a total of $179,550 in three installments between February 3 and March 1, 2021, and the First Mortgagees agreed to forbear from enforcing the first mortgage. The Forbearance Agreement included East Sovereign and Wyatt's acknowledgment that, starting on January 9, 2021, the total indebtedness of $7,544,450, plus interest of $1,967.67 per day, was due and owing. East Sovereign also confirmed that it was validly indebted to the First Mortgagees for the payment in full of the mortgage debt without defence, counterclaim, offset, cross-complaint, claim or demand of any kind or nature whatsoever.

7 East Sovereign made a payment of $30,000 but failed to satisfy the entire amount of $179,500 that it was required to pay between February 3 and March 1, 2021 under the Forbearance Agreement. The First Mortgagees commenced power of sale proceedings by Notice of Sale dated March 25, 2021, and the sale of the properties ultimately closed on August 24, 2021 for $9,000,000.

8 Under the Notice of Sale, the First Mortgagees claimed a total of $7,588,191.38 was owing according to the following breakdown[1]:

Principal Balance $7,182,000.00

Interest for January and February 2021 $119,700.00

Less Partial Payment received February 3, 2021 -$30,000.00

Accrued Interest to March 25, 2021 $49,191.75

Prepayment Fee $103,958.64

NSF Fees $250.00

Default Fees $179,550.00

Other Fees $1,250.00

TOTAL: $7,588,191.38

9 Following the sale of the properties, the First Mortgagees issued and served a discharge statement dated August 17, 2021 (the "Discharge Statement") claiming $7,983,687.04 from the proceeds of sale according to the following breakdown:

Principal Balance $7,544,450.00

Interest for January 9-31, 2021 $44,108.64

Interest for February - July 2021 $359,100.00

Interest for August 1-20, 2021 $39,353.40

Charge for Preparation of Statement of Claim $2,000.00

Discharge Fee $750.00

Appraisal Fee for two appraisals $14,125.00

Management Fee from May 14 - August 20, 2021 $9,800.00

TOTAL: $7,983,687.04

10 The Notice of Sale and Discharge Statement indicate different amounts, both for the principal balance and the Disputed Amounts. While the Notice of Sale set out the total amount due to the First Mortgagees as $7,588,191.38, the Discharge Statement claimed $7,983,687.04, which is $395,495.66 more than the amount set out in the Notice of Sale.

11 On August 26, 2021, Greenpath's counsel pointed out the inconsistency between the principal balance figure in the Discharge Statement and the Notice of Sale and requested that

the First Mortgagees send a corrected Discharge Statement. On September 2, 2021, the First Mortgagees' counsel responded:

> [w]hile the totals in the notice of sale accord, it looks as if the counsel who issued the notice broke out the amounts different [sic] than perhaps I would.

12 The First Mortgagees' counsel went on to refer to the Forbearance Agreement, which he attached, containing East Sovereign's "confirmation of $7,544,450 plus additional sums o/s [outstanding] In [sic] Feb of 2021". Counsel added: "I can confirm that the amount o/s [outstanding] to our client was indeed accurate".

13 Greenpath responded on September 24, 2021, setting out its position as follows:

a. Greenpath was not a party to the Forbearance Agreement and as such the Agreement is not enforceable as against Greenpath;

b. The Notice of Sale contained problematic items (the "Disputed Amounts"), specifically the pre-payment fee of $103,958.64 as well as the default fee in the amount of $179,550.00;

c. The default fee was in violation of s. 8(1) of the *Interest Act*; and

d. There should be sufficient surplus funds to pay the full amount ($762,436.42) set out in the discharge statement.

14 The First Mortgagees paid out $522,278.81 to Greenpath around November 4, 2021. Before the application judge, Greenpath claimed that the First Mortgagees were not entitled to the Disputed Amounts and sought payment of the whole amount of $762,436.42 set out in Greenpath's own discharge statement.

15 As noted above, there were discrepancies in the First Mortgagees' evidence. Not only did the $7,544,405 figure in both the Forbearance Agreement and the Discharge Statement lack particularized calculations for the individual line items, but the uncertainty surrounding its accuracy was exacerbated by the fact that neither the Forbearance Agreement nor the Discharge Statement made any reference to the Disputed Amounts claimed in the Notice of Sale.

The decision below

16 There were two applications before the application judge: (1) Greenpath sought "judicial determination" of the First Mortgagees' entitlement to the Disputed Amounts; and (2) the First Mortgagees claimed the Disputed Amounts directly against East Sovereign and Wyatt under the Forbearance Agreement. In the first application, Greenpath argued that the Disputed Amounts form part of the Forbearance Agreement, not the first mortgage, and that they are an improper "fine, penalty or rate of interest" forbidden by s. 8(1) of the *Interest Act*. In response, the First Mortgagees argued that the Forbearance Agreement was incorporated into the first mortgage such that they had priority over Greenpath to collect the Disputed Amounts. In the second application, the First Mortgagees asserted that the Forbearance Agreement was binding on East Sovereign and Wyatt as the agreement to forbear from enforcing the first mortgage was

consideration, which takes the Forbearance Agreement outside the scope of s. 8(1) of the *Interest Act*. In their notice of application, the First Mortgagees set out the principal amount of $7,182,000.00 but still claimed the prepayment fee of $103,958.64 and the default fee of $179,550.00.

17 The application judge first found that there was a gap in the First Mortgagees' evidence in that they had failed to provide particulars of the calculation of the $7,544,405 figure in both the Forbearance Agreement and the Discharge Statement. He noted that the affidavit evidence sworn by Bryce Coates, the president of Trilend, deposed that the Notice of Sale "wrongly broke out the amounts" without indicating how they should have been or were actually calculated.

18 Based on the record before him, the application judge was not able to determine why the sums in the Forbearance Agreement and the Discharge Statement differed from those in the Notice of Sale. The First Mortgagees did not explicitly deny that the Disputed Amounts were included in the higher principal balance claimed in the Forbearance Agreement and Discharge Statement. The other parties to the two applications accepted that the Disputed Amounts were contained in the Forbearance Agreement and Discharge Statement and that the First Mortgagees included them in the totals under both documents.

19 The application judge also rejected the appellants' argument that clause 19 of the Set of Standard Charge Terms, number 200033 (the "Standard Charge Terms") allowed for the mortgagor and a first mortgagee to increase the principal debt of any mortgage at any time, to the prejudice of the interests of subsequent mortgagees. He found that the Forbearance Agreement did not form part of the first mortgage and did not carry the First Mortgagees' priority to the second mortgage. As a result, the First Mortgagees were not entitled to claim the Disputed Amounts out of the proceeds of sale in priority to Greenpath's second mortgage.

20 In addition, the application judge found that the Disputed Amounts constituted a prohibited penalty pursuant to s. 8(1) of the *Interest Act* and could not be claimed against East Sovereign or charged in priority to Greenpath as second mortgagee.

Issues on appeal

21 The appellants raise two main issues on this appeal: (1) whether the application judge erred in finding that the Disputed Amounts were not owing pursuant to the terms of the first mortgage; and (2) whether the application judge erred in finding that the Disputed Amounts constituted a prohibited penalty pursuant to s. 8 of the *Interest Act*.

22 I will address these arguments in turn.

(1) Did the application judge err in finding that the appellants had no priority over Greenpath with respect to the Disputed Amounts?

23 The appellants submit that the application judge erred in finding that the Disputed Amounts of approximately $283,508 did not properly arise under the first mortgage. They argue that the Forbearance Agreement provides the First Mortgagees with priority with respect to amounts

otherwise owing under the first mortgage, and that Greenpath registered its second mortgage despite knowing that the first mortgage prohibited subsequent registration. They also argue that a portion of the Disputed Amounts constituted the broker's amounts payable to Trilend.

24 I see no merit to this argument.

25 First, I see no error in the application judge's conclusion that the First Mortgagees could not claim priority with respect to the Disputed Amounts because Greenpath was not a party to the Forbearance Agreement and the Disputed Amounts did not properly arise from the first mortgage. In reaching this conclusion, the application judge relied on the wording of the Standard Charge Terms of the first mortgage, and he found that the relevant provision, clause 19, did not allow for increases in the principal balance or any other parts of the first mortgage, other than the rate of interest. On this basis, the applicant judge found that the Forbearance Agreement was not "subsumed" into the first mortgage and that it was a separate agreement that was not enforceable against Greenpath. That conclusion is well supported by the language of the Standard Charge Terms and the record, and I see no basis for interfering with the application judge's conclusion on this issue.

26 Second, the application judge also properly rejected the argument that the $103,958.64 prepayment fee was a 3% lender fee to the broker, Trilend, which was already included in the first mortgage commitment. He did so because there was no evidence on this in the record before him, noting that "a factum is not evidence". The same is true on this appeal. There is no evidence that the Forbearance Agreement was a renewal of the first mortgage, nor that the alleged renewal fee was an actual cost incurred by the First Mortgagees. These findings were amply grounded in the record before the application judge, and I see no palpable and overriding error that could justify the intervention of this court.

27 In any event, as discussed in the section below, even if the Disputed Amounts properly fell under the first mortgage, they were an unlawful penalty contrary to s. 8 of the *Interest Act* and were thereby unenforceable against Greenpath as the second mortgagee, East Sovereign as the owner and mortgagor of the properties, and Wyatt as the guarantor of the first mortgage.

(2) Did the application judge err in finding that the Disputed Amounts constituted a prohibited penalty pursuant to s. 8 of the *Interest Act*?

28 It is useful to set out s. 8(1) of the *Interest Act*:

> **8 (1)** No fine, penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real property or hypothec on immovables that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

29 This provision serves a protective purpose: *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, 126 O.R. (3d) 108, at para. 50, citing *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226, 270 D.L.R. (4th) 717, leave to appeal refused, [2006] S.C.C.A. No. 265. As held by the British Columbia Court of Appeal in *Reliant Capital*, at para. 53, Parliament intended for mortgages on real estate to be treated differently than other loans:

> Parliament has singled out mortgages on real estate for special treatment, or at least treatment that differs from loans that are not secured on real property. I infer that at least one legislative purpose was to protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem, or to protect their equity. If an owner were already in default of payment under the interest rate charged on monies not in arrears, a still higher rate, or greater charge on the arrears would render foreclosure all but inevitable.

30 This passage was endorsed by the Supreme Court in *Krayzel Corp. v. Equitable Trust Co.*, *2016 SCC 18*, *[2016] 1 S.C.R. 273*, at paras. 20-21.

31 In *P.A.R.C.E.L.*, at paras. 53-56, Cronk J.A., writing for the court, outlined the criteria to be applied in determining whether an amount constitutes a violation of s. 8. The criteria may be summarized as follows:

1. The covenant in question must impose a "fine", "penalty" or "rate of interest". If it does not, then s. 8(1) is not engaged.
2. The "fine", "penalty" or "rate of interest" must relate to "any arrears of principal or interest secured by mortgage on real property" (emphasis omitted), whether the arrears arose on default occurring before or after maturity of the relevant debt instrument.
3. The covenant must have the prohibited effect of "increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears".
4. The arrears of principal or interest must be "secured by mortgage on real property".

32 The application judge found that the Disputed Amounts could not be recovered by the First Mortgagee from the proceeds of sale for two reasons.

33 First, in considering the default fee, the application judge dismissed the First Mortgagees' arguments that the parties contracted out of s. 8(1) and that s. 8(1) was consumer protection legislation that did not apply to the facts of the case. The wording of s. 8(1) was not narrow enough to exclude property holders like East Sovereign, and it was not open to the parties to contract out of this statutory public policy protection. East Sovereign was entitled to the protection of s. 8(1).

34 Second, as in *P.A.R.C.E.L.,* the First Mortgagees did not discharge their onus of establishing the basis for the calculation of the $7,544,405 amount that was contained in both the Forbearance Agreement and the Discharge Statement. The application judge also noted that the Notice of Sale made specific reference to the Disputed Amounts. Moreover, though the evidence established, as noted above, that the Notice of Sale "wrongly broke out the amounts," the First Mortgagees did not provide a breakdown of how they should have been, or in fact were, broken out.

35 In *P.A.R.C.E.L.*, at para. 96, this court made it clear that the onus is on the mortgagee claiming the amounts following default to prove that they "reflect real costs legitimately incurred

by the [mortgagee] for the recovery of the debt, in the form of actual administrative costs or otherwise". There, the creditor respondents were claiming certain late payment charges and default fees. With respect to the charges for these fees, Cronk J.A. stated the following at paras. 95-96:

> The respondents point to no evidence on the record before this court demonstrating that they incurred any actual losses as a result of late or missed payments under the Mortgage, apart from the amount of the non-payment itself. This is not a case where it is alleged that payments made by or on behalf of Parcel under the Mortgage were returned "NSF" or otherwise rejected for payment, giving rise to administrative costs for the respondents.
>
> In the absence of evidence that the charges in question reflect real costs legitimately incurred by the respondents for the recovery of the debt, in the form of actual administrative costs or otherwise, the only reason for the charges was to impose an additional penalty or fine, apart from the interest otherwise payable under the Mortgage, thereby increasing the burden on the appellants beyond the rate of interest agreed upon in the Mortgage. The courts have not hesitated to disallow similar charges on the basis that they offend s. 8 of the *Interest Act.* [Footnotes omitted.]

36 In light of this well-established onus, the application judge dealt with the prepayment and default fees separately.

37 Citing *We Care Funding Limited Partnership v. LDI Lakeside Developments Inc. et al, 2021 ONSC 7466*, the application judge found that given the absence of any evidence that the prepayment fee was an actual expenditure on the part of the First Mortgagees, or any requirement that the First Mortgagees pay the fee to Trilend, the prepayment fee represented an increase in the interest rate pertaining to monies in default, in excess of the interest rate payable upon monies not in default, contrary to s. 8 of the *Interest Act*: at para. 67.

38 Likewise, the application judge found that the First Mortgagees' arguments with respect to the default fee were neither borne out of the evidence nor supported in law. Though the First Mortgagees argued that the fee corresponded to three months' interest in accordance with s. 17 of the *Mortgages Act*, *R.S.O. 1990, c. M.40*, the application judge found there was no evidence that the fee was calculated in accordance with s. 17, nor that the amount in the Forbearance Agreement included an amount arising from s. 17. The application judge also referred to the finding in *We Care* that, once a mortgagee undertakes enforcement proceedings, it can no longer collect a three-month interest bonus as doing so would constitute a penalty and therefore offend the *Interest Act*: at para. 71. I would also note that the First Mortgagees have not adduced any evidence to support their argument that the default fees should be treated as anything other than what they were labelled as, i.e., default fees.

39 The bottom line is that the absence of any evidence to support the appellants' position that these were valid costs incurred is fatal, as the only reasonable inference is that they, in effect, increased the interest owing on the entire principal amount, even that which was not in arrears. I see no error on the part of the application judge in his analysis and conclusion that the disputed fees effectively constituted prohibited interest charges under s. 8 of the *Interest Act*.

Conclusion and Costs

40 The appeal is dismissed. Costs of the appeal are payable in the amount of $10,000 by the First Mortgagees to the respondent Greenpath.

A.L. HARVISON YOUNG J.A.
J.A. THORBURN J.A.:— I agree.
L.G. FAVREAU J.A.:— I agree.

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1 The line items in this table, as well as the table in para. 9, do not correctly add up to the totals indicated in each table. These errors are not material to the questions of law before us, nor were they addressed by the parties. The conclusions drawn in these reasons pertaining to the discrepancy between the principal balances and the Disputed Amounts are not impacted by these errors.

CAMERON STEPHENS MORTGAGE CAPITAL LTD.
Applicant

-and-

CONACHER KINGSTON HOLDINGS INC. et al

Respondents

Court File No. CV-23-00701672-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
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