

**CITATION:** Acquaviva v. Holmes, 2023 ONSC 1696  
**COURT FILE NO.:** CV-19-3830-00  
**DATE:** 2023 03 15

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
)  
)  
AURELIO ACQUAVIVA and )  
MARIA ACQUAVIVA ) *Bryan Fromstein, for the Plaintiffs*  
Plaintiffs )  
- and - )  
)  
)  
JOAN HOLMES )  
Defendant ) *Domenic Saverino, for the Defendant*  
)  
)  
) **HEARD:** February 16, 2023 at  
) Brampton, by videoconference

2023 ONSC 1696 (CanLII)

**REASONS FOR JUDGMENT**

**Emery J.**

[1] This is a private mortgage case. In Reasons for Judgment dated March 1, 2022 (“the Reasons”), I granted summary judgment to the plaintiffs Aurelio and Maria Acquaviva as chargees who hold the first charge against 15 Quatro Crescent in Brampton, a property owned by the defendant Joan Holmes. At the end of that decision, I granted summary judgment on liability, and ordered a trial with *viva voce* evidence to determine the amount owing under Rule 20.04(3).

[2] At para. 83 of the Reasons, I defined the following issues for trial:

1. What is the proper amount that was actually secured under the Acquaviva charge; and
2. What interest rate is payable on the principal amount owing on the charge after July 1, 2019.

[3] Although Ms. Holmes reserved the right to call evidence on the proper interest payable after July 1, 2019, she did not give that evidence at trial. In his closing submissions, Mr. Saverino conceded on her behalf that interest continued to accrue at the rate of 9.75% per annum after maturity as before the date the amount payable was due in full.

[4] The issue left for this court to determine is the amount that was actually secured under the Acquaviva charge. This determination does not include the payments made from the trust account of the plaintiff's lawyer Anthony Maniaci, once funds had been advanced by the Acquavivas.

### **Witnesses**

[5] The amount actually secured under the Acquaviva charge was addressed by three witnesses at trial: Mr. Acquaviva and Mr. Maniaci called by the plaintiffs, and Ms. Holmes for herself.

*Aurelio Acquaviva*

[6] Mr. Aurelio Acquaviva gave two affidavits dated January 29, 2021 and May 13, 2021 respectively. These affidavits were before the court on the motion for summary judgment, and were filed as Mr. Acquaviva's evidence in chief at trial. His evidence on the issue before the court was essentially that the net amount of \$649,292.05 was advanced on the face amount of \$720,000 secured by the charge. The components of this advance were as follows:

Gross amount of Mortgage @ 9.75%,	\$720,000.00
Less: Six months of prepaid interest	
$\$720,000 \times 9.75\% / 12 \times 6$	(\$35,100.00)
Interest adjustment date of 2 months 12 days	(\$14,007.50)
Lender's Fee of 3% x \$720,000.00	(\$21,600.00)
Net Amount	\$649,292.05

[7] Mr. Acquaviva also provided the evidence by affidavit that he and his wife advanced these funds to Mr. Maniaci, in trust. These funds were provided in the form of the following cheques and bank drafts:

HSBC Canada	\$174,292.05
BMO	\$35,000.00
IC Savings	\$400,000.00
IC Savings	<u>\$40,000.00</u>
Total	\$649,292.05

[8] Mr. Acquaviva understood that Ms. Holmes required this financing to payout a previous first charge to CIBC registered against title to her property in the amount of approximately \$835,505. This first charge would be replaced by the Acquaviva charge in first position. The six months pre-paid interest, the amount for an interest adjustment, and a lender's fee of 3% would be retained as though those funds had been advanced by the Acquavivas as lenders.

[9] Mr. Acquaviva relies upon the Acknowledgement and Direction marked as Exhibit 3 as evidence of the security given for the loan. This Acknowledgement and Direction was signed by Ms. Holmes on June 27, 2018 to register the charge for the entire \$720,000. This amount included the prepayment of \$35,100 for six months interest, the interest adjustment of \$14,007 and the lender's fee of \$21,600.

[10] Mr. Acquaviva was made available for cross-examination. Apart from the evidence he gave by way of affidavit, he knew little more about the transaction but that he and his wife took the funds they were advancing to Mr. Maniaci's office "to invest."

*Anthony Maniaci*

[11] Mr. Maniaci was called by the plaintiffs to testify. As he had not given an affidavit on the motion for summary judgment, Mr. Maniaci was examined in chief, and was then cross-examined.

[12] Mr. Maniaci was the lawyer acting for both the Acquavivas and for another lender, 2624221 Ontario Ltd. (“262”) on the refinancing of the Holmes’ property. Further funding from 262 was required to pay out the balance of the existing first charge, and to refinance the second charge to 262. Ms. Holmes was refinancing the second charge because the name of the chargor had previously been Margaret Omorgie, an individual who had been shown on title prior to July 2018. Ms. Holmes also refinanced the 262 charge to make further funds available to herself.

[13] The balance owing to CIBC on the first charge was \$835,505.

[14] Mr. Maniaci was examined on a number of documents that Mr. Fromstein had compiled in a compendium and uploaded to Caselines. He readily admitted that he did not have all documents related to this transaction as the file had been stolen by his law clerk, Priscilla Pietropaulo. Mr. Maniaci explained that Ms. Pietropaulo had been running a “mortgage scam” of some description from his office before she left her employment there. Mr. Maniaci further explained that

despite what is shown by the remaining documents in his possession, the trust ledger page from his PC Law program shows all money in and out on the file.

[15] In terms of money deposited in trust, Mr. Maniaci explained that the trust ledger page in evidence was the trust account record for the refinancing of the two charges. He explained that the funds shown on the trust ledger page came from both 262 and the Acquavivas. On close inspection, the ledger page in evidence is for file #6661, which is actually the file for the refinancing of the second charge to 262.

[16] The ledger shows that 262 deposited \$300,000 in trust on June 14, 2018. \$180,000 was transferred from those funds to file #6746 the same day, leaving \$120,000 available. On July 6, 2018, 262 deposited a further \$404,000 to bring the total funds from 262 on account of this refinancing to \$524,000.

[17] On July 6, 2018, the \$649,292 advanced by the Acquavivas was deposited into Mr. Maniaci's trust account for file #6661. The funds received by Mr. Maniaci in trust from 262 and from the Acquavivas on this file then totalled \$1,173,292.

[18] Mr. Maniaci referred to the trust ledger page to show that sufficient funds were advanced to CIBC from his trust account to discharge the previous charge. I note that \$853,505.92 is recorded on the trust ledger page as the amount paid to

CIBC on July 6, 2018. There was no explanation given for the increase of \$18,000.92 from the \$835,505 balance shown as owing in the evidence.

[19] There is a payment shown to Diamond Capital Investments Inc. in the amount of \$13,000 paid from trust on July 6, 2018. Diamond Capital is the firm associated with Sabine Pucciarelli (also referred to at times as Sabine Quattrocciochi). Ms. Pucciarelli was apparently acting as the mortgage broker on this refinancing. I say apparently because there is no agreement in evidence from Ms. Pucciarelli or Diamond Capital about any providing any brokerage services or receiving any fee. Ms. Pucciarelli did not give an affidavit on the motion or testify at trial.

[20] There were also discharge fees and legal fees paid from trust on July 6, 2018. There is an advance of \$20,000 to Mr. Saverino shown on the ledger page to pay a retainer for litigation purposes. Ms. Holmes was paid the balance of funds in the amount of \$46,316.13 on July 6, 2018.

[21] That was not the end of the transactions on July 6, 2018. The second charge to 262 was refinanced that day, with \$82,900 paid out to discharge the previous charge in favour of 262. That second charge was replaced by a new second charge to 262 having a face amount of \$775,000.

[22] These transactions were all channelled through file #6661 to place charges on the property owned by Ms. Holmes. The trust ledger shows that, after the business of receiving funds and disbursing proceeds was complete on July 6, 2018, there remained in trust \$131,139.05. Mr. Maniaci transferred those funds to file #6803 at the direction of 262. He explained that those funds were left in trust from the deposits 262 had made, and that they were transferred to file #6803 for another 262 financing.

[23] Mr. Maniaci testified that the interest adjustment of \$14,007 for two months and two days is a matter between the lender and the borrower. It is an adjustment to provide the lender with interest between the time that funds are advanced and the start date for the payment of interest. Mr. Maniaci agreed that the Acknowledgement and Direction for the Acquaviva charge specifies a start date of July 1, 2018 for the advance of funds, even though funds were not disbursed by his office until July 6, 2018. He also agrees that August 1, 2018 is shown as the start date for the payment of interest.

[24] According to Mr. Maniaci, Ms. Holmes had signed an Irrevocable Direction Re: Funds to his office dated June 25, 2018. This Direction was witnessed by Ms. Pucciarelli. This Direction was forwarded by Ms. Pucciarelli to Mr. Maniaci along with the 1<sup>st</sup> Mortgage Commitment dated June 25, 2018. Although the Direction



ostensibly provides the authority for Mr. Maniaci to deduct \$54,000 from the mortgage advance “representing the total mortgage fee therein”, there is no provision in the Mortgage Commitment between Ms. Holmes and the Acquavivas that provides for the payment of a “mortgage fee” or “lender’s fee”.

[25] It was Mr. Maniaci’s evidence that a lender’s fee can be agreed upon and paid pursuant to a direction for the payment of funds. The Direction that provided for payment of \$54,000 as a mortgage fee was never relied upon to pay that amount to the Acquavivas or to a third party, let alone \$21,600 for a lender’s fee. As Mr. Maniaci stated in evidence, the trust ledger page shows all funds going in and out of trust on this transaction.

*Joan Holmes*

[26] The first point Ms. Holmes in her testimony was that she understood 262 should have been granted the first charge instead of the Acquavivas.

[27] Ms. Holmes also testified that she was enticed into this transaction by Sabine Pucciarelli. She told the court that Ms. Pucciarelli even came to her work place to sign her up.

[28] Mr. Saverino advised the court that Ms. Holmes takes issue with the lender fee of \$21,600, and with the interest adjustment of \$14,007 for two months and

two days. He advised the court that Ms. Holmes agrees with all other components of the amount advanced by the Acquavivas to fund the charge. These components would be the actual amount of \$649,292.05 advanced, and the prepayment of six months interest of \$35,100, for a total of \$684,392.05.

### **Analysis**

[29] After counsel made their closing submissions on the evidence heard at trial, the issues for determination by this court had been reduced to whether the Acquaviva charge secured the \$21,600 held back for the lender's fee and the \$14,007 for the interest adjustment. There were also payments from Mr. Maniaci's trust account that Ms. Holmes questioned after the financing that I will address.

#### *The lender's fee*

[30] Mr. Fromstein made the submission that I had already made a finding at para. 76 of the Reasons for Judgment that the Acquavivas are entitled to the lender's fee that they are to receive upon payout of the charge.

[31] I make reference in para. 72 of the Reasons that the validity of a lender's fee in a mortgage case has been upheld where the parties have agreed upon those fees as part of the deal. The decision of Leiper J. in *Stoney Creek Centre Inc. v. 2459437 Ontario Inc.*, 2019 ONSC 2450 stands as authority for that proposition.

On an application to determine the proper amounts owing under a charge, Leiper J. found at paras. 21 and 35 that the parties had entered into an agreement for the borrower to pay a lender's fee as a term of the Mortgage Financing Agreement between them. This lender's fee was to be deducted from the amount advanced.

[32] Notwithstanding the observations of this court at paras. 72 and 76 of the Reasons in the instant case, a review of the evidence at trial reveals no such agreement was reached or recorded in the Mortgage Commitment letter dated June 25, 2018. The Direction that provided for an advance of \$54,000 as a mortgage fee was never acted upon. It is unknown if any other direction for \$21,600 was ever signed by Ms. Holmes. She did not give evidence about signing any other direction, and Mr. Maniaci told the court that his file containing transaction documents had been stolen by a previous employee.

[33] The authority to validate a lender's fee is predicated upon a finding that the borrower agreed to the payment of that lender's fee claimed. In *Stoney Creek*, the court recognized that a chargee is not entitled to repayment of an amount that is more than the principle sum advanced. Leiper J. quoted the general rule in *Edmonds v. Hamilton Provident & Loan Society* (1891), 18 O.A.R. 347 (Ont. C.A.) as authority for the proposition that if a mortgagee advances less than the face

value of the mortgage, it can only recover the amount advanced unless there is an agreement that provides otherwise (absent “fraud and oppression”).

[34] Leiper J. found on the facts in *Stoney Creek* that the parties had expressly agreed to a lender’s fee, with the consequent result, at para. 36:

This is a case where the *Edmonds* principle is displaced by the express agreement of the parties in the Mortgage Financing Agreement. There is no evidence of “fraud or oppression” in the negotiation of the agreement. Both parties were aware of the respondent’s financing costs. Both were represented by counsel on the deal. There were no allegations or evidence of any misrepresentations leading to a risk of loss. To the contrary, all of the documents contemplated that the respondent would seek financing of \$3 million and that the agreement with the applicant would be to pay all the fees and costs of the respondent’s financing to consummate the loan to Mr. Perruzza’s company.

[35] The decision of Leiper J. in *Stoney Creek* was upheld on appeal at 2020 ONCA 119. Writing for the panel, D.M. Brown J.A. affirmed the principle in *Edmonds* that a party may give a charge for a larger sum in consideration for a loan of a smaller amount where there is an actual agreement to that effect. This appears to have been the common law for the last 130 years. An agreement for the payment or withholding of funds for the purpose of paying a “lender’s fee”, a “broker’s fee” or even a “set-up fee” for a private mortgage or charge is therefore necessary to enforce those fees. In the event there is a perceived need to regulate fees of this kind, it is up to the legislature to enact whatever legislative measures are considered expedient to protect the consumer.

[36] In contrast to the facts in *Stoney Creek*, I find on the evidence there was no such agreement where Ms. Holmes agreed to pay either a lender's fee or a broker's fee. Therefore, the Acquavivas are not entitled to charge a lender's fee on top of the amount actually advanced for the charge.

*The interest adjustment*

[37] In *Edmonds*, the Court of Appeal also held as a general rule that a mortgagee can only claim interest from the time the money is advanced. See the reasons of MacLennan J.A. at para. 71.

[38] I find on the evidence that only 25 days elapsed between the date that funds were advanced to Ms. Holmes on July 6, 2018 and August 1, 2018 when the pre-paid interest would start. The Acquavivas are therefore entitled to an interest adjustment for those 25 days at \$182.81 per day calculated on \$684,392.05, for a total adjustment of \$4,570.

[39] The amount secured by the first charge granted by Joan Holmes to the Acquavivas is therefore \$688,962.05.

*Amounts disbursed*

[40] Ms. Holmes admitted on cross-examination that she did not use any of her own funds to pay out CIBC. There is no evidence to the contrary that the amount advanced by the Acquavivas under the first charge was used to pay out the \$853,505 shown in the trust ledger to CIBC.

[41] I find as a fact that the entire \$649,292 was required to apply against the outstanding balance on the CIBC charge.

[42] This finding makes the subsequent payments from trust irrelevant for the purposes of the trial. However, it appears that neither party provided the payout statement or any other evidence of what amount CIBC required to discharge the its charge on July 6, 2018. Therefore, the \$18,000 difference between the \$853,505 shown on the trust ledger as paid out from trust and the \$835,505 as the amount required to pay out the CIBC charge is a discrepancy. There was no evidence given about whether this was entry where the numbers were juxtaposed, or that the larger amount was greater than the lesser amount because of accumulated interest. This discrepancy is one for which Mr. Maniaci should account to Ms. Holmes, either outside of, or in the Toronto action.

[43] Similarly, the amounts paid by Mr. Maniaci for fees or advances, or to clear title, may have come from the 262 funds. The confusion arises from Mr. Maniaci's use of the one file and related trust ledger for two lenders to the same borrower. Mr. Maniaci may have to account to his clients as their lawyer and also to Ms. Holmes as an adverse party in the Toronto action. However, the inquiry in this action does not extend to reconciling the deposit of funds in trust and the disbursement of funds after the application of the refinancing proceeds. These disbursements include the transfer of \$180,000 from the funds deposited by 262 on June 14, 2018, the transfer of the balance of funds in the amount of \$139,139.05 on July 27, 2018, and the various payments that are not related to the Acquaviva advance.

[44] Mr. Saverino's submission that the transfer of those funds from funds deposited in trust on this file should be deducted under various scenarios fails to take into account two facts. The first is that there was an excess of funds deposited in trust by 262 to pay out the balance of the first charge to CIBC. The second is that Mr. Maniaci was acting for the lenders and not for Ms. Holmes. It appears that the trust account for 262 was used to clear funds initially deposited in trust and posted to this file before the excess was transferred to another file for other transactions.

### *Findings*

[45] The principle amount owed by Ms. Holmes as of July 1, 2019 totalled \$688,962. The annual interest on that amount at 9.75% comes to \$67,173, or \$5,598 a month. Interest under the charge, calculated over 44 months since July 1, 2019, equals \$246,303. This interest calculation brings the amount owing to \$935,265 as of March 1, 2023. This amount accrues at \$182.81 each day thereafter.

### **Conclusion**

[46] The court finds that Ms. Holmes owes \$935,265 plus per diem interest after March 1, 2023. This amount is secured and owing to Aurelio and Maria Acquaviva under the first charge.

[47] Post judgment interest on this secured amount shall continue to accrue at 9.75% per annum.

[48] The Acquavivas are also entitled to an order for possession of 15 Quatro Crescent under the terms of the charge, and that order is granted. Although they have asked for a Writ of Possession, there is evidence before the court that Ms. Holmes has rented part of the property to tenants. Therefore, a further motion with



proper evidence regarding occupancy is required before the court can consider granting a Writ of Possession. That motion can be made to any judge.

[49] At the conclusion of the trial, I heard submissions on costs. There was no Offer to Settle brought to my attention that precluded me from hearing those submissions.

[50] The applicable principles relating to costs payable under the terms of a contract were reviewed by Turnbull J. in *2557573 Ontario Inc. v. Furney*, 2020 ONSC 8131, at paras. 8-9. The Acquavivas in this case claim their costs for enforcing this charge “as between solicitor and client.” Their entitlement to costs is contractual as it was a term of the Standard Charge Terms that applied to the charge.

[51] As a matter of law, it is open for the court to exercise the discretion under s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to award costs contrary to an agreement between the parties: see *Bosse v. The Mastercraft Group Inc.*, 1995 CanLII 931 (Ont. C.A.) at page 33. However, the exercise of that discretion depends on the context in which it arises, and would turn on the facts and conduct of the parties in a particular case. I have found no good reason to exercise my discretion to override the Acquavivas’ contractual entitlement to costs “as between solicitor and client” or on a full indemnity basis.

[52] Even though I am granting costs to the Acquaviva on a higher scale, I am not awarding the full \$55,000 in fees claimed by Mr. Fromstein. In my view, 20% of the time spent on the summary judgment motion and a one day trial was consumed by accounting issues not of Ms. Holmes' making. As she was not responsible for causing that extra time, she should not have to pay for that time in costs.

[53] In the result, I consider \$44,000 in fees, HST on those fees of \$5,720 and disbursements of \$1,835 to be fair and reasonable, as well as proportionate to the amounts in issue.

[54] The sum total of the costs awarded to the Acquavivas is \$51,555.

[55] Post judgment interest on those costs shall accrue at 4% per annum under the *Courts of Justice Act*.

---

Emery J.

**Released:** March 15, 2023

**CITATION:** Acquaviva v. Holmes, 2023 ONSC 1696  
**COURT FILE NO.:** CV-19-3830-00  
**DATE:** 2023 03 15

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

AURELIO ACQUAVIVA and  
MARIA ACQUAVIVA  
Plaintiffs

**- and -**

JOAN HOLMES  
Defendant

---

**REASONS FOR JUDGMENT**

---

Emery J.

**Released:** March 15, 2023