

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1239466 Alberta Ltd. v. Promerita Peachland  
Development Corp.*,  
2023 BCSC 2040

Date: 20231122  
Docket: H138326  
Registry: Kelowna

Between:

**1239466 Alberta Ltd.**

Petitioner

And

**Promerita Peachland Development Corp. and  
The Point 3P Limited Partnership**

Respondents

In Chambers

Before: The Honourable Mr. Justice Gomery

## **Reasons for Judgment**

Counsel for the Petitioner:

S. Lefebvre

Counsel for the Respondent, Promerita  
Peachland Development Corp.:

S.R. Andersen

Place and Date of Hearing:

Kelowna, B.C.  
November 6, 2023

Place and Date of Judgment:

Kelowna, B.C.  
November 22, 2023

## Introduction

[1] This is a foreclosure proceeding. Promerita Peachland Development Corp. purchased a 50% interest in property from the petitioner. As part of the purchase price, it granted the petitioner a first mortgage. The Point 3P Limited Partnership (the “Partnership”) executed the mortgage as a covenantor. Promerita acknowledges that it has defaulted in payment of the amount secured by the mortgage, and that the petitioner is entitled to an order nisi of foreclosure. There is a dispute as to the terms of the order nisi.

[2] There are two parts to an order nisi: a declaration that the mortgage is in default and an order giving the borrower time in which to remedy the default and redeem the mortgage; and a personal judgment against the debtor. Promerita and the petitioner agree on the amount required to redeem. As of November 6, 2023, it was \$3,144,772.59.

[3] The dispute concerns the amount of the personal judgment. The petitioner says that it is entitled to a judgment for \$3,257,772.59 as of November 6, 2023 – that is \$113,000 more than the redemption amount – because there are two debts: the debt secured by the mortgage, and a second, separate debt incurred in connection with an agreement to extend the time for payment. Promerita denies the existence of a second, independent and unsecured debt.

[4] When the petitioner’s application came on for hearing on November 6, 2023, I reserved judgment as to the amount of the personal judgment and granted an immediate order nisi addressing the other elements of the relief sought by the petitioner.

[5] This is not a dispute about what was agreed between the parties. It is common ground that Promerita and the partnership agreed to pay the petitioner a daily extension fee of \$1,000 a day (among other payments). But Promerita maintains that its agreement to pay a daily extension fee is invalidated by s. 8 of the *Interest Act*, R.S.C. 1985, c. I-15. The petitioner does not dispute that s. 8 would

have that effect if the extension fee were secured by the mortgage. It denies that such is the case.

[6] Accordingly, the simple issue is: is the daily extension fee secured by the mortgage?

[7] For the reasons that follow, I have concluded that the petitioner is correct that the daily extension fee is not secured by the mortgage, and it is therefore entitled to personal judgment in an amount that includes the extension fee.

### **Background**

[8] An affiliate of Promerita entered into an agreement to purchase the property on September 16, 2021. It assigned the agreement to Promerita. The transaction closed and Promerita went on title on March 18, 2022. The mortgage was registered at the same time.

[9] The principal amount secured by the mortgage is \$3 million, with interest at 3% per annum. The debt was originally due on March 18, 2023.

[10] The petitioner, Promerita and the Partnership agreed in writing to grant Promerita a three-month extension in which to pay the mortgage debt. The annual interest rate over the three months was increased from 3% to 9%, and the new payment date was June 18, 2023.

[11] The petitioner, Promerita and the Partnership agreed in writing to a second extension of the deadline for payment. This agreement fixes a new deadline of July 16, 2023, in exchange for which Promerita agrees to pay a one-time Extension Fee of \$58,000 and to pay \$100,000 towards interest accrued to June 18, 2023. Promerita further agrees to pay the daily extension fee of \$1,000 for every day that the mortgage amount and accrued interest remain unpaid after July 16, 2023.

[12] On or about June 18, 2023, Promerita paid the \$158,000 required under the second extension agreement. The daily extension fee of \$1,000 per day remains unpaid.

[13] Section 8(1) of the *Interest Act* provides as follows:

**No fine, etc., allowed on payments in arrears**

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.

[Emphasis added.]

[14] If the daily extension fee of \$1,000 per day is secured by the mortgage, it has the effect of increasing the charge on the arrears beyond the rate of interest payable on the principal and is captured by s. 8(1). Conversely, if it is not secured by the mortgage, the prohibition in s. 8(1) does not apply; *Bankers Mortgage Corporation v. Plaza 500 Hotels Ltd.*, 2017 BCCA 66 at para. 27. The purpose of s. 8(1) is to protect landowners from charges that would make it impossible for them to redeem or protect their equity; *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18 at paras. 20-21. That purpose is not engaged by charges that are unsecured.

**Analysis**

[15] Promerita submits that the second extension agreement amends the mortgage and is not an independent agreement. It finds some support for this submission in the language of the second extension agreement, which states:

The undersigned parties agree to the following changes to that mortgage:

1. A one time fee (Extension Fee) of \$58,000 will be paid on June 19, 2023 for extending the loan repayment date from June 18, 2023 to July 16, 2023.
2. A payment of \$100,000 towards interest accrued to June 18, 2023 will be paid on June 19 2023.
3. Should the loan not be repaid by July 16, 2023, a further fee of \$1,000 per day shall be added to the Extension Fee until the Mortgage and the balance of the accrued interest thereon is paid in full.

No other terms of the mortgage are being changed.

[Emphasis added.]

[16] The mortgage incorporates by reference the Prescribed Standard Mortgage Terms, with some modifications. The prescribed terms are found at the *Land Title*

Act (Board of Directors) Regulation, B.C. Reg. 332/2010, Schedule B. Section 2(1) of the prescribed terms states:

2(1) In return for the *lender* agreeing to lend the *principal amount* to the *borrower*, the *borrower* grants and mortgages the *land* to the *lender* as security for repayment of the *mortgage money* and for performance of all the *borrower's promises and agreements*.

[Italics in original. Underlining added.]

[17] Promerita submits that its obligation to pay the daily extension fee is secured because it was incorporated into the mortgage by the second extension agreement and constitutes one of the borrower's promises and agreements contemplated by s. 2(1) of the prescribed terms.

[18] However, "borrower's promises and agreements" is itself a defined term. It is defined in a manner consistent with Promerita's argument in the prescribed terms, but the mortgage deletes the prescribed definition and substitutes for it the following:

"borrower's promises and agreements" means any one or more of the borrower's obligations, promises and agreements due or owing to the lender evidenced by or arising under or in connection with the Purchase Agreement.

[Emphasis added.]

[19] Promerita's promise to pay the daily extension fee is clearly not a promise "evidenced by or arising under ... the Purchase Agreement". It came into being independently of the Purchase Agreement, long after the Purchase Agreement was concluded.

[20] Nor do I think that the promise to pay the daily extension fee should be viewed as one "in connection with the Purchase Agreement". The daily extension fee is an addition to the \$58,000 Extension Fee promised in paragraph 1 of the second extension agreement. The parties did not contemplate that the Extension Fee would be secured by the mortgage. It was to be paid on June 19, 2023, the day the mortgage debt was due, in advance of the extension. It would be odd to view this extension payment as having a different character under the mortgage than the subsequent daily extension payments. It would be odd to view the daily extension

fee as a promise in connection with the Purchase Agreement, when the Extension Fee itself was not.

[21] The daily extension fee was negotiated to give Promerita a strong incentive to pay its debt without further delay. It was not essential to the incentive that the daily fee be secured. This was a commercial arrangement, negotiated by sophisticated parties dealing at arm's length. Had they intended that the daily fee become part of the mortgage debt, it would have been easy to have said so expressly.

[22] I conclude that, although the daily extension fee is reflected in the mortgage, it is not a charge secured by the mortgage because it is not one of the borrower's promises and agreements, as defined in the mortgage. Supreme Court Civil Rule 21-7(3) permits the petitioner to seek payment of the fee in addition to the mortgage debt in this foreclosure proceeding, and to claim judgment accordingly. Promerita's only objection to the claim is its defence under s. 8(1) of the *Interest Act*, and that defence fails.

**Disposition**

[23] The petitioner is entitled to judgment against Promerita and the Partnership in the amount claimed, inclusive of the daily extension fee.

[24] The petitioner has succeeded on this issue, but it failed on another issue addressed at the hearing on November 6, 2023. It sought a redemption period of one day and I held that the redemption period should be six months. Bearing in mind that success has been divided but that the petitioner was obliged to apply to court for the protection of its position, I award the petitioner costs, but only on scale A.

“Gomery, J.”