COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wing Wah Investment Inc. v. AKA Investments Ltd.*, 2024 BCCA 218

Date: 20240611
Dockets: CA49356; CA49358

Docket: CA49356

Between:

Wing Wah Investment Inc. and Kevin Yi-Hsiung Hsieh

Appellants
(Respondents)

And

AKA Investments Ltd.

Respondent
(Petitioner)

And

Indran Sathasivam

Respondent
(Respondent)

- and -

Docket: CA49358

Between:

Wing Wah Investment Inc. and Kevin Yi-Hsiung Hsieh

Appellants
(Petitioners)

And

AKA Investments Ltd.

Respondent
(Respondent)

Before: The Honourable Justice MacKenzie
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated August 23, 2023 (*AKA Investments Ltd. v. Sathasivam*, 2023 BCSC 1464, Vancouver Dockets H190833, S232844).

Counsel for the Appellants:	B.L. Lewis-Hand
Counsel for the Respondent AKA Investments Ltd.:	K.M. Jackson T.A. Posyniak
Place and Date of Hearing:	Vancouver, British Columbia February 27, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 11, 2024

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Justice Mackenzie
The Honourable Mr. Justice Willcock

Summary:

The appellants issued a loan to the respondent borrower, taking second mortgage security. The first mortgage was held by the respondent lender. After the respondent borrower defaulted under the first mortgage, the respondent lender obtained an order nisi which incorrectly set out the amounts of principal and interest due. The error was discovered more than three years later. The judge below granted the respondent lender's application to correct the order nisi under the slip rule and dismissed the appellants' petition for declarations that no interest was payable after June 30, 2020 under the first mortgage. The appellants appealed.

Held: Appeals dismissed. The judge did not err in her interpretation of the first mortgage in finding that interest was payable after June 30, 2020. It was open to the judge to amend the order nisi pursuant to the slip rule despite the passage of more than three years from the date the order was made. The appellants have not established a palpable and overriding error in the judge's finding that they were not prejudiced by the amendments.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] These appeals concern the interpretation of interest provisions in a mortgage, and the use of the slip rule to correct the amounts of principal and interest set out in an order *nisi* more than three years after the order was pronounced.

Background

[2] The appellants, Wing Wah Investment Inc. and Kevin Yi-Hsiung Hsieh (together "Wing Wah"), loaned $225,000 to the respondent, Indran Sathasivam, in December 2018, taking second mortgage security. The first mortgage was held by the respondent AKA Investments Ltd. ("AKA"), and secured a loan of $1.1 million. When Mr. Sathasivam defaulted on the payments due under the AKA mortgage, AKA commenced foreclosure proceedings in November 2019.

[3] AKA named the appellants as parties and served them with the petition and supporting materials. Despite being served, neither Mr. Sathasivam nor Wing Wah appeared at the hearing. On January 23, 2020, Master Muir granted an order *nisi* in favour of AKA on an uncontested basis.

[4] The order *nisi* incorporated two figures from the statement of accounting attached to AKA's application: the principal amount and the per diem amount due

under the mortgage. As it turned out, both amounts were incorrect because AKA's then counsel used the wrong interest rate. That mistake occurred because the AKA mortgage provided for an interest rate of 9.25% until December 31, 2019, increasing to an interest rate of 18% on January 1, 2020, but when AKA applied for the order *nisi* in November 2019, the lawyer used only the 9.25% rate. As a result, the order *nisi* set out the redemption amount on January 23, 2020 as $1,154,550.93 rather than $1,171,638.38. The order *nisi* also incorrectly provided for per diem interest of $286.12 based on 9.25% per annum, rather than a per diem interest based on 18% per annum**.**

[5] After the order *nisi* was granted, no party took further steps for two years; Wing Wah did not apply for conduct of sale of the property, and both during and after the six-month redemption period, Mr. Sathasivam took no steps to sell or refinance the property to repay his debts to the two mortgagees.

[6] On April 26, 2022, Wing Wah commenced its own foreclosure proceeding, obtaining an order *nisi* on July 11, 2022. On January 17, 2023, after the redemption period expired, Wing Wah obtained an order for conduct of sale of the property in its foreclosure proceeding. In February 2023, in anticipation of arranging a sale of the property, Wing Wah asked AKA for a payout statement. AKA provided a statement showing a balance owing of $1,921,597.81 as of March 1, 2023, with interest accruing at a per diem of $947.64. Wing Wah objected to AKA's claim for interest after June 30, 2020, taking the position that the Form B mortgage registered on title provided for payment of interest at 18% "for the period January 1, 2020 to June 30, 2020" only (emphasis added).

[7] In order to resolve this disagreement, on April 12, 2023 Wing Wah filed a petition in the BC Supreme Court seeking declarations that the amount to be paid to AKA under its mortgage did not include interest after June 30, 2020. In the alternative, Wing Wah sought a declaration that the applicable interest rate was that set out in the order *nisi*, namely 9.25%.

[8] At about the same time, AKA became aware that the order *nisi* contained the incorrect redemption amount and interest rate. It filed an application on June 23,

2023 in its foreclosure proceeding, seeking a further summary accounting of the amounts due under the AKA mortgage. In the alternative, AKA sought an order under R. 13-1(17) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (commonly referred to as the slip rule), or pursuant to the court's inherent jurisdiction, to vary the AKA order *nisi* to correct the interest rate applicable as of January 1, 2020.

[9] AKA's application and Wing Wah's petition were heard together. Wing Wah conceded that AKA was entitled to interest at 18% per annum from January 1, 2020 to June 30, 2020, but insisted that no contractual interest was payable after that period. In the alternative, if interest was found to be owing, Wing Wah took the position that the rate of 9.25% set out in the AKA order *nisi* applied, or in the further alternative, that the applicable rate was to be determined under the *Court Order Interest Act*, R.S.B.C. 1996, s. 79.

[10] The chambers judge held that the AKA mortgage provided for interest at 9.25% per annum until December 31, 2019 (the date of expected repayment), and thereafter, at the higher rate of 18% per annum until the date of actual payment. She rejected Wing Wah's argument that the mortgage did not provide for payment of interest after June 30, 2020. The judge therefore granted AKA's application to correct the order *nisi* to reflect the correct interest rate applicable after December 31, 2019, finding it was open to her to do so either under the slip rule or pursuant to the court's inherent jurisdiction. In the alternative, she found that the summary accounting term of the order *nisi* enabled AKA to recover the difference between the interest rate of 9.25% per annum set out in the order *nisi* and 18% per annum from and after January 1, 2020 .

[11] Having made these findings, the judge dismissed Wing Wah's petition for declarations that no interest was payable after June 30, 2020. She also rejected the appellants' argument that amendment of the order *nisi* through the slip rule or inherent jurisdiction would cause prejudice to Wing Wah.

Issues on appeal

[12] Wing Wah asserts that the judge made nine errors, which I would reframe as follows:

1. Interpreting the mortgage as providing for payment of interest after June 30, 2020;

2. Failing to consider that the interest payable under the mortgage contravened section 8 of the *Interest Act*;

3. Using the slip rule:

   (a) to vary substantive terms of the order *nisi,* and

   (b) without considering prejudice to the appellants; and

4. Finding that the order *nisi* could also be amended pursuant to the summary accounting provision in that order.

[13] I turn now to the first ground of appeal.

1. Interpreting the AKA mortgage to provide for interest after June 30, 2020

[14] The appellants' primary argument on appeal is that the judge misinterpreted the interest provisions of the AKA mortgage.

[15] The parties agree that the mortgage consists of the Form B and the prescribed standard mortgage terms ("PSMT"). Item 5(b) of the Form B states:

> 5. Payment Provisions:
>
> (b) 9.25% per annum compounded monthly for the period January 1, 2019 to December 31, 2019
> 18% per annum compounded monthly for the period January 1, 2020 to June 30, 2020[.]

The PSMT includes the following provisions:

Interpretation

1 (1) **In these mortgage terms:** …

"interest" means interest at the *interest rate* shown on the *mortgage form*;

…

"interest rate" means the interest rate shown on the *mortgage form*;

…

"mortgage form" means the instrument in the form approved as a mortgage by the Director of Land Titles under the *Land Title Act* and all schedules and addenda to the instrument;

"mortgage money" means the *principal amount*, *interest* and any other money owed by the *borrower* under *this mortgage*, the payment of which is secured by *this mortgage*;

…

"this mortgage" means the combination of the *mortgage form* and these mortgage terms;

…

Interest

3 (1) Interest is chargeable on the *mortgage money* and is payable by the *borrower*.

…

(3) *Interest* on advances or readvances of the *principal amount* starts on the date and on the amount of each advance or readvance and accrues on the *principal amount* until the *borrower* has paid all the *mortgage money*.

Payment of the mortgage money

4 The *borrower* promises to pay the *mortgage money* to the *lender* at the *place of payment* in accordance with the payment provisions set out in the *mortgage form* and these mortgage terms.

[Emphasis in original PSMT.]

Item 10 of the Form B sets out "Additional or Modified Terms" to supplement the PSMT. The following term was added after s. 5(1) of the PSMT:

(1.1) The promises and agreements made by the Borrower to the Lender in any guarantee, promissory note or any other agreement made by the Lender and the Borrower (the "Borrower's Agreements") are hereby incorporated by reference and made a part of this Mortgage. The Borrower promises to fully and promptly observe and perform all of the obligations and agreements of the Borrower set out in the Borrower's Agreements. If any provision of the Borrower's Agreements is inconsistent or conflicts with any other provision of this mortgage or the mortgage terms, the provision in the Borrower's Agreements will prevail.

[16] The appellants argue that on a plain reading of item 5(b) of the Form B, interest was only payable until June 30, 2020. They contend that, in finding interest payable beyond that date, the judge improperly relied on the Loan Agreement which was not part of the registered mortgage document. They say this amounted to a legal error because s. 26(1) of the *Land Title Act*, R.S.B.C. 1996, c. 250, provides that a mortgage is limited to the estate, interest or claim created or evidenced by the registered instrument:

> **26** (1) A registered owner of a charge is deemed to be entitled to the estate, interest or claim created or evidenced by the instrument in respect of which the charge is registered, subject to the exceptions, registered charges and endorsements that appear on or are deemed to be incorporated in the register.

[17] The appellants also rely on s. 29(2) of the *Land Title Act*, which confirms that anyone taking a subsequent charge on land from a registered owner is not affected by unregistered interests. The appellants point to the "mirror principle" which provides that a person is entitled to search the title to a property to ascertain whether there are prior registrations that could affect the sufficiency of the security they propose to take in respect of a subsequent transaction involving the same land: *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2019 BCSC 238 at paras. 69–74.

[18] I would not accede to these arguments for the following reasons.

[19] First, item 5(b) of the mortgage cannot be interpreted in isolation. The mortgage must be read as a whole and in context: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47. Section 3 of the PSMT provides that interest starts to run on the date the principal is advanced "and accrues on the *principal amount* until the *borrower* has paid all the *mortgage money*" (italics in original; emphasis added in underlined). Although the wording of item 5(b) read alone could suggest a cut-off date for interest of June 30, 2020, that reading is inconsistent with the requirement in s. 3(3) of the PSMT of payment of interest until the principal is repaid in full.

[20] The appellants say s. 3 does not govern, relying on the principle of contractual interpretation that specific provisions like item 5(b) override general

provisions such as s. 3(3). However, there is no invariable rule that specific terms must "prevail" over general ones. This interpretive principle is relevant only where there are apparent inconsistencies between different terms of the contract and where the court is otherwise unable to reasonably give meaning to the terms in issue: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority,* [1993] 1 S.C.R. 12 at 23–24, 1993 CanLII 145. That is not the case here, where the two terms can be read together sensibly.

[21] I also agree with the judge that the appellants' interpretation is strained and inconsistent with commercial reality. It would indeed be "a very unusual commercial document for any lender to agree to stop charging any interest on a loan if the borrower defaulted in payment on the due date and did [not] fully repay the amounts owing on maturity": RFJ at para. 33. As AKA submits, such a term would incentivize a borrower to default and retain the use of a lender's money.

[22] Second, I do not agree that the judge relied on the unregistered Loan Agreement in interpreting the AKA mortgage. The judge observed that, in accordance with item 10 of the Form B, AKA supplemented the PSMT with an additional term (1.1), which referred to "Borrower's Agreements". She then described the Loan Agreement which provided for interest accruing on the principal amount of $1.1 million from the date of advance at 9.25% per annum to the expected repayment date of December 31, 2019 and 18% per annum thereafter: at para. 31. However, having thus referred to the Loan Agreement, she returned to the AKA mortgage, saying:

> [32] In my view, a reading of the whole of the AKA Mortgage, including the Form B and the PSMT, is sufficient to support that the parties intended that 9.25% per annum interest would apply to December 31, 2019 and that 18% per annum interest would accrue thereafter to date of payment. The meaning of Item 5(b) in the AKA Mortgage, as above, was simply to reflect the interest payable up to June 30, 2020, being the day before the "Last Payment Date" in Item 5(i) of the Form B. In my view, those provisions did not detract from the more general provisions in the PSMT which require repayment of the "mortgage money" with interest up to the date of payment in full, particularly under ss. 3(3) and 4 of the PSMT.
>
> [Emphasis added.]

[23] The judge's recognition that the Loan Agreement "even more clearly" confirmed the parties' intention that interest on any outstanding balance after June 30, 2020 would continue to accrue at 18% per annum, did not detract from her primary finding that the AKA mortgage alone made that clear. In her conclusion to this part of her judgment at para. 34, the sufficiency of the mortgage is again evident—she confirmed that she would conclude that interest continued to accrue at 18% after June 30, 2020 based on "either the Form B alone or alternatively, the Form B together with the Loan Agreement".

[24] In summary on this ground of appeal, in my view the judge did not err in her interpretation of the AKA mortgage.

2. Contravention of s. 8 of the *Interest Act*

[25] The appellants contend the judge erred in law by failing to consider that the interest rate provision in the Loan Agreement was unenforceable because it violates s. 8 of the *Interest Act*, R.S.C., 1985, c. I-15. Section 8(1) prohibits the charging of an interest rate on arrears if that rate results in a charge on the arrears higher than that imposed on principal not in arrears: *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18 at para. 24; *Bankers Mortgage Corporation v. Plaza 500 Hotels Ltd.,* 2017 BCCA 66 at para. 33. The appellants say the interest calculation in the Loan Agreement does just that, because interest calculated after maturity, default or judgment is calculated daily, rather than monthly as it is in relation to interest payable before maturity, default or judgment.

[26] This argument, which the appellants seek leave to raise for the first time on appeal, cannot succeed in any event. That is so because the corrections to the order *nisi* are not based on a daily interest calculation—they reflect interest compounded monthly, which does not offend s. 8(1) of the *Interest Act*.

3. Use of the slip rule

[27] The appellants argue the judge made two errors in deciding to correct the order *nisi* under R. 13-1(17): first, using it to change a substantive term of the order, and second, failing to recognize the prejudice to the appellants in changing terms of

the order they had relied on for more than three years. In my respectful view neither error is made out.

[28] As to the substantive nature of the order, the appellants argue that correction of the amount of principal and interest due is a substantive change that exceeds the authority to amend an order under the slip rule. They rely on *Chand v. Insurance Corporation of British Columbia*, 2009 BCCA 559 in which this Court said:

> [44] There are limits as to what can be corrected under Rule 41(24). McLachlin and Taylor, *British Columbia Practice*, 3rd ed. by Frederick Irvine (Markham, Ont.: Butterworths, 2006), summarize these limits at 41-38 to 39:
>
> > Notwithstanding that R. 41(24) is much wider than the old "slip rule", it cannot be used to amend or alter a substantive finding even though that finding might be demonstrated to be in error ... R. 41(24) does not permit changing a final order where a judge has second thoughts about his order, or to permit the parties to provide fresh details on matters already before the court …. Its proper use is (1) to rectify a slip in drawing the order which, if unamended, would produce a result contrary to the intention of the court or of the parties… or (2) to provide for a matter which should have been but was not adjudicated upon…. [citations omitted].
>
> [Emphasis added.]

[29] The appellants submit that the very purpose of an order *nisi* is to declare the mortgage to be in default, and to fix the amount the mortgagor must pay to redeem the mortgage, both principal and interest. Wing Wah says those terms are substantive findings that are incapable of amendment under the slip rule.

[30] I would not accede to this argument. The amendments sought by AKA did not alter the substantive finding that the mortgage was in default, and that it could be redeemed upon payment of principal and interest due to the date of payment. Rather, AKA sought to correct the sums of principal and interest payable because they had been based on inaccurate calculations. In my view, that is precisely the kind of error the slip rule is intended to address:

> (17) The court may at any time correct a clerical mistake in an order or an error arising in an order from an accidental slip or omission, or may amend an order to provide for any matter that should have been but was not adjudicated on.

[31] In *Canada Trustco Mortgage Company v. Rao,* 2002 BCSC 1052, Garson J. (later J.A.) granted a very similar application to correct an order *nisi* originating from an uncontested hearing in which counsel inadvertently claimed an incorrect amount in the order *nisi*: at para. 2. Garson J. described the issue before her this way:

> [6] Thus the materials placed before the court at the foreclosure hearing were the original petition and affidavit with the correct mortgage balance, and a memorandum document titled "Relief Sought at Hearing" which incorrectly stated that the redemption amount was $102,066.66.
>
> [7] At the foreclosure hearing counsel for the mortgagor, Rao appeared. Rao's counsel did not notice the error in the amount of the judgment requested. Mr. Rao now argues that the Honourable Mr. Justice Barrow gave the petitioner the relief it asked for and that the error of the petitioner is not the kind of error to which [the slip rule] applies. He says that there is no jurisdiction for this court to correct the error.

[32] The appellants say *Rao* is distinguishable from the case before us because in *Rao*, the applicant identified the correct amount in the petition and supporting affidavit. I would not agree. The error may be more evident in such a case, but both *Rao* and the present case involve applicants asking the court to make an order using figures that were later determined to be in error. As Southin J.A. observed in *Kenmar Inns Ltd. v. Letroy* (1994), 1994 CanLII 2387 at para. 50, 100 B.C.L.R. (2d) 323 (C.A.):

> It would, in truth, be a poor legal system in which a litigant loses [that] which [is] rightfully his … because his counsel who had, so to speak, the last clear chance, failed when he drew up the order to take it.

[33] A similar view was expressed by this Court in *Chand,* supporting the use of the court's inherent jurisdiction to correct such a mistake saying:

> [46] In addition to [the slip rule], the court has, through inherent jurisdiction, "the power to amend the entered order on the basis that it contained an error in expressing the manifest intention of the Court" (*Buschau v. Rogers Communications Inc.*, 2004 BCCA 142, 237 D.L.R. (4th) 260 at para. 26, leave to appeal ref'd [2004] S.C.C.A. No. 221). In the absence of evidence of irrevocable steps in reliance or undue prejudice, the court should correct the order (para. 27). It is not in the interests of justice for an order to stand that does not reflect the parties' true entitlements (para. 27).
>
> [Emphasis added.]

[34] I turn now to Wing Wah's contention that the judge failed to recognize the prejudicial effect of correcting the order, particularly given how long it had been in place. The appellants submit there was clear evidence they had relied on the original terms of the AKA order *nisi* and were prejudiced by the corrections.

[35] First, the appellants say they delayed in commencing their own foreclosure proceeding because they were relying on the accrual of interest at 9.25% as set out in the order *nisi*. They point out that if the 18% rate is substituted, the amount owing on the mortgage increases by more than $500,000 in the three and one-half year period between the granting of the order *nisi* and AKA's application to amend. The appellants submit that if they had known of the higher interest rate accruing under the AKA mortgage, they would have taken steps earlier to protect the equity of redemption available to them so as to preserve, as much as possible, their ability to recover under the Wing Wah mortgage: RFJ at para. 74.

[36] I agree with the judge's conclusion that the appellants should have known that interest was accruing at a rate of 18%. A second mortgagee is bound by the terms of a prior mortgage. In the present case the additional term referred to in the Form B clearly directed any person dealing with the property to any relevant "Borrower's Agreements" between AKA and Mr. Sathasivam. It follows that both the terms of the AKA mortgage and the incorporated terms of the Loan Agreement were known or should have been known to Wing Wah when it advanced its loan to Mr. Sathasivam: RFJ at para. 67.

[37] Next, Wing Wah says that if it had known AKA was seeking interest after June 30, 2020, it would have attended the application for the order *nisi* to challenge that claim. However, given that the mortgage provides for 18% interest after June 30, 2020, they would not have succeeded in any event, and no prejudice flows from their non-attendance.

[38] Whether the appellants were prejudiced by the amendments to the order *nisi* is a finding of fact. The appellants have not established that the judge made a palpable and overriding error in her finding that the appellants were not prejudiced by the amendments.

4. Finding that the summary accounting provision in the order *nisi* permitted amendment of the principal and interest amounts due

[39] The appellants contend the judge erred in law by finding that the court had jurisdiction under the summary accounting provision to vary the amount of principal and interest set out in the order *nisi*. Having found it was open to the judge to correct the order *nisi* under the slip rule, it is not necessary to decide this question and I decline to do so.

[40] In conclusion, I see no basis upon which this Court could interfere with the judge's exercise of her discretion to correct the calculations in the order *nisi* pursuant to the slip rule, despite the passage of three and one-half years from the date that order was made. Nor do I see any basis upon which this Court could interfere with her conclusion that Wing Wah's petition should be dismissed given that it sought declarations inconsistent with the terms of the mortgage.

Disposition

[41] I would dismiss both appeals.

"The Honourable Madam Justice Fenlon"

I AGREE:

The Honourable Justice MacKenzie

I AGREE:

"The Honourable Mr. Justice Willcock"