

Court of King's Bench of Alberta

Citation: Stayura Well Services Ltd v Vision Credit Union Ltd, 2023 ABKB 716

Date: 20231214
Docket: 2103 11648
Registry: Edmonton

Between:

Stayura Well Services Ltd

Applicant

- and -

Vision Credit Union Ltd

Respondent

- and -

Gerald Stayura and Judy Stayura

Cross Applicants

**Memorandum of Decision
of
Applications Judge W.S. Schlosser**

[1] This is an application under s 74(2) of the *Law of Property Act*, RSA 2000, c L-7 on striking, but otherwise relatively straightforward facts.

[2] Sub-Sections 74(2) and (3) provide:

74(2) When a mortgagor becomes entitled to pay off the mortgage money, and a dispute arises between the mortgagee or other person entitled to receive the mortgage money as to the amount payable in satisfaction of the mortgage, the Court may, on the application of either party and on the giving of notice to any persons that the Court may direct, after hearing evidence in any manner that it may direct, by order fix the amount payable as at the date to be mentioned in the order and direct the payment of that amount into a bank, together with any interest accrued

on it since the date so fixed to the date of payment, to the credit of the mortgagee or other person entitled to it and, on the payment into a bank, the interest on the mortgage ceases to run or accrue.

(3) The Registrar shall, on presentation of the order and of the receipt of the manager or agent of the bank for the amount of the mortgage money and interest, make on the certificate of title in the register a memorandum discharging the mortgage, and stating the serial number of the order and the date on which the serial number was assigned.

[3] Both Stayura Well Services Ltd (SWS) and Gerald and Judy Stayura (Gerald and Judy) seek to have mortgages they provided as security for a credit facility granted by Vision Credit Union (Vision) to SWS, discharged.

Cases Cited

By the Parties

Stayura Well Services Ltd v Vision Credit Union Ltd, 2022 ABQB 490; *Law of Property Act*, RSA 2000, c L-7 (as amended) s 38(3) and (4), and 74(2); *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 (CanLII), [2014] 2 SCR 633; *Bhasin v Hrynew*, 2014 SCC 71 (CanLII), [2014] 3 SCR 494; *Bank of Montreal v Kundi*, 2019 ABQB 126; *Credit Union Act*, RSA 2000, c C-32; *Alberta Treasury Branches v 1401057 Alberta Ltd. (Katch 22)*, 2013 ABQB 748; *Peddle v Toller*, 162 ER 1160; *Balme v Paver*, 37 ER 866; *CIBC Mortgage Corp v Duguay*, [1991] B.C.J. No. 450; *Fernwood Neighbourhood Resource Group Society v Kimpton*, 2009 BCSC 867; *Coast-to-Coast Industrial Development Co v 1657483 Ontario Inc*, 2010 ONSC 2011; *Falconbridge on Mortgages*, Fifth Edition (Thomson Reuters, 2022 looseleaf), pages 34-4; *Suri Holdings Inc v Jung*, 2022 ABKB 714; *Interpretation Act*, RSA 2000, c I-8; *Court of Queen's Bench Act*, RSA 2000, c C-31; *Alberta Rules of Court*, Alta Reg 124/2010; *McAllister v Calgary (City)*, 2021 ABCA 25; *Vogel v Solid Gem Enterprises Ltd*, 2010 ABQB 411; *Brennenstuhl Estate v Trynchy*, 2007 ABQB 703; *Mayhew v Adams*, [1930] 3 WWR 539; *3072453 Nova Scotia Co v 1623242 Ontario Inc*, 2015 ONSC 2105; *Ontario Mortgages Act*, RSO 1990, c M.40, s. 12; *NJS Midtown Portfolio Inc v CMLS Financial Ltd*, 2020 ONSC 3973; *Fernicola (In Trust) v Creview Developments Inc*, 2008 CarswellOnt 6088; *Harbour Edge v CanSport*, 2020 NSSC 383; *Real Property Act*, RSNS 1989, c 385, s.28; *Meadow Ridge Estates Inc v Moskowitz Capital Mortgages Fund II Inc*, 2016 NSSC 261; *C M Callow Inc v Zollinger*, 2020 SCC 45; *30724453 Nova Scotia Company v 1623242 Ontario Inc*, 2015 ONSC 2105; *Meadow Ridge Estates Inc v Moskowitz Capital Mortgage Fund II Inc*, 2016 NSSC 261; *Barkwell v McDonald*, 2023 ABCA 87.

By the Court

Hierath v Shock, 2020 ABQB 35.

Facts

[4] Gerald and Judy guaranteed a loan given by Vision to SWS.

[5] The loan was for the principal sum of \$800,000.00. It matured June 1, 2021. The credit facility also provided for an authorized overdraft of the SWS checking account to \$100,000.00.

[6] In addition to the unlimited guarantee provided by Gerald and Judy, the loan and credit facility was supported by a collateral mortgage over two parcels of land owned by SWS. The guarantee was supported by a collateral mortgage given by Gerald and Judy over two parcels of land owned by them.

[7] The guarantee permitted Gerald and Judy to terminate their obligation under the guarantee on 90 days notice. Notice was given May 1, 2020 and became effective in July, 2020.

[8] The overdraft agreement required a 'debt service ratio of 1.25: 1'. In October 2019 Vision took the position that SWS was offside the debt service ratio. SWS disagreed. The Authorised Overdraft Agreement (AOD) was terminated July 21, 2020. The account at that time had a positive balance.

[9] On September 16, 2020 SWS sued Vision for wrongfully terminating the AOD facility.

[10] SWS attempted to obtain a payout statement for its collateral mortgage but Vision purported to charge some of the legal fees that it had expended in the defence of the AOD action to the payout and purported to charge for the payout statement itself, in contravention of s 38(3) of the *Law of Property Act* which reads:

38(3) A mortgagor or purchaser may, not more than twice a year by notice in writing to the mortgagee or vendor, require the mortgagee or vendor, as the case may be, to furnish, to the mortgagor or purchaser or a person designated by the mortgagor or purchaser, without charging any fee or expense or accepting any amount for so doing, a statement in writing setting out with respect to the mortgage or agreement for sale

(a) the amount of principal, interest and any other charges owing,
and

(b) the balance in the tax account.

(4) The mortgagee or vendor shall answer a notice given under subsection (2) or (3) within 30 days after the mortgagee or vendor receives it and if, without reasonable excuse, the mortgagee or vendor fails to do so or the mortgagee's or vendor's answer is incomplete or incorrect, any rights that the mortgagee or vendor may have for the enforcement of the mortgage or for the cancellation or specific performance of the agreement for sale are suspended until the mortgagee or vendor has complied with the notice.

[11] SWS, Gerald, and Judy attempted to have the mortgage security released: Gerald and Judy for the mortgage supporting their guarantee; SWS for the mortgage supporting the loan. They attempted to do this by tendering the amount they understood to be owing under the credit facility.

[12] The payment attempts are as follows (from Gerald and Judy's Brief - references omitted):

15. On April 15, 2021, counsel for SWS, Mr. Jeremy Hockin, K.C., of Parlee McLaws LLP received written correspondence from counsel for Vision advising:

(a) the current balance of the Term Loan was \$664,886.07, consisting of \$643,664.09 of principal and \$1,221.98 of interest, with interest accruing thereafter at the rate of \$87.29 per day;

(b) the balance provided was not a "payout statement", as even if the current balance was tendered, Vision would refuse to provide a discharge of the SWS Mortgage and G&J Mortgage as Vision had taken the position that legal costs incurred by Vision in defending the AOD Action are secured by the SWS Mortgage and G&J Mortgage, including "potential" legal costs not yet incurred. The two mortgages would not be discharged until the AOD Action was discontinued and SWS and the Cross-Applicants provide releases to Vision.

16. On May 31, 2021, counsel for SWS on behalf of SWS and the Cross-Applicants tendered full payment to Vision for amounts owing under the SWS Mortgage and the G&J Mortgage.

17. On June 1, 2021, counsel for Vision advised that, notwithstanding tendering of payment of the amount owing under the mortgages, discharges of the mortgages would not be provided until the AOD Action is discontinued, costs paid, and releases executed in favour of Vision. It was further suggested that Vision would apply the funds to the Term Loan, which would reduce the Term Loan to "zero", if the funds were resented without conditions.

And:

21. On December 3, 2021, counsel for SWS, on behalf of SWS, tendered payment in the amount of \$619,082.82 (the "December 3, 2021 Payment") on the express trust condition that it would be applied to the amount outstanding under both the SWS Mortgage and the G&J Mortgage.

22. The December 3, 2021 Payment was calculated as follows:

(a) \$661,348.37 being the amount stated to be owing under the Term Loan on SWS's client member statement of October, 2021;

(b) Less the "Principal Disbursements" added to the Term Loan on May 26, 2021, September 24, 2021, and October 25, 2021 in the amounts of \$19,297.60, \$18,595.49, and \$3,888.73;

(c) Less interest charged to October 26, 2021 on the noted "Principal Disbursements" in the amount of \$483.73.

23. SWS had also made payments of principal and accrued interest on November 1, 2021 and December 1, 2021 with the principal portions being \$4,220.16 and \$4,314.35 respectively.

24. The December 3, 2021 Payment was tendered without the condition of Vision providing discharges, but under protest by SWS and the Cross-Applicants to the extent that Vision applied the payment to any of its legal fees added to the Term Loan.

[13] The reason for Vision's refusal is that the Vision mortgage provides:

You will immediately pay all our expenses of enforcing or protecting our security or any of our rights under the Mortgage or any Agreements. Our expenses include...

our legal fees on a solicitor and own client indemnity basis and all other costs *related to protecting or enforcing our interest under the Mortgage. These expenses will form part of the obligation secured and will bear interest as provided in the Agreements...*

(emphasis added)

[14] Vision takes the position that their legal fees for the defence of the AOD action are secured by the mortgage. Legal fees now exceed \$209,000.00.

Analysis

[15] This case bears more than a passing resemblance to *Hierath v Shock* (per Robertson, M). In that case, the learned Master observed:

[32] The interpretation of contracts is to be done so as to determine the intent of the parties and the scope of their understanding, giving the words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53, 2014 CSC 53, at para. 47.

[16] Vision's position requires finding that the intent and meaning of the mortgage provision just quoted, is that the lender is entitled to retain the borrower's security past maturity and, despite full payment of the indebtedness plus interest, retain it as security for defence costs in an action by the borrower alleging wrongdoing on the part of the lender.

[17] Despite Vision's very able argument, this interpretation is untenable. The words set out above cannot reasonably bear that meaning. Vision's position also violates the *Bhasin* principle of good faith and honest performance (at paras 33, 60, 63, 65 and 66) which is of particular importance and applicability in contracts of adhesion, such as this one (see also *Bank of Montreal v Kundi* at para 98).

[18] Accordingly, it is declared that:

- 1) Vision has no proper claim for legal fees in these circumstances, such that Vision can refuse to discharge the mortgage security unless and until their legal fees are paid;
- 2) Vision is to provide a payout statement, without any charge for legal fees, as at June 1, 2021; accounting for all subsequent payments of principal and interest (of which there appear to be two) and credit these in full against the amounts owing as at that date;
- 3) Subject to what follows, and on payment of this amount, Vision is to discharge the SWS mortgage security forthwith; and
- 4) Vision is to discharge forthwith the mortgage security given by Gerald and Judy in support of their now expired guarantee.

Costs

[19] The applicants seek full indemnity costs on the principle of *quod circumiret circumveniat*.

[20] Litigation costs are always in the discretion of the Court. Costs on a solicitor client scale, however, are typically awarded for litigation misconduct, not for playing a weak hand.

[21] Costs on an elevated scale are warranted here. In this regard, it is appropriate to exercise one of the options described in the *McAllister* decision.

[22] The applicants are awarded two sets of costs; one for each applicant, at 40% of indemnity costs to be assessed. The costs may be set off against the mortgage balance.

Heard on the 30th day of November, 2023.

Dated at the City of Edmonton, Alberta this 14th day of December, 2023.

W.S. Schlosser
A.J.C.K.B.A.

Appearances:

Jeremy H. Hockin, KC
Parlee McLaws LLP
for the Applicant

Matt T. Feehan
Ogilvie LLP
for the Respondents

Spencer Norris
Miller Thomson LLP
for the Cross Applicants