

Re 459745 Ontario Ltd. and Wideview Holdings Ltd. et al.

59 O.R. (2d) 361
[1987] O.J. No. 359
Also reported at 37 D.L.R. (4th) 765

**ONTARIO
HIGH COURT OF JUSTICE
REID J.**

15TH APRIL 1987

Mortgages — Interest — Penalty — Mortgage requiring mortgagor to pay three months' interest on default — Requirement in nature of bonus or penalty and void — Interest Act, R.S.C. 1970, c. I-18, s. 8.

The applicant mortgaged certain lands to the respondents. When the mortgage matured, the applicant did not repay it, but sought refinancing. The respondents then delivered a notice of sale, claiming three months' interest payable on default in accordance with the term in the mortgage. On consent, the amount due under the notice, including the three months' interest, was paid into court and the sale proceedings stayed pending the outcome of the application for an order declaring that the three months' interest claim was void and for payment out of the three months' interest.

Held, the application should be granted.

The clause requiring three months' interest on default amounted to a bonus or penalty, which had the effect of increasing the interest rate beyond that stipulated by the mortgage, contrary to s. 8 of the Interest Act, R.S.C. 1970, c. I-18.

Adams Properties Ltd. v. Sherwood Estates Ltd. et al. (1976), 144 D.L.R. (3d) 562, folld

Gullett v. Income Trust Co. (1985), 37 R.P.R. 123, not folld

Statutes referred to

Interest Act, R.S.C. 1970, c. I-18, s. 8

APPLICATION for an order that interest paid into court for default pursuant to a notice of sale under a mortgage was not due and for payment out of the moneys.

Larry J. Levine, Q.C., for applicant.

Maxwell M. Steidman, Q.C., for respondents.

REID J.— Applicant seeks an order that the sum of \$11,843.75 representing three months' interest payable on default as described in the notice of sale under mortgage delivered by respondents is not due and payable as offending the Interest Act, R.S.C. 1970, c. I-18, s. 8. It seeks also an order directing the payment out of that sum (plus interest) into court by order of Boland J. made on consent in this proceeding on June 26, 1986.

Applicant mortgaged to respondent Wideview Holdings Limited certain lands and premises. The mortgage secured the sum of \$379,000 and charged interest on that sum at 12 1/2% per annum. Subsequently, the mortgage was assigned to the respondent Edward Reiter as trustee. The mortgage matured on April 14, 1986. Applicant did not pay off the mortgage. It was attempting to arrange refinancing.

Respondents delivered a notice of sale to applicant on May 22, 1986. The notice included a claim for \$11,843.75 for "three months' interest payable on default".

Boland J.'s order allowed applicant to pay the principal and interest due under the mortgage and required respondents to deliver a discharge. It ordered the sale proceedings stayed, to await the outcome of the application.

Section 8(1) of the Interest Act reads:

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

The clause in the mortgage (the clause) on which the claim for the disputed amount rests is:

AND, the said Mortgagor covenants with the Mortgagee that in the event of non-payment of the said principal moneys at the time or times above provided, he shall not require the Mortgagee to accept payment of said principal moneys without first giving three months' interest in advance on the said principal moneys.

The notice read:

AND TAKE NOTICE that this mortgage matured on the 14th day of April, 1986.

AND WE hereby give you notice that the amount now due on the mortgage for principal money, interest, taxes and costs, respectively, are made up as follows:

for principal owing as of April 14, 1986 \$379,000.00
for interest from April 14, 1986 at 12 1/2% per annum to date
hereof 5,061.81
for interest equal to three month's interest payable on default 11,843.75
RECEIVED on account cheque dated the 14th of May, 1986 (3,947.92)
for costs on solicitor and client basis 400.00

TOTAL ... \$392,357.64

together with interest on the said principal and interest at the rate of 12 1/2% per annum from the date hereof to the date of payment or sale.

AND unless the said sums are paid on or before the 2nd day of July, 1986 we shall sell the property covered by the said mortgage under the provisions contained in it.

The exaction of the \$11,843.75 would have the effect of raising the interest rate substantially above the 12.5% rate charged on principal not in arrears. On its face the clause is unenforceable. Any question whether s. 8 applies when default occurs on maturity was settled by *Adams Properties Ltd. v. Sherwood Estates Ltd. et al.* (1976), 144 D.L.R. (3d) 562 (B.C.C.A.). That case held that a requirement in a mortgage that "a bonus equal to three months interest in advance" be paid where there had been default or late payment was unenforceable. While the term "bonus" does not appear in the clause before me, I can see no significance in its absence. The requirement of three months' interest amounts in itself to a bonus.

No authority was cited to me by Mr. Steidman which would in my opinion justify any other conclusion than that the clause is unenforceable. In *Gullett v. Income Trust Co.* (1985), 37 R.P.R. 123 (Ont. C.A.), the effect of s. 8 was not considered. The decision is therefore neither relevant nor binding.

The application is granted. The clause is declared unenforceable. The money paid into court together with accrued interest shall be paid out to applicant upon applicant's filing with the registrar a certificate of the accountant showing the amount standing in court.

Costs to applicant.

Application granted.