

FEES, COSTS AND PENALTIES

Court denies mortgagee's claim for unproven fees and charges related to overdue mortgage BY **JAMES COOK**

Mortgagees suing to recover amounts owing under a mortgage in default should not expect a court to rubber stamp the amounts claimed for fees, costs and penalties that are alleged to be owing on top of the principal and agreed-upon interest.

In *BMMB Investments Limited v. Naimian*, 2020 ONSC 7999 (CanLII), Justice F.L. Myers of the Ontario Superior Court of Justice took the opportunity in a summary judgment decision

brought by a mortgagee to assess the evidence (or lack thereof) filed in support of the fees, costs and penalties claimed.

The facts of the case were straightforward. The defendant had entered into a mortgage with the plaintiff mortgagee for a principal amount of \$1.6 million. The defendant defaulted and the mortgagee brought a motion for summary judgment, which was heard in December 2020. There was no serious issue raised as to the defendant's liability for the mortgage debt and interest at the



rate set out in the mortgage documents. The legal fees claimed by the mortgagee's lawyer were found to be reasonable, due and owing under the mortgage.

However, Justice Myers found several issues with regard to the fees, costs and penalties claimed by the mortgagee.

Firstly, the mortgagee claimed reimbursement from the defendant for a number of disbursements that were allegedly incurred in enforcing the mortgage, including "property maintenance and management" fees, two appraisals, a corporate search, PPSA renewal and HST on fees.

However, none of the alleged disbursements were supported by invoices filed by the mortgagee, and there was no basis to assess whether the costs were incurred in the amounts claimed, let alone whether the alleged expenditures were reasonable. Justice Myers was concerned about the lack of evidence in such circumstances and reasoned as follows:

I have no basis to form any conclusion about the expenditures for which reimbursement is claimed in this case. Claims for costs reimbursement in mortgage enforcement are susceptible of abuse. Service providers who know that their lender clients will pass on their invoices to their borrowers may be incentivized to charge above-market rates.

It does no injustice to any plaintiff to require it to adduce evidence to support disbursements for which it claims reimbursement.

As no evidence is adduced by the plaintiff to support any of the costs for which it claims reimbursement, none is allowed.

Secondly, the mortgagee claimed fees for "stopped payment processing," "default processing," "discharge fees" and "late fees." Justice Myers outlined several concerns with the fees claimed:

- As a matter of contract, there should be evidence of the occurrence of the event for which the contract allows a fee to be charged.
- Fees charged may be unrelated to a genuine pre-estimate of damages to be incurred by the lender on the occurrence of the specified event, in which case, the fee may be an unenforceable "penalty" at common law.
- Excessive fees can mask increased interest charged on a mortgage default in violation of the prohibition in section 8 of the Interest Act, which provides that no fine, penalty or rate of interest shall be required on any arrears of principal or interest secured by mortgage that has the effect of increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears.

Similar to the issues with the disbursements claimed, Justice Myers was concerned with the lack of evidence filed by the mortgagee in support of the fees. While there may often be good business reasons for costs to be estimated in advance and fixed in a contract, the fees and charges levied

on a mortgage default must be genuine pre-estimates of costs actually incurred by a lender rather than penalties. Otherwise such charges may violate section 8(1) of the Interest Act, which provides as follows:

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.

Courts will generally disallow charges that violate this section: P.A.R.C.E.L. Inc. v. Acquaviva, 2015 ONCA 331 (CanLII) at para 96.

In the motion at hand, the fees claimed by the mortgagee were disallowed due to the absence of evidence that the fees were either a genuine pre-estimate of damages suffered by the lender or that the charges reflected real costs legitimately incurred by the mortgagee for the recovery of the debt, in the form of actual administrative costs or otherwise.

The decision reflects an overriding concern with protecting borrowers from being faced with unproven claims for fees and charges allegedly owing under a mortgage in default. Justice Myers described the balancing of interests between lenders and borrowers that ought to be considered in such cases:

An approach that regards mortgage fees



with suspicion works no hardship on lenders. The common law has done so for centuries to protect the weaker party from fees that over-compensate the stronger party on a claim of breach of contract. Should it not be assumed that in setting its interest rate and other terms under the mortgage, the lender has included in its calculus its cost of doing business? A lender's ability to hive off from the daily work of its account clerks the specific increased burden caused by an individual mortgagor's default is a dubious proposition at best. I can understand that a lender who wishes to compete may want to reduce its interest rate by excluding some of its extraordinary costs and then charge those costs specifically only to those borrowers whose defaults cause those costs to be incurred. That is perfectly legitimate. But in that case, it behooves the lender to be able to prove with evidence that it incurred the costs that it seeks to charge to the individual borrowers. Absent proof of specific costs being incurred, the costs are rightly subsumed in its ordinary costs of doing business.

Lastly, Justice Myers assessed the claim for a charge of three months' interest owing (which amounted to \$41,000), which the mortgagee attempted to levy because payment of the mortgage was not made on the due date.

Section 17 of the Ontario Mortgages Act expressly allows a borrower who

is in default to repay the principal of the mortgage on giving three months' notice to the lender or paying three months' interest in lieu of notice, despite any terms of a mortgage that may provide otherwise.

had any relationship to any costs incurred by the mortgagee.

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Mortgagees seeking to collect on an overdue mortgage would do well to carefully review the decision and determine which fees, costs and penalties they wish to claim, and to ensure that the requisite evidence is filed in support.

The purpose of this term is to allow a borrower who is in default to pay off the mortgage and provide a reasonable period of time for the lender to look for alternative investments. However, the three-month repayment right does not mean that a mortgagee is entitled to charge a borrower an extra three months' interest when collecting on an overdue mortgage. In such circumstances, imposing the charge amounts to a disguised form of penalty violation of section 8 of the Interest Act. Justice Myers denied the three months' interest charge on the basis that there was no evidence that it

which fees, costs and penalties they wish to claim, and to ensure that the requisite evidence is filed in support. In some cases, it may not be worth incurring the expense of attempting to prove each and every amount claimed. ■

James Cook is a partner at Gardiner Roberts and has been with the firm since 2002. As a litigator in the firm's Dispute Resolution Group, he has experience in a broad range of commercial, real estate and professional liability litigation. Information: grllp.com