SUPREME COURT OF NOVA SCOTIA
Citation: *Ferguson v. Amiro*, 2011 NSSC 416

Date: 20111117
Docket: Hfx. No. 342741
Registry: Halifax

Between:

Gregory Ferguson

Plaintiff

v.

Shane Andrew Amiro and Nadine Arzina Amiro

Defendants

Judge: The Honourable Justice Pierre L. Muise

Motion Heard: September 8, 2011

Final Written Submissions Received: September 27, 2011

Counsel: Alan C. Fownes, counsel for the Plaintiff
Gregory Barro, counsel for the Defendants

A. INTRODUCTION

[1] On March 6, 2009, Nadine Amiro and Shane Amiro entered into a second mortgage on their matrimonial home with Gregory Ferguson. The Mortgage was for a 12 month term. The Amiros made all payments required under the Mortgage during that 12 month term. On March 6, 2010, they were advised by Ferguson that they could continue to make the same monthly payments that they had been making, which were interest-only payments. They continued to make those same monthly payments until August of 2010. At that time, they were advised that there would be a $5,000.00 renewal fee for continuing the Mortgage; and, they stopped making the monthly payments.

[2] In November of 2010, the Amiros received a discharge statement dated October 21, 2010. They were of the view that a number of the amounts charged in that statement were not properly chargeable. They hired a lawyer to discuss the matter with Ferguson's lawyer. On January 18, 2011, Ferguson commenced an action claiming payment of outstanding amounts, interest, charges and expenses, and an order for foreclosure, sale and possession, in default of payment.

[3] The Amiros filed the within motion for an order pursuant to the ***Money-lenders Act***, R.S.N.S. 1989, c. 289, declaring that certain amounts claimed by Ferguson were not provided for under the Mortgage and/or should be disallowed as being excessive. They have also requested an order, pursuant to Section 42 of the ***Judicature Act***, R.S.N.S. 1989, c. 240, discontinuing the foreclosure action, conditional upon payment of amounts due under the mortgage.

[4] The parties disagree on whether Section 4 of the ***Money-lenders Act*** allows the Court to grant relief where the charges for the loan, together with the interest, are less than the criminal interest rate (i.e. a rate exceeding 60%), but are found to be excessive in the circumstances. I must determine the proper interpretation of Section 4 of the ***Money-lenders Act***.

[5] I must also determine whether the foreclosure action herein should be discontinued under section 42 of the ***Judicature Act***.

[6] Irrespective of the conclusions reached in relation to these first two points in issue, both parties ask that a determination be made in relation to which, if any, of

the charges contested by the Amiros are properly chargeable. Given the parties' consent, I will make that determination.

B. INTERPRETATION OF SECTION 4 OF *MONEY-LENDERS ACT*

[7] Section 4 of the ***Money-lenders Act*** states:

> "Where in any action or proceeding in the Supreme Court or in the county court in respect of any loan from a money-lender, the court finds **that** the amount of the charges for commission, expenses, inquiries, fines, bonus and renewals in respect of which the Legislature has power in this behalf, and any other such charges, together with the amount of interest, exceeds the amount of interest calculated at the rate permitted, or **that** any conveyancing in connection therewith was unnecessary, or the charges therefor excessive, or **that** insurance other than that reasonably proper for security for the loan was required by the money-lender, the court shall have jurisdiction and power to
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> (a) reopen the transaction and take an account between the creditor and the debtor;
>
> (b) notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken and relieve the debtor from payment of either the whole or any part of any sum in excess of the sum adjudged by the court to be due for principal and interest;
>
> (c) order the creditor to repay any such excess if the same has been paid or allowed on account by the debtor; or

> (d) except in respect of interest, set aside, either wholly or in part, or revise or alter any security given or agreement made in respect of the loan and, if the creditor has parted with the security, order him to indemnify the debtor."
> [Emphasis added.]

[8] Section 2 (d) defines "rate permitted" as meaning "a rate that is a legal and valid rate in respect of the loan and is not in contravention of any Act heretofore or hereafter enacted by the Parliament of Canada". Pursuant to Section 347 of the ***Criminal Code***, R.S.C. 1985, c. C-46, an effective annual rate exceeding 60% is illegal.

[9] Ferguson is of the view that the words "or that any conveyancing in connection therewith was unnecessary, or the charges therefor excessive" should be read together as describing one category of pre-requisites to relief. The Amiros take the position that: the words "or the charges therefor excessive" describe a separate category; and, if the Court finds that the charges "in respect of any loan from a money-lender" are excessive, it is open to the Court to grant relief.

[10] In my view, the words "in respect of any loan from a money-lender" are included to specify that the type of action or proceeding to which Section 4 applies is one "in respect of any loan from a money-lender".

[11] The use of the word “that”, at the beginning of what can reasonably be interpreted as separate categories, indicates the word “that” was used to signal the start of each new category of pre-requisites to relief.

[12] The fact that the word “that” is not included before the words “the charges therefor excessive” indicates that it is not meant to stand alone as its own separate category. This interpretation is supported by the following passage from R. Sullivan, ***Driedger on the Construction of Statutes*, *Third Edition*** (Toronto and Vancouver: Butterworths Canada Ltd., 1994), at page 170:

> “One of the most striking features of legislative drafting is its avoidance of stylistic variation. As much as possible, drafters strive for uniform and consistent expression. Once a pattern of words has been devised to express a particular purpose or meaning, the pattern is used for this purpose or meaning each time the occasion arises. This practice of consistent expression creates expectations in the reader that may form the basis for an implied exclusion argument.”

[13] Further, if the words “the charges therefor excessive” were meant to refer to the overall charges for the loan, it would have made more sense to include them at the end of, or immediately after, the first category dealing with the loan charges and interest.

[14] In my view, the drafters of Section 4 have inserted the word "that" to signal the beginning of each of the three categories of prerequisites to relief. The first category deals with the loan charges, together with interest. The prerequisite to relief is made out if the combined loan charges, together with interest, exceed the "rate permitted", which is the criminal interest rate of 60%. The second category deals with conveyancing. The prerequisite to relief is made out if the conveyancing was unnecessary or the charges for it were excessive. The third category allows relief where the money-lender requires insurance beyond what is reasonably proper for security for the loan.

[15] The Court in ***Olympic Enterprises Ltd. v. Dover Financial Corp***., 1995 CarswellNS 2008 (N.S.S.C.), at paragraphs 8 and 9, compared what was required for relief under the ***Unconscionable Transactions Relief Act***, R.S.N.S. 1989, c. 481, with that under the ***Money-lenders Act***, as follows:

> "The issue under the *Unconscionable Transactions Relief Act* is whether or not the transaction is unconscionable. Under the *Money-lenders Act*, the issue is whether the interest rates charged are in excess of rates permitted under any *Act* of Parliament, in this case the *Criminal Code*. Plaintiff's counsel argue that the interest rate charged under the plaintiff's mortgage exceeds the rate permitted under the *Criminal Code* and, therefore, the plaintiff has breached the provisions of the *Money-lenders Act*.

> As can be seen from the provisions of the *Unconscionable Transactions Relief Act* and the *Money-lenders Act*, the relief under both *Act*s is similar. Under the former, the plaintiff must show that the attacked transaction is unconscionable while under the later the plaintiff must simply prove that the interest rate charged violated a federal *Act,* in this case the *Criminal Code*."

[16] The Court in ***Olympic Enterprises*** found that the charges and interest constituted a criminal interest rate. Therefore, it did not have to determine whether the charges were excessive, nor whether the transaction was unconscionable. However, in comparing the two ***Acts***, the Court did not mention that excessive loan charges, short of amounting to a criminal interest rate, would also constitute a prerequisite to relief. The failure to mention that, though unnecessary given the factual finding indicated later in the decision, is some indication that the Court in ***Olympic Enterprises*** interpreted section 4 of the ***Money-lenders Act*** as requiring the loan charges, with interest, to amount to a criminal interest rate before relief could be granted.

[17] This separation of charges related to conveyancing, from other charges relating to the loan, is also consistent with the approach in the now repealed Federal ***Money-lenders Act***, R.S.C. 1906, c. 122 (repealed by S.C. 1956, c. 46, s. 8). Section 7 of that Legislation stated, in part:

> "In any suit, action or other proceeding concerning a loan of money by a money-lender, the principal of which was originally under five hundred dollars, wherein it is alleged that the amount of interest paid or claimed exceeds the rate of 12% per annum, including the charges for discount, commission, expenses, inquiries, fines, bonus, renewals, or any other charges, **but not including taxable conveyancing charges**, the court may reopen the transaction ... ." [emphasis added]

[18] The words "the charges therefor excessive", in the Nova Scotia ***Money-lenders Act***, in my view, relate to any conveyancing in connection with "proceedings ... in respect of [the] loan". It does not create a separate category for overall charges, with interest, in respect of the loan, that are excessive.

[19] In contrast, Section 3 of the ***Unconscionable Transactions Relief Act*** provides that the Court may grant relief :

> "Where, in respect of money lent, the court finds that, having regard to the risk and to all the circumstances, the cost of the loan is excessive and that the transaction is harsh and unconscionable ... ."

[20] However, the Amiros have not pled, relied upon, nor advanced, any claim under the ***Unconscionable Transactions Relief Act***. Consequently, I am not to

make a determination in relation to whether a remedy should be granted under that ***Act***. However, I note that, in addition to establishing that the "cost of the loan" was "excessive", the Amiros would also have to prove that the transaction was "harsh and unconscionable".

[21] The Amiros presented the case of ***Ekstein et al v. Jones***, 2005 CanLII 30309 (Ont. S.C.), in support of its argument that relief could be granted under Section 4 of the ***Nova Scotia Money-lenders Act***, if they established that the total cost of the loan, including interest, was excessive "having regard to the risk and all the circumstances", even if it did not exceed the criminal interest rate of 60%. With respect, the ***Ekstein*** case does not assist in interpreting section 4 of the ***Nova Scotia Money-lenders Act***. It deals with legislation describing the pre-requisites to relief in a very different way. It would provide assistance in interpreting Section 3 of the Nova Scotia ***Unconscionable Transactions Relief Act***. In fact, the wording, in the Ontario ***Unconscionable Transactions Relief Act***, laying out the prerequisites to relief, is identical to that which I have quoted from the Nova Scotia ***Unconscionable Transactions Relief Act***. However, as indicated, there is no claim, in the case at hand, under that ***Act.***

[22] The Amiros have acknowledged that, during the one year term of the Mortgage, they paid an effective annual rate of slightly under 40%. They have acknowledged that the first category of prerequisites to relief under Section 4 of the ***Money-lenders Act*** requires that the “rate permitted” of 60% be exceeded. Their request for relief was based on an argument that the charges in respect of the loan, with interest, were excessive, given the level of risk involved. In light of my conclusion on the interpretation of Section 4 of the ***Money-lenders Act***, I cannot grant them the relief requested upon that basis.

[23] Even if I am wrong in my conclusion on the interpretation of Section 4 of the ***Money-lenders Act***, I am of the view that, in the circumstances of this case, it has not been shown that the charges were excessive, given the level of risk involved, for the reasons which follow.

[24] This was a second mortgage. Therefore, any amounts realized from a foreclosure and sale would have had to have paid off the first mortgagee, and all expenses associated with the foreclosure and sale, before Ferguson would be able to recover any amounts owing to him.

[25] The Amiros knew that the charges and interest rate were high prior to entering into the mortgage. They had signed the Disclosure to Borrower (entered as Exhibit 2), which outlined the fees and showed that the cost of borrowing was approximately 43.38%. Ms. Amiro testified, and I accept, that: they thought it was their only option; they needed to pay off other debts; and, the first mortgagee would not give them a second mortgage.

[26] The statement of funds received and disbursed (Exhibit D to Ms. Amiro's Affidavit) indicates that $6,000.00 was paid out to ARC Accounts Recovery Corporation, for the pay-out of a Wells Fargo financial account. I infer that shows Wells Fargo engaged a debt recovery firm because the Amiros had defaulted. There is also the amount of $8,600.00 shown as having been paid to Commercial Credit Adjusters Ltd., for the pay-out of the Credit Union Mastercard. There was no evidence of whether Commercial Credit Adjusters Ltd. was the usual corporation to which the Credit Union Mastercard payments were made. However, given the name of the payee, and the amount being rounded to an even $100.00 unit, absent evidence to the contrary, the most reasonable inference is that: the Mastercard debt was in collection as well; and, the amount was an agreed pay-out amount.

[27] Given those circumstances, in my view, the Amiros were a significant risk. There was insufficient evidence to establish what the reasonable range of effective interest rates would be is such high risk circumstances. Thus, they have not established that the effective interest rate of just under 40% (including all fees and interest payments), during the first year, was excessive, having regard to the risk and all of the circumstances involved.

C. WHETHER THE WITHIN FORECLOSURE ACTION SHOULD BE DISCONTINUED UNDER SECTION 42 OF THE *JUDICATURE ACT*

[28] The Court in ***CIBC Mortgage Corp. v. Jordan***, 2001 NSSC 28, at paragraphs 6 to 10, concluded that Section 42 of the ***Judicature Act*** does not apply to a mortgage after the end of the term of that mortgage. The reasoning for that is that, once the term of a mortgage has ended, even if the mortgagor is not in default, the mortgagee has the right to be paid the full amount owing. The Court further noted that Section 42 of the ***Judicature Act*** is meant to give a mortgagor a second chance to, within a reasonable time, make up a payment he or she has missed. [See also ***CIBC v. Hurlburt***, 2008 NSSC 408, paragraphs 27 and 28.]

[29] In the case at hand, the Mortgage was entered into on March 6, 2009. The Mortgage specified that the term of the Mortgage would end on March 6, 2010, at which time any balance owing had to be paid. The Amiros argue that the Mortgage was not renewed. Even if it is found to have been renewed, any such renewal would have expired on March 6, 2011, at the latest. The Amiros filed their motion on August 5, 2011. At that time, the term of the mortgage, whether renewed or not, had expired. Consequently: Section 42 of the ***Judicature Act*** does not apply; and, I cannot discontinue the within foreclosure action pursuant to it.

D. WHICH, IF ANY, OF THE CONTESTED CHARGES ARE PROPERLY CHARGEABLE?

I) Duplicated Lender's Fee

[30] The Amiros alleged that they were charged the $3,500.00 lender's fee twice. However, in my view, it is clear that one of the $3,500.00 fees was not a lender's fee. Rather, it was a broker fee paid to "Canada Lend", a third party. That fee is identified in the Statement of Funds Received And Disbursed , attached as Exhibit

D to the Affidavit of Nadine Amiro, sworn August 3, 2011, and entered as Exhibit 1 in the within motion.

[31] The document entitled “Disclosure to Borrower” was entered as Exhibit 2. Ms. Amiro confirmed that the signatures on that document, shown at the first page of Exhibit 2, were the signatures of herself and her husband, Shane Amiro. Page 1 of 3, in the Disclosure to Borrower, shows a fee of $3,500.00 referred to as a “commitment fee”, and a further fee of $3,500.00 referred to as a “broker fee”.

[32] A document entitled “TERM SHEET: SECOND MORTGAGE COMMITMENT” is attached as Exhibit B to the Affidavit of Ms. Amiro. (Any reference in this decision to “Term Sheet” is a reference to this document.) It specifies that: “The Lenders Fee on this transaction is $3500.00.”

[33] I find that the “commitment fee” of $3500.00 contained in the Disclosure to Borrower is the same fee that is referred to in the Term Sheet as the Lenders Fee. I further find that the broker fee of $3,500.00 referred to in the Disclosure to Borrower is the broker fee that is indicated in the Statement of Funds Received and Disbursed as having been paid to Canada Lend.

[34] The Amiros were made aware that they would be required to pay both fees, in the amount of $3,500.00 each. They signed the Disclosure to Borrower, according to the date shown on the copy of the document in Exhibit 2, on February 25, 2009. The Amiros signed the Term Sheet on March 6, 2009, the same date on which they signed the Mortgage. Thus, they were aware of both fees when they entered into the Mortgage.

[35] The Amiros agreed to pay those fees. They have not established any reason for the Court to relieve them of their contractual obligation to pay them. In my view, they were properly chargeable and should not be credited against any other amounts the Amiros may owe Ferguson.

ii) NSF Charges / Late Fees

[36] The Term Sheet specifies that: "A fee of $300.00 will be charged for dishonoured cheques."

[37] The Mortgage is attached as Exhibit C to the Affidavit of Ms. Amiro. Clause 1.01 refers to the lands and premises being mortgaged as those described in Schedule “A”. There is a document labelled Schedule “A”, containing a property description, attached to the Mortgage.

[38] There is also another document attached to the Mortgage. It is labelled Mortgage Schedule “A”. That is a four page document. The bottom right-hand corner of each page bears the words “Chargor’s Initials” followed by a blank line to insert initials. However, all four of those initial lines are blank.

[39] There is nothing in the Mortgage itself which incorporates Mortgage Schedule “A” by reference.

[40] In my view, simply recording the Mortgage with the four pages of Mortgage Schedule “A” attached, does not make it part of the Mortgage.

[41] The Amiros did not initial Mortgage Schedule “A” so as to show that they agreed to the terms and conditions therein. It was not incorporated by reference

into the Mortgage. Consequently, I find that the Amiros are not bound by the terms and conditions in Mortgage Schedule “A”.

[42] However, they are bound by the terms and conditions in the Term Sheet.

[43] The discharge statement dated October 21, 2010, in Exhibit E to Ms. Amiro’s Affidavit, includes a $300.00 “NSF” charge for September 6, 2010, and another for October 6, 2010. However, Ms. Amiro’s evidence that they stopped making payments, in August of 2010, was uncontradicted and I accept it. Therefore, the “NSF” charges in the October discharge statement, I find, are in reality included as late payment fees.

[44] The discharge statement dated April 6, 2011, attached as Exhibit F to Ms. Amiro’s Affidavit, refers to eight “Late fees” of $300.00, representing the months of September, 2010 to April, 2011.

[45] Ferguson justified these late payment fees as being chargeable in accordance with Mortgage Schedule “A”, which, under the heading “Administration Fee”,

states: “The Chargor shall pay to the Chargee an Administration Fee of $300.00 for each occurrence of any of the following events: 1. Late Payment; ... .”

[46] As I have stated, the Amiros are not subject to the terms in Mortgage Schedule “A”. They are subject to the terms in the Term Sheet, which, however, only provide for a $300.00 fee in relation to dishonoured cheques. There was no evidence of any dishonoured cheques.

[47] Consequently, in my view, neither the “NSF” charges, nor the “Late fees” are chargeable.

iii) Default Proceedings Fee of $1,500.00

[48] The Term Sheet does specify that: “A fee of $1500.00 will be charged for each action or proceeding instituted.” The Amiros accepted that term.

[49] The Court in ***1259121 Ontario Inc. v. Canada Trust Co.***, 2007 CarswellOnt 1571 (S.C.J.), at paragraphs 16 to 22, addressed whether a similar condition was enforceable. The condition in ***1259121 Ontario Inc*** provided for the payment of

an “Administration Fee” if “collection or other legal proceedings [were] taken”. The Court concluded that the fee was “a penalty rather than a genuine pre-estimate of damages”, and, on that basis, concluded the provision was unenforceable.

[50] At paragraph 18, the Court quoted, with approval, the principles applicable to determining whether or not such charge is a penalty, from paragraph 3 of ***Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*** (1914), [1915] A.C. 79 (U.K.H.L.), as follows:

> “1. The essence of a penalty is a payment of money stipulated as *Interrorem* of the offending party; the essence of liquidated damage is a genuine covenanted pre-estimate of damage.
>
> 2. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not as at the time of the breach.
>
> 3. There is a presumption that it is a penalty when a single sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages.”

[51] There was no evidence from Ferguson as to what the $1,500.00 was meant to cover. His lawyer, Alan Fownes, suggested that it was for his “inconvenience”.

That suggestion conforms with the fact that Clause 6.01 of the mortgage provides that all costs and charges incurred by Ferguson in “collecting or attempting to collect any monies” or “enforcing or attempting to enforce any of the remedies and powers” in the mortgage are to be paid by the Amiros to Ferguson, with interest. After considering what is covered under Clause 6.01, there appears to be little or nothing else left to be covered by the default proceedings fee of $1500.00.

[52] The amount is a lump sum. It is the same amount regardless of the nature, extent or cost of the action or proceeding instituted. I have not seen any evidence that, at the time the mortgage was entered into, there was anything to indicate that $1,500.00 was a reasonable estimate of costs, to be incurred by Ferguson, in a default proceeding, which were not otherwise provided for in Clause 6.01 of the Mortgage.

[53] In my view, Ferguson has not established that he was reasonably likely to incur costs anywhere near the $1,500.00 range. Simple “inconvenience”, even assuming that it is one of the losses or damages to be considered, is insufficient to make the $1,500.00 a reasonable pre-estimate.

[54] In light of the foregoing circumstances, I conclude that the default proceedings fee of $1,500.00 is a penalty, not a genuine pre-estimate of loss or damage. As such, it is unenforceable.

[55] It would be open to Mr. Ferguson to provide evidence of reasonable costs incurred by him and not otherwise covered under Clause 6.01. However, no such evidence was forthcoming. Therefore, I cannot include a charge for such reasonable costs.

iv) Mortgage Renewal Fee

[56] The Mortgage, Term Sheet and Disclosure to Borrower do not contain any provision for a mortgage renewal fee. No other documentation has been provided to the Court which provides for a mortgage renewal fee.

[57] Ferguson argued that: "The mortgagee gets to decide whether and on what terms any extension or forbearance on the right to foreclosure will be granted." I agree that Ferguson could decide what terms for extension, renewal or forbearance he was prepared to agree to. However, he could not force the Amiros to agree to

the terms he decided upon. They did not have to accept the condition for a renewal fee. I find that they rejected the renewal fee condition. Consequently, there was no acceptance of the offer to renew.

[58] In the case at hand, at or about the end of the term of the Mortgage, on March 6, 2010, Ferguson told the Amiros that they could keep making the same monthly payments. They did continue to make those payments until August of 2010. They stopped making those payments when they were advised, through Mr. Steinfield (the representative of Ferguson's mortgage broker), that there would be a $5,000.00 renewal fee.

[59] Ferguson argued, based on Clause 18.01 of the Mortgage, that the verbal extension and the continued payments required the Amiros to pay a renewal fee. However Clause 18.01 states:

> "THAT if the Mortgagor makes any payments of whatsoever nature to the Mortgagee after the expiration of the original term of this mortgage or any subsequent term agreed to in writing between the Mortgagor and the Mortgagee without first having agreed in writing with the Mortgagee as to the terms of payment of the balance of the monies then remaining unpaid such payments shall **not** be deemed to have renewed the term of this mortgage or the unexpired term of years based on the monthly amortized payments." [emphasis added]

[60] In my view, Clause 18.01 provides that the continued payments, made past the end of the term of the mortgage, based on a verbal arrangement between the parties, did not have the effect of renewing the term of the Mortgage.

[61] The Mortgage could not be unilaterally renewed by Ferguson on terms unilaterally imposed by him.

[62] In my view, no renewal fee was ever agreed upon and there never was a renewal of the Mortgage. As such, the mortgage renewal fee, shown as a “prorated Lender’s fee” of $2,333.33 on the April 6, 2011 discharge statement, is not properly chargeable.

v) Statement Preparation Fee

[63] Both discharge statements include a $400.00 statement preparation fee. They do not specify which statement it relates to.

[64] Mortgage Schedule “A” does state:

> "Provided that when a Discharge of this Charge is required, then the Chargee's solicitor will prepare the Discharge documentation for execution by the Chargee, the costs of which shall be at the Chargor's expense."

[65] However, I have already concluded that the Amiros are not bound by the terms and conditions in Mortgage Schedule "A".

[66] The Term Sheet does not specifically provide for payment of a statement preparation fee. It does have a general provision stating that the Amiros are "responsible for the processing, legal, survey, and insurance fees associated with this loan." In addition, Clause 6.01 of the mortgage provides for the payment of a wide range of costs, if they are incurred to collect monies owing or enforce remedies and powers under the mortgage.

[67] Therefore, Ferguson, if he were to establish that he incurred costs in preparing the discharge statements, could properly charge the amount incurred to the Amiros. There is no evidence of what, if any, costs were so incurred.

[68] Further, both discharge statements end with:

> "E. & O.E.

Yours Truly,

M. Steinfeld,

Per Gregory Ferguson".

I infer, from that ending, absent evidence to the contrary, that the discharge statements were prepared by Ferguson. As such, more likely than not, he incurred little or no cost in preparing them.

[69] Further, the statement preparation fee of $400.00 is noted as being payable to Mortgage Central, along with the "Pro-rated Lender's Fee", which I have concluded is the pro-rated mortgage renewal fee. Therefore, more likely than not, it is a fee sought to be charged in connection with a renewal which did not occur. There was no evidence of any provision or agreement authorizing Ferguson to charge the Amiros a statement preparation fee for a renewal of, nor for an offer to renew, the Mortgage.

[70] Ferguson, in the brief filed on his behalf, indicated that Mortgage Central was the broker for Ferguson. There was no evidence to confirm that. It was not

disputed by the Amiros. However, there is no evidence that the Amiros agreed to a term or condition requiring them to pay a statement preparation fee to Ferguson's broker, in connection with any renewal, or proposed renewal, of the Mortgage.

[71] In my view, the $400.00 amount noted in both discharge statements, as a statement preparation fee, is not chargeable.

vi) Pre-payment Interest Penalty

[72] Both discharge statements include a charge in the amount of $1,049.31 for an additional three months' interest.

[73] The Term Sheet states: "This mortgage is open to payment in full or in part at any time WITH 3 MONTH BONUS."

[74] Clause 23.01 of the Mortgage provides that if the Mortgage is pre-paid before maturity, the Mortgagee must pay "the greater of ninety (90) days bonus interest ... or the amount of interest payable ... to the end of the term of the loan".

[75] In the case at hand, the term of the loan had already ended and was not renewed. The only payments made prior to the end of the term of the Mortgage were the regular monthly payments. Consequently, there was no pre-payment to attract an interest penalty.

[76] Further, Ferguson has now initiated a foreclosure action. The Court in ***Ashley et al v. Royal Bank***, 1984 CarswellNS 91 (S.C., T.D.), at paragraph 7, ruled that, once the mortgagee initiates a foreclosure action, it cannot claim a pre-payment interest penalty. As such, Ferguson is not entitled to such a penalty.

[77] I, therefore, find that the pre-payment interest penalty of $1,049.31 is not chargeable.

vii) Solicitor and Client Costs

[78] Ferguson, in the brief filed on his behalf, claims the following solicitor and client costs: $2,300.00 "for preparing for and attending the September 8, 2011 motion in Yarmouth, NS"; and, $3,450.00 for "foreclosure action fees and disbursements to date".

[79] Clause 6.01 of the mortgage states:

> "THAT on default of payment of any instalment of the principal and interest hereby secured, or on breach of any covenant or proviso herein contained, the Mortgagee shall be entitled to send an inspector or agent to inspect and report upon the value, state, and condition of the said lands and a solicitor to examine and report upon the title to the same and to retain the services of a real estate appraiser to report upon the value of the land herein mortgaged at the Mortgagor's expense, and all expenses incurred in so doing together with all costs and charges (including solicitor and client costs) which the Mortgagee may incur or pay in collecting or attempting to collect any monies payable hereunder, including long distance telephone tolls or enforcing or attempting to enforce any of the remedies and powers herein contained for the recovery of the monies hereby secured, or any part thereof, shall form and be a charge upon the said lands, and payable forthwith to the Mortgagee by the Mortgagor and shall bear interest at the rate aforesaid computed from the time of payment of the same as upon principal money advanced upon the security of these presents."

[80] The Court in ***Canada Trustco Mortgage Co. v. Homburg***, 1999 CarswellNS 238 (S.C.), dealt with the question of whether a similar provision was enforceable. The provision in ***Homburg**,* reproduced at paragraph 4, reads as follows:

> "If default is made in the payment of any sum due under this Mortgage the Mortgagee may send an inspector to inspect and report on the value, state and condition of the Mortgaged Premises and a solicitor to examine and report on the title of the Mortgaged Premises, and all expenses incurred in so doing, together with the costs and charges (including solicitor and client costs) which the Mortgagee may incur or pay in collecting or attempting to collect any monies payable hereunder, or enforcing or attempting to enforce any of the remedies and powers herein contained, and of recovering or attempting to recover possession of and keeping possession of the Mortgaged Premises or any part thereof, (including, without limitation of the generality of the foregoing, solicitor and

> client costs in any proceeding for foreclosure and sale) shall be payable forthwith by the Mortgagor, shall bear interest at the rate aforesaid computed from the time of payment, and shall be a charge upon the Mortgaged Premises."

[81] The provision in ***Homburg*** specifically included solicitor and client costs in a proceeding for foreclosure and sale. The provision in the case at hand does not specifically refer to a proceeding for foreclosure and sale. However, in my view, such a proceeding is encompassed within "enforcing or attempting to enforce any of the remedies and powers herein contained for the recovery of the monies hereby secured, or any part thereof". According to ***Homburg***, where a mortgage contains such a provision, solicitor and client costs are to be awarded, unless there are special circumstances, such as the existence of oppressive or vexatious conduct on the part of the mortgagee. The Court, at paragraphs 39 and 40, stated:

> "In my view, the law in Nova Scotia is that where a mortgage stipulates the mortgagor pays to the mortgagee costs on a solicitor and client basis, costs should be awarded on that basis except in special circumstances. The court has an overall discretion as to costs but that discretion should not deprive the parties to that which they have agreed, except when those special circumstances exist.
>
> What are the 'special circumstances?' They are situations where the mortgagee uses oppressive or vexatious conduct. They are situations which include the mortgagee causing vexatious delays or unnecessary costs. To quote the Ontario Court of Appeal, they render 'the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances.' In my opinion, it should be recognized that the mortgagor has no control over the quantum of costs and the court should be cautious in the amount it taxes against the mortgagor because of

> this lack of control notwithstanding that which may be viewed as an appropriate amount as between the mortgagee and its solicitor."

[82] At paragraph 18, the Court cited a passage from pages 691 and 692 of ***Falconbridge on Mortgages (Fourth Edition)***. The last paragraph cited in that passage states:

> "A mortgagee may be deprived of his costs, or even ordered to pay costs, if he resists the right to redeem, makes unfounded claims, improperly refuses to account or causes vexatious delays and unnecessary costs."

[83] In my view these examples of circumstances which would cause the mortgagee to be deprived of his costs, are examples of the types of circumstances which would constitute oppressive or vexatious conduct, amounting to special circumstances, warranting depriving a mortgagee of the solicitor and client costs provided for in a mortgage.

[84] I have found that many of the amounts claimed by Ferguson, in the discharge statements, were unfounded. I have disallowed: the $300.00 per month late fee charged for each month since the Amiros stopped paying; the default proceedings fee of $1,500.00; the pre-payment bonus interest penalty in the amount of $1,049.31; and, the $2,733.33 amount noted as being payable to

Mortgage Central for the mortgage renewal fee and the preparation of a statement. These claims were significant, particularly given that the mortgage principal was only $28,000.00.

[85] I accept Ms. Amiro’s evidence that they continued making the monthly payments, even past the end of the term of the Mortgage, until they received a call from Mr. Steinfeld, which I infer from seeing his name on the discharge statements, was the representative of Mortgage Central (Ferguson’s mortgage broker). Mr. Steinfeld advised them they had to pay a fee of $5,000.00 to renew the mortgage. I accept that precipitated their discontinuing the payments pending clarification and resolution of the matter.

[86] I further accept that, after the Amiros received the October 21, 2010 Discharge Statement, they hired a lawyer to discuss the matter with Ferguson, because they were disputing the charges. In my view, it was reasonable for them to dispute the charges which I have disallowed. It was unreasonable for Ferguson to insist upon them being paid. I find that, more likely than not, had Mr. Ferguson presented a discharge statement without the charges which I have disallowed, the

matter would have been resolved without the need to commence a foreclosure action. In my view, Ferguson's failure to do so has caused unnecessary costs.

[87] Had Ferguson only included justifiable charges in the discharge statements, more likely than not, there would have been no need for the within motion and he would not have incurred solicitor and client costs for preparing for and attending at the motion.

[88] Ferguson submitted the case of ***426008 B.C. Ltd. v. Catherine Ann Simons, Harvey Arthur Simons et al***, 2006 BCSC 1809. That case deals with circumstances similar to those in the case at hand. The mortgagor in that case did not pay out the mortgage because of the "unjustified demands of the mortgagee for excessive payments" and asked to "be relieved of the requirement to pay interest after those demands". [Paragraph 29] The Court refused to relieve the mortgagor of the obligation to pay interest because she "could have ... tendered to the mortgagee what she calculated was due and demanded a discharge ... or ... commenced a proceeding to determine what it was that was due of her".

[89] The ***Simons*** case is distinguishable from the case at hand. In the case at hand, the Amiros are not seeking to be relieved of the requirement to pay interest from the time that they would have paid out the Mortgage, but for the unreasonable and unfounded demands by Ferguson. Their position is merely that it would be inequitable to allow Ferguson to recover solicitor and client costs for proceedings which would not have been required, but for his continuing to insist upon the payment of unjustified amounts.

[90] In my view, the circumstances in the case at hand are sufficiently oppressive to constitute special circumstances warranting disallowing the solicitor and client costs provided for in the Mortgage.

[91] Consequently, the costs relating to the foreclosure action will be at the discretion of the Court dealing with that action.

[92] As far as the costs of the within motion are concerned, I am not bound by the provision in the Mortgage for solicitor and client costs. I may exercise my discretion in making an award of costs.

E. AMOUNT DUE UNDER MORTGAGE

[93] After disallowing the above referenced charges and costs, it leaves only the mortgage principal and interest owing. There were no protective disbursements as the Amiros remained in the home and continued to pay all other amounts required to preserve the property. The mortgage principal is $28,000.00. There are 15 monthly interest payments of $349.77 owing. That represents interest payments that were to be made from September 6, 2010 to November 6, 2011 inclusive. The total of those monthly interest only payments is $5,246.55. Therefore, the total principal and interest owing to November 6 , 2011 is $33,246.55.

[94] Since I was unable to discontinue the foreclosure action under Section 42 of the ***Judicature Act***, it is still ongoing. Therefore, it would not be appropriate for me to order that interest at the rate provided for in the mortgage stops accruing and is replaced by the rate of interest payable on judgments. Consequently, interest will continue to accrue at the rate provided for in the mortgage which amounts to approximately $11.50 per day from November 6, 2011.

F. CONCLUSION

[95] Based on the foregoing, I conclude the following:

1. The Amiros' motion under section 4 of the ***Money-lenders Act*** is dismissed;

2. The Amiros' motion under section 42 of the ***Judicature Act*** is dismissed;

3. Ferguson's claim for payment, by the Amiros, of the following amounts is found to be unjustified and disallowed: the monthly late fees of $300.00; the default proceedings fee of $1,500.00; the mortgage renewal fee of $2,333.33; the statement preparation fee of $400.00; the pre-payment interest penalty of $1,049.31; and, solicitor and client costs totalling $5,750.00.

4. The outstanding amount owing under the Mortgage, as of November 6, 2011, is $33,246.55.

5. Interest shall accrue thereafter, until payment, or until the matter is otherwise resolved between the parties or within the main foreclosure action, whichever comes first, at the rate provided for under the Mortgage (14.99%), which amounts to approximately $11.50 per day.

6. The issue of costs in the foreclosure action is to be at the discretion of the Court dealing with that action. That Court shall not be bound by the provision, in the Mortgage, for payment of solicitor and client costs to Ferguson.

7. I am not bound by the provision in the Mortgage for solicitor and client costs. I may exercise my discretion in determining the costs of this motion.

G. COSTS

[96] If the parties cannot agree on the costs of this motion, the Court asks that they provide submissions on costs by correspondence.

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PIERRE L. MUISE, J