

CANADA / JUDGMENT

Gemstone Advantage Limited v. Zhang

2025 BCSC 1012

COURT

Supreme Court of British Columbia

DECIDED

4 June 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 1012 Gemstone Advantage Limited v. Zhang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gemstone Advantage Limited v. Zhang,

2025 BCSC 1012

Date: 20250604

Docket: H230655

Registry: Vancouver

Between:

Gemstone Advantage Limited

Petitioner

And

Rachelle Gao Zhang

also known as Gao Weiping

also known as Wei Ping Gao

Respondent

Before: The Honourable Justice Jones

Reasons for Judgment

Counsel for the Petitioner:

E. Watson

Counsel for the Respondent:

J. Wagner

Place and Date of Hearing:

Vancouver, B.C.

July 8, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 4, 2025

Table of Contents

Introduction.. 3

Background.. 3

Parties Positions. 4

Issues. 5

Issue #1 - Is the default interest rate of 22% in the Demand unenforceable?. 5

Legal Framework.. 7

Issue #2: Was the Demand invalid because it was based on an unenforceable interest rate?. 11

Issue #3 and #4: Redemption Period and Order Absolute. 17

Conclusion.. 21

Introduction

- [1] The petitioner, Gemstone Advantage Limited ("Gemstone"), applies for orders relating to the foreclosure of two properties, the registered owner of which is the respondent, Rachelle Gao Zhang, also known as Gao Weiping, also known as Wei Ping Gao ("Ms. Zhang").
- [2] The two properties are two strata units located on Cypress Street in the Shaughnessy area of Vancouver, legally described as follows:

Parcel Identifier: 025-839-071

Strata Lot 2 District Lot 526 Group 1 New Westminster District Strata Plan BCS638 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form V

("Lot 2")

Parcel Identifier: 025-839-080

Strata Lot 3 District Lot 526 Group 1 New Westminster District Strata Plan BCS638 together with an interest in the common property in

proportion to the unit entitlement of the strata lot as shown on Form V

("Lot 3", and collectively with Lot 2, the "Lands")

- [3] As described in more detail below, Ms. Zhang agreed to guarantee debts and liabilities associated with the issuance of bonds by a third party, secured by a mortgage and assignment of rents between Ms. Zhang as mortgagor, and Gemstone, as mortgagee, registered in the Land Title Office against the Lands (the "Mortgage").

Background

- [4] By a bond instrument dated December 18, 2019, Glorious Property Holdings Ltd. (the "Issuer"), issued bonds of up to HK\$100,000,000.
- [5] The bond instrument was amended and restated by an amendment and restatement agreement dated March 26, 2021, and a second amended and restatement agreement dated February 23, 2022 (as amended the "Bond Instrument"), the principal amount at that time was HK\$68,000,000.
- [6] By the Bond Instrument, the Issuer agreed to redeem certain bonds issued to Golden Leap Investment Limited, as bondholder (the "Bondholder"), on or before December 15, 2022.
- [7] Pursuant to a limited guarantee and postponement of claim agreement dated February 23, 2022 (the "Guarantee"), Ms. Zhang, as guarantor (the "Guarantor") guaranteed payment to Gemstone, as security agent for the Bondholder, of all of the debts and liabilities of the Issuer, to Gemstone and the Bondholder, as defined in the Guarantee.
- [8] The Guarantee was limited to the realization and enforcement of the Mortgage of the Lands by foreclosure and court-ordered sale.

Parties' Positions

Gemstone's Position

- [9] Gemstone states that it made demand to Ms. Zhang as the Guarantor by letter dated May 30, 2023 for payment of HK\$76,701,672.99 owing as of May 22, 2023, plus interest accruing thereafter at the rate of 22% per annum, compounded daily, and costs (the "Guaranteed Indebtedness") pursuant to the Guarantee (the "Demand"), but the Guarantor has failed to pay.
- [10] Gemstone states that Ms. Zhang is indebted to Gemstone for the amount of the Guaranteed Indebtedness, pursuant to the Guarantee, secured by the Mortgage.

- [11] Gemstone seeks declarations that the Mortgage is in default, the amount due and owing under the Mortgage, the amount required to redeem the Lands, an order setting the redemption period, and liberty to apply for Order Absolute.

Ms. Zhang's Position

- [12] Ms. Zhang's position is that the Demand was not a lawful demand to her as the Guarantor because the Bond Instrument provides for interest at 12% per annum, while the Demand refers to a default interest rate of 22% per annum, compounded daily, and costs, which Ms. Zhang states is a penalty clause and unenforceable at law, and Ms. Zhang submits that the Demand did not provide the form of certification of the amount due as required by the Bond Instrument.
- [13] Ms. Zhang states that her obligations under the Guarantee are limited to and solely payable from any proceedings realized by Gemstone through either a foreclosure or court-ordered sale of the Lands, and the Guarantee does not provide the right to an Order Absolute.

Issues

- [14] The issues are:
1. whether the default interest rate of 22% in the Demand is unenforceable as a matter of law;
 2. whether the Demand is valid;
 3. if the Demand is valid, what is the appropriate redemption period; and
 4. whether Gemstone is entitled to an order absolute.

Issue #1 - Is the default interest rate of 22% in the Demand unenforceable?

Interest Rates

- [15] The Bond Instrument sets out two rates of interest. As long as the Issuer maintained payments, it was liable for an interest rate of 12% per annum (the "Normal Rate").
- [16] Upon default, however, the Bond Instrument states that the interest would accrue on the overdue sum at the rate of 22% per annum, compounded daily (the "Default Rate").
- [17] The Bond Instrument terms relating to interest state:
9. INTEREST
- 9.1 Interest during the term of Bonds
- (a) From the Issue Date until the earlier of:
 - (i) the Maturity Date;
 - (ii) any Bondholder Redemption Date; and

(iii) any Early Redemption Date,

the Bonds shall bear interest at twelve per cent. (12%) per annum and such interest shall be payable on the last day of each Interest Period.

11.4 Default interest and delay in payment

- (a) If the Issuer fails to pay any sum in respect of the Bonds when the same becomes due and payable under these Conditions, interest shall accrue on the overdue sum (both before and after judgment) at the interest rate of twenty two per cent. (22%) per year, compounded daily, from the due date and ending on the date on which full payment is made to the applicable Bondholder in accordance with these Conditions and shall be payable on demand by the applicable Bondholder free and clear of and without set-off or deduction for Taxes or otherwise. Such default interest shall accrue on the basis of the actual number of days elapsed and a 365-day year.
- (b) A certificate of a Bondholder showing a calculation in reasonable detail of the amount of any of the amounts due (or expressed to be due) and unpaid shall, in the absence of manifest error, be conclusive as against the Issuer as to the amounts due. Default interest (if unpaid) arising on an overdue amount will be compounded with the overdue amount and will remain immediately due and payable.

[Emphasis added.]

[18] The Mortgage was security for Ms. Zhang's obligation to Gemstone pursuant to the Guarantee.

[19] Gemstone registered the Mortgage as a charge on the Lands.

[20] The demand letter dated May 30, 2023 delivered to Ms. Zhang states, in part:

Pursuant to the terms of the Guarantee, granted by you in favour of Gemstone, you guaranteed payment of all of the debts and liabilities, present and future, of the Obligors to Gemstone and the Bondholders as defined in the Guarantee (the "Guaranteed Obligations").

As security for, inter alia, your obligations under the Guarantees, you have granted a mortgage to Gemstone that was registered in the New Westminster Land Title Office on March 1, 2023 (the "Mortgage"). The Mortgage is a charge on the properties legally describe [sic] as:

[the Lands]

We are instructed that the Obligors are in default of the Guaranteed Obligations. We are further instructed that, as of May 22, 2023, the amount due and owing by the Obligors pursuant to the Guaranteed Obligations was HK \$76,701,672.99, plus interest accruing thereafter at the rate of 22% per annum, compounded daily, and costs.

[Bold emphasis in original; underline emphasis added.]

- [21] Ms. Zhang submits that the amount Gemstone demanded in the May 30, 2023 demand letter is based on the unenforceable Default Rate, contrary to s. 8 of the Interest Act, R.S.C. 1985, c. I-15.

Legal Framework

- [22] Rule 21-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 provides for petition proceedings in foreclosure, including, inter alia, the court's power to determine summarily the amount due to Gemstone, the daily amount of interest from the date of hearing of the application, and pronounce judgment for any amount determined to be due.
- [23] Section 8 of the Interest Act provides that lenders may not impose a higher interest rate on arrears secured by real property than on principal not in arrears:

No fine, etc., allowed on payments in arrears

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.

- [24] In *Reliant Capital Ltd. v. Silverdale Development Corp.*, 2006 BCCA 226, the Court of Appeal explained that higher interest rates for loans in arrears is not uncommon in the commercial world, and legitimate and effective to ensure prompt repayment of the loan; however, the exception is mortgages, the rationale for the exception for mortgages explained as follows:
- [52] The prohibition against extra charges on arrears remains in place for loans secured by a mortgage. Moreover, the additional charge on arrears is prohibited in mortgage loans whether that charge is expressed as such, or whether the interest provision simply has "the effect" of increasing the charge in respect of arrears.
- [53] Parliament has singled out mortgages on real estate for special treatment, or at least treatment that differs from loans that are not secured on real property. I infer that at least one legislative purpose was to protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem, or to protect their equity. If an owner were already in default of payment under the interest rate charged on monies not in arrears, a still higher rate, or greater charge on the arrears would render foreclosure all but inevitable.
- [25] Whether s. 8 applies will generally turn on the particular language of the agreement and the circumstances in which it was made: *Reliant Capital* at para. 68.
- [26] The Supreme Court of Canada affirmed this articulation of the purpose of s. 8 in *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18 at para. 21.

- [27] In *Krayzel*, the majority of the Supreme Court of Canada confirmed that a rate increase triggered by the passage of time alone will not infringe s. 8, but that a rate increase triggered by default will: *Krayzel* at para. 3.
- [28] At issue in *Krayzel* was whether s. 8 only applied to higher interest rates imposed as a "penalty" for default, or if the provision equally applied to agreements that offered a lower rate of interest as a "reward" for the absence of default. The majority of the Court held that, whether the term was worded as a penalty for default or a reward for not defaulting, it would infringe s. 8 if it had the effect of imposing a higher rate of interest on arrears than on principal money not in arrears: *Krayzel* at para. 3.
- [29] In *P.A.R.C.E.L. Inc. v. Acquaviva*, 2015 ONCA 331, the Court of Appeal for Ontario identified four requirements for s. 8 to apply. These are summarized in *RiverRock Mortgage Investment Corporation v. Blazys et al.*, 2024 ONSC 6357 at para. 60, as follows:
1. The covenant in question must impose a "fine", "penalty" or "rate of interest". If it does not, then s. 8(1) is not engaged.
 2. The "fine", "penalty" or "rate of interest" must relate to "any arrears of principal or interest secured by mortgage on real property", whether before or after maturity of the relevant debt instrument.
 3. [T]he covenant must also have the prohibited effect of 'increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears'."
 4. "[T]he arrears of principal or interest must be 'secured by mortgage on real property'."
- [Citations omitted in original.]
- [30] In *P.A.R.C.E.L.*, the Court of Appeal for Ontario considered whether s. 8 is engaged when the term stipulating a higher interest rate on arrears is contained in an agreement that is separate from the mortgage instrument itself.
- [31] The Court summarized the facts of the case as follows:
- [68] In this case, the substance of the transaction between the parties is relatively straightforward. The respondents loaned \$458,488.07 to the appellants. The loan proceeds were applied to discharge an existing mortgage. The repayment of the loan was secured by a promise to pay set out in a promissory note. That note was secured, in turn, by a mortgage on real property in the same amount. The Note and the Mortgage pertain to one loan between the parties, the repayment of which is secured equally by the Note and the Mortgage.
- [32] The Court held that an interest rate escalation provision in the promissory note violated s. 8: *P.A.R.C.E.L.* at para. 76. The fact the provision was contained in the promissory note, rather than the mortgage agreement, did not bar the application of s. 8 for three reasons:

- a) First, the Court found Reliant Capital did not stand for the proposition that s. 8 only applies when the prohibited charges are contained in the mortgage instrument. Rather, it found at para. 60:

in my view, s. 8 of the Interest Act can also apply in cases in which the prohibited charges are provided for in a debt instrument that evidences and secures a loan and that is secured by a mortgage on real property. Where, as here, the debt instrument and the mortgage that secures it are for the same principal amount and provide for the same payment terms, and where payment of one is payment of the other, the mortgage is not a true collateral or accessory security; the two instruments secure repayment of the original or principal liability -- here, the single loan -- and s. 8 applies to both.

- b) Second, the Court found that the language of s. 8 itself did not limit the prohibition to the terms of the mortgage instrument itself.
- c) Third, the Court found that this conclusion was consistent with its earlier decision in *Pizzey Estate v. Crestwood Lake Ltd.* (2004), 69 O.R. (3d) 306, 2004 CanLII 36108 (C.A.).

[33] Here, the clause setting out the Default Rate in the Bond Instrument engages s. 8. For ease of reference, the default interest clause is quoted again as follows:

11.4 Default interest and delay in payment

- (a) If the Issuer fails to pay any sum in respect of the Bonds when the same becomes due and payable under these Conditions, interest shall accrue on the overdue sum (both before and after judgment) at the interest rate of twenty two per cent. (22%) per year, compounded daily, from the due date and ending on the date on which full payment is made to the applicable Bondholder in accordance with these Conditions and shall be payable on demand by the applicable Bondholder free and clear of and without set-off or deduction for Taxes or otherwise. Such default interest shall accrue on the basis of the actual number of days elapsed and a 365-day year.

[34] This clause meets the requirements for engaging s. 8 set out in *P.A.R.C.E.L.* because:

- a) it imposes a "rate of interest": the language in the term clearly refers to "interest" and the amount is framed in terms of a percentage, compounded daily;
- b) it relates to arrears of principal or interest: the term is titled "Default" interest and the Default Rate only applies to an overdue sum, after payments have ceased;
- c) it increases the charge on the arrears beyond the rate of interest payable on principal money not in arrears: the Default Rate of 22% per year, compounded daily, is higher than the normal interest rate of 12% per annum due if the payor has not defaulted;

d) the arrears of principal or interest are secured by a mortgage on real property: under the Guarantee, Ms. Zhang agreed to act as Guarantor for the Issuer relating to debt they owed to Gemstone. In doing so, she gave the Mortgage on the Lands to Gemstone, which registered the Mortgage as a charge on the Lands in March 2023.

[35] To the extent that Gemstone argues that the interest rate is enforceable because it is contained in the Bond Instrument, rather than the Guarantee, the Court of Appeal for Ontario's decision in P.A.R.C.E.L. is relevant. It stands for the proposition that s. 8 will apply to terms where "the debt instrument and the mortgage that secures it are for the same principal amount and provide for the same payment terms, and where payment of one is of the other": P.A.R.C.E.L. at para. 60.

[36] Here, payment under the Guarantee was for the same principal amount as under the Bond Instrument, under the same interest terms, and payment of one would be payment of the other.

[37] As a result, the effect of the application of s. 8 is that the default interest rate is unenforceable.

Issue #2: Was the Demand invalid because it was based on an unenforceable interest rate?

[38] Having found that the default interest rate in the Bond Instrument is unenforceable as contrary to s. 8, the next issue is whether the Demand is invalid because it was based on an unenforceable interest rate.

[39] Ms. Zhang submits that there is a "manifest error" (wording from clause 11.4(b) of the Bond Instrument) in the Demand by virtue of the calculation of the interest following default at the 22% Default Rate contrary to the Interest Act, and there was no certificate showing a calculation in reasonable detail of the amount of the amounts due or expressed to be due. The clause 11.4(b) wording is set out again as follows:

(b) A certificate of a Bondholder showing a calculation in reasonable detail of the amount of any of the amounts due (or expressed to be due) and unpaid shall, in the absence of manifest error, be conclusive as against the Issuer as to the amounts due. Default interest (if unpaid) arising on an overdue amount will be compounded with the overdue amount and will remain immediately due and payable.

[40] As a result, Ms. Zhang submits there should be a further demand in the form provided by the Guarantee, and a normal six month redemption period for a foreclosure pursuant to section 16(2) of the Law and Equity Act, R.S.B.C. 1996, c. 253, which also provides that a longer or shorter redemption period may be set if the court considers, in the circumstances, that a shorter or longer period is justified.

- [41] Gemstone submits that there was no manifest error in the calculation, because the calculation was in accordance with the wording of the Bond Instrument, with the interest rate and interest calculation being incorporated by the terms of the Mortgage, as follows: "(b) the interest rate and interest calculation period shall be determined pursuant to the terms of the amended Bond Instrument annexed to the Second Amendment."
- [42] The question is what is the effect of the Demand, if any, where the Demand does not include a calculation of the amounts due or expressed to be due and unpaid, and the stated amount of the Demand is based on an unenforceable interest rate.
- [43] In *Barclay Construction Corp. v. Bank of Montreal* (1989), 65 D.L.R. (4th) 213, 1989 CanLII 5198 (B.C.C.A.), the Court of Appeal considered whether a creditor is required to give notice for payment before enforcing security instruments, as follows:
- [15] ... Here Barclay relied primarily upon the judgment of Estey J. in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.* (1982), 1982 CanLII 19 (SCC), 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, [1982] 1 S.C.R. 726, and to a lesser extent upon *Thermo King*. This passage from p. 16 of *Lister* was quoted to support a purported general trend towards requiring reasonable notice for payment before enforcing security instruments:

The rule has long been enunciated in *Massey v. Sladen* (1868), L.R. 4 Ex. 13 at p. 19, that the debtor must be given "some notice on which he might reasonably expect to be able to act". The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but none the less real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment.

- [16] The "eagerness" to construe concept in the last sentence of this paragraph ought not to be given such prominence as to obscure the other salient points in it, such as that the primary task is that of construing the debt-evidencing instrument, that economic duress is a factor to be taken into account, and that what is reasonable "will depend upon all the facts and circumstances in each case".
- [17] It is because the facts and circumstances differ from case to case that there is no rule of universal application on what constitutes reasonable notice. In some cases, for example, it is reasonable that there be no notice at all: see *Canadian Imperial Bank of Commerce v. Quesnel Machinery Ltd.* (1985), 1985 CanLII 630 (BC SC), 62 C.B.R. (N.S.) 91 (B.C.S.C.) at p. 93, per McLachlin J., as she then was. It is also because the facts and circumstances differ from case to case that a judgment in one case is only persuasive authority in another if the facts and circumstances are closely analogous. There is no such close analogy here between this case and either *Lister* or *Thermo King*.

[Emphasis added.]

- [44] In *North Country Credit Union v. Edey et al*, 2004 BCSC 1670, a mortgage was in arrears when a demand was sent. The debtor objected to the demand, arguing that the arrears were only one payment when the letter referred to two payments in arrears. Despite that error, the Court held, at paras. 14-15, that default had been established, the default properly triggered a demand, and the real issue was the true nature of the demand, and whether it met the terms of the mortgage.
- [45] The debtor also argued that the demand for payment of the arrears and taxes, including a warning of the commencement of foreclosure proceedings, was insufficient to accelerate payment of the entire principal under the mortgage.
- [46] The Court held that the demand was sufficient under the terms of the mortgage because the terms of the mortgage included a provision that the entire remaining principal was accelerated and due and payable in the event of default.
- [47] The Court stated that the demand clearly warned of foreclosure in the event that the defaults were not cured. A specific and direct demand for the full principal was not required, the demand letter was sufficient under the terms of the mortgage such that the entire principal was accelerated in the event the arrears and costs were not paid.
- [48] Here, the Demand was notice to Ms. Zhang from Gemstone that Gemstone intended to rely on the terms of the Guarantee, demanding payment and notifying Ms. Zhang that if payment of the stated amount was not received on or before June 9, 2023, legal proceedings may be commenced against her without further notice, including foreclosure of the Mortgage.
- [49] Relevant facts in this case regarding the debt-evidencing instrument are that the Mortgage, as security for the Guarantee of the Bond Instrument debt, incorporated by reference the interest provisions of the Bond Instrument. Clause 11.4 of the Bond Instrument provides that a certificate of a Bondholder showing a calculation in reasonable detail of the amount of any of the amounts due (or expressed to be due) and unpaid shall, in the absence of manifest error, be conclusive as against the Issuer as to the amounts due.

Amount due based on the Default Rate of 22% following default

- [50] The Demand states that the amount due and owing by the Obligors, that term including the respondent as Guarantor, was HK\$76,701,672.99 as at May 22, 2023 plus interest accruing at the rate of 22% per annum, compounded daily, and costs.
- [51] The Demand does not include a certificate of any calculation, or any calculation at all, of the HK\$76,701,672.99, other than the statement of that amount and the Default Rate, without reference to the date of the default.

- [52] The affidavit evidence filed for this application indicates that the default occurred on September 16, 2022 at which point the Normal Rate 12% interest to September 16, 2022 on the outstanding principal at that time of HK\$65,000,000, was HK\$2,009,753.42.
- [53] Interest at the Default Rate of 22%, if applicable, from September 17, 2022 to the date of the application, July 8, 2024, was HK\$31,446,194.69, less some interest payments, for a total of HK\$92,455,948.12 in principal and interest owing based on the Default Rate.
- [54] However, none of that kind of detailed calculation is included in the Demand for the amount owing to May 22, 2023, nor was there any certificate showing a calculation in reasonable detail of the amount of any of the amounts due (or expressed to be due) and unpaid, as contemplated by the terms of the Bond Instrument interest provisions at clause 11.4(a) and (b).

Amount due based on the Normal Rate following default

- [55] Further evidence filed for this application indicates that applying an interest rate of 12% on the principal of HK\$65,000,000 from the date of default, September 17, 2022, to the application hearing date, July 8, 2024 equals HK\$16,135,232.88, and, subtracting HK\$6,000,000 in interest payments, the total principal and interest outstanding at the date of the application, July 8, 2024, was HK\$75,135,232.88, with per diem interest accruing at 12% per annum, compounded daily, at HK\$21,369.86.
- [56] As noted above, the comparable calculation if the Default Rate at 22% is used for the same dates results in principal and interest totalling HK\$92,455,948.12, and per diem interest accruing at 22% per annum, compounded daily, at HK\$55,693.30.
- [57] There is no evidence of any response by Ms. Zhang to the Demand, her brief affidavit evidence includes reference to the Bond Instrument, the Mortgage, and her statement that she never received a copy of the certificate of calculations relating to the amount claimed to be due and owing.
- [58] At the time she received the Demand, Ms. Zhang could not have known how the Court would ultimately rule on whether or not the Default Rate interest rate was enforceable or not; nevertheless, the Demand provided Ms. Zhang with notice that default had occurred, it demanded payment in accordance with the terms of the Guarantee, and notified Ms. Zhang that if payment was not made, legal proceedings which could include foreclosure of the Mortgage might be commenced against her.
- [59] That notice was, in the words of Barclay: "some notice on which [she] might reasonably expect to be able to act" (at para. 15), and, in the words of Edey, "clearly [warning] of foreclosure in the event that the defaults [were] not cured." (at para. 25).

- [60] Regarding the specific terms of the debt-evidencing instrument, the interest terms of the Bond Instrument, incorporated by reference in the Mortgage, include the clause 11.4(b) reference to a certificate showing a calculation of the amount due, or expressed to be due, which, in the absence of manifest error, was conclusive as against the Issuer as to the amounts due.
- [61] Ms. Zhang has not demonstrated that the amount of the Demand was a manifest error. It was the amount "expressed to be due" according to the terms of the Bond Instrument. The effect of no certificate of the calculations of the amount owing in the Demand, according to clause 11.4(b) of the Bond Instrument, is that the amount of the Demand is not conclusive as against Ms. Zhang as to the amounts due as stated in the Demand; however, the Demand was reasonable to the extent that it gave Ms. Zhang notice of the default, demand for payment pursuant to the terms of the Guarantee, all of which is notice for which she might reasonably be expected to be able to act.
- [62] As a result of the application of s. 8 of the Interest Act, Gemstone cannot enforce the quantum stated in the Demand, that is, the amount stated is not conclusive as against Ms. Zhang, but in my view, it does not make the Demand invalid as the Demand was notice to Ms. Zhang of Gemstone's intention to rely on the Guarantee for payment of the debt, including possible foreclosure against the Lands.
- [63] Gemstone submits that rather than re-issuing the Demand with a six month redemption period as requested by Ms. Zhang, the Court should "read in" a 12% interest rate and proceed with foreclosure steps.
- [64] In both P.A.R.C.E.L at para. 76; and Krayzel at para. 38, the Court imposed a lower interest rate after finding that an increased rate violated s.8. However, the circumstances of both these cases can be distinguished. The consequence of the rulings in P.A.R.C.E.L. and Krayzel was to set the interest rate going forward. It was not to determine whether a demand letter was valid and could lead to foreclosure.
- [65] More analogous is *Walia v. 2155982 Ontario Inc.*, 2019 ONSC 1059, aff'd 2020 ONCA 493. In *Walia*, the plaintiff was a mortgagee and the respondent was a mortgagor and owner of a property in Stratford, Ontario. The plaintiff sought judgment for possession of the property. The respondent had borrowed a total of \$350,000 from the plaintiff, by way of a first mortgage agreement and second mortgage agreement. Both agreements set the interest at 12% per annum. In April 2015, the mortgage matured without being paid. The parties then signed a renewal of mortgage agreement, which provided for interest of 21% per annum.
- [66] The Ontario Superior Court of Justice found that, under s. 8, "arrear" referred to the entire mortgage in default and the "trigger" event for the increased interest was the respondent's non-payment: *Walia* at para. 34.
- [67] As a result, the interest rate of 21% violated s. 8: *Walia* at para. 37.

[68] Justice Hebner made a declaration that the term increasing the mortgage rate to 21% was invalid. She ordered that the quantum of interest payable was 12%. She also ordered that the mortgage be discharged upon payment of the principal, interest, and an administration fee within 30 days: *Walia* at para. 49.

[69] Here, similarly, having found the 22% Default Rate unenforceable, but the Demand being valid notice of default and possible foreclosure, and the 12% Normal Rate applicable, I find that the outstanding balance of the debt pursuant to the Mortgage at the date of the application, July 8, 2024, was HK\$75,135,232.88, with per diem interest accruing at 12% per annum, compounded daily, at HK\$21,369.86.

Issue #3 and #4: Redemption Period and Order Absolute

[70] The next issues are Gemstone's submission that foreclosure should be granted based on a one day redemption period and order absolute.

[71] Ms. Zhang submits that a six month redemption period is appropriate. She also submits that the wording of the Guarantee does not provide for an Order Absolute, referring to the final sentence of clause 2.1 of the Guarantee, as follows:

2.1 Guarantee. For valuable consideration, I hereby provide a limited guarantee of payment of all of the debts and liabilities ... of the Primary Debtor and the Other Obligors ... ("Guaranteed Obligations"). The Guaranteed Obligations shall be limited to and solely payable from any and all proceeds realized by the Company [Gemstone] (acting as security trustee for the Bondholders) in a foreclosure or court-ordered sale of the Land through the exercise of its remedies under the Mortgage.

[Emphasis added.]

[72] Regarding Ms. Zhang's request for a six-month redemption period, and the petitioner's request for a one-day redemption period, in *Lanyard Investments Inc. v. 3771 No. 3 Road Inc.*, 2024 BCSC 1664, Associate Judge Robertson considered the petitioner's request for a shorter redemption period, as follows:

[18] the starting point is a six month redemption period, with any order for a shortened period to be exceptional as it is "contrary to the ancient principle that a defaulting mortgagee should have a six-month grace period to redeem the property", as noted in [McEachern, C.J.S.C., as he then was, in *On Foreclosure Practice*, (1983) 41 Advocate 583], where the test was stated this way:

The redemption should not be less than six months unless:

- (a) the premises are abandoned or suffering waste. The fact that premises are vacant does not necessarily mean that they are abandoned; or
- (b) the mortgagor has no equity and is unlikely to be able to refinance and the mortgagee will likely suffer a loss or increased loss if the usual order is made.

Even in these circumstances, an immediate order absolute or a shortened redemption period will not always be made, particularly in the case of residential premises where the mortgagor is in occupation. The court retains a discretion in this connection, but, in most cases, the position of the mortgagee should not be worsened materially.

[19] This was cited with approval in *CIBC Mortgage Corp. v. Gomez*, 1997 CanLII 1823 at para. 4 and *Tri City Capital Corp. v. 0942317 B.C. Ltd.*, 2016 BCSC 1514, at para. 172.

[73] In *1055249 B.C. Ltd. v. Grace Mtn. Land Company, Ltd.*, 2023 BCSC 2339, Justice Stephens reviewed principles relating to an order absolute, as follows:

[50] Where a party fails to redeem a mortgage before the expiry of the redemption period set out in an order nisi, the petitioner may apply for an order of foreclosure: Supreme Court Civil Rules, R. 21-7(6).

[51] An order absolute has been described as an order that "finally and absolutely determine[s] the parties' rights": *Bank of Montreal v. Brett*, 53 B.C.L.R. 346, 1984 CanLII 859 (S.C.) at para. 7 per Justice McLachlin (as she then was). After the granting of an order nisi, "a further application for an order absolute is required at the expiry of the redemption period to finally and absolutely foreclose the mortgagor of [their] rights": *Bank of Montreal* at paras. 5, 7.

[52] An application for an order absolute has been referred to as "relatively routine [in] nature and one that is regularly granted in chambers upon the petitioner meeting the requirements of showing that the redemption period has expired without the mortgagor having made any payments to redeem the property": *Polera Enterprises Ltd. v. Mountain Shores Development Corp.*, 2014 BCSC 706 at para. 1.

[53] However, where the borrower opposes an order absolute, an application for an order absolute can, as here, occur at the same time as an application to extend the redemption period. As stated by Justice Armstrong, this is because "[a]ny delay in granting an order absolute would amount to an extension of the redemption period": *High Wave Management Ltd. v. Englishman River Falls RV Park Ltd.*, 2017 BCSC 353 at paras. 47-49.

[Emphasis added.]

[74] Here, the wording of the Guarantee quoted above refers to "foreclosure or court-ordered sale of the Lands through the exercise of its remedies under the Mortgage." That same wording is included in the Mortgage, and that wording neither specifically grants nor excludes an application for an order absolute.

[75] Other evidence of the circumstances of the Lands and the debt includes the following:

- a) another mortgage referred to as the "Haitong Mortgage", made in favour of Haitong International Securities Company Limited ("Haitong") was registered against the Lands before the Mortgage.

- b) The loan balance of the Haitong Mortgage is stated to be HK\$190,025,966.37 as of May 31, 2024.
 - c) There is evidence of a priorities deed dated February 23, 2022, between Haitong, the petitioner and the respondent.
 - d) Each of the two properties also has an earlier CIBC mortgage registered against them, the evidence referring to the principal of the CIBC mortgage on Lot 2 as CDN\$3,250,000 and Lot 3 as CDN\$4,282,800.
 - e) An appraisal of the value of Lot 2 and Lot 3 as of June 13, 2024 was CDN\$6,640,000 and CDN\$7,340,00, respectively, for a total value of CDN\$13,980,000.
- [76] With evidence of the Canadian dollar equivalent of the Mortgage debt of HK\$75,135,232.88 appearing to be close to the appraised value of the Lands, and the evidence of the total amount of the Mortgage, Haitong Mortgage and CIBC mortgages secured against the Lands totalling in excess of CDN\$50,000,000, if the Lands were sold at the appraised value, based on the Bank of Canada's June 12, 2024 foreign exchange rate for the Hong Kong dollar, there would be a shortfall of over CDN\$40,000,000; however, Ms. Zhang is just one of the Obligor of the Bond Instrument, and the terms of the Guarantee are that Ms. Zhang's Guaranteed Obligations are limited to the proceeds realized by Gemstone in a foreclosure or court-ordered sale of the Lands through the exercise of the remedies under the Mortgage.
- [77] In any event, it appears clear that based on the evidence in this application, Ms. Zhang has no equity in the Lands, and the total debt secured against the Lands appears to significantly exceed the appraised value of the Lands in 2024.
- [78] Considering all of the circumstances above, specifically the evidence of the lack of Ms. Zhang's equity in the Lands, the amount of the debt secured against the Lands, and the risk of further loss to Gemstone, it is my view that a redemption period less than six months is justified. Similar to Walia, the redemption period will be 30 days, the 30 day period expiring on July 4, 2025, failing which the respondent will then be in a position to apply for an order absolute and conduct of sale.
- [79] Under this approach, the mortgagor gains certainty as to amount due at the lower rate of interest and is given a set period to pay that amount. If the deadline is not met, then the mortgagee is in a position to apply for order absolute and conduct of sale.
- [80] The Foreign Money Claims Act, R.S.B.C. 1996, c. 155 provides that "if... the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date," the conversion date being "the last day, before the day on which a payment under the order is made by the judgment debtor to the judgment creditor,

that the bank quotes a Canadian dollar equivalent to the other currency."

- [81] I find that Gemstone has established a default in payment under the Mortgage and is entitled to judgment in the amount of money due and payable being the Canadian dollar equivalent of HK\$75,135,232.88 as of July 8, 2024 together with interest thereon at the rate of 12% per annum, compounded daily, being a daily rate of the Canadian dollar equivalent of HK\$21,369.86 from July 8, 2024, to and including the date of payment, plus assessed costs of the petitioner of and in connection with this proceeding.

Conclusion

- [82] The orders that follow from the above are:

THIS COURT ORDERS AND DECLARES THAT:

1. The term of the mortgage and assignment of rents dated February 23, 2022 (the "Mortgage") increasing the rate of interest from 12% to 22% on default of payment is unenforceable as contrary to s. 8 of the Interest Act;
2. The amount of the Demand from the petitioner to the respondent dated May 22, 2022 is unenforceable as the increase in the interest rate from 12% to 22% on default of payment is contrary to s. 8 of the Interest Act;
3. The Mortgage made between the respondent, Rachell Gao Zhang, also known as Gao Weiping, also known as Wei Ping Gao, as mortgagor, and the petitioner, as mortgagee, and registered in the New Westminster Land Title Office on March 1, 2022, under registration number CA9751537 and CA9751538 are charges on the following lands and premises:

Parcel Identifier: 025-839-071

Strata Lot 2 District Lot 526 Group 1 New Westminster District Strata Plan BCS638 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form V

("Lot 2")

Parcel Identifier: 025-839-080

Strata Lot 3 District Lot 526 Group 1 New Westminster District Strata Plan BCS638 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form V

("Lot 3", and collectively with Lot 2, the "Lands")

in priority to any right, title or interest of any of the respondents in the Lands.

4. There has been a default under the Mortgage and that the last date for redemption shall be July 4, 2025 (the "Redemption Date").

5. The amount of money due and owing under the Mortgage and the amount of money required to redeem the Lands on the Redemption Date is the Canadian dollar equivalent of HK\$75,135,232.88 as of July 8, 2024 together with interest thereon at the rate of 12% per annum, compounded daily, being a daily rate of the Canadian dollar equivalent of HK\$21,369.86 from July 8, 2024, to and including the date of payment, plus assessed costs of the petitioner of and in connection with this proceeding (the "Amount Required to Redeem").

THIS COURT FURTHER ORDERS THAT:

6. Upon the respondent, paying to the solicitor of record for the petitioner or, if no such solicitor exists, then either to the petitioner or into Court to the credit of this proceeding at the Court Registry, Vancouver, British Columbia, the Amount Required to Redeem before pronouncement of either order absolute of foreclosure or an order approving the sale of the Lands, then the petitioner shall reconvey the Lands free and clear of all encumbrances in favour of it or by any person claiming by, through or under it, to the respondent or respondents that made payment.
7. If the Lands are not redeemed, the petitioner shall be at liberty to apply for an order absolute of foreclosure and upon pronouncement of order absolute of foreclosure the respondents and all person claiming by, through or under him shall thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption in and to the Lands, and all monies paid under the Mortgage shall become the property of the petitioner free from any right of the respondents and the respondents shall immediately deliver to the petitioner vacant possession of the Lands.
8. The petitioner is at liberty to apply to this Court for an Order directing an inquiry, assessment or accounting to be held of any amounts due to the petitioner pursuant to the Mortgage for principal, simple or compound interest, taxes, utilities, insurance expenses, legal or collection expenses, costs, charges, or changes in interest rate, whether such amounts become due before or after the date of pronouncement of this Order, and for an Order varying the Amount Required to Redeem and the Judgment in this Order accordingly.
9. The assessed costs of and in connection with this proceeding are awarded to the petitioner.
10. The petitioner's costs to and including this Order will be assessed on a party and party scale B basis, and the petitioner is at liberty to apply for an Order that any of its costs after this Order will be assessed on a different basis.

"Jones J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/10/2025BCSC1012.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/gemstone-advantage-limited-v-zhang-2025>

Prepared on 28 October 2026 · Esheria