

CANADA / JUDGMENT

Haptom v. Pahl

2013 BCSC 71

COURT

Supreme Court of British Columbia

DECIDED

18 January 2013

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2013 BCSC 71 Haptom v Pahl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Haptom v Pahl,

2013 BCSC 71

Date: 20130118

Docket: H120788

Registry: Vancouver

Between:

Samuel Haptom

Petitioner

And

Rodney Wayne Pahl, 0790216 B.C. Ltd., The Owners,

Strata Plan BCS3249 and Her Majesty the Queen in Right of Canada

Respondents

Before: The Honourable Mr. Justice R. Punnett

Reasons for Judgment

(In Chambers)

Counsel for the petitioner:

S.J. Marescaux

Counsel for the respondents

Rodney Wayne Pahl and

0790216 B.C. Ltd.:

D.K. Magnus

Place and Date of Hearing:

Vancouver, B.C.

October 29, 2012

Place and Date of Judgment:

Vancouver, B.C.

January 18, 2013

- [1] The petitioner seeks judgment against the respondents Rodney Wayne Pahl and 0790216 B.C. Ltd under two loan agreements relating to the same debt as well as an order nisi of foreclosure and judgement under two mortgages granted over two separate parcels of land securing that debt. The respondent mortgagors Mr. Pahl and 0790216 B.C. Ltd. challenge the mortgages and loan agreements for uncertainty and failure to comply with the Interest Act, R.S.C., 1985, c. I-15. The remaining respondents did not participate in the application.

Background

- [2] The petitioner entered into a loan agreement dated July 10, 2009 with the respondent Mr. Pahl and two other individuals. As security for the advancing of credit under the loan agreement Mr. Pahl, along with the other individuals, granted and mortgaged to the petitioner the lands registered to Mr. Pahl (Pahl Lands).
- [3] After the execution of the loan agreement with Mr. Pahl the petitioner agreed to release the other two individuals. On April 7, 2011 an amending agreement was entered into between 0790216 B.C. Ltd. and the petitioner. Under the amending agreement 0790216 B.C. Ltd. signed a loan agreement and mortgaged to the petitioner land owned by 0790216 B.C. Ltd. (0790216 Lands).
- [4] Both the loan agreement with Mr. Pahl and the loan agreement with 0790216 B.C. Ltd. provide for the advance of a \$150,000 non-revolving term facility with interest at 24% per annum. The repayment clauses in the loan agreements provide as follows:
- a) Loan agreement with Pahl:

Interest only, \$3,000 per month, on the 1st day of each month payable by way of 6 post dated cheques commencing September 1, 2009. Interest adjust amount of \$96.77 per day for month of July from Advancement Date to July 31 is payable August 1, 2009. Last Payment on February 1st, 2010.

b) Loan agreement with 0790216 B.C. Ltd.:

Interest only, \$3,000 per month, on the 1st day of each month payable by way of 6 post dated cheques commencing May 1, 2011.

[5] Each loan agreement is secured by a Form B mortgage. The Form B mortgages are the same in that they both state in box 5(b) that the interest rate is 24% per annum, in box 5(d) that the interest calculation period is annually, in box 5(g) that the amount of each periodic payment is \$3,000, and in box 5(h) that the Interest Act statement respecting the equivalent rate of interest calculated half yearly not in advance is "N/A%" per annum. They differ from the loan agreements wording to the extent that the \$3,000 payment is not identified as interest only as in the loan agreements. Both Form B mortgages reference the Prescribed Standard Mortgage Terms (Land Title Act R.S.B.C. 1996 c0. 250, s. 227).

Issues

- [6] Is there uncertainty respecting the interest to be charged given the loan agreements refer to interest only of \$3,000 per month but the Form B mortgage refers to payment of \$3,000 per month with no reference to interest?
- [7] Does the Interest Act, R.S.C., 1985, c. I-15 apply?

Law on Uncertainty

[8] In *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968). 1 D.L.R. (3d) 513 the British Columbia Court of Appeal summarized the law on uncertainty as follows at 517-518:

In the first place, consideration must be given to the duty of a Court and the rules it should apply, where a claim is made that a portion of a commercial agreement between two contracting parties is void for uncertainty or, to put it another way, is meaningless. The primary rule of construction has been expressed by the maxim, *ut res magis valeat quam pereat* or as paraphrased in English, "a deed shall never be void where the words may be applied to any extent to make it good". The maxim has been basic to such authoritative decisions as *Scammell v. Ouston*, [1941] 1 All E.R. 14; *Wells v. Blain*, [1927] 1 D.L.R. 687, [1927] 1 W.W.R. 223; *Ottawa Electric Co. v. St. Jacques* (1902), 31 S.C.R. 636, as well as many others, which establish that every effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to. Also, as stated as early as 1868 in *Gwyn v. Neath Canal Navigation Co.* (1868), L.R. 3 Ex. 209, that if the real intentions of the parties can be collected from the language within the four

corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.

[9] In *First City Investments Ltd. v. Fraser Arms Hotel Ltd.* (1979), 104 D.L.R. (3d) 617 (B.C.C.A.), Hinkson J. for the court said this at 623:

In my view, the approach adopted by Wilson C.J.S.C. in the *Diamond Developments* case is not appropriate. Rather the approach to be adopted is that set out by Bull J.A. in *Marquest Industries Ltd. v. Willows Poultry Farm Ltd.* (1968), 1 D.L.R. (3d) 513, 66 W.W.R. 477. He said at pp. 517-8 D.L.R. p. 482 W.W.R.:

if the real intentions of the parties can be collected from the language within the four corners of the instrument, the court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.

Discussion of Uncertainty

[10] The petitioner seeks judgement against Mr. Pahl and 0790216 B.C. Ltd. under the loan agreements and pursuant to their covenants in the mortgages.

[11] The respondents submit that the failure of the mortgages to state that payment is interest only, (as in the loan agreements), along with box "h" stating the equivalent half yearly rate of interest is not applicable creates uncertainty respecting the actual interest charged. That is, if the agreement is interest at 24% per annum with interest calculated annually the \$3,000 per month payments are greater than the actual interest due. However if the interest is calculated monthly then the \$3,000 per month is in fact interest only.

[12] It is clear from both the loan agreements and the Form B mortgages that the annual rate of interest is 24% per annum calculated annually. It is only the payments that were to be made monthly. The monthly payments appear to have been calculated by taking the annual total interest of 24% on \$150,000 (\$36,000) and simply dividing it into 12 equal payments of \$3,000. This ignored the "reinvestment principle" which I will address later in these reasons. The consequence is that payment of \$3,000 a month, applied to interest only, results in total interest that is greater than 24% per annum calculated annually.

[13] The respondents submit that the rate of interest is void as it is uncertain. They submit that it is not clear if it is 24% per annum or a higher rate arising from the monthly payments of \$3,000 per month. They argue further that because of this uncertainty, the actual interest rate is hidden, so that the Interest Act applies. They assert that s. 6 of the Interest Act results in no interest being payable because the mortgage does not provide a statement showing the amount of principal money and the rate of interest chargeable on that money calculated yearly or half-yearly, not in advance. In the alternative they state that interest chargeable under the mortgage is restricted to 24% per annum calculated annually.

- [14] The position of the petitioner is that there is no uncertainty: that both the loan agreements and the mortgages provide for interest of 24% per annum on a line of credit of \$150,000 with payments of \$3,000 per month. It is the petitioner's submission that the intent of the parties is clear and that the fact that the monthly payment exceeds the actual interest payable monthly does not lead to uncertainty nor to the application of the provisions of the Interest Act.
- [15] Does the fact that the loan agreements state that the \$3,000 payable per month is interest only, while the mortgages do not, lead to uncertainty? That is, do the loan agreements conflict with the mortgages such that the interest being charged is uncertain and as a result the mortgagors cannot determine what they are obligated to pay? In my view there is no such conflict nor is there uncertainty.
- [16] The loan is evidenced by the loan agreements. Those agreements are the primary loan documents. The mortgages are security for those loan agreements. The result is that judgment can be granted under the loan agreements in accordance with the terms of the loan agreements while the mortgage security can be enforced in accordance with the mortgage terms. Mortgage security need not mirror the loan agreements it secures.

The Loan Agreements

- [17] The loan agreements contain all of the essential terms. The petitioner is entitled to judgment against Mr. Pahl and 0790216 B.C. Ltd. in accordance with those terms. That is, judgment on the balance due with interest at 24% per annum calculated annually and payable with monthly payments of interest only. However, the calculation of the balance due raises two issues: the first is that monthly payments on an annual interest calculation trigger the reinvestment principle and the second the fact that the \$3,000 per month payment exceeds the actual interest calculated and compounded annually.
- [18] As noted by Wilson J. in *Dyson v. Moser*, 2002 BCSC 1486 at para. 18, relying on *Bank of Nova Scotia v. Dunphy Leasing Enterprises Ltd.*, 1991 ABCA 351, [1992] 1 W.W.R. 577 (C.A.), aff'd [1994] 1 S.C.R. 552, when the payments are more frequent than the interest calculation period, the amount paid may exceed the interest due in a particular year, so that the reinvestment principle applies.
- [19] In *Bank of Nova Scotia* at para. 103 Fisher J.A. discussed the reinvestment principle as follows:
- [103] There is however another sense in which "compounding" of interest is said to occur and that is when the dates for payment of interest under a contract are more frequent than the dates for calculating interest thereunder. When this happens, what has come to be known as the reinvestment principle (or deemed reinvestment principle) is said to apply. This principle and the very point that its application is akin to compounding of interest (though not compounding in the mathematical sense in which this word is ordinarily used) were explained by Mary Anne Waldron in "Sections 6 and 7 of the Canada Interest Act: Curiouser

and Curiouser" (1984) 62 Can. Bar Rev. 146 at 171:

The re-investment principle, in its simplest form, is a reflection of the basic fact of financial planning that a dollar payable today is worth more to a lender and costs more to a borrower than a dollar payable at some future date. Anyone who appreciates the value of deferring taxes appreciates that point.

An example will illustrate. Suppose that ... I borrow \$1,000 at 12% per annum, calculated annually. ... If I pay \$10 every month, by the end of the year I will have paid \$120. ... I have conferred upon my lender the opportunity of investing the interest paid before the calculation date. ... The effect is that he will earn interest on interest, just as though he had been allowed to compound it. If interest is to be paid more frequently than it is to be calculated, then arguably the lender should charge less interest than the stipulated rate divided by the number of payment periods or, just as in more frequent compounding, he will receive a greater yield from the loan, with a consequent greater cost to the borrower. ... The principle is known as the reinvestment principle. [Emphasis added.]

[104] Frequently the terms "compounding" and "calculating" are used interchangeably. But understanding the distinction between the two terms that I have just outlined as well as the difference between the two uses of the term "compounding" is key to resolving these issues: first, rationalizing what might otherwise appear to be contradictory judicial authorities; and second, knowing when the reinvestment principle will be applied in a loan contract so as to require a creditor to calculate interest by the effective rate method where the contract is silent on this point. [CanLII]

[20] The applicability of this principle depends on whether interest is to be calculated annually or monthly. The loan agreements clearly provide for monthly payments of interest but such interest is calculated annually. I am satisfied that the reinvestment principle applies.

[21] As I am satisfied that the reinvestment principle applies the payments made under the loan agreements by the respondents to the petitioner of \$3,000 per month must be recalculated in accordance with it. That is, on the basis that the annual rate of interest agreed to was 24% per annum compounded annually with monthly payments for interest only. This will also address the second issue of recalculation of the \$3,000 per month interest only payment. Any overpayment of interest is to be credited to the Petitioner. Given the per annum rate is set at 24% per annum calculated annually there is no violation of s. 4 of the Interest Act (R.S.C., 1985, c. I-15).

The Mortgages

[22] While the mortgages do not refer to the \$3,000 per month being interest only they do clearly provide that the principal is \$150,000 with interest at 24% per annum calculated annually with payments of \$3,000 per month. The Prescribed Standard Mortgage Terms provide for the manner in which the \$3,000 payments are to be applied as follows:

"interest calculation period" means the period or periods for the calculation of interest shown on the mortgage form;

"interest rate" means the interest rate shown on the mortgage form;

...

Interest:

3. (1) Interest is chargeable on the mortgage money and is payable by the borrower.
- (2) Interest is not payable in advance. This means that interest must be earned before it is payable.
- (3) Interest on advances or readvances of the principal amount starts on the date and on the amount of each advance or readvance and accrues on the principal amount until the borrower has paid all the mortgage money.
- (4) Interest payable on any part of the principal amount advanced before the interest adjustment date is due and payable to the lender on the interest adjustment date.
- (5) At the end of each interest calculation period, unpaid accrued interest will be added to the principal amount and bear interest. This is known as compound interest.

...

6 (3) Any money paid to the lender under this mortgage shall,

- (a) prior to a default, be applied first in payment of interest, secondly in payment of the principal amount and thirdly in payment of all other money owed by the borrower under this mortgage, and
- (b) after a default, be applied in any manner the lender chooses.

[23] As a result the \$3,000 per month is payable in accordance with the mortgage terms and is applied firstly to interest, secondly to payment of principal with the balance if any to all other money owed under the mortgage. There is no contravention of the Interest Act given the annual interest rate is properly expressed as an annual rate. The purpose of s. 6 of the Interest Act "is to protect a mortgagor from having concealed from him the true rate of interest which he is paying." (Kilgoran Hotels Ltd. v. Samek, [1968] S.C.R. 3 at 5; Ferland v. Sun Life Assurance Co. of Canada, [1975] 1 S.C.R. 266.) I find there is no such concealment here.

Conclusion

[24] The petitioner is therefore entitled to judgment against Mr. Pahl and 0790216 B.C. Ltd. in accordance with the loan agreements recalculated to account for the reinvestment principle. Any overpayment shall accrue to the credit of the respondents Mr. Pahl and 0790216 Ltd.

- [25] The petitioner is also entitled to judgment against Mr. Pahl and 0790216 B.C. Ltd. in accordance with the mortgages, the amount to be calculated in accordance with the mortgage terms, that is, the monthly payment is to be applied firstly to interest at 24% per annum calculated annually with the balance to the principal.
- [26] In my view the fact that these calculations may result in differing judgment amounts is consistent with the loan agreements and the mortgage. The judgment under the loan agreements includes the balance due under the mortgage terms.
- [27] The petitioner is also entitled to the relief sought in paragraphs 1, 2, 3, 4, 5, 6, and 11 of the petition subject to the redemption amount being calculated in accordance with these reasons. While a six-month redemption period has been ordered it is without prejudice to the right of the respondents to apply for relief from forfeiture.
- [28] Should the parties be unable to agree on the redemption and judgment amount under the mortgages and the judgment amounts under the loan agreements there shall be a reference to the registrar to calculate such sums in accordance with these reasons.
- [29] Unless there are circumstances affecting costs that I am unaware of in my view each of the parties should bear their own costs.

"Punnett J."

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