COURT FILE NO.: CV-23-1786-00

SUPERIOR COURT OF JUSTICE – ONTARIO

7755 Hurontario Street, Brampton ON L6W 4T6

RE: HINDS, Horace,
PHILLIPS, Beryl, applicants

AND:

TASMA 5 RIALTY LTD., respondent

BEFORE: Justice K. Barnes

COUNSEL: J. Krieger, for the applicants
Email: jay@jaylaw.ca

T. Walker and S. Kamalakaran for the respondent
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HEARD: March 7, 2024, by video conference

REASONS FOR DECISION

INTRODUCTION

[1] Beryl Phillips and Horace Hinds (the Applicants) request an Order that Tasma 5 Rialty Ltd. (the Respondent) pay all outstanding property taxes on the

property with municipal address 29 Four Seasons Circle, Brampton, Ontario (Four Seasons property).

[2] The Applicants request a declaration that the Notice of Sale dated June 21, 2022, (NOS) issued by the Respondent is null, void and invalid. My conclusions on the issues are set out below.

[3] The Respondent has no obligation to pay all outstanding property taxes, including penalties and interest, to the City of Brampton on the Four Seasons Property.

[4] The Notice of Sale dated June 21, 2022, issued by the Respondent is valid and enforceable. On consent, the Respondent shall delete the three months interest sought in the NOS.

[5] I have considered all the evidence and submissions of counsel but I have only reproduced portions necessary to explain and provide context for the conclusions I have reached.

FACTS

[6] Beryl Phillips (Phillips) owned land with the municipal address 664 Old Weston Road, Toronto, Ontario (Old Weston Road). The Applicant Phillips co-owned land with the municipal address the Four Seasons Property with co-Applicant Horace Hinds.

[7] On or about December 1, 2011, Philips and Hinds received a first mortgage from Home Trust. (the Home Trust Mortgage) which renewed on November 17, 2017, for a one-year term, with an interest at 2.89% per annum. The monthly payments were $2,723.07 ($2,197.14 plus $525.93 for property taxes).

[8] Paragraph 7.7 of the Home Trust Mortgage Standard charge terms states that the borrowers (the Applicants) were responsible for paying the property taxes unless the Home Trust (or its successor) chose to collect and remit the taxes. Home Trust elected to collect and remit the taxes. The Applicants paid Home Trust $2723.07 each month. Home Trust remitted the monthly tax payment to the City of Brampton.

[9] Philips gave a first priority mortgage of $608,000.00 for one year to Tasma 5 Riality Limited (the Respondent) at an annual interest rate of 8% per annum (the Cross-Collateral mortgage). This mortgage was first priority on the Old Weston Road Property. The Four Season Property was the Cross–Collateral.

[10] The Cross Collateral Mortgage was second in priority to the Home Trust Mortgage on the Four Seasons Property at the same annual interest rate of 8%. The parties agreed that the Cross-Collateral Mortgage would take effect should the Applicants default.

[11] The Applicants defaulted on their January 1, 2018 mortgage payment to Home Trust. On January 30, 2018, Home Trust issued a Notice of Sale under the

Home Trust Mortgage (Home Trust NOS) with a redemption date of March 12, 2018.

[12] According to paragraph 7.7(c)(vi) of the Home Trust Standard Terms upon this default any money collected for taxes was to be applied to the amount owing on the Home Trust Mortgage.

[13] The Applicants and the Respondent were notified of the Home Trust NOS during the first week of February 2018. The Respondent requested a discharge statement from Home Trust. Between February 13 and 15, 2018, the Respondent paid out the Home Trust Mortgage and registered a Transfer of Charge on title.

[14] The Respondent purchased the prior mortgage on the Four Seasons Property and as per the parties' contract, paragraph 7.7 of the Cross-Collateral Mortgage applied. The Respondent informed the Applicants that the new mortgage rate on the Four Seasons Property was 8%. Based on this rate, the new monthly payment of $3103.02 was due and payable to the Respondent on the 1st of each month beginning on April 1, 2018.

[15] The Applicants did not pay $3103.02. The Applicants continued to pay monthly payments of $2723.07 (inclusive of the monthly property tax premium) based on the Home Trust Mortgage rate of 2.89%. The Respondent has received such payments totalling $186,290.00 from the Applicants.

[16] The Respondent did not remit the taxation portion of the payment to the City of Brampton. As of December 5, 2023, the amount of property taxes, including penalties and interest, owing on the Four Seasons property was $46,200.67. In separate proceedings, the Respondent is seeking possession of the Four Seasons Property

[17] The Respondent concluded that the Applicants were in default for failing to pay the correct monthly premiums and failing to remit the property taxes to the City of Brampton. On June 21, 2022, the Respondent issued a Notice of Sale of the Four Seasons property (NOS). The NOS stated the principal owing as $465,453.51; a 10% administrative fee (per the Cross-Collateral Mortgage) of $46,545.35 and three months interest according to section 17 of the *Mortgages Act,* R.S.O. 1990, c. M.40, of $9,309.07.

[18] At all times all parties were represented by lawyers and received legal advice before entering into the mortgages.

ISSUES

[19] The issues raised are:

1. Is the Respondent bound by Home Trust's commitment to remit taxes to the City of Brampton?

2. Does the interest rate in the Cross-Collateral Mortgage override the interest rate in the Home Trust Mortgage?

3. Is there a legal basis for declaring the NOS null, void and/or invalid?

APPLICABLE LAW

[20] Mortgages are contracts between borrowers and lenders. The purpose of a mortgage is to set terms for borrowing and lending between the parties. Mortgage provisions should be interpreted with an understanding of the purpose of these provisions and should not be interpreted in a manner that renders the said provision ineffective: *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust,* 2007 ONCA 205, 85 O.R. (3d) 254.

[21] An encumbrancer is entitled to the interest rate stipulated in its mortgage: *Andridge Capital Corp v. Marcil, Lavallee, Loyer* 1994 CarswellOnt 3057 (C.J.), at para. 22.

[22] The dispute centers on whether section 8 of the *Interest Act,* R.S.C. 1985, c.I-15 applies. The applicable provisions are sections 2 and 8 which are reproduced below.

> Section 2: Except as otherwise provided by this Act or any other Act of Parliament, any person may stipulate for, allow and exact, on any contract or agreement whatever, any rate of interest or discount that is agreed on.

> Section 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 a 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.
>
> Section 8(2): Nothing in this section has the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrears.

[23] The purpose of section 8 of the *Interest Act* is "to protect the owners of real estate from interest or other charges that would make it impossible for owners to redeem or 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 arrears would render foreclosure all but inevitable*": Reliant Capital v. Silverdale Development Corp.,* 2006 BCCA 226, 52 B.C.L.R. (4th) 13, at paras. 51 to 53*; P.A.R.C.E.L. Inc. et al. v. Acquaviva* 2015 ONCA 331, 126 O.R. (3d) 108, at para. 51.

[24] Contractual provisions should not be interpreted in a manner that frustrates the legislative intent of parliament. Contractual provisions inconsistent with applicable legislation are illegal and unenforceable.

[25] Section 8 of the *Interest Act* prohibits a lender from charging a higher interest rate on money in arrears than it charges on money not in arrears: *P.A.R.C.E.L.,* at para. 51,52,55.

[26] Section 8 of the *Interest Act* must be read harmoniously with section 2 which preserves a general right of freedom to contract for "any rate of interest or discount". Section 2 is subject to the restriction imposed by section 8 which prohibits a lender from charging a higher interest rate on money in arrears than the lender charges on money not in arrears. Therefore, a lender cannot charge a penalty upon a default: *Krayzel Corp. v. Equitable Trust Co.*, 2016 SCC 18, [2016] 1 S.C.R. 273, at para. 26; *Tomell Investments Ltd. v. East Marstock Lands Ltd.*, at p. 983*; Reliant Capital Ltd.,* at paras. 34 and 37; *P.A.R.C.E.L.,* at para. 51.

[27] The prerequisites required to trigger section 8 are described in *P.A.R.C.E.L* at paras. 53 – 56 as follows:

a. The covenant must impose a "fine, penalty, or rate of interest." If it does not section 8 is not engaged;

b. The "fine, penalty or rate of interest" must relate to "any arrears of principal or interest secured by a mortgage or real property";

c. The covenant must have the effect of “increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears”; and

d. The arrears of principal or interest must be “secured by a mortgage on real property”.

[28] Section 8 will not apply in circumstances where there are no arrears and the rate increase only applies to the principal. Section 8 would also not apply where the rate increase is provided as consideration for the lender’s forbearance in executing the security: *Stawro v. Mayfield Holdings Inc.,* 2016 ONCA 710, at para. 14.

[29] Administrative fees which fail to specify the real legitimate costs incurred by the lender for recovery of the debt constitute a fine or penalty which increases the burden on the borrowers beyond the rate of interest agreed upon in the mortgage and thus contravenes section 8 of the *Interest Act*: *P.A.R.C.E.L.,* at para. 96.

[30] A contrary position was taken by the British Columbia Court of Appeal which held that an administrative fee upon default was not a charge exacted on arrears. It is an independent obligation arising upon the default of the loan. It is a liquidated damage determined at the time the contract was made: *Bankers*

Mortgage Corp. v. Plaza 500 Hotels Ltd., 2017 BCCA 66, 94 B.C.L.R. (5th) 67, at paras. 27 and 28.

POSITION OF THE APPLICANTS

[31] The Applicants submit that paragraph 2.2(c) of the Home Trust Mortgage states “Our successors and anyone to whom we transfer the mortgage is also bound by it”. The Respondent purchased the Home Trust Mortgage and is bound by all terms in that Mortgage. Therefore the Respondent is obligated to remit the tax portions of payments made to them to the City of Brampton.

[32] According to the Applicants, when the Respondents purchased the Home Trust Mortgage the applicable interest rate was 2.89%. The Applicants argue that the Cross-Collateralized mortgage provision increases the interest rate to 8% because it imposes a fine or penalty as described in section 8. The same argument applies to the 10% administrative fee calculated per the Cross-Collateral mortgage which the Applicants describe as a penalty or fine.

[33] The Applicants submit that the Respondent acted in bad faith when it purchased the Home Trust Mortgage within the 35-day redemption period stipulated by section 32 of the *Mortgages Act*. This triggered the Cross-Collateral Mortgage provisions which made it impossible for the Applicants to redeem the Four Seasons Mortgage.

[34] Further, the Respondent's decision to continue to accept monthly payments at the 2.89% rate over six years constitutes a waiver of its alleged right to receive monthly payments calculated at the 8% per annum rate.

[35] The redemption fee of 10% is unenforceable because it fails to provide particulars to indicate the costs incurred by the Respondent in purchasing the Home Trust Mortgage.

POSITION OF THE RESPONDENTS

[36] The Respondent submits that the principle of freedom of contract governs the parties. The parties agreed to the Cross-Collateral Mortgage with the advice and guidance of legal counsel.

[37] According to the Respondent, it is not liable for the Applicant's tax arrears. The Respondent had the right to purchase the Home Trust Mortgage to protect its interests and to enforce the terms of the Cross-Collateral Mortgage. Section 101 of the *Ontario Land Titles Act,* R.S.O. 1990, c. L.5 permits Home Trust to sell the Home Trust Mortgage to the Respondent.

[38] The Respondent assumed the Home Trust's rights and responsibilities under the Standard Charge terms of the Home Trust Mortgage. Section 7.7 of the Home Trust Standard Charge requires the Applicants to remit the taxes unless Home Trust chose to do so. The Home Trust Standard Charge provided that upon

default the portion remitted for taxes applied to the principal owing. The Applicants had defaulted and therefore any money remitted for tax applied to the principal owing from the default thereon.

[39] According to the Respondent, their assumption of the Home Trust Mortgage resulted in funds being applied to the Applicant's indebtedness. Pursuant to section 7.7(c)(vi) of the Home Trust Standard Charge Terms none of the $465,453.51 paid for the Home Trust Mortgage applied to the tax arrears.

[40] Section 7.7(c) of the Home Trust Standard Charge terms requires notice to the Applicants if the Respondent were collecting and remitting taxes. The Respondent did not provide any such notice. Instead, the Applicants were informed that as per the terms of the Cross-Collateral Mortgage, an 8% interest rate will apply and the monthly payments of $3,103.02 were due and payable to the Respondents on the first of every month.

[41] In addition, the terms of the Cross-Collateral mortgage states that the Applicants were responsible for paying the taxes and any taxes paid by the Respondent will be reimbursed by the Applicants.

[42] Section 32 of the *Mortgages Act* does not preclude Home Trust from selling the Four Seasons Mortgage to the Respondent during the 35-day period within which the Applicants could redeem the mortgage. There was no bad faith in the sale and purchase of the Four Seasons Mortgage.

[43] The Terms of the Cross-Collateral Mortgage are not uncertain. On default of the Four Seasons Mortgage, the Respondent was entitled to purchase said mortgage and the 8% interest and 10% administrative fee would apply.

[44] Section 2 of the *Interest Act* provides that any contract can have any interest rate agreed on. The provisions of the Cross–Collateral Mortgage should not be interpreted in a manner that renders the provisions of that mortgage ineffective. Therefore, the 8% interest rate is valid and enforceable.

[45] The Home Trust Mortgage was in default around January 2018, and the Cross-Collateral Mortgage provides for the transfer of the Mortgage in the event of a default. The Cross-Collateral Mortgage did not relate to any “arrears” of principal or interest under the Home Trust Mortgage and therefore Section 8 of the *Interest Act* does not apply.

[46] The 10% administrative fee is an independent obligation arising from the Cross-Collateral Mortgage. It is not a fine or penalty applied on the default of the Four Seasons mortgage and is thus not prohibited by section 8. The administrative fee is a liquidated damage determined when the mortgage contract was made and not at the time of the breach.

ANALYSIS

[47] The Cross-Collateral Mortgage does not offend section 8 of the *Interest Act*. The Respondent is not required to remit property tax arrears to the City of Brampton. The NOS is valid and enforceable.

[48] The Applicants and Home Trust were contractually bound by paragraph 7.7 of the Home Trust Standard Charge Terms which gave Home Trust the option of electing to collect and remit the Applicant's taxes. Home Trust elected to collect and remit the Applicants' taxes.

[49] The premiums the Applicants' paid per their November 2017 mortgage renewal included the monthly tax amount which Home Trust remitted to the City of Brampton.

[50] Section 2.2 of the Home Trust Standard Charge Terms required any third party who purchased the Four Seasons Mortgage to be bound by the terms of the Home Trust Standard Charge Terms. The fact that the Respondent purchased the Four Seasons Mortgage to protect its priority as a creditor does not change this fact. The Respondent correctly concedes this fact.

[51] Home Trust could not enter into a prior or subsequent agreement with the Applicants stipulating that upon a default, the interest rate on the arrears on the Four Season Mortgage will change from 2.89% to 8%. This would be contrary to

section 8 of *the Interest Act* and unenforceable. As purchaser of the Four Seasons Mortgage, the Respondent is subject to the same restriction.

[52] The Respondent purchased the Four Seasons Mortgage and absent an agreement between the Applicants and the Respondent, the Respondent was bound by the Home Trust Standard Charge Terms including Home Trust's election to collect and remit the taxes.

[53] At the time of the Respondent's purchase of the Four Seasons Mortgage, the Applicants were in default of the Mortgage. As between the Applicants and Home Trust, it was open to the Applicants to seek to redeem the Mortgage within 35 days.

[54] There is, however, no prohibition against Home Trust selling the Four Seasons Mortgage to the Respondent within the redemption period. In such a circumstance, absent an agreement between the Applicants and the Respondent, since the Respondent had assumed the rights and obligations of Home Trust, the date of redemption remained unchanged and the Applicants' right of redemption remained.

[55] Absent an agreement between the Applicants and the Respondent, additional obligations binding the parties under the Home Trust Mortgage include the 2.89% interest rate and the monthly premium under that rate.

[56] Therefore, absent an agreement between the Applicant and the Respondent, the six-year payment of the monthly premiums at the 2.89% interest rate cured the mortgage default and the Respondent's obligation to remit taxes collected to the City of Brampton continued.

[57] There is an agreement between the parties that modifies the obligations and responsibilities described above. This agreement is the Cross-Collateral Mortgage.

[58] The Respondent is correct. There was nothing ambiguous or uncertain about the Cross-Collateral Mortgage. Page 4, paragraph 2 of the Additional Charges provisions of the Cross-Collateral Mortgage (First and Second Priority) sets out what the parties agreed could occur if they ran into default on the Home Trust Mortgage. The effect of the said provision can be summarized as follows:

a. If the Chargor (the Applicant Philips) were to default on a prior Charge or encumbrance (the Home Trust Mortgage), the Chargee (the Respondent) is entitled to redeem or pay out this prior Charge or encumbrance (the Home Trust mortgage).

b. If the Chargee (the Respondent) decides to pay out the prior Charge or encumbrance (the Home Trust Mortgage) or transfer the prior Charge or encumbrance to itself. Any amount paid by the Chargee (the Respondent) to redeem or pay out the Home Trust Mortgage

shall bear an interest rate of 8 percent and not the interest in the prior Charge or encumbrance (i.e., not the 2.89% in the Home Trust Mortgage).

c. In those circumstances, the Chargor (the Applicant Philips) shall also pay the Chargee (the Respondent) an administrative fee of 10% of the amount the Chargee (the Respondent) paid to redeem or payout the prior Charge of encumbrance (Home Trust Mortgage).

d. The Chargor (the Applicant Philips) agrees to execute all documents requested by the Chargee (the Respondent) to effect the redemption or transfer of a prior Charge or encumbrance (Home Trust Mortgage).

[59] Based on the said contract, all the conditions precedent to trigger the buy-out provisions of the Cross-Collateral Mortgage were present. The Applicants were in default of the Home Trust Mortgage and the Respondent had purchased the Home Trust Mortgage, therefore, the mortgage rate changed from 2.89% to 8% on the principal and the 10% administrative charge applied. Despite the Applicants' effort to resile from this contract, this is what the parties expected would happen should the Applicants default.

[60] The effect of the Cross-Collateral Mortgage was to maintain the same principal outstanding but increase the interest rate from 2.89% to 8%.

[61] The Cross-Collateral Mortgage imposes an interest rate of 8% on the entire principal. In effect, this Mortgage increases the borrowing costs for the Applicants as a result of their default making the likelihood of foreclosing more likely. Does the “fine, penalty or rate of interest” relate to “any arrears of principal or interest secured by a mortgage or real property? The binding Court of Appeal decision in *Stawro* indicates that the answer to this question is no.

[62] In *Stawro* at paras. 1 -10, 14, the appellants were owners of two adjoining properties. The respondent was the assignee of the mortgages on both properties.

[63] The original mortgagees of the first property obtained a default judgment on the first property. They then assigned the mortgage on the first property to Finance Mart Corp (FMC):, at para. 2.

[64] The agreement between the original mortgagees and FMC had the effect of increasing the interest rate of the mortgage on the first property from 8.4% to 12% The recalculated amounts reflected past defaults, accrued costs and additional fees: at para. 6. FMC was also the mortgagee on the second property.

[65] FMC then transferred both mortgages to the respondent. The terms of the transfer of the second mortgage to the respondent included the payment of a legal transfer fee and an increase of the mortgage rate to 12%: at para. 7.

[66] The Court of Appeal concluded that there was nothing in any of the assignment agreements which had the effect of imposing a higher rate on the arrears owing than the principle not in arrears and hence section 8 was not engaged. Further, the increased interest rate on the first property was agreed to as the price of the lender's forbearance on execution: at para. 14.

[67] In this case, the parties agreed to a Cross-Collateral Mortgage which applied to the entire principal owing on default. The agreement between the parties states that the 8% shall apply to the entire amount the Respondent paid to redeem the Home Trust Mortgage. Thus, the 8% increase does not relate to "any arrears of principal or interest secured by a mortgage or real property" nor does it have the prohibited effect of "increasing the charge on the arrears beyond the rate of interest payable on principal money not in arrears". Therefore, per *Stawro*, section 8 is not engaged.

[68] In effect, both parties with the guidance and advice of legal counsel agreed to a contract which is in effect an end run to the prohibition imposed by section 8. The rate of 8% agreed to is lower than that of 12% in *Stawro.* It is not an unconscionable or criminal rate. For all the foregoing reasons, I will give effect to the intention of the parties as set out in the Cross-Collateral Mortgage.

[69] The fallout from this decision is that under the terms of the Cross-Collateral Mortgage, the Respondent was under no obligation to remit taxes to the City of

Brampton. The Applicants were bound by contract to pay the premium calculated at an 8% annual interest rate. The monthly amounts paid at 2.89% annual interest rate were insufficient and the Applicants were properly noted in default. The decision by the Respondent to collect an amount less than that specified in the Cross-Collateral Mortgage is not a valid legal waiver in the face of express contractual terms that the interest rate shall be calculated at 8%.

[70] The administrative fee is triggered by the default. It is calculated in reference to the amount the Respondent paid to redeem the Home Trust mortgage. As per *Stwaro* section 8 does not apply because the prerequisites in *P.A.R.C.E.L.* do not apply to these facts. Thus, the principle articulated in *P.A.R.C.E.L*. para. 96 that the administrative fee constitutes a fine or penalty captured by section 8, in circumstances where there is no evidence that it reflects actual or potential losses or expenses incurred as a result of the default do not apply. The administrative fee in the NOS is valid and enforceable.

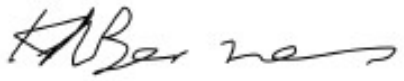
[71] In effect, the Cross-Collateral Mortgage and the Home Trust Mortgage secure the repayment of the same principal amount. This mortgage increases the amount payable and the interest rate payable. The Cross-Collateral Mortgage is triggered when the Applicants default on the Home Trust Mortgage.

[72] Despite the Applicants' protestations, there is no basis to conclude that they were unaware of the implications of the Cross–Collateral Mortgage provisions

should they default. It is not disputed that they received legal advice when reviewing and signing the Cross-Collateral Mortgage.

[73] The record does not provide any cogent evidence of a lawful basis for setting aside the impugned provision of the Cross Collateral Mortgage. Absent such evidence the impugned provision of the contract is valid as described.

[74] These are the reasons for my decision. Should the parties be unable to agree on costs a cost outline of no more than 4 pages shall be submitted in 20 days.



JUSTICE K. BARNES