COURT OF APPEAL FOR ONTARIO

CITATION: First National Financial GP Corporation v. Golden Dragon Ho 10 Inc., 2022 ONCA 621
DATE: 20220831
DOCKET: C68855 & C69031

MacPherson, van Rensburg and Roberts JJ.A.

DOCKET: C68855

BETWEEN

First National Financial GP Corporation

Applicant
(Respondent)

and

Golden Dragon Ho 10 Inc. and Golden Dragon Ho 11 Inc.

Respondents
(Respondents)

DOCKET: C69031

AND BETWEEN

First National Financial GP Corporation

Applicant
(Respondent)

and

Golden Dragon Ho 10 Inc. and Golden Dragon Ho 11 Inc.

Respondents
(Appellants)

Thomas G. Conway and Kevin Caron, for the appellant (C68855) / respondent (C69031), Liahona Mortgage Investment Corporation

Eric Golden and Chad Kopach, for the respondent (C68855 & C69031), First National Financial GP Corporation

Martin Diegel, for the respondents (C68855) / appellants (C69031), Golden Dragon Ho 10 Inc. and Golden Dragon Ho 11 Inc.

David Preger, for the receiver, Deloitte Restructuring Inc.

Heard: January 26, 2022 by video conference

On appeal from the judgment of Justice Charles T. Hackland of the Superior Court of Justice, dated November 16, 2020, with reasons reported at 2020 ONSC 6994 (C68855 & C69031).

On appeal from the costs order of Justice Charles T. Hackland of the Superior Court of Justice, dated May 12, 2021 (C69031).

L.B. Roberts J.A.:

[1] There are two appeals before this court.

[2] The first appeal concerns a priority dispute among the first mortgagee, First National Financial GP Corporation ("FN"); the second mortgagee, Liahona Mortgage Investment Corporation ("Liahona"); and the mortgagors, Golden Dragon Ho 10 Inc. ("GDH 10") and Golden Dragon Ho 11 Inc. ("GDH 11") (together "Golden Dragon"). This dispute is in relation to the distribution of proceeds from the court-ordered sale of Golden Dragon's mortgaged properties under a receivership. The principal question on this appeal is whether the trial judge erred in finding that FN, as first mortgagee, is entitled to payment of future, unearned,

accelerated interest to the end of the term of FN's closed mortgages (the "accelerated interest").

[3] In addition to joining in the first appeal, Golden Dragon also appeals from the order approving the court-appointed receiver's costs (the "costs order"), arguing that those costs were unwarranted because the receiver's attendance at trial was not necessary.

[4] For the reasons that follow, I would allow the first appeal. In my view, this case required a fact-driven contractual analysis of the mortgage provisions as bargained for by the parties and as invoked by the specific events of this case. In accordance with the trial of the issue as set by the parties and the trial judge, FN had to prove its entitlement to accelerated interest. The trial judge erred by failing to interpret FN's closed mortgages in their entirety and by determining, without regard to all relevant contractual provisions, that FN had a standalone common law entitlement to accelerated interest that was divorced from the contractual provisions of its mortgages. When the mortgages' provisions are viewed in their entirety, it is clear that the parties contemplated and set out FN's entitlements upon the early discharge of its mortgages caused by Golden Dragon's default within the particular fact pattern of this case and that those entitlements did not include accelerated interest.

[5] As I shall also explain, I would dismiss Golden Dragon's appeal from the costs order. The trial judge made no error in the exercise of his discretion to award costs to the court-ordered receiver whose presence at trial was helpful and necessary. His decision is entitled to considerable appellate deference.

Background

[6] Golden Dragon formerly owned two adjoining residential apartment buildings at 345 and 347 Barber Street in the City of Ottawa (the "properties"). On the purchase of these properties from Quex Property Corporation ("Quex") in May 2016, Golden Dragon assumed three closed mortgages: a first mortgage secured over 345 Barber Street; a first mortgage secured over 347 Barber Street; and a second mortgage secured over 347 Barber Street, which ranked *pari passu* with the first mortgage on that property. These three mortgages were held by FN (the "FN mortgages"). The principal amounts under the FN mortgages totaled $7,546,240. FN had agreed to lend this amount to the original borrower, Quex, pursuant to two commitment letters dated March 2, 2007, and March 5, 2007. The three FN mortgages over the properties were 20-year closed commercial mortgages, as confirmed in the Agreed Statement of Facts at trial.

[7] Without giving notice to FN, despite being required to do so under its mortgages, Golden Dragon subsequently placed a second mortgage on 345

Barber Street (owned by GDH 11) in the principal amount of $2,900,000. This mortgage was held by Liahona (the “Liahona second mortgage”).

[8] Golden Dragon unsuccessfully attempted to renovate the properties and became insolvent. As of December 2016, the Liahona second mortgage on 345 Barber Street was in default and no further payments were credited after April 3, 2017. On April 20, 2017, Liahona issued a notice of sale and, on June 10, 2017, obtained a default judgment against GDH 11 in the amount of $3,033,988, together with judgment for possession of 345 Barber Street.

[9] Beginning in June 2017, the FN mortgages were in unremedied default. The FN mortgages included cross-default provisions, meaning that a default under one FN mortgage was deemed to be a default under all three FN mortgages. On August 17, 2017, FN made a formal demand that Golden Dragon pay the arrears and cure the non-monetary defaults under the FN mortgages and delivered notices of intention to enforce security pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The amounts claimed by FN to bring its mortgages into good standing pursuant to its formal demands totalled $150,632.

[10] Golden Dragon failed to cure the defaults. As a result, FN retained CLV Group Inc. to attorn the rents at the properties and commenced an application to appoint Deloitte Restructuring Inc. (“Deloitte”) as the interim receiver of the properties.

[11] On September 22, 2017, the trial judge granted FN's application to appoint Deloitte as the interim receiver. The order provided, among other things, that, notwithstanding the commencement of the application by FN and the appointment of the receiver, FN "shall be deemed to be protecting its security, shall not be deemed to have resorted to realizing upon its security over the Property, and the equitable right of redemption in respect of [FN's] mortgages over the real property of [Golden Dragon] … shall not be triggered."

[12] According to Deloitte's report, by December 2018, Deloitte had repaired and stabilized the properties, with over 90% of the units rented by tenants. The rents collected by Deloitte were sufficient to pay its costs, as well as the payments owed under the FN mortgages. The monthly costs for the property manager, Deloitte, and its counsel amounted to about $15,000, on average, with the result that no excess cashflow from the properties would be available to remedy Golden Dragon's outstanding debts or provide any payments to Liahona for many years. In other words, there were insufficient funds to make any payments to Liahona.

[13] After reviewing appraisals for the properties, Liahona inquired of FN whether it would agree to their sale. FN agreed that, subject to certain terms, it would not oppose Liahona if it moved for an order that Deloitte market and sell 345 Barber Street, and would also support Deloitte selling 347 Barber Street. FN supported that the properties be marketed and sold together to maximize the recovery. FN

provided Liahona with mortgage discharge statements for both properties, reflecting prepayment penalties of approximately $1.8 million.

[14] Following its discussions with FN, Liahona brought a motion to expand Deloitte's mandate to permit it to market and sell the properties. On May 21, 2019, the trial judge granted this motion (the "expanded powers order"). The expanded powers order provided that the terms of the September 22, 2017 appointment order would continue, and stated that "notwithstanding (i) the variation and amendment of the status and mandate of the interim receiver [Deloitte] as provided for in this Order, (ii) any other terms(s) of this Order, and (iii) FN not opposing this Order, FN shall still be deemed to be protecting its security over the Property, shall not be deemed to have resorted to realizing upon its security over the Property, and the equitable right of redemption in respect of FN's mortgages over the lands and premises … shall not be triggered."

[15] Deloitte secured an offer to purchase the properties. In September 2019, Deloitte moved for an order to approve the sale. FN opposed the motion to approve the sale of the properties. It argued that its agreement to have the receiver sell the properties was premised on it receiving, from the sale proceeds, payment of accelerated interest to the end of the terms of its closed mortgages, which it referred to as "yield maintenance penalties". FN submitted that, if it was precluded from receiving the yield maintenance penalties, it wished to maintain its mortgages

in place until the end of their terms, or until the properties were sold by Golden Dragon.

[16] Pursuant to an amended and restated approval and vesting order dated October 11, 2019, and an endorsement released on October 23, 2019, the trial judge approved the sale by Deloitte, and authorized a partial distribution from the net proceeds of sale, subject to the receiver holding back "the sum of $1.7 million pending the Court's further ruling on a disputed prepayment penalty claimed by" FN: *First National Financial GP Corporation v. Golden Dragon Ho 10 Inc. and Golden Dragon Ho 11 Inc.*, 2019 ONSC 6127, 73 C.B.R. (6th) 237, at para. 1. He also directed a trial of FN's claimed entitlement to the payment of "yield maintenance penalties".

[17] By order dated November 7, 2019, the sale of the properties was complete; the titles to the properties were vested in the new purchaser, and the FN mortgages and the Liahona second mortgage were all vested off title.

[18] On November 25, 2019, the trial judge granted an interim administration and distribution order, dated as of October 23, 2019. From the partial distribution, FN received the full outstanding principal and interest owing under the FN mortgages up until the date of the sale, plus its costs of enforcement, save and except for the amounts claimed as yield maintenance penalties. Liahona received only partial payment of the outstanding principal owing under the Liahona second mortgage.

Trial of the Issues and Judgment

[19] The trial judge directed that there be a two-stage trial of the issues. With input from the parties, the trial judge framed the first question as "[w]hether the terms of the FN charges over the Properties entitle FN to the Yield Maintenance claimed as a result of the early repayment of its charges."

[20] The trial judge determined that nothing in the express terms of the FN mortgages gave FN a right to claim the disputed "yield maintenance penalties" in the circumstances. Although the mortgages contained a prepayment provision allowing Golden Dragon to redeem the mortgages upon payment of a "yield maintenance" penalty calculated in accordance with a formula set out in the provision, the provision provided that this privilege only applied if Golden Dragon was not in default. Since Golden Dragon was in default, it no longer enjoyed the privilege of prepayment of the mortgages. As a result, FN had "no entitlement to charge a yield maintenance penalty, based only on the express terms of the charge."

[21] The trial judge accepted that the FN mortgages were closed mortgages from the time that Golden Dragon went into default, and that they continued as such until the time that the FN mortgages were vested off title upon the closing of the sale of the properties by Deloitte. He found that the FN mortgages were closed in the sense that there were no prepayment provisions available to Golden Dragon

because of Golden Dragon's default. He held that Golden Dragon could not open up the closed FN mortgages by way of its own default, and that it could not exercise an equity of redemption in these circumstances.

[22] As a result, the trial judge determined that FN was entitled to the amounts claimed: (1) under a common law rule that a mortgagee is entitled to all accelerated interest owing to the date of maturity when a closed mortgage is vested off title before the end of the term; or (2) in accordance with an implied term that he read into the FN mortgages.

[23] The trial judge found that there was no particular significance to the fact that Golden Dragon was insolvent. He also held that the common law anti-deprivation rule did not apply because FN's claim to accelerated interest stemmed from a common law rule rather than a contractual term.

[24] The trial judge rejected Liahona's submission that FN could not claim an entitlement to accelerated interest under a closed mortgage unless there was a specific clause in the mortgage capable of supporting such a claim. The trial judge concluded that the accelerated interest under the FN mortgages became due when the FN mortgages were terminated prematurely upon being vested off title pursuant to Deloitte's court-supervised sale.

[25] The trial judge declined to allow Golden Dragon's motion to vary the appointment order and delete the clauses which deem that the receiver's activities

and the terms of the order will not constitute a realization on FN's security. He found that FN, by not opposing and indeed cooperating with Liahona's motion to the court to obtain the expanded powers order authorizing the receiver to market and sell the properties, and by allowing 347 Barber Street to be included in the sale to make the sale commercially feasible, was not engaging in a realization on its security so as to trigger an equity of redemption in favour of Golden Dragon.

[26] The trial judge issued a declaration that the FN mortgages continued to be closed mortgages on the closing date of the receivership sale, and that FN was entitled to be paid the sum of $1,473,141.82, which represents a prepayment of accelerated interest on the FN mortgages, calculated in accordance with the yield maintenance formula as defined in the FN mortgages. He further ordered the receiver to pay this sum to FN from the funds held in trust from the proceeds of the sale of the properties.

Issues

[27] Liahona and Golden Dragon raise the following issues:

i. Did the trial judge err in finding that FN had a common law entitlement to accelerated interest under the FN mortgages?

ii. Did the trial judge err by implying a contractual term into the FN mortgages that entitled FN to accelerated interest?

[28] Golden Dragon further raises the following third issue:

iii. Did the trial judge err in awarding costs to the receiver?

Analysis

(i) Issue One: Did the trial judge err in finding that FN had a common law entitlement to accelerated interest under the FN mortgages?

(i) The parties' positions

[29] Liahona and Golden Dragon argue that the trial judge erred in effectively creating a common law rule that entitled FN to accelerated interest that was not provided for under the FN mortgages. They maintain that any entitlement by FN to accelerated interest must be contained expressly in the terms of the FN mortgages. While the parties provided for FN's rights and entitlements upon Golden Dragon's default, they did not include a right to accelerated interest. No provision of the FN mortgages provides for FN to recover accelerated interest in the circumstances of this case. FN could have bargained for accelerated interest but failed to do so; FN should therefore be held to its end of the bargain. Liahona and Golden Dragon submit that the trial judge erred by effectively rewriting the FN mortgages to include a right to accelerated interest in favour of FN.

[30] FN argues that the trial judge simply applied the well-established common law principle, unaffected by Golden Dragon's insolvency, that a mortgagor is not entitled to open up a closed mortgage unless permitted to do so by the contractual terms of the mortgage, or by provision of agreed-upon compensation to amend the terms of the mortgage to allow it to do so. Here, according to FN, no term of the

FN mortgages permitted Golden Dragon to open up the FN mortgages once Golden Dragon was in default. As a result, FN was entitled to be paid accelerated interest as consideration for the discharge of its closed mortgages.

(ii) Correct analytical approach

[31] In my view, the trial judge erred in his application of the relevant legal principles and in his failure to interpret the mortgage contracts in their entirety. These are errors of law that, as agreed by the parties, are subject to a correctness appellate standard of review: see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 52-53.

[32] It is well settled that a mortgage is a contract and that, "subject to any statutory provisions, the rights and obligations of the parties must be found within the terms of the contract": *Re Belyon Properties Ltd. and Kelcey*, [1968] 2 O.R. 257 (C.A.), at p. 260.

[33] Accordingly, a mortgage contract is to be construed in accordance with the well-established principles of contractual interpretation. Those relevant to this appeal are reproduced in the following excerpt from the succinct summary by this court *per* Winkler C.J.O. in *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 268 O.A.C. 279, at para. 16:

> The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the

> intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. … The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. … [Emphasis added; citations omitted.]

[34] No statutory provisions apply here. It is common ground that s. 17 of the *Mortgages Act*, R.S.O. 1990, c. M.40, which allows a mortgagor to cure a default "made in the payment of any principal money secured by a mortgage" by paying three months' interest on principal monies in arrears, is not at play in this case. Also inapplicable, given that Golden Dragon is a corporate mortgagor, is s. 18 of the *Mortgages Act*, which provides a residential mortgagor with a right to redeem after five years, with only three months' interest as a prepayment charge.

[35] As a result, the trial judge was required to carry out a contractual analysis of the plain language of the FN mortgages to determine if FN had any entitlement to accelerated interest upon the early, court-ordered discharge off title of its mortgages due to Golden Dragon's default.

[36] In my view, the trial judge strayed from the proper question of FN's entitlement to accelerated interest under its mortgages to the erroneous consideration of FN's entitlement to accelerated interest under the common law. To be fair, this resulted from the reformulation by the parties of the issues to be

tried from FN's entitlements under its mortgages to general entitlements under the common law, as follows:

> [FN] seeks a declaration that it is entitled to be paid an amount of approximately $1.5 million, representing a prepayment of future interest arising from the sale by a court appointed receiver of two properties on which FN holds first mortgages…. FN bases its claim for the prepayment amount on the terms of its mortgages on the properties including the relevant commitment letters incorporated by reference into these mortgages, as well as on the common law applicable to closed commercial mortgages which are discharged prior to their full term. [Emphasis added.]

[37] The trial judge properly began his analysis by turning to the terms of the FN mortgages. He agreed with Liahona's submission that FN had no claim for "yield maintenance penalties" as provided for under the terms of the FN mortgages, namely, under ss. 33 and 34 of the commitment letters that were incorporated into the mortgages, since no term of the FN mortgages entitled FN to "yield maintenance" in the circumstances of Golden Dragon's default.

[38] The trial judge stopped his contractual analysis at that point and did not turn to consider the other relevant provisions of the mortgages that could apply in the circumstances of an early discharge of the mortgages because of default. As I explain in further detail below, the FN mortgages did provide for early discharge and FN's entitlements, both in the event Golden Dragon was not in default, and in the event that it *was* and the mortgages were discharged off title. The former included FN's entitlement to accelerated interest in the defined form of "yield

maintenance" where Golden Dragon was not in default; the latter provided only for payment of principal and accrued interest owed up to default, but no accelerated interest.

[39] Instead of completing the requisite contractual analysis of the FN mortgage terms, the trial judge went on to consider FN's claim only as a common law claim for accelerated interest, without regard to and divorced from all of the relevant provisions of the FN mortgages.

[40] This led him to conclude that there was a standalone, "established common law entitlement that a mortgagee may claim [accelerated] interest on a closed mortgage, calculated over the full term of the mortgage, when the mortgage is discharged prior to its term, as long as the mortgagee has not realized on its security." As he stated:

> I will now discuss whether the FN mortgages are closed commercial mortgages and, if so, whether FN is entitled to compensation for lost future interest when the mortgages were vested off title and if such entitlement exists, can it be "any discounted amount FN is prepared to accept as a compromise", as claimed in FN's Reply factum.
>
> …
>
> I agree with FN that well settled case law recognizes that when a closed mortgage is redeemed prior to the end of its term, the [mortgagor] must pay not only the outstanding principal and accrued interest, but also the future interest to the end of the term. The exceptions to this arise when the mortgagee takes steps to realize on

> its security – in such cases an equitable right of redemption without payment of penalty accrues to the borrower. Other exceptions are mortgages with specific terms that provide otherwise or statutory exceptions such as section 18(1) of the *Mortgages Act* which, as noted, does not apply to corporate borrowers such as the mortgagors in the present case. [Emphasis added.]

[41] To the extent that the trial judge found that there is a standalone common law entitlement, divorced from the contractual provisions of the mortgage contract, to accelerated interest for a mortgagee under a closed mortgage, this was an error. Similarly, the so-called common law principle referenced by the trial judge that a mortgagor is not entitled to open up a closed mortgage and insist on its discharge without payment of further consideration absent a contractual entitlement to do so is not a standalone common law principle.

[42] Rather, the common law recognizes any entitlement to accelerated interest or an early discharge that flows from the particular mortgage in issue (or, if applicable, from statutes like the *Mortgages Act* which are inapplicable in the present case).

[43] The trial judge relied upon four cases to find and apply in FN's favour a common law entitlement to accelerated interest: *Saperstein v. Royal Trust Corporation of Canada* (1988), 24 B.C.L.R. (2d) 114 (C.A.); *Bankruptcy of CAF* +, 2013 ONSC 2749, 3 C.B.R. (6th) 123; *NJS Midtown Portfolio Inc. v. CMLS Financial Ltd.*, 2020 ONSC 3973, 7 B.L.R. (6th) 296; and *1186708 Ontario Inc. v. Attara Developments Limited*, 2013 ONSC 3137. However, those cases do not

speak to a standalone common law entitlement to prepayment of accelerated interest divorced from the provisions of the mortgage in issue. Rather, they stand for the proposition that, absent any contractual provisions to the contrary, where a mortgagor claims an early discharge of a closed mortgage, the mortgagee can insist on prepayment of interest as consideration for the amendment of the mortgage to provide for the early discharge.

[44] For example, I do not read *NJS Midtown Portfolio Inc.* as reaffirming a standalone "common law rule that future interest is payable on a mortgage with no right of prepayment, where the mortgagee has not resorted to its security and has not triggered the right to redeem", as the trial judge here suggested. Rather, in that case, Kimmel J. relied on the British Columbia Court of Appeal's approach to interpreting the mortgage contract in *Saperstein*: that where a mortgagor seeks an early discharge of a closed mortgage, absent any relevant prepayment or other terms, the mortgagor has to obtain an amendment to the original contract by providing additional consideration. Kimmel J. properly turned to and interpreted the mortgage contract at issue and stated, at para. 73 of her reasons, that where "there is no contractual right to prepay the mortgage and receive a discharge, the mortgagor must reach an agreement with the mortgagee to amend the terms of the mortgage and pay whatever penalty is negotiated" (emphasis added).

[45] The court's approach was the same in *Attara*. *Attara* involved the court-supervised sale of properties subject to various closed mortgages. Morawetz J.

(as he then was) analyzed the closed mortgages in issue and determined that they did not contain pre-payment provisions and that it was not open to the mortgagors to amend the contract provisions. Accordingly, Morawetz J. determined that the mortgagors had to take the mortgages as they stood, with no prepayment privileges, and that the mortgagees were therefore entitled to be paid accelerated interest as a result of the early vesting off title of the closed mortgages. These conclusions arose from Morawetz J.'s contractual interpretation of the mortgage provisions rather than from his application of any standalone common law principle divorced from the mortgages.

[46] The statement relied upon by the trial judge in the present case (and also referenced by the court in *Attara*) from *Bankruptcy of CAF* +, at para. 10, that "[a]t common law there was no right to prepay a mortgage as the mortgagee was entitled to repayment of the principal amount of the loan together with the interest originally bargained for unless the mortgage contained a prepayment clause" is correct. In other words, there is no standalone common law principle that can be applied independently of a holistic interpretation of the particular mortgage contract in issue. Any rights flow from the contract. The common law recognizes the contractual rights bargained for by the parties.

[47] This is in keeping with fundamental principles of contractual interpretation. A corporate mortgagor is not otherwise entitled to an early discharge of a closed mortgage without amending the original contract and paying additional

consideration, such as accelerated interest, unless provisions under the contract or a statute like the *Mortgages Act* permit early discharge, or the mortgagee takes steps to realize on its security, or the parties have specifically provided for entitlements upon early discharge in the event of default that do not include any entitlement to additional consideration for the early discharge of the mortgage. This result does not flow from the application of a standalone common law principle but from the interpretation of the contractual terms that provide that the mortgage is closed, absent terms that provide otherwise.

[48] I contrast the cases cited by the trial judge in this case with the example of the contractual default provisions referenced in the recent decision of the Court of Appeal of Alberta in *1951584 Ontario Inc. v. Northern Bear Golf Club Inc.*, 2021 ABCA 91, 24 Alta. L.R. (7th) 1, leave to appeal requested but application for leave discontinued, [2021] S.C.C.A. No. 183. In that case, the parties did explicitly provide for the mortgagee's remedy of accelerated interest for the remainder of the term of the mortgage upon the debtor's default, which was granted upon sale pursuant to a full receivership. The appeal in that case principally turned on whether the summary judgment motion judge erred in his conclusion that the accelerated interest was not a penalty and did not contravene s. 8 of the *Interest Act*, R.S.C. 1985, c. I-15. However, of note for the purposes of the present appeal is that, as the parties could have done in the present case, the parties in *Northern Bear* had bargained for and included the accelerated interest clause. In the

promissory note at issue in that case, it was stated to be "a genuine pre-estimate of liquidated damages" upon default.[1]

[49] It was therefore incumbent on the trial judge to look at all of the terms of the FN mortgages to ascertain whether FN was entitled to payment of accelerated interest on its mortgages in the event Golden Dragon defaulted and the mortgages were terminated prematurely upon being vested off title. FN's contractual entitlements should have been not only the trial judge's point of departure, but indeed the focus of his entire analysis. The trial judge did not maintain this correct focus.

[50] I now turn to complete the contractual analysis of the mortgage provisions.

[51] The trial judge correctly began his analysis by first turning to the provisions of the FN mortgages. Specifically, he looked at the provisions for "yield maintenance" upon early discharge of the FN mortgages.

[52] Section 34 of the commitment letter in respect of the FN mortgage for 345 Barber Street (which is identical to s. 33 of the commitment letter in respect of the FN mortgages for 347 Barber Street) provides for prepayment of yield maintenance as accelerated interest as follows:

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[1] The court in *Northern Bear* also referenced the trial judge's decision in this case, but only the trial judge's conclusion that FN's claimed accelerated interest did not contravene s. 8 of the *Interest Act*, which issue was not renewed on appeal before this court.

> **34. Prepayment Privilege**
>
> Provided that there has been no default under the mortgage and only in the event of a bona fide ["arm's"] length sale of the subject property, the Borrower shall have the privilege to prepay the mortgage, in whole, together with compensation for lost interest, "Yield Maintenance", as reasonably calculated by the Lender. In the event of such prepayment in whole, the compensation will be the greater of the yield maintenance amount or three (3) months' interest.
>
> "Yield Maintenance" means the amount in dollars, if any, by which the present value of all remaining payments of principal and interest due under the mortgage, plus the present value of the principal balance secured by the mortgage that would have been due on the maturity date hereof, when discounted at the Lender's interpolation, based on duration of the mortgage, of "Government of Canada Bond Yields", as hereinafter defined, exceeds the principal balance of the mortgage which is outstanding on the date of such payment. [Emphasis added.]

[53] The trial judge correctly concluded that the yield maintenance terms in the FN mortgages did not apply because Golden Dragon was in default under the mortgages.

[54] That, however, was not the end of the contractual analysis that the trial judge was required to undertake to answer the question in issue, namely, whether FN had any entitlement to accelerated interest. To that end, he should have examined the other provisions of the mortgages, including s. 8 of the mortgage schedule and ss. 10 and 12 of the standard charge terms, as modified by the mortgage

commitment letters that were incorporated by reference into the mortgages, per s. 3 of the mortgage schedule.

[55] Section 8 of the mortgage schedule provides that "[i]t shall constitute a default hereunder if the Chargor shall become insolvent or be subject to any bankruptcy, arrangement with creditors, proposal, or liquidation, winding-up or dissolution" (emphasis added). As a result, in addition to its default in making payments under the FN mortgages, Golden Dragon's insolvency also triggered the default provisions of those mortgages.

[56] Upon the default of the mortgagors, s. 10 of the standard charge terms allows the mortgagee to take possession of the properties to collect rents and profits, sell the properties, and, importantly, to use the proceeds of sale to discharge interest and principal under its mortgage(s) then due, and to discharge the claims of subsequent encumbrancers in a defined sequence. It does not provide for the payment of accelerated interest. The sequence of payments, which I have separated out for clarity, is as follows:

- "firstly in payment of all the expenses incident to the sales, leases, conveyances, or attempted sales, or leases";
- "secondly all costs, charges, damages and expense of the Chargee relating to taxes, rents, insurance, repairs, utilities and any other amounts which the Chargee may have paid relating to the Charged Premises";

- "thirdly in discharge of all interest and costs then due in respect of the Charge";
- "fourthly in discharge of the principal money secured by the Charge";
- "fifthly in payment of the subsequent encumbrancers according to their priorities and the residue shall be paid to the Chargor as he may direct...". [Emphasis added.]

[57] Further, s. 12 of the standard charge terms provides that, upon Golden Dragon's default, the only accelerated payment to which FN is entitled is accelerated principal:

> [I]f any default shall occur in the payment of the interest money secured by the Charge, or any part thereof, or in payment of any instalment of principal … then at the option of the Chargee, the principal money secured by the Charge or intended so to be shall forthwith become due and payable in like manner and with the like consequences and effects as if the time herein mentioned for payment of such principal money had fully come and expired, subject to any relief afforded to the Chargor at law. [Emphasis added.]

[58] The provisions that I have just cited speak explicitly to the relief available to FN upon Golden Dragon's default that results in the early discharge of the mortgages. While these provisions entitle FN to accelerate the *principal* amounts outstanding upon any default by Golden Dragon, among other remedies, they do not provide for any entitlement to *accelerated interest* in the event of any default by Golden Dragon. Rather, the only interest to which FN bargained an entitlement on Golden Dragon's default is the interest accrued to the date of default.

[59] The circumstances delineated in the mortgages under which FN is entitled to accelerated interest are limited and, given Golden Dragon's default, inapplicable here. Other than the prepayment provisions of ss. 33 and 34 of the commitment letters already reviewed, s. 10 of the mortgage schedule is the only other contractual provision incorporated into the mortgages that concerns FN's entitlement to accelerated interest. Like ss. 33 and 34, it does not apply in the circumstances of Golden Dragon's default. Rather, s. 10 would apply only if Golden Dragon had voluntarily sold, conveyed or transferred the secured properties, or encumbered its shares, which did not occur. Section 10 replaced s. 26 of the standard charge terms with the following:

> The Chargor covenants and agrees with the Chargee that in the event of the Chargor selling, conveying, transferring or entering into an agreement for sale or transfer of title of the Property hereby charged or of any of the shares of the Chargor, if the Chargor is a corporation, to a purchaser or transferee not approved, in writing, by the Chargee, which approval shall not be unreasonably withheld, all monies hereby secured together with all interest thereon until the Maturity Date and any amount payable and due as a result of prepayment shall at the option of the Chargee, forthwith become due and payable. [Emphasis added.]

[60] FN argues that none of these provisions applies because it did not take any steps to realize on its security under its mortgages. FN points to the provisions of the September 22, 2017 and May 21, 2019 orders and argues that notwithstanding the commencement of the receivership application, the appointment of Deloitte,

and the expansion of Deloitte's powers to sell the properties, FN shall be deemed to be protecting its security and not to have resorted to realizing upon its security, thereby triggering Golden Dragon's equitable right of redemption to open up the mortgages.

[61] There are several difficulties with FN's position. In sum, it purports to implicitly override the mortgage terms and it misconstrues the meaning and scope of the two orders.

[62] First, the September 22, 2017 order. In my view, it has nothing to do with the sale of the properties, the early discharge of the mortgages off title because of Golden Dragon's default, or FN's entitlements on the happening of those events, as provided for in the mortgage terms that I have just reviewed. The deeming provisions contained in the interim receivership appointment order reflect no more than the recognition that the mere appointment by a mortgagee of an interim receiver for the purpose of protecting its security by collecting arrears, "will not be deemed to be a resort to the security", thereby triggering the mortgagor's right to redeem: *Re Shankman and Mutual Life Assurance Co. of Canada* (1985), 52 O.R. (2d) 65 (C.A.), at p. 71.

[63] Next, the May 21, 2019 order. In my view, the deeming provisions are irrelevant to the interpretation of ss. 10 and 12 of the standard charge terms, which the trial judge did not consider. They do not refer to or affect the financial

consequences provided for in ss. 10 and 12 of the standard charge terms in the event of Golden Dragon's default and the resulting early discharge of the FN mortgages. There can be no issue that by its actions, FN triggered the provisions of s. 10. It sought the initial appointment of the receiver and encouraged and facilitated the sale of the properties. In light of its actions, its suggestion, in purporting to oppose the approval of the sale, that it intended to maintain its mortgages on title, was disingenuous. It was effectively rejected as such by the trial judge who found, at para. 4 of his October 23, 2019 endorsement ordering the sale of the properties and vesting the mortgages off title that "[FN's] opposition had nothing to do with the fairness of the process, nor the sale price, both matters about which they were completely satisfied." As the trial judge further observed about FN's support for the sale of the properties, at para. 13 of his October 23, 2019 reasons:

> - The sale process, although initiated by Liahona, was agreed to and encouraged by [FN].
>
> - [FN] further supported the sale process by consenting to have the receiver include the 347 property in the sale to maximize the recovery (Liahona has no security on 347).
>
> - [FN], on the evidence, was reluctant to re-establish a relationship with the debtor with whom there had been a litany of disputes and where a clear lack of trust existed. [FN's] counsel put this reason forward during negotiations between the mortgagees to explain [FN's] support for selling the properties

[64] The provisions from the mortgage schedule and standard charge terms that I have just reviewed specifically provide for FN's entitlements in the event of Golden Dragon's default and the early discharge and vesting off title of the mortgages. These provisions specifically address the circumstances of the early discharge of the mortgages upon Golden Dragon's default but do not include accelerated interest, and instead provide only for principal, accrued interest to the date of default, and costs. Accordingly, the contractual provisions distinguish this case from those referenced by the trial judge already discussed that deal only with a mortgagee's entitlement on the early discharge of closed mortgages with no similar contractual provisions as here. The trial judge erred by failing to address these provisions and consider their effect.

(iii) Conclusion

[65] For these reasons, the trial judge erred in his analysis of this issue. The parties put their minds to when FN would be entitled to accelerated interest and what would happen upon Golden Dragon's default and the resulting early discharge of the mortgages, namely, that the entitlements set out in ss. 10 and 12 of the standard charge terms would take effect. Had the trial judge carried out a correct contractual analysis, he would have concluded, as I have, that FN had no contractual entitlement to accelerated interest under its mortgages in the circumstances of Golden Dragon's default and resulting discharge of the

mortgages off title. Rather, just as the parties had bargained, FN's entitlements upon default were limited to payment of principal, accrued interest to that point, and costs.

(ii) Issue Two: Did the trial judge err by implying a contractual term into the FN mortgages that entitled FN to accelerated interest?

[66] Golden Dragon and Liahona submit that the trial judge erred in holding that FN's entitlement to accelerated interest arises from an implied contractual term. Implying a term was an error because it would contravene the common law anti-deprivation rule; it is inconsistent with the express terms of the FN mortgages; and it was not necessary to give the FN mortgages business efficacy.

[67] FN submits that the anti-deprivation rule is inapplicable because there was no bankruptcy. In any event, FN asserts that the trial judge's implied term did not contradict the terms of the FN mortgages and was in keeping with FN's contractual and common law entitlement to accelerated interest.

[68] I agree that the trial judge erred in implying a contractual term into the FN mortgages because such an implied term was inconsistent with the express terms of the FN mortgages, as earlier analyzed, and because doing so was not necessary to give business efficacy to the FN mortgages. It is not necessary for me to determine whether the anti-deprivation rule applies here.

[69] The standard of appellate review on this issue was stated by this court in *Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514, 388 D.L.R. (4th) 672, at para. 29: “The issue of implication of contractual terms raises questions of mixed law and fact, as would interpretation of the contract, and the same standard of review should apply, palpable and overriding error, unless extricable errors of law are evident.” Here, the trial judge erred in principle.

[70] First, implied terms cannot contradict express provisions of an agreement or be unreasonable: *Energy Fundamentals Group Inc.*, at para. 36; *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.* (1984), 43 O.R. (2d) 401 (C.A.), at p. 403. The trial judge had already determined that the yield maintenance provisions of the FN mortgages did not provide any contractual entitlement to FN for accelerated interest and that the FN mortgages only provided for interest acceleration and prepayment in the event that Golden Dragon was not in default under the mortgages.

[71] Further, an implied term was not necessary to give business efficacy to the FN mortgages. Courts may imply a term into a contract based on the presumed intentions of the contracting parties if the term is necessary for business efficacy or if it meets the officious bystander test: see *Energy Fundamentals Group Inc.*, at paras. 30-40; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 29. Neither condition was met in this case. The wording of the FN mortgages indicates that the parties put their minds to what would happen

upon default and, in doing so, they did not provide for payment of accelerated interest.

[72] FN argues that acceding to Liahona's arguments would render closed commercial mortgages a fiction. FN submits that, in effect, it would allow a mortgagor with a closed mortgage to avoid its obligations under the closed mortgage by granting a second mortgage and then defaulting to allow the second mortgagee to appoint a receiver. Alternatively, FN submits that it would permit secured obligations under a closed mortgage to be avoided by way of bankruptcy.

[73] I do not share FN's policy concerns. The present case involves the interpretation of specific contractual terms agreed upon by the parties. As a result, this outcome is tied to the specific facts of this case and the parties' specific mortgage agreements, as well as the manner in which the trial of the issue was defined. FN's submission amounts to a speculative "floodgate" argument, which I reject.

(iii) Issue Three: Did the trial judge err in awarding costs to the receiver?

[74] Golden Dragon repeats the submission made at trial that Deloitte should not have attended all four days of the trial of issues and that it was unreasonable for the trial judge to approve all of Deloitte's costs without reduction. Golden Dragon does not contest the attendance of Deloitte's counsel at the trial, but instead argues that the receiver's presence was not necessary.

[75] I disagree. First, Golden Dragon did not raise any objection to Deloitte's attendance until making costs submissions. As the trial judge fairly noted, the time for such a discussion was prior to the trial of the issues. Moreover, I agree with the trial judge's conclusion that Deloitte's presence was warranted, as it was in keeping with its role as an officer of the court in these receivership proceedings.

[76] The trial judge considered and applied all of the relevant factors and came to a reasonable decision. I am not persuaded that the trial judge made any error in the exercise of his discretion to approve Deloitte's reasonable costs. There is no basis to intervene.

Disposition

[77] I would allow the appeal from the November 16, 2020 judgment. If the parties cannot agree as to the form and content of the appropriate order, they may each file submissions of no more than 5 pages within 14 days of the release of these reasons.

[78] I would dismiss the appeal from the May 12, 2021 costs order.

[79] I would grant Liahona and Golden Dragon their partial indemnity costs from FN. By letter dated January 28, 2022, counsel for the parties advised of their agreement with respect to costs for the appeals, and I would therefore make the following order:

i. Since the appeal of the November 16, 2020 judgment is allowed, FN shall pay the costs of the appeal to Liahona and Golden Dragon in the amount of $60,000, plus disbursements and HST. As the parties did not specify how the costs are to be divided as between Liahona and Golden Dragon, nor the amount of the disbursements and HST, I would leave it to the parties to agree on those matters.

ii. Deloitte's legal fees and disbursements will be dealt with on a passing of accounts before a judge in Ottawa in the underlying receivership proceedings.

Released: August 31, 2022 JCM

J.B. Ralletts J.A.

I agree. J.C. MacPherson J.A.

I agree. K. van Rensburg J.A.