

Everest Finance Corporation v. Jonker, 2023 ONCA 87

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An interesting recent Court of Appeal decision - *Everest Finance Corporation v. Jonker*, 2023 ONCA 87.

Jonker had a mortgage over their home with Everest. They defaulted in making the required payments on the mortgage, and Everest commenced power of sale proceedings. Everest brought its motion for summary judgment, which was originally scheduled to be heard in May 2020 but, due to the intervention of the COVID-19 pandemic, the motion was only heard on December 10, 2021.

Jonker did not dispute that they had not made the required payments and summary judgement was granted in favour of Everest. Everest sought \$412,834.81 due and owing on the mortgage.

As part of the award, the motion judge granted judgement for the principal amount, taxes, disbursements and other items. However, the motion judge reduced the interest arrears from \$63,010.50 to \$20,000. The motion judge stated that the increase in the interest arrears:

... lies primarily at the fee of the pandemic, which prevented the Court from hearing the Plaintiff's motion in a timely manner. This lacuna in time should not be borne by the Defendant in its entirety. I find a reasonable figure for arrears to be \$20,000.

Similarly, the motion judge reduced the amount that Everest sought for costs from \$34,846.85 to \$20,000 in the exercise of her "discretion".

The appeal was granted in favour of Everest.

The Appeals Court set out that the motion judge did not cite any authority for the proposition that a court may reduce interest owed on a debt pursuant to a contractual term because of delays in the court system and the Court was not aware of any such authority. Jonker owed a contractual debt to Everest which included interest that accrues on that debt until it was paid. There was no basis to reduce the amount legally due out of some judicial sense of what is fair and equitable.

As well, the Court stated that the motion judge's discretion in awarding costs did not extend to changing the contractual terms of the mortgage. The mortgage provided for full indemnity costs for steps taken to recover the amount due. While the motion judge might vary the amount sought if it included amounts that were not appropriate, or because excessive rates or time were charged, she did not have the authority to essentially change the contracted full indemnity costs provision to a partial indemnity one. Full costs in favour of Everest were restored.

Thank you to my colleague James Cook in our firm's Litigation Department for bringing this case to my attention

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