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Section 6 of the Federal *Interest Act* is Obsolete

By: Jonnette Watson Hamilton

Case Commented On: *David v Premiere Canadian Mortgage Corporation,* 2015 ABQB 505 (CanLII)

In this decision, Justice Robert A. Graesser makes an interesting policy argument about section 6 the *Interest Act*, R.S.C. 1985, c. I-15, using it to bolster his conclusions about the application of the doctrine of precedent. As a result, this decision is useful for teaching about precedents, the principle of *stare decisis,* and how to use policy in making legal arguments. This decision also illustrates the need for reform of the 135 year old federal *Interest Act*.

Section 6 of the federal *Interest Act* provides that if a mortgage is repayable in one of three ways — on a "sinking fund plan", by blended payments of principal and interest, or involving "an allowance of interest on stipulated repayments" — then the mortgage must contain a statement of the interest payable calculated annually or semi-annually and not in advance. If the mortgage does not contain that statement, then "no interest whatever shall be chargeable, payable or recoverable". The consequences of not complying with section 6, if it applies, are therefore significant. In this particular case, the interest paid by the Davids, which they were seeking to have returned to them, amounted to more than $83,000. (This was not a mortgage foreclosure case. The Davids had satisfied all of their obligations under the mortgage and were suing the mortgagee for non-compliance with section 6 of the *Interest Act*.)

Many judges have spent a lot of time figuring out what the three types of repayment listed in section 6 mean. Professor Mary Ann Waldron, QC, reviewed the case law interpreting this "unclear and confusing legislation" in her article "Section 6 and 7 of the *Canada Interest Act*: Curiouser and Curiouser" (1984) 62 Can Bar Rev 146 at 147, 149-162, and in her book, *The Law of Interest in Canada* (Toronto: Carswell, 1992) at 103-105.

The Davids argued that their mortgage loan contained a "blended payment" type of provision. Their mortgage provided that interest was to be calculated at 9.9 percent compounded monthly; that mortgage payments of $1,445 were due monthly, on the 15th of each month; and that each mortgage payment was to be applied "firstly in payment of the interest, secondly in payment of all other charges due under this mortgage, and thirdly in reduction of the principal sum...".

The issue was whether their mortgage required blended payments, thus triggering the application of section 6 and the need for, in the words of section 6, "a statement showing the amount of the principal money and the rate of interest chargeable on that money, calculated yearly or half-yearly, not in advance". No such statement appeared in the mortgage in this case, only the statement showing the rate of interest compounded monthly.

So was the Davids' mortgage one that required blended payments? The interpretation of "any plan under which the payments of principal money and interest are blended" in section 6 was addressed by the Supreme Court of Canada for the first time in *Kilgoran Hotels v Samek*, [1968]

SCR 3, 1967 CanLII 19 (SCC). In a unanimous judgment, the Court determined that "blended" meant "mixed so as to be inseparable arid indistinguishable" and that, because payments of principal and interest were "distinguished by the very wording of the [repayment] clause" in the case before them (which stated that payments were to be allocated first to interest and second to principal), it "could scarcely be simpler" to do the arithmetical calculations for each payment (at page 5 SCR). Thus, the mortgage did not require blended payments.

The Supreme Court of Canada again considered the meaning of "blended payments", as well as the ratio of *Kilgoran Hotels v Samek,* seven years later in *Ferland v Sun Life Assurance Company of Canada*, [1975] 1 SC.R 266, 974 CanLII 136 (SCC). The majority held (and the concurring opinion did not differ on this issue):

> In [*Kilgoran Hotels v Samek*] as in the case at bar, the deed, after stipulating an annual rate of interest, provided that the debtor would pay off the principal and interest in quarterly instalments of a specified amount, applicable first to interest and then to principal. The Court held unanimously that this was not a plan under which the payments of principal money and interest are blended within the meaning of the provision above quoted, because the rate of interest was clearly stipulated, and only a simple arithmetic calculation was necessary to determine the portions of each payment which were applicable to interest and principal respectively. In short, the Court held that principal and interest are *blended* only if the deed does not disclose the true rate of interest payable [emphasis in the original]) (*Ferland* at 270-271 SCR).

Given this interpretation of "blended payments" by the Supreme Court, it should come as no surprise that Professor Waldron argued that although section 6 of the *Interest Act* might have been intended to require disclosure of the effective cost of borrowing (i.e., the actual amount paid for the loan secured by the mortgage) and standardize reporting of that cost for the purposes of comparison, the courts' interpretation of the section "gravely weakened" its ability to achieve its purpose ("Curiouser and Curiouser" at 148-149).

Justice Graesser agreed with Professor Waldron's conclusion that *Kilgoran Hotels* and *Ferland* ensured that section 6 very rarely applies (at paras 17, 20). As he put it, "unless the interest rate cannot be calculated by the information provided in the Mortgage, section 6 of the *Interest Act* will not apply" (at para 22).

Given this long-settled state of the law about the meaning of "blended payments" in section 6 of the *Interest Act*, what was the Davids' argument? They argued that the Supreme Court decision in *Kilgoran Hotels* was wrong and that Justice Graesser should come to the conclusion reached in *Paragon Properties (Finance) Ltd v Matthews*, [1996] A.J. No. 323, 185 AR 158, a decision of Master Alberstat.

Justice Graesser determined that he could not accept the Davids' argument for two doctrinal reasons: first, the doctrine of precedent, and, second, the status of the *Paragon Properties* decision itself.

The Supreme Court's interpretation of "blended payments" in section 6 in *Kilgoran Hotels*, reiterated in *Ferland*, may well be wrong. Professor Waldron argued that it was and it certainly seems circular. However, the Supreme Court of Canada sits at the pinnacle of the hierarchy of courts in Canada. It is the final court of appeal in the country and in a legal system based on the

doctrine of precedent, that is all it takes for its interpretation to be the only one that counts. As US Supreme Court Justice Robert H. Jackson (1892-1954) wrote about the United States Supreme Court in his concurring opinion in *Brown v. Allen*, 344 U.S. 443 (1953): "We are not final because we are infallible, but we are infallible only because we are final."

The doctrine of precedent is based on *stare decisis*, which means "to stand by previous decisions". Once a point of law has been decided in a particular case by a higher court within in the same jurisdiction, that law must be applied in all future cases in lower courts that have the same material facts. The decision of a higher court in another jurisdiction, or of a court at the same or lower level in the hierarchy of courts, can only be, at best, a persuasive authority. See Paul M. Perell, "*Stare decisis* and techniques of legal reasoning and legal argument" in the *Best Guide to Canadian Legal Research* for a fuller explanation.

Justice Graesser quite rightly decided that "*stare decisis* makes me bound by the decisions of the Supreme Court of Canada. I cannot prefer a decision of a Master in Chambers over that of the Supreme Court of Canada" (at para 25). A Master in Chambers is quite a bit lower in the hierarchy of courts, below not only the Supreme Court of Canada, but also the Court of Appeal of Alberta, and a Justice of the Court of Queen's Bench of Alberta such as Justice Graesser; see Master Funduk's comments about "pecking order" in *South Side Woodwork v RC Contr* (1989) 95 AR 161, 1989 CanLII 3384 at paras 51-53.

The second reason Justice Graesser rejected the Davids' argument was that the *Paragon Properties* decision of Master Alberstat was overturned on appeal to the Court of Queen's Bench; see *Paragon Properties (Finance) Ltd v Mathews*, 185 AR 158, 1996 CarswellAlta 452. Master Alberstat did not refer to either of the Supreme Court of Canada decisions, *Kilgoran Hotels* or *Ferland,* in his brief judgment. Instead, he relied upon a decision of the Manitoba Court of Appeal, *Standard Reliance Mortgage Corp. v. Stubbs* (1916), 32 D.L.R. 57, and a passage (at 858) explaining the purpose of section 6 of the *Interest Act*. He failed to note that the Manitoba Court of Appeal decision was appealed to the Supreme Court of Canada (*Standard Reliance Mortgage Corp. v. Stubbs,* [1917] 3 W.W.R. 402) and two judges in that court specifically disagreed with the Manitoba Court of Appeal's understanding of the purpose of section 6 (at 405 and 408). The Manitoba Court of Appeal decision relied upon by Master Alberstat was also overruled by the Supreme Court. And the Master Alberstat decision relied upon by the Davids was overturned by the Alberta Court of Queen's Bench because of its misplaced reliance on the Manitoba Court of Appeal and because "[t]he leading cases which our Courts must now follow in considering what are blended payments are the Supreme Court of Canada decisions in *Kilgoran Hotels Ltd*. . . . and *Ferland* . . ." (1996 CarswellAlta 452 at para 10).

Justice Graesser then adds a third non-doctrinal reason for rejecting the Davids' argument. This is the policy point that I referred to in the first paragraph of this post. He certainly didn't need to add anything to his reasons for refusing to ignore the Supreme Court of Canada in *Kilgoran Hotels* and *Ferland* in favour of Master Alberstat's overturned decision in *Paragon Properties*. That is perhaps why he refers to this third reason as merely an "observation" (at para 26). But the arid and technical nature of the doctrinal reasons, based on the doctrine of precedent and the hierarchy of courts and who overruled who and why, might leave the parties and other readers wanting a more policy-oriented analysis.

Section 6, as Justice Graesser notes (at para 26), was enacted in 1880 by *An Act relating to Interest on moneys secured by Mortgage of Real Estate*, SC 1880, c 42 — 135 years ago now. It was, as he also notes (at para 27), an early type of consumer protection legislation. Its requirement for disclosure of a comparable rate of interest has, however, been largely superseded by much more comprehensive and consumer-friendly legislation, such as *Alberta's Fair Trading Act*, RSA 2000, c F-2, with its 43 sections devoted to the disclosure of the cost of credit. Justice Graesser notes that the purpose of section 6 of the *Interest Act* — "to prevent borrowers from being misled" — appears to be covered by the much newer provincial legislation (at para 27). Indeed, as he also notes, it is not clear how much disclosure of "the amount of the principal money and the rate of interest chargeable on that money, calculated yearly or half-yearly, not in advance" helps borrowers (at para 27). In addition, 135 years ago mathematical calculations were not as easily made as they are now with the help of our technology. Today, given the basis for compounding interest and the dates for compounding and paying interest, most people are able to find out the effective rate of interest on their mortgage (at para 28).

These policy reasons are not offered by Justice Graesser as reasons to ignore section 6 of the *Interest Act*. No matter how obscure, narrowly applicable and anachronistic that provision might be, it is still the law. Instead, Justice Graesser offers these policy reasons as further justification for refusing to challenge the merits of the Supreme Court of Canada decisions in *Kilgoran Hotels* and *Ferland.*

As a result, applying *Kilgoran Hotels* and *Ferland*, Justice Graesser finds that the mortgage in this case does not require blended payments because it contains a provision that distinguishes between interest and principal and because the mortgage contains enough information to easily calculate the interest rate with annual or semi-annual compounding (at paras 30-32).

Professor Waldron concluded 35 years ago that the purposes of section 6 of the *Interest Act* — accurate information for borrowers and standardization of that information for comparison purposes — are still worth pursuing ("Curiouser and Curioser" at 179). To the extent that there is still a need for federal legislation in the cost of credit disclosure area, pursuit of those goals should be updated with reform of the *Interest Act*. Perhaps it might become part of the current government's "Putting Canadian Consumers First" platform?