

**CITATION:** Amur Capital Fund Inc. v. Stach, 2025 ONSC 5141  
**COURT FILE NO.:** CV-24-12244  
**DATE:** 2025-09-10

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Amur Capital Fund Inc., Plaintiff

**AND:**

Graziella Stach, a.k.a. Graciella Stach, and Serge Ayotte, Defendants

**BEFORE:** The Honourable Madam Justice S.K. Stothart

**COUNSEL:** J. Catenacci, Counsel, for the Plaintiff

R. Refcio, Counsel, for the Defendants

**HEARD:** July 25, 2025

**ENDORSEMENT**

**Overview**

[1] The plaintiff and the defendants reached a settlement of the plaintiff's mortgage action which resulted in a consent judgment against the defendants which included the costs of the action, and the summary judgment motion brought by the plaintiff. Following the judgment, the defendants sought a payout statement so that they could discharge the mortgage and obtain new financing for their properties. The plaintiff provided a discharge statement that included additional legal fees and costs and a holdback amount. The defendants objected to the payment of these additional amounts.

[2] The defendants have brought this motion seeking an order that the plaintiff provide a mortgage payout statement that complies with the consent judgment. They take the position that they do not have to pay legal fees and costs incurred prior to the judgment because these were included in the terms of judgment itself. They also object to paying a holdback because this was not provided for in the judgment. In the alternative, they seek an order directing that any other disputed costs or payments requested by the plaintiff which exceed the amount fixed by the judgment be referred to an Assessment Officer pursuant to Rule 58 of the *Rules of Civil Procedure* R.R.O. 190, Reg. 194 and that the plaintiff take no further enforcement action in the interim, pending final resolution of the assessment

[3] The plaintiff takes the position that it can claim fees and costs incurred prior to the judgment because the terms of the Charge provide that these would be paid on default. The plaintiff takes the position that the holdback is required to cover any costs it may incur in discharging the

mortgage. The plaintiffs submit that the defendants have not tendered any funds to pay the judgment, as such are not entitled to the injunctive relief they seek.

[4] For the following reasons, I find that the legal fees and disbursements incurred by the plaintiff related to all enforcement work up to March 28, 2025, are addressed and adjudicated in the consent judgment. I also find that the plaintiff has not established a basis to insist on payment of a “holdback” amount as a precondition to discharge the mortgage.

### **Background**

[5] The defendant Graziella Stach as mortgagor granted a Charge over three properties to the plaintiff securing the principal sum of \$1,488,000. The defendant Serge Ayotte guaranteed the loan. The mortgage matured on May 15, 2023. Prior to this date, a renewal agreement was sent to the defendants setting out that if the renewal documentation was not received by May 15, and if the mortgage was not renewed, it would become due and payable at that time. When the plaintiff did not receive the renewal documents in time, it made demands for payment to Ms. Stach on June 13 and to Mr. Ayotte June 16. On June 22, 2023, the defendants provided the plaintiff with the signed renewal documents. By this time, the plaintiff was no longer prepared to renew the mortgage. On July 28, the plaintiff issued and served a notice of sale.

[6] On October 3, 2024, the plaintiff commenced an action by way of statement of claim. It sought payment of the sum of \$1,737,706 due under the covenants in the mortgage, payment of “such further monies as may become due and owing pursuant to the covenants contained in the mortgage”, possession of the mortgaged properties, pre-judgment interest at the rate of 8.5% from October 4, 2024, to the date of payment or judgment, and post-judgment interest at the rate of 8.5% per annum.

[7] In response, on October 30, 2024, the defendants issued a statement of defence and counterclaim against the plaintiff. In their statement of defence, the defendants denied that they defaulted on the mortgage payments, asserted that the plaintiff refused to renegotiate the mortgage, that the penalties imposed by the plaintiff were inappropriate, and that the plaintiff acted in bad faith during mediation. In their counter claim, the defendants repeated their allegations of bad faith during mediation, the imposition of unlawful penalties and charges, and sought damages.

[8] The plaintiff issued a reply and defence to counterclaim asserting that it was under no obligation to renegotiate the terms of the mortgage, it acted in good faith, the interest and fees charged were in accordance with the terms and conditions of the mortgage and did not violate the *Interest Act*, R.S.C. 1985, c.I-15, and that they participated in the mediation in good faith.

[9] On December 20, 2024, the plaintiff served and filed a notice of motion seeking summary judgment. The motion sought “all amounts owing under a mortgage between the defendants as mortgagors and guarantor, possession of the mortgaged properties, leave to issue a writ of possession against the property, and costs of the action and motion”.

[10] The summary judgment motion was to be heard on March 28, 2025. That day the parties advised the court that they had negotiated a resolution of the action and the motion. Justice A.D. Kurke endorsed the matter “Judgment to go in the form of the draft filed on consent”.

[11] On April 1, 2025, Justice Kurke issued the judgment requiring the defendants to pay the plaintiff \$1,771,727.21, bearing post judgment interest at the rate of 8.5% per annum, that the defendants deliver the properties to the plaintiff, that any writ of possession obtained against the properties not be enforced by eviction before June 6, 2025, with “costs of the action and motion” fixed at \$7,292.80 inclusive of H.S.T. and disbursements from its date plus post judgment interest at the rate of 5% per annum. This was in accordance with the draft judgment that had been provided to the court.

### **The events following the judgment**

[12] On April 28, 2025, the defendants wrote to the plaintiff advising that they had arranged alternative financing for the monies owed. The defendants asked for the plaintiff’s payout statement for an effective date of May 2, 2025, with per diems thereafter as the defendants wanted to complete the payout on an “ASAP” basis.

[13] On May 6, 2025, the plaintiff provided a payout statement that included an outstanding loan balance of \$1,517,093.23, interest to May 9, 2025 in the amount of \$270,899.23, an administration fee in the amount of \$2,500, a discharge fee in the amount of \$175, a property management fee in the amount of \$361.60, legal costs and disbursements in the amount of \$26,324.43, a discharge preparation and registration fee in the amount of \$981, and a hold back of \$7,500. The total payout was \$1,825,834.49.

[14] On May 14, 2025, counsel for the plaintiff advised that the payout statement had expired on May 9 and that they had instructions to proceed with legal action. On the same day, counsel for the defendants wrote back advising that the terms of the judgment provided that no action would be taken until June 6 and that they expected to have funds over the next few days and were proceeding on the basis of the May 6 statement plus per diem. Plaintiff’s counsel responded that they would check with the plaintiff and obtain instructions about the per diem.

[15] On May 20, 2025, the defendants requested confirmation that they were to add the per diem to the payout statement. The plaintiff responded confirming the per diem and requested confirmation that the funds would be provided that day. The defendants responded that they expected to provide the funds the next day.

[16] On May 22, the plaintiff wrote that it had not received the funds and sought a confirmation that the funds would be provided that day. If not, an updated payout statement would be required. The defendants responded that they expected the funds that day, but if not, they would add the per diem for the extra day.

[17] On May 29, the defendants requested that the payout statement be reviewed. On May 30, the plaintiff confirmed that it had been reviewed and provided an updated payout statement with the interest adjusted.

[18] On June 3 the defendants requested a breakdown of the legal costs set out in the payout statement. The next day the defendants wrote stating that costs had been fixed for the motion and the action and requested a detailed legal breakdown of the additional legal costs demanded. The plaintiff provided a breakdown of these costs on June 20, 2025. The break down was 22 pages in length and included all the legal fees and disbursements incurred by the plaintiff as of June 13, 2023, totaling \$27,228.43.

[19] After receiving the breakdown, the defendants brought this motion.

### **Analysis**

[20] I find that the legal fees and disbursements related to all enforcement work up to March 28, 2025, are addressed and adjudicated in the Order of Justice Kurke. I also find that the plaintiff has not established a basis to insist on payment of a “holdback” amount as a precondition to discharge the mortgage.

[21] The defendants submit that the Order of Justice Kurke adjudicated the total amount of indebtedness owed by the defendants to the plaintiff under the mortgage, determined the rate of post-judgment interest, and specifically fixed the costs of the action and motion in the sum of \$7,292.80 inclusive of H.S.T. and disbursements. They agree that they must pay the interest accrued and any reasonable costs incurred by the plaintiff following the judgment. They disagree that they are required to pay the legal fees and disbursements included in the payout statement that pre-date the judgment. They also take issue with the administration fee and holdback, which did not form part of the judgment. The defendants seek an order permitting them to pay the amount of the judgment, any accrued interest, and post judgment costs, so that the mortgage can be discharged, and they can move forward with re-financing the property

[22] The plaintiff takes the position that under the terms of the mortgage and at law, it is entitled to the costs it has claimed. It submits that the standard charge terms attached to the Charge entitle it to “all costs, charges and expenses which may be incurred in taking, recovering and keeping possession of the charged property” including all solicitor’s charges “as between solicitor and its own client, whether any action or other judicial proceeding to enforce such payment has been take out or not”.

[23] The plaintiff submits that the non-merger clause contained in the Charge provides that the judgment in this case does not merge with the other contractually enforceable clauses in the Charge, such as the term relating to their entitlement to costs, charges and expenses in taking, recovering and keeping possession of the charged property. In support of its position, the plaintiff relies on three decisions, *Benson v. Gibson*, 2000 CarswellOnt 3946 (S.C.J.); *Viola v. McLeod*, 2006 CarswellOnt 2961; and *NRD Management Services Ltd. v. Dorothy Litwin*, 2021 ONSC 3238.

[24] The plaintiff submits that the only differences between the judgment and the payout statement provided are that it includes: (a) the interest due as of the discharge statement; (b) property management charges for additional costs incurred since the date of the judgment; (c) legal fees for all enforcement work, including the costs award in the judgment; and (d) a holdback to

account for any fees or costs that might be incurred between the date of the statement and the date of payment.

[25] The most recent payout statement dated June 17, 2025, sets out the following expenses to be paid in order to discharge the mortgage:

- a. Outstanding balance: \$1,517,093.23
- b. Interest to June 20, 2025: \$287,559.10
- c. Administration fee: \$2,5000
- d. Discharge fee: \$175
- e. Legal costs and disbursements: \$27,228.43
- f. Discharge preparation and registration fee: \$981
- g. Holdback: \$7,500

Total: \$1,843,398.36.

[26] The detailed breakdown of legal fees and disbursements provided by the plaintiff in support of its claim for \$27,228.43, commences June 13, 2023, when the plaintiff provided instructions to commence legal action on the mortgage, and continues until June 13, 2025, the day prior to the most recent payout statement. Based on the breakdown, it appears that post-judgment legal costs as of June 12, 2025, were approximately \$4,860.

[27] In the three decisions provided by the plaintiff, the court dealt with costs claimed by a mortgagee following default judgment.

[28] In *Benson v. Gibson*, the mortgagee obtained default judgment. Following this, the mortgagee obtained a writ of possession. When the mortgagor sought to pay out the mortgage, the mortgagee delivered a payout statement seeking the principal balance, legal costs incurred post power of sale, property inspection costs, a mortgage statement fee, a discharge administrative fee, and a discharge of the mortgage fee.

[29] Justice Juriansz, as he then was, found that the default judgment did not preclude the mortgagee from claiming further expenses incurred in exercising a power of sale after the default judgment where those expenses had not been claimed in the action. Juriansz found that the power of sale provision was separate from the other terms in the mortgage. In that case, the power of sale provisions stated that all costs incurred in the exercise of the power sale were to be a charge on the land. Because these costs related to enforcing the judgment, the mortgagee was entitled to be paid for them: *Benson v. Gibson*, at paras. 10 and 13.

[30] In *Violi v. McLeod*, the mortgagee obtained default judgment for the amount owing under the mortgage, costs, an order for possession of the lands, and post-judgment interest. The mortgagee then issued a writ of seizure and sale and obtained an order for a writ of possession. When the mortgagee sent a letter demanding possession of the property the mortgagor requested a discharge statement. The mortgagor took the position that it was required to pay the amount set out in the default judgement.

[31] Justice Flynn held that once the mortgagor paid the amount set out in the judgment, plus post judgment interest, it was entitled to the removal of the writ of seizure and sale. With respect to what the judgment amount included, Flynn found that it included any costs added by virtue of the standard charge provisions, including standard charge no. 8 which relates to costs, charges, legal fees and expenses incurred to the judgment date: *Violi v. McLeod*, at para. 17.

[32] Justice Flynn found that payment of the judgment did not end the mortgagee's remedies under the Covenant because other terms did not merge with the judgment. The decision does not go on to address what further claims the mortgagee was entitled to because the parties agreed that the matter would proceed to an assessment, and the matter was adjourned for that purpose. The decision does not set out the results of that assessment.

[33] In *NRD Management Services Ltd. v. Dorothy Litwin*, the mortgagee obtained default judgment and a writ of possession. When the mortgagee first attempted to obtain default judgment, it claimed the principal and various administrative fees and default fees provided for in the Charge. The request was rejected by the registrar because of the inclusion of these fees. The mortgagee then obtained default judgment solely for the principal, interest and costs. When the mortgagor sought to discharge the mortgage, it took the position that it was only required to pay the amount set out in the judgment and not the other fees claimed by the mortgagee. Justice M.D. Sharma found that the mortgagee was still entitled to claim the fees set out in the terms of the covenant because these terms did not merge with judgment. Sharma noted that the mortgagee had always attempted to claim these fees but had been prevented from doing so when it obtained default judgment. Sharma went on to find that if he was wrong on this issue, he was prepared to exercise his authority and vary the default judgment to include the additional amounts to be paid in order to discharge the mortgage.

[34] The case before me is very different than the three cases cited by the plaintiff. In this case the plaintiff issued an action against the defendants seeking the principal amount owed under the mortgage, interest, possession of the properties and "such further monies as may become due and owing pursuant to the covenants contained in the mortgage". I find that this would have included the amounts owed under standard charge no. 8, which includes legal fees (as between solicitor and client) and expenses incurred in taking, recovering and keeping possession of the charged land and in any other proceeding taken in connection with or to realize upon the security given in the Charge.

[35] This case did not proceed to default judgment. The defendants defended the claim and brought their own counterclaim, which the plaintiffs defended. The amounts owed pursuant to the covenants were clearly in dispute in both the action and the counterclaim.

[36] When the plaintiff brought a motion for summary judgment, it sought all amounts owing under the mortgage, possession of the properties, leave to issue a writ of possession against the properties and costs of the action and the motion on a substantial indemnity basis.

[37] At the summary judgment motion, both parties faced the potential of an adverse outcome. This is a reality of litigation. It is within this context, that the parties reached a resolution of both the action and the motion. The consent judgment and issued order provides that the defendants are to pay the plaintiff \$1,771,727.21. Based on the materials filed in this motion, the principal owing at the time the mortgage matured was \$1,517,093. I find it is reasonable to conclude that the consent judgment amount, which added another \$254,634.21, included things such as interest, costs, and fees up to that date.

[38] The issued order also provides that the defendants pay to the plaintiff “costs of this action and motion fixed in the sum of \$7,292.80 inclusive of H.S.T. and disbursements from its date plus post judgment interest at the rate of 5.055% per annum”. I find it is reasonable to conclude that the judgment agreed to by the parties included the legal costs (legal fees and disbursements) incurred by the plaintiff in the action and motion up to the date the parties settled the action. While this amount does not cover all the legal costs incurred by the plaintiff, which are set out in the detailed breakdown, it is clear that the parties reached an agreement to fix the costs of the action by way of a settlement that was incorporated in the consent judgment.

[39] *Benson v. Gibson* does not stand for the proposition that where a mortgage action seeking enforcement of the terms contained in the covenant is settled by the parties and judgment is issued which includes the costs of the action, that the mortgagee can then claim all legal costs associated with enforcement of the mortgage leading up to the date of the settlement. Such a finding would run contrary to the purpose and spirit of settlement. Parties should be encouraged to settle disputes including the issue of costs. Settlements should be treated with the finality they are intended to achieve.

[40] In *Benson v. Gibson*, the court found that the mortgagee was entitled to be paid for the further steps it took following default judgment related to the power of sale. The defendants in this case are prepared to pay the further reasonable costs incurred by the plaintiff following the judgment, which relate to discharging the mortgage.

[41] With respect to the demand that the defendants pay “holdback” monies, I was not taken to any provision in the Charge that permitted the plaintiff to claim this additional amount. If the payout statement sets out the amounts owed under the judgment, interest accrued post judgment, and any costs incurred post-judgment, and the defendants pay that amount, I do not understand why further funds would be required. This is not a situation where the plaintiffs have the funds, and wish to hold some of them back, pending satisfaction that certain steps have been completed. This is a situation where the plaintiff is demanding payment of an amount which is over and above full payment of the judgment and post-judgment interest and costs. When the defendants make full payment of the judgement, post-judgment interests and costs, which will include the administrative cost to discharge the mortgage, they are entitled to have the mortgage discharged. I do not see how

the plaintiffs can insist that the defendants pay more than this amount and then call this a “hold-back”.

[42] In *Benson v. Gibson*, Justice Juriansz referenced, with approval, G.W. Dunn and W. Gray in *Practice in Mortgage Remedies in Ontario: The Practice In Mortgage Actions*, which sets out that where a mortgagee signs judgment against a mortgagor on the covenants prior to completing the sale of the mortgaged property under power of sale, the mortgagee will be bound by the judgment and will not be able to claim a higher amount out of the sale proceeds than that provided in the judgment: *Benson v. Gibson* at para. 8; *XLO Investments Ltd. v. Hachey*, 1987 CarswellOnt 2644 (Ont.Dist.Ct.).

[43] In this case, where the judgment specifically sets out the costs of the action, the mortgagee will be bound by the judgment and will not be able to claim payment of a higher amount of costs incurred prior to the judgment in order to discharge the mortgage.

[44] For these reasons, I conclude that the plaintiff is not entitled to payment of all its legal costs (fees and disbursements) incurred leading up to the judgment in order to discharge the mortgage. I find that the judgment amount includes all legal costs incurred up to the date of the judgment. During the hearing of this motion, the plaintiff took no issue that the subsequent legal costs, following the judgment on April 1, 2025, to June 13, 2025, were \$4,860 and so I set them at that amount.

[45] I am satisfied that the plaintiff is not entitled to a holdback amount given the defendants must pay the total amount owing in order to have the mortgage discharged. The plaintiffs are entitled to charge a reasonable fee to discharge the mortgage, which may be claimed in advance.

[46] For these reasons, I order the plaintiff to provide a mortgage payout statement to the defendant within 10 days of this decision, that sets out the amount owing pursuant to the Order of Justice Kurke, post judgment interest at the rate set out in the judgment, and reasonable fees associated with the cost of discharging the mortgage. Payment of these amounts will fully address any amounts owed to the plaintiff by the defendants in this case. If the parties cannot agree on what fees are reasonable, they may return before me for a determination on this issue.

[47] I have assumed that the parties agreed to extend the period during which any writ of possession obtained against the properties would not be enforced, pending this decision. This condition of the judgment is varied, and the period during which any writ of possession obtained against the properties shall not be enforced is extended to September 29, 2025, to permit the exchange of the payout statement and payment of the amounts owed.

[48] If the parties cannot agree on the issue of costs related to this motion, the defendants shall provide written submissions that are no more than 2 pages in length within 15 days of this decision. The plaintiff shall provide written submissions no more than 2 pages in length 15 days following receipt of the defendants’ submissions. The defendants may provide reply submissions of no more than 1 page in length within 5 days of receipt of the plaintiff’s submissions.

[49] If I do not receive written submissions within these time frames, the costs of this motion shall be deemed to have been determined between the parties.

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The Honourable Madam Justice S.K. Stothart

**Date:** September 10, 2025