Date: 19980108 Docket: CA139794

NOVA SCOTIA COURT OF APPEAL

Cite as: Royal Bank of Canada v. Marjen Investments Ltd., 1998 NSCA 37

Freeman, Hallett and Bateman, JJ.A.

BETWEEN:

ROYAL BANK OF CANADA	)	W. Augustus Richardson
	)	and Goldie Trager
Appellant	)	for the Appellant
	)	
	)	
	)	
- and -	)	
	)	
	)	J. Brian Church, Q.C.
	)	for the Respondent
MARJEN INVESTMENTS LIMITED	)	
and **GORDON POWELL**	)	
	)	
Respondent	)	
	)	Appeal Heard:
	)	November 20, 1997
	)	
	)	Judgment Delivered:
	)	January 8, 1998
	)	
	)	
	)	

THE COURT: The appeal is allowed per reasons for judgment of Bateman, J.A.; Freeman and Hallett, JJ.A., concurring.

Bateman, J.A.:

This is an appeal by the Royal Bank from a decision of Justice Hilroy Nathanson of the Supreme Court on an application for deficiency judgment in a foreclosure proceeding.

Background:

In June of 1991 the appellant provided mortgage financing to the respondent Marjen Investments Limited in the amount of $545,000. The mortgage was guaranteed by the respondent, Gordon Powell. The property mortgaged was a building at 5970-2 Spring Garden Road in Halifax containing both commercial and residential premises. At the time of the financing the property was appraised at $750,000. In March of 1996 Marjen fell into arrears when a major tenant vacated the property. The respondents, unable to meet the mortgage payments, agreed to sell the property to a third party through a share transfer and renewal of the mortgage arrangement. The sale was subject to the purchaser having "arranged financing satisfactory to him". The purchaser did not proceed with the transaction. On July 31, 1996 the appellant commenced foreclosure proceedings. No defence was filed.

The appellant delayed the foreclosure action at the request of the respondents who advised that they were negotiating sale of the property to the abutting land owners. On September 20, 1996, the respondents entered into an agreement to sell the property for $590,000 on condition that the purchaser assume the existing mortgage of $515,000 and arrange the balance of the financing. The appellant bank was prepared to finance only to a limit of $481,800, based upon the cash flow of the property. The sale was aborted when the purchaser failed to obtain financing. On October 16 Justice Davison of the Supreme Court granted an order for foreclosure and sale, fixing the amount due under the mortgage at $551,887.20, together with interest at 11.25% from October 1 until the earlier of payment of the amount due or 20 days from the Sheriff's sale.

There were two appraisals of the property. One was done on August 8, 1996, by Kempton Appraisals, at the request of the respondents, Marjen and Powell, which estimated market value to be $650,000. Another, dated November 4, by Varner Appraisals Limited, commissioned by the appellant, valued the property at $590,000.

On November 21, 1996, the property was purchased by the appellant at the Sheriff's sale for the sum of $455,000.

On December 3, 1996 a purchaser offered to buy the property from the Bank for $498,000. The appellant countered at $530,000 which was not accepted. On December 6 Sabhary Caravan Company offered to purchase the property for $530,000. The appellant's counter offer of $540,000 was accepted. On January 13, 1997, the purchaser terminated the agreement due to the defects revealed on the inspection of the property. The report, prepared by an engineer retained by the purchaser, referred to roof problems, recommending a full inspection of the roof; sloping floors in the residential units which would require significant expense to rectify; deferred maintenance in the residential units; and major water problems in the lower basement.

On February 5, 1997, the appellant listed the property with Harrigan Financial Services as broker. On February 7 the Stardust Motel (1989) Company offered to purchase the property for $425,000. The appellant's counter offer at $550,000 was unacceptable.

On February 13, Rijpke Beukema and Linda Beukema Nelson offered to purchase the property for $510,000. After a counter offer by the appellant, the

Beukemas' further offer of $535,000 was accepted, conditional upon inspection of the property.

After inspection, the Beukemas asked for a $46,000 reduction in the purchase price. Their inspection report revealed, *inter alia*, water damage throughout parts of the building, a need for a new roof and replacement of the chimney. The parties could not come to an agreement.

On February 20, 1997, the Supreme Court confirmed the Sheriff"s sale and the appellant was given six months to apply for a deficiency judgment against the respondents.

On April 3 the Beukemas made a new offer of $500,000. The appellant countered, accepting that price, but altering certain conditions. The property was sold to the Beukemas on April 30, 1997.

The appellant, having sold the property for $500,000, made application for a deficiency judgment in the amount of $109,810.71. At the hearing on July 3, Justice

Nathanson, in an oral decision, dismissed the application without costs. This is an appeal from that order refusing deficiency judgment.

Preliminary Issue:

The order dismissing the application for deficiency was issued July 8, 1997, and the Notice of Appeal filed on July 15, 1997. On July 18 a letter to counsel from Justice Nathanson's secretary advised:

> . . . We have now received a Notice of Appeal C.A. No. 139794 dated July 14, 1997. Justice Nathanson has asked me to inform you that because of the grounds for appeal outlined in the Notice, that he wishes to render a written decision which he hopes to file in the very near future.

The written decision was filed on September 18, 1997.

Counsel for the appellant had asked Justice Nathanson, at the conclusion of the Chambers hearing, whether he would be filing written reasons. He replied that he would not. In the circumstances, the parties have agreed that the judge's written decision, which is materially the same as that delivered orally, should not form part of the record on appeal. I would agree.

<u>Issues</u>:

The grounds of appeal are:

(i) Did the Chambers Judge err when he refused to use the resale price for the purpose of calculating the deficiency?

(ii) Did the Chambers judge err when he refused to take into account any expenses incurred or any income earned by the appellant by reason of its possession of the property between the date of the default judgment and resale?

<u>Power of the Court on Appeal:</u>

In **Montreal Trust Co. of Canada v. Grab** (1995), 139 N.S.R. (2d) 343, this Court summarized the test on an appeal from a decision fixing the deficiency judgment. Roscoe, J.A., writing for the Court, said at p. 346:

> That we might have come to a contrary conclusion is not sufficient. Although this Court must review the record carefully to ensure the trial judge did not make findings in the absence of evidence or fail to consider material evidence, we cannot substitute our opinion or assessment of the evidence for that of the trial judge. In other words, this Court cannot re-try the issue. We have the duty to re-examine the conclusions of the Chambers Judge; however, the authorities are also clear that the Appeal Court's jurisdiction in this regard has defined limits and, particularly, should not be exercised unless it can be clearly demonstrated that she made some manifest or palpable and overriding error which affected her assessment of the facts. In the absence of such an error, it is not the Appeal Court's function to "substitute its assessment of the balance of probability for the findings of the judge who presided at trial." See: **Stein et al v. The Ship "Kathy K" et al**, [1976] 2 S.C.R. 802; 6 N.R. 359; 62 D.L.R. (3d) 1 (S.C.C.)

Analysis:

(i) Did the Chambers Judge err when he refused to use the resale price for the purpose of calculating the deficiency?

Certain amendments to the **Civil Procedure Rules** pertaining to foreclosure practice were adopted by the Supreme Court in 1995. Relevant to this appeal are changes to **Rules 47.09** and **47.10,** which bear upon the calculation of a deficiency judgment.

To put the current amendments in their proper context it is helpful to briefly track the history of the foreclosure practice, as it relates to the granting of a deficiency judgment. In 1972 the **Civil Procedure Rules** came into force. **Rule 47.10** stated:

> Where the purchase money [from a Sheriff's sale on foreclosure] is insufficient to pay what is found to be due to a plaintiff for principal and interest and costs, the plaintiff shall be entitled, when the mortgagor is a defendant and such relief has been claimed, to an order for the payment of the deficiency.

In **Central Trust Co. v. Adshade et. al.** (1983), 60 N.S.R. (2d) 414, Hart, J.A. thoroughly reviewed the development of the Nova Scotia foreclosure practice. As regards deficiency judgments he commented at p.422:

> It would appear from the earlier authorities that the Courts of Equity would protect a mortgagor against a mortgagee if the mortgagee sought to recover more than was just and reasonable upon a security.

> This would be done by opening up the foreclosure and permitting redemption or by refusing a deficiency judgment if the property could not be restored. It would also appear that under the Nova Scotia type mortgage practice a judicial sale was considered sufficient protection for the mortgagor and that the mortgagee was entitled to a deficiency judgment based upon the difference between the amount recovered at the sale and the amount outstanding on the mortgage, provided the mortgagor was a party to the proceeding. In a more recent case in this province [**Briand v. Carver**, (1967), 4 N.S.R. 1965-69 141 (T.D.)], however, Cowan, C.J.T.D., considered that he had authority to refuse an application for a deficiency judgment where the mortgagee's solicitor had bid the property in at the sale for a nominal amount because it would be unjust and inequitable to permit the mortgagee to have the property and a judgment for almost the full amount of the mortgage debt as well. . . .

On June 15, 1978, presumably in response the concerns expressed by then Chief Justice Cowan in **Briand v. Carver, supra,** as outlined by Hart, J.A. in **Adshade,** above, the Supreme Court issued **Practice Memorandum No. 16**:

> The provision in the foreclosure order with respect to deficiency judgment permits an application to be made after the sale of the mortgaged property. If the property is sold to someone other than the mortgagee, the amount of any deficiency is ascertained and the application for the deficiency judgment can be made at the time when the order of confirmation is applied for. *If, however, the mortgagee buys in at the sale, the practice of the court is to require some evidence of the actual value of the mortgaged premises and to require that credit be given the mortgagor for that value. In most cases, the mortgagee wishes to resell to a third party by an arm's length sale, and thus establish the actual value. It is considered desirable to permit the mortgagee, in such circumstances, to delay the application for a deficiency for a reasonable time, and yet to encourage him to apply for confirmation without delay*. The following clause is suggested for inclusion in the order of confirmation, if such a right is to be reserved:-
>
> "AND IT IS FURTHER ORDERED that the plaintiff is granted leave to apply for a deficiency judgment within   months from the date of this order."

> [Emphasis added]

In **Canadian Imperial Bank of Commerce v. England's (R) Warehouse Ltd.** (1996), 147 N.S.R. (2d) 321, Hallett, J.A. described the practice which has developed regarding deficiency judgments. At p.334:

> In the Nova Scotia mortgage foreclosure practice, the Supreme Court directs how the Sheriff's Sale is to be conducted at the time the foreclosure order is signed. There has been an assumption that Sheriff's Sales at public auction after the court-ordered advertising will result in a reasonable price being obtained for the property foreclosed. However, in recent years, there is often no interest shown in bidding at the Sheriff's Sale and the mortgagee obtains the property for the outstanding taxes and expenses connected with the sale. This development led the Court to impose duties on a mortgagee who buys in at the Sheriff's Sale usually for a nominal sum. If the mortgagee intends to retain the property (which would be unusual) the mortgagor would be credited with the fair market value of the property (as established by independent appraisals) against the amount fixed by the foreclosure order as being due on the mortgage. Thus, the mortgagee would obtain a deficiency judgment for the balance. If the mortgagee resells the Court must be satisfied the price obtained was reasonable. *The case law with respect to the practice on deficiency judgment applications was codified by the 1984 enactment of Rule 47.10(2).*
> [Emphasis added]

Rule 47.10(2), as enacted in 1984, provided:

> (2) Where a plaintiff or a party related in interest is the purchaser at a sale pursuant to rule 47.08, and it appears that the price paid was less than the fair market value of the property at the time of sale, the court, in determining the amount of the deficiency, may deem the sale price to have been

> (a) the fair market value of the property at the time of the sale as established by independent appraisal; or
>
> (b) the amount realized upon a resale of the property if the Court is satisfied that the price obtained was reasonable, but in that event any income derived from the property before resale shall be added to the price obtained and there shall be deducted therefrom the costs of resale (including real estate commission paid to a third party), expenses reasonably incurred to derive income from the property and other costs reasonably and necessarily incurred to protect or conserve it.

Thus, for the purpose of calculating the deficiency, where the mortgagee had purchased the property at the Sheriff's sale, the Court would deem the sale price to be, (i) the fair market value of the property, at the time of sale, when the mortgagee retained the property, or, in the event that the property was resold by the mortgagee, (ii) the resale price of the property, if found to be a reasonable price.

As regards the duty upon a mortgagee who purchases the property at the Sheriff's sale and resells, in **England's Warehouse**, **supra**, Hallett, J.A. rejected the suggestion that the mortgagee must obtain fair market value for the property. The obligation is to achieve a reasonable price, which may not be fair market value (at p. 337). He said at p. 339:

> *Rule 47.10(2)* requires only that the mortgagee obtain a reasonable price on a resale. The onus of proof on this issue is on the mortgagee. The mortgagee should not be adjudged to have failed the duty unless

> the price obtained on the resale is clearly unreasonable in the circumstances. This must be so because the mortgagor's default put the mortgagee in the position that action to realize on the security was required. *Secondly, the result of the Sheriff's Sale will have already demonstrated a lack of interest in the property. Under such circumstances appraisals of fair market value are often shown to have been overstated.*
> [Emphasis added]

Hallett, J.A. rejected as well, the proposition that the mortgagee had an obligation in all circumstances to vigorously market the property before resale. He continued at p. 339:

> Counsel for England's Warehouse also asserts that a mortgagee had to vigorously market property bought in at a foreclosure sale to be entitled to a deficiency judgment calculated on the basis of the price obtained on the resale. Counsel relies on a statement made by Roscoe, J.A., writing for this Court, in **Royal Trust Company of Canada v. Offman** (1994), 132 N.S.R. (2d) 306; 376 A.P.R. 306 (C.A.). She stated at p. 309:
>
>> "*Rule 47.10(2)* presents alternative methods of determining the amount of a deficiency where fair market value is not obtained at the sheriff's sale. Each method involves the fixing of a 'deemed' sale price. In the first, provided for in subs.(a), the court must value the property based on the fair market value as established by independent appraisal. This method should be utilized when the deficiency application is made at a time when the mortgagor still holds the property. With this method, it is necessary to rely on the appraisers' opinions of fair market value because the actual fair market value is not known. Fair market value is generally recognized to be the price which would be expected to be received by a willing vendor from a willing buyer on the open market. The second method, provided for in subs. (b), should be used by the court if the mortgagee has resold the property, which is the situation here. Subsection (b) provides that the resale price should be the deemed sale price if the court is satisfied that

> the resale price is reasonable. In this event, the market has determined the fair market value and the opinions of the experts, which are invariably based on estimates and assumptions about future events, although useful, are not determinative. If the property has been exposed to the market for a significant period of time, a number of offers received, the purchaser is at arm's length from the vendor, and vigorous marketing efforts have been undertaken, the court should not be hesitant to find that the price obtained was reasonable, unless there is some persuasive evidence to the contrary. It should also be noted that in this case the appellant also had the property for sale for several months prior to the foreclosure sale."

> That statement must be read in the context of the factual situation of that case. The mortgagee had bought in the property and had made vigorous efforts to sell it. *The statement of Roscoe J.A. cannot be interpreted to mean that in every instance where a mortgagee acquires a property at a sheriff's sale that the mortgagee must vigorously attempt to sell the property through advertising, etc. The obligation on the mortgagee on a resale is to take reasonable care to see that a reasonable price is obtained.*
> [Emphasis added]

Under the wording of **Rule 47.10(1)**, prior to the recent amendment, the Court did not have a discretion to refuse to grant a deficiency. That discretion did derive, however, from the Court's equitable jurisdiction. Hart, J.A. said in **Central Trust Co. v. Adshade** (1983), 60 N.S.R. (2d) 414 at p.424:

> It can be seen from the decided cases that apart from the decision of Chief Justice Cowan [*Briand v. Carver*] there is a strong tendency to accept the amount bid at the judicial sale as determinative of the subsequent deficiency. A review of the English jurisprudence reveals, however, that *equity has always looked behind the procedure followed to determine that no unfair advantage is obtained by any party to the transaction.* The judicial sale is normally a fair method of valuing a property but, in my opinion, there is always a possibility that such a sale might not accomplish the purpose for which it is held.

> It may be conducted in such a way as to discourage bidding, as was done in the Halifax Hotel Company case, *MacDonald v. Hirsch, et al.* (1932–33) 5 M.P.R. 469, or the bids at the sale may be completely artificial and bear no relation to actual value, as was the case in *Briand v. Carver, supra*. On the other hand, if all parties interested had adequate notice of the sale and were no way impaired in their ability to bid, then it would be a question of fact whether the sale price represented the amount properly recovered and to be credited against the mortgage debt to establish a deficiency judgment. *It is therefore the responsibility of the judge when exercising his equitable jurisdiction in matters such as these to have regard to all such factors when deciding the amount, if any, of a deficiency judgment that should be approved.*
>
> Chief Justice Cowan in *Briand v. Carver* made reference to *techniques that were available to assist the Court in coming to its conclusions*. He referred to the production of appraisal reports and evidence as to other expenses of foreclosure which should be used. Apparently this procedure has been followed in the Trial Division in recent years and, although the rules of Court have not been changed to codify the procedure, it is now the practice that such evidence must be adduced. The practice was referred to by Hallett, J., in *Nova Scotia Savings and Loan v. MacKay* et al. (1980), 41 N.S.R. (2d) 432, . . .

The primary purpose of the appraisal reports, on an application for a deficiency, is to assist the Court in fixing a fair value when the mortgagee has purchased the property at the Sheriff's sale, often for a nominal amount, and has not resold it. Where the property has been resold, an appraisal report provides the Court with a hypothetical value to which to compare the price actually realized. If there is little difference, the inquiry into the reasonableness of the resale price is simplified. Where, however, there is a significant difference in the two values, the Court will more closely scrutinize the circumstances surrounding the resale.

Civil Procedure Rule 47.10, which came into effect September 1, 1995, now provides:

> 47.10. (1) Where in the case of a sale pursuant to rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest, and disbursements as authorized by the mortgage instrument, and costs, and the person against whom the deficiency is claimed is a defendant, the plaintiff *may* be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency.
>
> (2) Where a plaintiff or a party related in interest is the purchaser at a sale pursuant to Rule 47.08, and it appears that the price paid was less than the fair market value of the property at the time of sale, the court, in determining the amount of the deficiency, *may deem the sale price to have been the fair market value of the property at the time of the sale.*
>
> (3) An application for deficiency judgment shall be made to the court within six (6) months from the date of the Sheriff's Sale, on ten (10) days notice.
> [Emphasis added]

In subparagraph (1), the word "may" has been substituted for "shall". The change in the wording of **Rule 47.10(1)**, *inter alia*, purports to remove the Court's obligation to award a deficiency, and substitutes a discretion. This does not, however, effect a substantive change in the law since, pursuant to its equitable jurisdiction, the Court has always had a discretion to refuse the application for a deficiency. In this regard, the change does no more than to codify the existing jurisdiction of the Court.

The Court's focus on an application for deficiency judgment on foreclosure is to ensure that the mortgagee recovers no more than “is just and reasonable” (per Hart, J.A. in **Adshade**, **supra**). When the mortgagee has purchased the property at the Sheriff’s sale, and applies for a deficiency judgment, prior to resale, it is reasonable for the Court to look to objective evidence of value (per Hallett, J.A. in **Nova Scotia Savings and Loan v. MacKay, supra**). It may be that the price paid by the mortgagee at the sale is an acceptable amount, particularly where there has been competitive bidding. On the other hand, the purchase price may be nominal, in which case, it is appropriate to assign a more realistic value. This ensures that the mortgagee does not, after obtaining a deficiency judgment, resell the property for an amount greater than the price paid at the Sheriff’s sale and thereby effect double recovery. Where the property has not been resold, the best evidence of value is generally established through appraisals. When the property has been resold, however, and, particularly, when subjected to vigorous marketing efforts, as in **Offman, supra**, the Court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property.

Justice Nathanson was apparently of the view that the change to the wording of **Rule 47.10** had altered the law in respect to both the Court's responsibility to grant a deficiency judgment and that regarding the valuation of the property.

At the Chambers hearing the appellant had tendered affidavit evidence of the appraised value of the property at the time of the Sheriff's sale. The purpose of the information was to support the reasonableness of the resale price. At the time of preparing the report, the appraiser had not been privy to certain information about the property, which was material and would reduce the appraised value. Specifically, the appraiser had not known that there was a leasehold inducement to one of the tenants, which resulted in a debt owed by the mortgagor to that tenant, and that the roof of the building was in need of replacement. Counsel for the appellant asked the Court to consider these factors. Justice Nathanson ruled that she was not entitled to introduce such evidence. He said:

> I put it in slightly different terms. I put it in terms that you had introduced evidence as to what the appraised value was on the date of sale and, therefore, [are] not now allowed to adduce evidence that is contrary to your own witness.

In addition, counsel was advised by the Chambers judge at the outset of the hearing that evidence of the resale price was no longer relevant. He said:

> Since we now have a date of default judgment and since the Court will not consider expenses or resales by the mortgagee, who bought at the sale, after that time . . .

This, he said, resulted from the change to the **Civil Procedure Rules**, specifically **Rule 47.10(2)**. In a subsequent exchange with counsel for the appellant, Justice Nathanson confirmed his position that evidence of market activity leading up to the resale would not be considered by the Court:

> **MS. TRAGER**
> Just so I understand your ruling in light of Justice Hood's decision, then, which is a total departure from what I understood is *that market activity is no longer relevant? Twenty days after the foreclosure sale the evidence that we put forward about the sale activity, all the offers received, the conditions, not of that it relevant?*
>
> **THE COURT**
> *None of it is relevant any more*. I wouldn't have worded it -- the comment the way that you worded it --the comment the way that you worded it .
>
> **MS. TRAGER**
> I'm sorry My Lord.
>
> **THE COURT**
> Well, it's not my ruling that's changing anything and it's not Justice Hood's ruling that changes anything. There's a change to the rules two and half years ago.
>
> **MS. TRAGER**
> I guess my understanding of the change to the rules was that the Court now had the discretion whether or not to order a deficiency.
>
> **THE COURT**
> Oh, no. No, no. You have the right to demand the deficiency. *The discretion of the Court comes in what the fair market value of the property is as of the date of sale.* That's what the rules require.

MS. TRAGER
Right

THE COURT
Okay?

MS. TRAGER
But -- and [are you] saying now that practice prior to the change, the Courts would look at market activity.

THE COURT
Yes

MS. TRAGER
And [are you] saying now the Courts will not look at market activity.

THE COURT
No, they will. We'll -- insofar as valuing the property, the fair market value of the property, the Court will look at the appraisal as of the date of sale, any existing appraisals prior to that date of sale, such as the one that the bank gets when it accepts the application for a mortgage and, second of all, will even look at anything after the date of sale if it's reasonably close in time.

MS. TRAGER
But will not look at the offers put in by ---

THE COURT
No.

MS. TRAGER
--- potential purchasers ---

THE COURT
Once --

MS. TRAGER
--- in the ensuing six months on which the appraisal is based. The appraisal -- a market value is given based on the assumption the property will be exposed for a minimum of six months.

Justice Nathanson did, however, at a further point in this discussion advise counsel that he had considered the evidence of market activity in reaching his conclusion on market value.

In light of the judge's remarks to counsel, it is unclear whether he did give appropriate consideration to the evidence of market activity. He deemed the value of the property to be that set out in the Varner appraisal ($590,000), with a minor monetary adjustment, notwithstanding compelling evidence of marketing efforts by the mortgagee and unsuccessful third party offers, preceding the actual resale. He made no comment on the sufficiency of the marketing efforts, the reasonableness of the appellant's efforts to resell the property, nor did he indicate why he was rejecting that evidence. He refused to entertain the evidence from the appraiser adjusting the estimated market value. Justice Nathanson said:

> So what happens after the date of default judgment is not relevant except in one circumstance, and that is that the Court is willing to look at resales together with all other evidence, either at the time of sale -- an appraisal at the time of sale or preceding the sale in order *to ascertain what the fair market value of the property was at the time of sale*.
> [Emphasis added]

In the result, Justice Nathanson dismissed the application for a deficiency. In this regard he said:

> **MS. TRAGER**
> And we have presented evidence of numerous offers given to us within the weeks after the date of the foreclosure sale. The market activity was nowhere near the five, ninety.
>
> **THE COURT**
> I agree. I understand. I've read it. And what I'm saying is I have considered all of that evidence and I have adjudicated on the evidence that you have presented and my adjudication is that the figure that should be taken is the appraisal as of the date of sale. *That is the best indication of fair market value* except for the fifteen thousand dollar error ($15,000) that the appraiser made.
> [Emphasis added]

In support of his conclusions that the law had changed, Justice Nathanson relied upon the decision of Hood, J. in **Toronto Dominion Bank v. Phillips and Ellmore** (1996), 152 N.S.R. (2d) 16 (S.C.). There the judge had before her an uncontested application for a deficiency judgment following a foreclosure and sale. She considered the changes to the **Civil Procedure Rules** relating to deficiency judgments. At p. 17 she said:

> ***Rule 47.10 (2)***, which was amended effective September 1, 1995, deals with the situation where the plaintiff is the purchaser at the sale and the price paid is less than the fair market value of the property at the time of the sale. Under those circumstances, the court, in determining the amount of the deficiency, may deem the sale price to have been the fair market value of the property at the time of the sale. Accordingly, the court is to determine the fair market value of the property at the time of the sheriff's sale and use that figure as the basis for determining the amount of the deficiency on an application for deficiency judgment pursuant to rule 47.10 (3). *Under Rule 47.10 (2), before it was amended, the Court was restricted to deeming the sale price to be <u>either</u> the fair market value as established by appraisal <u>or</u> the amount realized on resale if the court was satisfied*

> *that the amount was reasonable. Accordingly, the previously decided cases interpreting rule 47.10 (2) no longer apply.*
>
> The wording of rule 47.10 (1) has changed. It used to provide that “the plaintiff shall be entitled to an order for payment of the deficiency”. It now provides that “the plaintiff may be entitled, if such relief was claimed in the originating notice, to an order for payment of the deficiency”.
>
> Greater discretion has now been given to the court to fix the sale price for purposes of determining the deficiency. The court must determine the fair market value and, in doing so, the court is entitled to look at the subsequent sale price and any appraisal that has been done for the Sheriff’s sale, any appraisal done for the resale and, if relevant, any appraisal done at the time of the mortgage. The court is not restricted to choosing one of these figures in determining what the fair market value of the property was at the time of the sale.

With respect, Justice Hood’s comment that under the previous wording of **Rule 47.10(2)**, the Court was limited, in fixing a value, to choosing between the appraised value or resale price, is inconsistent with the decision of this Court in **Silver Spoon Desserts v. F.B.D.B.** (1995), 144 N.S.R. (2d) 161. There, writing for the majority of the Court, I said at p.167:

> I do not read the rule, however, as limiting the judge to choosing between a "reasonable value" and "fair market value" as established by a market appraisal, the alternatives set out in rule 47.10(2)(a) and (b). For example, under subsection (a), the Court may be presented with an appraisal which, although independent, is unacceptable to the Chambers judge. The judge has the option, if there is a sufficient evidentiary base, to come to an adjusted figure reflecting the value of the property at the time of the Sheriff's Sale. The mortgagee takes the risk, of course, that the judge will conclude that there is not sufficient evidence to prove value, and thus decline to award a deficiency. This is within the discretion of the Chambers judge. The Chambers judge, here, was satisfied that the evidence was adequate to enable him to determine the value at the time of the Sheriff's Sale.

Nor, with respect, do I agree with Justice Hood's statement that the new **Rule** allows the Court *greater* discretion in fixing the sale price for the purpose of calculating the deficiency.

Coincidentally, Hood, J. did accept the resale price of the property as representative of fair market value. She said:

> In determining the fair market value of this property, I conclude that the sale price of $80,000.00, the resale price, is the fair market value of the property. The difference between the appraised value and the sale price is approximately 3 ½ percent which is not so markedly below the value in the appraisal report as to cause me to conclude that the resale price was not the best possible price on the subsequent resale. Where the difference between the appraised value and the sale price is such a small percentage, and where the agreement was entered into so soon after the Sheriff's sale, the actual price paid by a willing buyer is, in this case, the best indication of fair market value.

These amendments to the **Civil Procedure Rules** have not yet been extensively considered by this Court. There is, however, reference to the new **Rules** in two recent cases.

In **Credit Union AtlanticLimited v. Bonang**, C.A.114305, October 10, 1995, unreported, Hallett, J.A., in comparing the current wording of **Rule 47.10** with the former, said: "This is a more simplified test but the principle is the same."

In **Royal Bank of Canada v. Bremner** (1997), Can. Rep. (NS) 45 (C.A. No. 132524, February 3, 1997) Flinn, J.A. commented upon the revision to the **Rules**:

> [para3] The appellant opposed the application for deficiency judgment because he alleged that one of the two properties sold for less than its fair market value. The appellant's position was, as it is on this appeal, that, in view of a recent amendment to **Civil Procedure Rule** 47.10(1), the Chambers judge has a discretion, in all cases, to inquire into a judicial sale to ensure that the mortgagor has received credit for the fair market value of the property.
>
> [para4] **Civil Procedure Rule** 47.10(1) provides as follows:
>
>> 47.10 (1) Where in the case of sale pursuant to Rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest, and disbursements, as authorized by the mortgage instruments, and costs, and the person against whom the deficiency is claimed is a defendant, the plaintiff <u>may</u> be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency. [emphasis added]
>
> [para5] Prior to the amendment, the word "shall" appeared in place of the word "may" which I have underlined.
>
> [para6] The Chambers judge, Justice Davison, rejected the appellant's argument and granted deficiency judgment to the Bank.
>
> [para7] Justice Davison decided that the amendment to **Rule** 47.10(1), changing the word "shall" to "may" was done to permit the Court to refuse to award a deficiency judgment in certain exceptional circumstances. In other words, the amendment was simply a recognition of the Court's inherent jurisdiction to intervene, in the appropriate case. In referring to **Canadian Imperial Bank of Commerce v. England's (R) Warehouse Ltd.** (1996), 147 N.S.R. (2d) 321 (N.S.C.A.) Justice Davison correctly pointed out:
>
>> .....in the absence of evidence of improper conduct, why should the Court exercise its jurisdiction to take away the right of the Bank to recover the money it loaned? The Court has an equitable jurisdiction but only to be exercised if the circumstances demand.
>
> [para8] As Hallett, J.A. said in **England** at p. 336:

> If the directions of the Court with respect to the conduct of sales of foreclosed property do not result in the property being purchased at the Sheriff's Sale for fair market value or even a reasonable price, the court cannot lay the responsibility for that result on the mortgagee unless the mortgagee has interfered with the conduct of the sale in a way that results in a depressed price being realized. Barring that eventuality, and assuming compliance with the Court ordered directions respecting the sale, there is no basis for the Court to exercise its equitable jurisdiction and refuse to calculate the deficiency judgment on the price paid at the Sheriff's Sale by a purchaser unrelated to the mortgagee.
>
> [para9] The amendment to **Rule** 47.10(1) has no effect on these principles, and Justice Davison was correct in so deciding. Further, and contrary to the submissions of counsel for the appellant, the amendment does not place additional obligations on the mortgagee other than those already provided for in the **Rules.**

The plain language of the **Rules** does not support the conclusion that the law has been changed by the amendment nor is any such intent revealed in the new **Practice Memorandum** which was issued in March of 1997.

Practice Memorandum No. 13, relating to foreclosure practice, which was in effect under the former wording, essentially tracked the wording of **Practice Memorandum 16**, reproduced above, and provided in relevant part:

> If however, the mortgagee buys in at the sale, the practice of the court is to require some evidence of the actual value of the mortgaged premises and to require that credit be given to the mortgagor for that value. In most cases, the mortgagee wishes to resell to a third party by an arm's length sale, and thus establish the actual value. It is considered desirable to permit the mortgagee in such circumstances, to delay the application for a deficiency for a reasonable time, and yet to encourage him to apply for confirmation without delay. The following clause is suggested for inclusion in the order of confirmation, if such a right is to be reserved:

> "AND IT IS FURTHER ORDERED that the plaintiff is granted leave to apply for a deficiency judgment within   months from the date of this order."

The replacement **Practice Memorandum 13** (1997) outlines the changes to the former procedure. Under "*Highlights*" the memorandum provides:

> Highlights of the changes from the procedure formerly in use include the following:
>
> (a) simplified, standardized forms;
> (b) a standardized procedure for all sales by public auction by a sheriff;
> (c) entry of default judgment, subject to later quantification, twenty (20) days after the date of sale by public auction or payment by the sheriff to the plaintiff, whichever is earlier;
> (d) after entry of default judgment, interest pursuant to **Interest on Judgments Act**;
> (e) claims for possession as against the defendant are automatic; and
> (f) claims against guarantors (where the guarantee is contained in the mortgage document) may be automatic, and may proceed at or after the claim for deficiency.

There is no mention in the new **Practice Memorandum** of a change in the law as regards the valuation of the property for purposes of calculating the deficiency judgment. The **Practice Memorandum** states that another memorandum concerning applications for deficiency is to be issued at a later date. I am not aware that there has been a further memorandum.

There is nothing, then, either in the new wording of the **Rule**, nor in the **Practice Memorandum** which supports the approach taken by Justice Nathanson.

As Hallett, J.A. said in **England, supra**, a mortgagee is under no obligation to attend the Sheriff's sale, let alone bid on the property. Where there is insufficient bidding on the property to produce a realistic sale price both the mortgagor and the mortgagee stand to gain if the mortgagee bids in the property. Inevitably, the mortgagee will attempt to resell the property at an increased price, which, if achieved, will reduce the deficiency. If on resale the property attracts less than the appraised "market value", provided the mortgagee has made adequate efforts, in the circumstances, to achieve a reasonable price there is no reason to lay the loss at the doorstep of the mortgagee. The resale price is the best representation of the value of the property.

The discretion in determining to refuse a deficiency judgment, or in assigning a value to the property, whether pursuant to the Court's equitable jurisdiction or the **Civil Procedure Rules**, must be exercised judicially. (See **R. v. Casey** (1988), 80 N.S.R. (2d) 247, at p. 248, per Macdonald J. A., and **Sharp v. Wakefield et al** , [1891]

A.C. 173 at p. 191, per Lord Halsbury regarding the judicial exercise of a discretionary power).

In **Ward v. James**, [1965] 1 All E.R. 563 at p.570, Lord Denning approved the following comment from **Grimshaw v. Dunbar**, [1953] 1 All E.R. 351 (H.L.), at p.353, where Jenkins, L.R. said:

> ... did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right considerations? If so, then he decided on wrong principles, his error was a matter of law, and this court can interfere...
>
> ... In my view, although no reasons are given by a judge exercising, or refusing to exercise, a discretionary jurisdiction, it may nevertheless, be possible, on looking at the facts, to say that, if the judge has taken all the relevant circumstances into consideration and had excluded from consideration all irrelevant circumstances, he could not possibly have arrived at the conclusion to which he came, because on those facts that conclusion involves a palpable miscarriage of justice....

As Hallett, J.A. said in **England, supra**, the mortgagee on a resale is not obliged to obtain the "fair market value" for the property, as projected in an appraisal report, but rather the Court is to assess whether the sale price is reasonable in the circumstances. The new wording of **Rule 47.10(2)** *permits* the judge to deem the sale price to be "fair market value", but "fair market value" is not necessarily synonymous with the appraised value. The **Rule** does not distinguish, as did its predecessor, between a circumstance where the mortgagee applies for a deficiency before reselling

the property and that where the mortgagee applies after the property is resold. When the property has been resold, the judge, in the proper exercise of his or her discretion, must consider all of the circumstances, which includes evidence of the resale price and the market activity as well as other relevant details surrounding the foreclosure. A market appraisal is simply one estimate of "fair market value". Provided the mortgagee has, in the circumstances, made reasonable efforts to resell the property the Court should not without good reason depart from that price as the true indicator of value. With respect, in my view, the Chambers judge erred, in these circumstances, in equating the appraised value with "fair market value". This resulted from his failure to consider the evidence pertaining to the resale or from his misapprehension of that evidence, if considered. Notwithstanding the amendment to the **Rules**, the duty of the Court remains to assess whether the price obtained by a mortgagee who resells the property is a reasonable price in the circumstances and, thus, should be the amount used to calculate the deficiency. In the result, I would allow this ground of appeal.

There was no evidence before Justice Nathanson to indicate that the appellant had not acted reasonably in its disposal of the property. The respondents had been unsuccessful in their attempts to sell the property between May and September of 1996. From the fact that the appellant purchased the property for $455,000 at the

Sheriff's sale one would infer that there was some bidding but that the price at which there was interest in the property was substantially below the appraised value. The appellant made attempts to sell the property without the assistance of an agent between November of 1996 and February of 1997. Any offers received were well below the appraised value. The appellant was unsuccessful in disposing of the property between February and April, even though assisted by an agent. In effect the appellant and the respondents were unable to arrange a sale for the property over the 12 month between May 1996 and April of 1997. The sale price was the best realizable offer received. Additionally, the inspection reports revealed that the property was in a state of disrepair. The Varner Appraisal, which was accepted by the judge as representative of fair market value, contained several limitations. The judge refused the appellant's request to receive evidence from the appraiser adjusting the estimated value. The appraiser noted in his introduction to the report that he had conducted a "limited inspection" of the premises. It referred to the soft market conditions in the area. The appraiser was only able to view one of the six residential units and relied upon the owner's assurance that the units were all of comparable quality. The crawl space in the basement was not readily accessible. The main roof could not be inspected but the owner stated that it was in good condition. Certain of the commercial leases were not signed. The appraisal was based upon the assumption that these rental arrangements

were supported by signed leases. The appraiser was unaware of the leasehold inducement which reduced the value of the property.

In my view, the evidence before the Chambers judge overwhelmingly supported the resale price as representative of fair market value for the purpose of calculating the deficiency. While the price was considerably lower than either appraised value, those opinions of value are based upon estimates and assumptions about future events, which, although useful, are not determinative (per Roscoe, J.A in **Offman, supra**). I would fix the value of the property, for the purpose of calculating the deficiency, at its resale price of $500,000.

(ii) Did the Chambers judge err when he refused to take into account any expenses incurred or any income earned by the appellant by reason of its possession of the property between the date of the default judgment and resale?

Prior to the 1995 amendments, **Civil Procedure Rule 47.09** read:

> Unless the court otherwise orders, in a proceeding for foreclosure or foreclosure and sale, a judgment for any amount due on a mortgage shall not be ordered, entered or enforced before the proceeds of sale have been realized.

Civil Procedure Rule 47.09 now provides:

> (1) Unless the Court otherwise orders, in a proceeding for foreclosure, sale and possession, default judgment shall occur on the earlier of twenty (20) days after the date of sale by public auction or payment to the sheriff, but judgment for any amount due shall not be entered before the proceeds of sale have been realized and a deficiency, if any, has been determined by the Court.
>
> (2) Interest on any judgment shall be pursuant to the **Interest on Judgments Act**.

It has been the practice in Nova Scotia to allow a mortgagee on a deficiency application to claim reasonable expenses incurred up to the date of the application and to require the mortgagee to account for any income earned on the property during that same period. In **Nova Scotia Savings and Loan v. MacKay et al.** (1980), 41 N.S.R. (2d) 432 Hallett, J., as he then was, at p. 437, explained the rationale for so doing:

> In *Briand v. Carver et al.* (1968), 66 D.L.R. (2d) 169, where the mortgagee purchased the property at the Sheriff's Sale for $50.00 and the evidence indicated that it was worth $5,500.00, the mortgagee's claim for deficiency of $4,561.78 was refused. The Court exercised its discretion and, relying on equitable principles, held that to allow the deficiency under the circumstances would have been inequitable in that the plaintiff would have had both the property and a judgment for the deficiency. Since that time, mortgagees, when applying for deficiencies, have followed the practice of supporting their claims with affidavits of realtors as to the market value of the property at the time of the sale so that the Court could assess the adequacy of the price obtained at the Sheriff's Sale when considering the application for the deficiency judgment. *This Court has therefore imposed certain obligations on the mortgagees before a deficiency judgment will be granted and it would seem only just that coincident with these obligations mortgagees should, where the mortgagee has purchased at the Sheriff's Sale, if the mortgagor has so contracted and the mortgagee*

> *has so pleaded, have the right to expend moneys to protect the property and to recover the same on a claim on the covenants so long as the expenditures were properly and reasonably incurred to realize the best price possible so as to minimize a claim for a deficiency against the mortgagor. In particular, a mortgagee should, if the mortgage so provides, be entitled to claim on the covenants to reimburse the mortgagee for real estate commissions actually paid and reasonable legal fees on the resale plus costs of maintenance, repairs and taxes during the period the property is held by the mortgagee after purchase at the foreclosure sale and prior to disposing of the same, less any revenue from the property. It goes without saying that the mortgagee must manage the property prudently and make reasonable efforts to dispose of the property at the best price that can be obtained at the earliest possible time. The foregoing expenses should be allowed by the Court in calculating the ultimate deficiency where it does not exceed the deficiency on the Sheriff's Sale.*
> [Emphasis added]

At the outset of the Chambers hearing, however, Justice Nathanson advised counsel that any expenses incurred by the mortgagee in relation to the property, after the date of the default judgment would no longer be considered, nor would the mortgagee be required to account for income. He said:

> Now, the decision of Madam Justice Hood, which has been referred to in at least one of the briefs, is, as far as I'm concerned, the law of Nova Scotia unless and until it is changed by the Court of Appeal. Now, the important point made in that decision is that any claim that's made after the date of default judgment is irrelevant. That means that when a mortgagee buys in at the mortgage sale, the expenses that accrue to the mortgagee after default judgment is entered is for the mortgagee to pay out of his, her or its own pocket and cannot be claimed against the mortgagor. That's why we have — that's the natural result of adopting a process of default judgment.
>
> . . .
>
> Let me carry that thought one step further. Since we now have a date of default judgment and since the Court will not consider expenses or resales by the mortgagee, who bought at the sale, after

> that time — which accrued after that time, then it follows that if there are expenses, the mortgagee must pay them as they would for any property that the mortgagee owns. But if there should be a windfall benefit from resale, the mortgagee doesn't have to account for it.

On the plain wording of the amendment to the **Rule**, it is reasonable to conclude that its purpose was to limit the mortgage interest rate to the twenty-day period following the Sheriff's sale. After that time, interest runs at the, generally lower, rate prescribed by the **Interest on Judgments Act**. This is referred to in subsections (c) and (d) of the *Highlights* section of the new **Practice Memorandum 13**, set out above. There is no mention in that Memorandum that a mortgagee could no longer claim expenses and need not account for income. While the default judgment is to be entered not later than twenty days after the Sheriff's sale, the amount due is not entered until the deficiency, if any, is determined by the Court. When the mortgagee has purchased the property at the Sheriff's sale, with intention to resell it, it is unlikely that the resale will occur within the twenty-day period. The mortgagor, however, is entitled to the benefit of the deficiency calculated on the resale price, if higher than that paid by the mortgagee at the Sheriff's sale. It is illogical, and unfair, in those circumstances to require the mortgagee to bear the burden of any reasonable expenses incurred while preserving the property for resale. Against those expenses should be offset any income derived from the property. A deficiency judgment is intended to provide to the

mortgagee a judgment for the amount by which the proceeds from the security fell short of the amount owing on the mortgage. The mortgagor benefits from the mortgagee reselling the property because the higher price obtained lowers the deficiency judgment.

Prior to amendment **Rule 47.10(2)** expressly required the Court, in fixing the amount of the deficiency, to take into account income and expenses. While this wording has been dropped from the **Rule**, there is nothing in the new wording which would alter the Court's longstanding practice in this regard. The obligation to account for income and expenses did not arise from the **Rule**, rather the **Rule**, as previously drafted, was a codification of the law as it had developed.

Accordingly, this ground of appeal should be allowed.

Disposition:

I would remit the matter to the trial Court for a calculation of the deficiency judgment, using a property value of $500,000 and taking into account the reasonable expenses and income up to the date of the resale of the property. In the circumstances there will be no costs on the appeal.

Counsel did not address, and therefore we have not considered, whether the Supreme Court can, through its rule making capacity pursuant to the **Judicature Act**, effect a change to the common law.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Hallett, J.A.

C.A.139794

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ROYAL BANK OF CANADA	)	
	)	
Appellant	)	
	)	
	)	
- and -	)	
	)	
	)	
MARJEN INVESTMENTS LTD and	)	REASONS FOR
GORDON POWELL	)	JUDGMENT BY:
	)	BATEMAN, J.A.
	)	