

CROMWELL, J.A.: (Orally)

The issue on this appeal is whether the Chambers judge erred in refusing to include in the deficiency judgment sought by the appellant protective disbursements and real estate commission with respect to the foreclosed property.

Briefly put, the facts are these. In May, 1997, the Supreme Court granted an order for foreclosure, sale and possession in the appellant's favour against the respondents. The appellant purchased the property at the Sheriff's sale for an amount equaling the Sheriff's fees and outstanding taxes. In December, the appellant appeared in Chambers before Gruchy, J. of the Supreme Court on an application for a deficiency judgment. An agreement of purchase and sale had been entered into in the amount of \$61,000.00. The deficiency amount claimed was based on the resale price being the amount realized. The appellant claimed \$3,709.00 for the real estate commission that would come due on closing of the transaction and \$3,844.00 for management expenses (including inspections, lawn care, etc.) pending the resale. The Chambers judge, apparently following a decision of Nathanson, J. in **Royal Bank of Canada v. Marjen** (1997), 162 N.S.R. (2d) 172 (S.C.), granted a deficiency judgment for the amounts claimed excluding the real estate commission and management expenses.

At the time of the hearing before the Chambers judge, the decision of

this Court allowing the appeal in **Marjen** (1998), 164 N.S.R. (2d) 293 (C.A.) had not been released. That decision held that certain amendments to **Civil Procedure Rule** 47 did not change the practice of allowing 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. As Bateman, J.A. put it on behalf of the Court at p. 312:

When the mortgagee has purchased the property at the Sheriff's sale, with intention to resell it, it is unlikely that the sale 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.

The learned Chambers judge therefore erred in principle in disallowing the real estate commission and management expenses claimed by the appellant. There was no issue before the Chambers judge (or before us) that the amounts claimed in this regard were unreasonable. The calculation of the deficiency judgment should accordingly be amended to reduce the amount realized by these amounts. The appeal is allowed without costs. The amount of the deficiency judgment is increased to \$24,012.64.

Cromwell, J.A.

Concurred in:

Jones, J.A.

Pugsley, J.A.

