

The reasons for judgment of the Court were delivered orally by:

Jones, J.A.:

This is an appeal from a decision of MacDonald, J. in Chambers in Supreme Court dismissing an application for summary judgment in a foreclosure proceeding.

The appellant became the assignee of a mortgage on an apartment building in Dartmouth. The respondent became the sole mortgagor. The mortgage had been renewed three times. The last renewal was for a term of five years at an interest rate of 9.875% amortized over 17½ years, maturing December 1, 1996. The last renewal agreement contained a provision that the balance of principal and interest would become due and payable on demand. On April 3, 1997, written demand was made upon the respondent for payment of the balance then outstanding on the mortgage in the amount of \$873,271.80, together with interest thereafter at the *per diem* rate of \$235.69.

The appellant commenced these foreclosure proceedings against the respondent on May 1, 1997. Its motion for summary judgment was heard by MacDonald, J. on December 18, 1997 and dismissed by decision dated January 9, 1998.

MacDonald, J. found that the appellant had established a clear *prima facie* case respecting the mortgage and the amount due, but that the respondent had raised a fairly arguable issue to be tried by way of defence. That issue was that by letter dated

September 24, 1996, the appellant had made a binding offer to renew the mortgage. He found it unnecessary to deal with the second issue raised - whether the appellant had breached a duty to act reasonably and in good faith towards the respondent in negotiating the terms of the renewal of the mortgage.

The decision of MacDonald, J. was made in the exercise of his discretion. We can only reverse it if he erred in law or his decision resulted in a patent injustice.

We are of the unanimous opinion that the letter of September 24 from the appellant to the respondent was not, and could not arguably be said to be, an offer capable of being accepted so that a binding contract of renewal resulted. True, it did refer to processing the "renewal" of the mortgage instead of an application for renewal. However, the letter did not contain such basic terms as the term of the renewal, the rate of interest or the amortization period. There is no evidence that the proposal in the letter, as far as it went, was accepted by the respondent. Over the ensuing months until the foreclosure proceedings were commenced the parties negotiated about a number of items and ended in disagreement.

In our opinion, MacDonald, J. erred in law in finding an arguable issue was raised on the basis of any binding offer or agreement to renew the mortgage.

With respect to the other issue of lack of good faith not dealt with by MacDonald, J., we are of the opinion that no arguable issue has been presented. The duty on

parties negotiating a contract is to be distinguished from that which rests upon them in its performance. There is generally no obligation upon parties negotiating a contract to bargain in good faith. Fridman, **The Law of Contracts**, Third Edition, states at p. 78:

. . . the law does not recognize an agreement to agree or a contract to make a contract. [**Delta Hotels Ltd. v. Okabee Can. Invts. Co.** (1992), 3 Alta. L.R. (3d) 85 (Alta. C.A.). As part of this refusal to accept any obligation to arrive at a concluded agreement on the part of someone who is in the process of negotiation, it is also clear that a party involved in such negotiations is under no obligation with respect to the ultimate conclusion of the negotiations. There is no duty to bargain in good faith giving rise to a contractual remedy when the contract is not completed by reason of the default of one party or the other. [**MacDougall v. St. Peters Bay (Community)** (1992), 100 Nfld. & P.E.I.R. 45 (P.E.I. T.D.) at 52-59.]

The appeal must be allowed with costs to the appellant against the respondent in this Court in the amount of \$1,250.00 plus disbursements. The appellant will have judgment against the respondent, in addition to such costs, for an order for foreclosure, sale and possession pursuant to the terms of the mortgage. The matter is remitted to the Supreme Court to settle the terms of the foreclosure order.

Jones, J.A.

Concurred in:

Chipman, J.A.

Hallett, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

**CANADA TRUSTCO)
MORTGAGE COMPANY)**

Appellant)

- and -)

RICHARD HOMBURG)

Respondent)

) REASONS FOR
) JUDGMENT BY:
) JONES, J.A.
) (Orally)