



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

FLINN, J.A.:

The appellant defaulted on a loan he had obtained from the respondent Bank. The loan was secured by a first mortgage on two properties owned by the appellant. The Bank obtained an order for foreclosure and sale which, in addition to ordering a judicial sale of the two properties, fixed the amount due on the loan at \$138,043.90. The two properties were sold by the Sheriff, for the County of Lunenburg, to third parties at a judicial sale. The sale yielded, net to the Bank, \$130,943.33.

After taking into account interest which was accruing on the loan, and protective disbursements incurred by the Bank, the Bank applied for a deficiency judgment of \$31,893.22.

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.

**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 may be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency." (emphasis added)

Prior to the amendment, the word "shall" appeared in place of the word "may" which I have underlined.

The Chambers judge, Justice Davison, rejected the appellant's argument and granted deficiency judgment to the Bank.

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."

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."

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 appeal will be dismissed. The respondent will have its costs of this appeal which we fix at \$1,000 plus disbursements.

Flinn, J.A.

Concurred in:

Matthews, J.A.

Bateman, J.A.

NOVA SCOTIA COURT OF APPEAL

**BETWEEN:**

ALBERT E. BREMNER

Appellant

- and -

ROYAL BANK OF CANADA

Respondent

REASONS FOR  
JUDGMENT BY:

FLINN, J.A.  
(orally)