

NOVA SCOTIA COURT OF APPEAL

Freeman, Pugsley, and Bateman, JJ.A.

**Cite as: Silver Spoon Desserts Enterprises Ltd. v. Federal
Business Development Bank, 1995 NSCA 168**

BETWEEN:

<p>SILVER SPOON DESSERTS ENTERPRISES LIMITED, ROBERT SILVER and DEANNA SILVER</p>	<p>)))</p>	<p>W. Michael Cooke, Q.C. for the appellant</p>
	<p>)</p>	
	<p>)</p>	
<p>- and -</p>	<p>)</p>	
<p>FEDERAL BUSINESS DEVELOPMENT BANK</p>	<p>))))</p>	<p>Gerald R.P. Moir, Q.C. for the Respondent</p>
<p>Respondent</p>	<p>)</p>	<p>Appeal Heard: June 7, 1995</p>
	<p>)</p>	<p>Judgment Delivered: September 13, 1995</p>

THE COURT: Appeal allowed with costs of \$1000 inclusive of disbursements per reasons for judgment of Bateman, J.A.; Freeman, J.A. concurring; Pugsley, J.A. dissenting.

BATEMAN, J.A.:

This is an appeal by the mortgagors from the decision of the Chambers judge granting a deficiency judgment in a foreclosure action.

Facts:

In 1990, the Federal Business Development Bank lent \$500,000 to Robert Silver, Deanna Silver and Silver Spoon Desserts Enterprises Limited. The loan was repayable on terms and repayment was secured by a real property mortgage and a debenture. The real property mortgage was granted by Robert and Deanna Silver, owners of the mortgaged property, 1813 Granville Street in Halifax, where the corporate appellant carried on a restaurant business called "The Silver Spoon".

The loan fell into default in January, 1992. Over the course of the next two years FBDB and the Silvers attempted to work out the financial problems of the Silver Spoon restaurant and to avoid liquidation. The last of these various efforts failed. On March 21st, 1994, FBDB instructed its solicitors to sue for foreclosure and sale of 1813 Granville Street.

The action was not defended. An order for foreclosure and sale was granted on May 5th, 1994. It settled the mortgage debt at \$560,909.08. The Sheriff conducted an auction on June 16th, 1994.

During the period that the mortgage was in default and prior to the Sheriff's Sale, the Silver's had attempted to find investors for the business. In addition, they presented FBDB with certain information indicating that the value of the property was substantially below the balance remaining on the mortgage.

The day before the Sheriff's Sale, FBDB entered into an agreement to resell the property to a trustee for an undisclosed client, if FBDB acquired title at the sale. This client was not prepared to bid at the Sheriff's Sale. The agreement provided for a purchase price of \$325,000. The property was sold

by the Sheriff to FBDB for taxes and Sheriff's expenses, FBDB being the only bidder. FBDB resold the property to the undisclosed purchaser as agreed.

FBDB applied for a deficiency judgment to be based upon the resale price. The Chambers judge did not accept that the resale price was "reasonable" within the meaning of **Rule 47.10(2)(b)** but determined, from the evidence, a market value for the purposes of calculating the deficiency.

The mortgagors appeal from the decision of the Chambers judge. The submission of the appellants, is that FBDB acted improperly in arranging the sale, not having made adequate efforts to market the property. The appellants submit that the "sale price" so obtained is not reflective of the value of the property, for the purpose of calculating the deficiency.

Grounds of Appeal:

The appellant alleges an error by the Chambers judge on the following grounds:

1. The Learned Chambers Judge erred in refusing to allow an adjournment for the purposes of obtaining a transcript of the Discovery of one of the Respondent's witnesses.
2. The Learned Chambers Judge erred in his calculations in setting the fair market value when he adopted the forced sale value as fair market value.
3. The Learned Chambers Judge erred in not accepting the fair market value evidence that was before him.
4. The Learned Chambers Judge erred in not considering the dealings of the agents or employees of the Respondent in their dealings with the Appellants.
5. The Learned Chambers Judge erred in fact when he found that both parties to the proceeding attempted to market the property between 1991 and 1994.

6. The Learned Chambers Judge erred in fact by excluding the building addition valued at Twenty-five Thousand Dollars (\$25,000.00) as testified to by Mr. Silver and supported by Turner Drake evaluation as additional fair market value to the Appraisal Report of 1992.

7. The Learned Chambers Judge erred in law when he accepted the non-disclosure of the chattel sale with the Sheriff's sale of real estate to the public on the final Order as being proper and acceptable conduct.

8. The Learned Chambers Judge erred in law in granting a Deficiency Judgment based on a decline in real estate values in the area, which was not supported by the evidence.

9. Such other grounds as may appear from the record.

The respondent filed a Notice of Contention.

The Power of the Court on Appeal:

In **Montreal Trust Co. of Canada v. Grab**, C.A. No. 110429, (N.S.C.A.), March 20, 1995, as yet unreported, the Court considered an appeal from a decision fixing the deficiency judgment. Roscoe, J.A., writing for the Court, said:

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] 62

D.L.R. (3d) 1(S.C.C.)

Background:

In **Central Trust Company v. Adshade et al.** (1983), 60 N.S.R. (2d) 414 (N.S.S.C.A.D.), at p. 422, Hart, J.A. said of the mortgage practice in Nova Scotia:

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, 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. (emphasis added)

Indeed, in **Briand v. Carver and Carver** (1967), 4 N.S.R. 1965-1969 (T.D.), the case referred to by Hart, J.A. in the above passage, Cowan, C.J. recommended at p 157:

The appropriate authorities might all give consideration to an amendment to the **Real Property Act**, R.S.N.S. 1954, c. 244, to provide that on any application for a deficiency judgment, the applicant should present to the court appraisals made by independent appraisers as to the fair market value of the

mortgaged property and that a deficiency judgment might, in the discretion of the court, be limited to the difference between the amount owing on the mortgage, plus taxes, expenses of sale and taxed costs, after deducting an amount equal to the fair market value of the mortgaged property over and above prior encumbrances, as determined by the court.

In Nova Scotia Savings and Loan Co. v. MacKay and MacCulloch

(1979), 41 N.S.R. (2d) 432 (T.D.), Hallett, J., as he then was, said at p. 437:

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. (emphasis added)

The rationale behind equitable intervention to disallow the deficiency, where the mortgagee has bid successfully, is to ensure no unfairness and, in particular, no double recovery by the mortgagee. As was stated by Hart, J.A. in **Central Trust v. Adshade et al**, supra, at p. 424:

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 above comments were made before revision of the relevant **Civil**

Procedure Rule.**Civil Procedure Rule 47.10 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, disbursements authorized by the mortgage instrument, interest and costs, and the mortgagor is a defendant, the plaintiff shall be entitled to an order for payment of the deficiency (together with interest on that amount at the rate provided for in the mortgage from the date of the sale to the date of the order), if such relief has been claimed.

(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.

(3) An application for deficiency judgment pursuant to sub-paragraph (2), unless otherwise ordered by the court, shall be made within six months from the date of the Sheriff's Sale on ten days notice and any deficiency

judgment allowed shall not exceed the difference between the amount realized by the plaintiff from the Sheriff's Sale and the amount owing to the plaintiff at that date determined in accordance with the provisions of the order for foreclosure and sale.

Where there has been a Sheriff's Sale, the price paid by the third party purchaser is accepted as adequate. It matters not that it may be substantially below the "appraised value" or less than the price originally paid by the mortgagors for the property. Presumably, the focus is to ensure that the mortgagee receives the balance of the money it has advanced and no more.

A mortgagee purchasing the property at the Sheriff's Sale, however, will undoubtedly resell it, possibly for more than the amount paid at the sale. In such a circumstance, if the deficiency is based upon the amount paid at the Sheriff's Sale, should the mortgagee sell the property for more than that amount, it receives double recovery.

Where the mortgagee has purchased the property at the Sheriff's Sale and it appears that the property has been sold for less than fair market value then, pursuant to **Rule 47.10(2)**, the court may base the deficiency amount upon a "deemed" sale price. The Court may "deem" the price to be "fair market value" as established by independent appraisals, when, at the time of the deficiency hearing, the mortgagee has not resold the property. Where the mortgagee has resold the property, the Court may "deem" the sale price to have been the resale value, if reasonable. The **Rule** is silent as to what occurs, when the resale price, under **Rule 47.10(2)(b)** is determined not to be reasonable.

The Decision of the Chambers Judge:

The Chambers judge correctly identified the issue before him as follows:

There has not been an appraisal of the property since March of 1992. The plaintiff is

proceeding under **Civil Procedure Rule 47.10(2)(b)**. *The issue before me is, was the price of \$325,000 reasonable.* (emphasis added)

He analyzed the background to the **Rule** and says:

In addition the court in the **Adshade** case went on to direct that the judge should inquire as to whether any unfair advantage is obtained by any party to the transaction when he sets the deficiency judgement.

The Chambers judge found that the FBDB mortgage officer who arranged for the resale "... did not intend to take any unfair advantage of the defendants during the whole of the transaction."

He reviewed, in detail, the evidence of value before him. At p. 10:

Ms. Lindsay, in her affidavit, states that by the spring of 1994 the plaintiff was convinced that the value of the property was "significantly less" than the values in the 1992 appraisal. She said that in addition to appraisals, one must be guided by a general knowledge of market conditions, indications from attempts to sell, and prices of comparable properties. She said she was influenced by the fact that the Silvers were unsuccessful in efforts to attract investors. She said she was advised by Mr. Silver, on March 25, 1994, that a new appraisal established a value of \$254,000.00 and he stated he felt this was a correct price. During his testimony, Silver said his statements about the value being under the \$325,000.00 figure were made for negotiation purposes in his attempts to buy the property.

Both parties to the proceeding attempted to market the property between 1991 and 1994. The plaintiffs agreed to take \$350,357.00 for the property, which included \$12,357.00 for taxes. Mr. Silver said the investors backed out of the arrangement because the property was not worth that much money.

When Mr. Silver gave her a copy of the new assessment at \$280,000.00 fixed by the

Assessment Appeal Court in March, 1994, Ms. Lindsay felt with all of the factors that the \$325,000.00 selling price "well exceeded" the other opinions of value.

By letter dated January 23, 1994, Mr. Silver suggested that the plaintiff accept \$315,000.00 or proceed with foreclosure.

Mr. Silver stated the worth of the property as a going concern was in excess of \$600,000.00. He said he paid \$410,000.00 for the property in March, 1990 and expended \$500,00.00 in renovations. The defence submitted an appraisal of Turner Drake, dated June 15, 1990, which valued a sale price at \$607,000.00. Mr. Silver testified the assessment in 1993 was \$394,000.00 which was subsequently reduced to \$280,000.00. Mr. Silver testified that if the city had used the same area as the appraiser, the assessment would be over \$675,000.00. On cross-examination he agreed he made the statement that the property was not worth \$325,000.00.

As to the "reasonableness" of the price obtained by Ms. Lindsay, the judge said at p. 7:

Ms. Lindsay has been employed with the plaintiff for over 15 years. She said she has never had occasion to arrange a sale to a third party before F.B.D.B. buys the property at the Sheriff's sale. There was little public input to determine valuation. She had spoken with a few prospects, but there was no advertisement of the property. Notwithstanding, Ms. Lindsay maintains the \$325,000.00 figure was adequate and as support for that she cites the assessment value of \$280,000.00, knowledge of the downtown retail market, the number of occasions the defendants failed to sell the property, the lack of public interest as demonstrated by no bidders at the Sheriff's sale, and the continuous comments by Mr. Silver that the property was not worth more than \$254,000.00. (emphasis added)

He concluded that the price obtained was not reasonable:

However, the Court must examine the

transaction for its integrity and reasonableness. *The burden is on the mortgagee, who seeks a deficiency judgement, to advance proof that the request is reasonable. The rules of court require evidence sufficient to establish market price.* As stated by Roscoe, J.A., in the **Offman** case, the market determines the fair market value under Rule 47.10(2)(b). In the proceeding before me, the market had no opportunity to set the value. There was no advertising and the direct approach of Ms. Lindsay was limited to three persons. In my judgement it is not sufficient to prove fair market value to rely on the assessed value, the expressions of value of one of the defendants who is attempting to purchase the property, or the absence of bidders at the Sheriff's sale. The court should have evidence of market value.

The property was sold quickly and without adequate publicity. It may be that Ms. Lindsay's evidence that the market values had depreciated in 1994 is accurate, but I would require more substantial evidence than that statement before offering the difference on the judgement. I set the value of the property at the time of the Sheriff's sale at \$370,000 ... (emphasis added)

Analysis:

Contrary to the contention of the respondent, I do not take the Chambers judge to have required that, under **Rule** 47.10(2)(b), the mortgagee must establish that the price obtained was fair market value. Rather, the Chambers judge was not satisfied, on the evidence, that the market value had dropped sufficiently to satisfy him that the resale price was a reasonable one. The sufficiency of the evidence is a matter for the Chambers judge. He did not misdirect himself in this regard.

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.

In **Royal Trust Corporation of Canada v. Offman** (1994), 132 N.S.R. (2d) 306 (C.A.) the mortgagee, Royal Trust, purchased the property at the Sheriff's Sale. The mortgagee was successful in selling the property through a listing. On the application for deficiency judgment, Royal Trust sought to have the deficiency fixed, based upon the actual selling price, rather than the appraisals, which reflected a higher value. The Chambers judge declined to rely upon the value set out in any of the four appraisals, nor did he accept the actual resale value.

Roscoe, J.A., writing for the Court, said 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 ss.(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 mortgagee 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 ss.(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. (emphasis added)

The Court in **Offman** agreed that the Chambers judge "correctly declined to rely only on the appraisers' opinions of value in fixing the deemed sale price." It held, however, that the judge was in error in not using the resale price as indicative of value as it was a reasonable price.

Unlike **Offman**, however, this is not a case where the mortgagee continues to hold the property nor is it one in which the property has been exposed to the "vigorous marketing efforts" contemplated by Roscoe, J.A.

Having rejected the price obtained by F.B.D.B. as reasonable, within the meaning of 47.10(2)(b), the Chambers judge was entitled to weigh the evidence and determine if it was sufficient to establish the value of the property at the time of the Sheriff's Sale. He was not limited to accepting the value from the Turner Drake appraisal or dismissing the application.

The Chambers judge had before him two appraisals performed by

Turner Drake, one reflecting the value at June 15, 1990 and the other, the value at March 2, 1992. There was, as well, other evidence of value: the tax assessment of the property had been substantially reduced; over a lengthy period of time the mortgagors had been unable to attract investors in order to forestall foreclosure; the mortgagor advised the mortgagee that there was an additional appraisal of the property indicating a value of \$254,000; there had been no bidders at the Sheriff's Sale. In other words, there was evidence from which the judge could have determined the value.

The sufficiency of the evidence is a question of fact. It cannot be said, here, that the judge proceeded on an absence of evidence.

The Chambers judge set the value of the property at the time of the Sheriff's Sale at \$370,000. The appellant submits that, in so doing, the Chambers judge erred, in particular, that he adopted the "forced sale value" rather than the "fair market value". I do not accept the submission that the Chambers judge simply adopted the forced sale value. He analyzed the Turner Drake appraisal in some detail, reproducing the calculation of "forced sale value" in his decision as follows:

VALUATION FORCED SALE VALUE

Methodology

We have estimated the Forced Sale Value of the property on the basis that it would be acquired by a speculator intent on holding the property and eventually reselling it at the market value of \$564,000. The holding period is unlikely to be less than a year given the soft real estate market and we have used 1 year as the time horizon in this case.

It is assumed that a speculator would carry the building vacant for 6 months before it is successfully leased. After 12 months it will be resold at its full market value. No net rental income is included since it is assumed to be given away as free rent or as tenant inducement. The valuation is set out below:

Potential Re-Sale Price	\$564,000.
Holding and Selling Costs	

Realty taxes	\$10,047.	
Insurance	\$1,200.	
Heating (5,214 ft. ² @ \$1.00/ft. ²)	\$5,214.	
Total Annual Holding Costs	\$16,461.	
Anticipated vacancy period	x 6 months	
	\$8,231.	
Commission on re-sale @ 4%	\$22,560.	
Legal costs on re-sale @ 1%	\$5,640.	
Developers Profit @ 15%	\$84,600.	
Total	\$121,031.	\$121,031.
		\$442,969.
Deferred for 1 year @ 15%		x 0.8696
		\$385,206.
Deduct		
Transfer taxes on purchase @ 3.25%	\$12,009.	
Legal costs on purchase @ 1%	\$3,695.	
Total	\$15,704.	\$15,704.
Total Indicated Value		\$369,502.
Rounded to		\$370,000

Conclusion

The Forced Sale Value is estimated to be \$370,000. This value equates to \$70.06/ft.² of gross floor area. The value is consistent with the forced sale value indicated by Comparable No. 2 on the Building Sales Schedule on the preceding pages. This sale indicated a price of \$78.61/ft.² overall. However, the price also reflects the value of the restaurant equipment. The adjusted sale price after deducting the value of equipment equates to \$63.94/ft.²

He found the "forced sale value", as set out in the Turner Drake appraisal, to be representative of the "fair market value", at the time of the Sheriff's Sale. In this regard the Chambers judge says:

The appraisal defines "forced sale price" as "the price the property would bring if sold at public auction, or by tender, after limited advertising in local newspapers". However, when you examine the calculations in the appraisal, the method starts with the fair market value which is then reduced by expected protective and necessary disbursements. *This is the method used by our courts. No other depriving factor can be ascribed to the use of the word "forced" in the appraisal.* (emphasis added)

In the Turner Drake appraisal, the fair market value was estimated to be \$564,000. That price was realizable, according to the appraisal, after a lengthy marketing period. In the forced sale calculation, the appraisers assumed that the

property would be rented for 6 months of a 12 month marketing period, thus generating some income. During the vacancy period, the mortgagee would incur certain expenses, including taxes, insurance and heat. There would be legal expenses and real estate commission on the eventual sale. These costs are all recoverable (net of rent received) under **Rule 47.10(2)(b)**. In other words, if the mortgagee had held the property for the year to maximize resale price, as is contemplated by s. 47.10(2)(b), certain "costs" would have been deducted from the proceeds, before calculating the deficiency. The mortgagor would not have had the benefit of a credit for the full resale proceeds.

Since the mortgagee sold the property immediately after the Sheriff's Sale, no holding period was required. Accordingly, these costs, which would have been necessary to realize appraised value, were not incurred and need not be deducted, thus the mortgagor was in no worse position due to the pre-arranged sale. This is what I understand the Chambers judge to be saying when he refers to the "forced sale price" as not subject to any other "depriving factors".

The Chambers judge had before him evidence from which he could estimate market value at the time of the Sheriff's Sale. I do not agree with the Chambers judge, however, that the calculation of "forced sale value" in the Turner Drake appraisal does not contain other "depriving factors". In particular, it includes an allowance for a developer's profit of \$84,600. This is not a cost which would be inevitable should the property be held for the year to gain the maximum resale price. It should, therefore, not be included in reaching "market value" under his methodology. The Turner Drake calculation contains, as well, deductions for transfer taxes and legal costs on the purchase. These are not expenses that would be charged back to the mortgagor before calculating the deficiency.

I would therefore, use the methodology adopted by the Chambers judge, but adjust the "forced sale price" to remove these additional "depriving factors".

There was, as well, uncontradicted evidence from the mortgagor that the Turner Drake appraisal was based upon a floor plan that did not include a 10 foot by 20 foot addition. Mr. Silver estimated that this would increase the market value, as calculated in the Turner Drake report, by \$25,000. Thus a potential market value of \$589,000 should be substituted for the \$564,000.

The Turner Drake "forced sale calculation" should thus be adjusted by substituting the following figures:

Potential resale price	\$589,000.
Heating	5,414.
Commission on re-sale @ 4%	23,560.
Legal costs on re-sale @ 1%	5,890.
Developers Profit @ 15%	nil
Transfer taxes on purchase @ 3.25%	nil
Legal costs on purchase @ 1%	nil

These adjustments result in a fair market value of \$480,000 at the time of the Sheriff's Sale. The mortgage debt having been settled at \$560,909.08, the deficiency is \$80,909.

As to the remaining grounds of appeal, the Chambers judge did not err in finding that the allegations of improper behaviour by the respondent are unfounded. In addition, the Chambers judge properly exercised his discretion in refusing the appellant's request for an adjournment.

In summary, I would allow the appeal and substitute a deficiency of \$80,909.

As the appellants have been substantially successful, I would order costs of \$1000 inclusive of disbursements.

J.A.

Concurred in:

Freeman, J.A.

PUGSLEY, J.A.: (Dissenting)

Robert Silver, his wife and business partner, Deanna Silver, together with their private company, Silver Spoon Desserts Enterprises Limited (the Company), appeal from an order of a judge of the Supreme Court sitting in Chambers, granting a deficiency judgment of \$190,909.08 in favour of Federal Business Development Bank (the Bank) after a foreclosure sale of property from which they operated a restaurant known as The Silver Spoon.

In view of the proposed disposition of this appeal, only one ground of appeal need be considered - that the Chambers judge erred in granting a deficiency judgment.

Background

After successfully operating a restaurant in Halifax for ten years, the Silvers decided to relocate, and purchased a property at 1813 Granville Street (the Property) for \$400,000. Renovations, purchase of equipment, and professional fees, were completed by September 1990 at a cost of over \$500,000.

On November 18, 1990 the Silvers borrowed \$500,000 from the Bank which was secured by a first mortgage (the Mortgage) on the Property. The Bank of Montreal had advanced \$58,000 secured by a first charge on the equipment, after obtaining an appraisal of the Property from Turner Drake and Partners, real estate valuers.

Payments on the Mortgage were made without interruption until January 1992 when a serious decline in revenue prompted the Silvers to request "immediate relief" from the Bank.

On April 27, 1992 after extended negotiations, and a further appraisal

by Turner Drake, requested on this occasion by the Bank, it agreed to waive principal payments for six months and reschedule the balance of payments.

The restaurant business continued to decline, however, and further arrears on the Mortgage accumulated.

On January 23, 1994, Ms. Silver wrote to the Bank advising she and her husband had attracted new investors who were willing to advance

80% of assessed value of [the Property] - a total of \$315,000 by April 1, 1994. In return for the payment of \$315,000 to your corporation the investors would require a full release and assignment of your first mortgage on [the Property] in addition to a release of your collateral mortgage on equipment. The investors would assume the potential tax liability outstanding in the amount of approximately \$28,000 . . . With regards to the above proposal, if the Bank is not in a position to accept the offer by February 5, 1994, it is our position, given the state of the economy, that the Bank should proceed with foreclosure action as suggested . . .

Negotiations were concluded on the above basis but, unfortunately, the closing date (March 15) passed without the transaction being concluded.

The default was explained by Mr. Silver in his letter of March 25, 1994 to the Bank:

Just a note to reflect upon what happened to our proposal recently. As was stated to you the investors were originally in a position to finance 80% of the assessed value of [the Property] (\$394,000). Since that offer was originally held open a confidential valuation was carried out which reflected a current value re market conditions of \$254,000. Regretfully I was not privy to that report. I will state that since that time the N.S. Assessment Appeal Court has upheld a 1991 valuation of \$280,000 which works out to be market value of \$60.67 per square foot (1991). I believe at this point in time the valuation the investors relied upon is correct since market value has since dropped

further. ...

On March 25, 1994 the Bank filed an Originating Notice (Action) against the Silvers and the Company, claiming \$556,044.83 (including interest arrears of \$58,000, and protective disbursements of \$12,000) or, in default, foreclosure sale. The Bank also claimed for a deficiency in case the sum realized at the sale was insufficient to satisfy its claim.

The order for foreclosure and sale was granted on May 5 and the three notices advertising the sale by public auction on June 16 were placed in the daily paper. On June 16 no bidder was present at the sale other than a representative of the Bank who purchased the Property for \$20,313.71 (equivalent to outstanding taxes and Sheriff's expenses).

On June 15, the day before the Sheriff's Sale, the Bank agreed to resell the Property to Peter Claman as trustee, for an undisclosed client, if the Bank acquired title at the sale. The agreement provided for a purchase price of \$325,000 with closing slated for July 18. By a separate agreement the Bank, after concluding negotiations with the Bank of Montreal, sold the equipment to Mr. Claman's client for \$15,000. The agreements for resale of the Property and sale of the equipment were duly concluded.

In support of the application for a deficiency judgment of \$255,703.80, the Bank filed the affidavits of its solicitors, attesting to the procedural requirements relating to the foreclosure, as well as the affidavits of Glenda Lindsay, an account manager with 15 years experience at the Bank, who assumed responsibility for the Silvers' account in September 1993. Ms. Lindsay was also cross-examined at the Chambers application by counsel for the Silvers. Although no defence was filed by the Silvers to the Originating Notice (Action) the Silvers and their Company, as of right, contested the application for the

deficiency and filed Mr. Silver's affidavit. The pre-trial cross-examination of Mr. Silver, on his affidavit, was tendered on behalf of the Bank. Mr. Silver, with leave of the Court, gave evidence before the Chambers judge.

The Two Appraisals of Turner Drake

The Turner Drake appraisal prepared for the Bank of Montreal as of June 15, 1990, was predicated on the assumption that the renovations (then ongoing) were completed. The renovations were assumed by the appraiser to cost between \$250,000 and \$300,000. In fact, renovations and miscellaneous expenses aggregated \$500,000.

Turner Drake considered the highest and best use of the Property to be that of a commercial restaurant.

Market value was defined in the report as "the amount that would be paid for the interest if, at the time of its sale, it was sold on the open market by a willing seller to a willing buyer".

The authors of the valuation note:

It is assumed that the Property will be exposed for sale, and well advertised on the open market for a reasonable period of time.
[emphasis added]

The market value of the Property, exclusive of equipment, was determined at \$615,000.

Turner Drake also inspected the property on March 2, 1992 for the Bank, noting that the building had been extensively renovated to a multi-level restaurant in 1990 with three dining areas and two kitchens on six levels.

The highest and best use of the Property was considered to be a continuation of the existing commercial restaurant use.

The definition of market value remained unchanged.

The same assumption was employed, namely that "the property will be exposed for sale, and well advertised on the open market for a reasonable period of time".

Market value of the Property, exclusive of equipment, furniture and utensils, was determined as of March 2, 1992, at \$564,000.

The report states:

The market conditions are very soft at the present time both for leasing and sales. Sales activity is very slow and we expect that the market for the subject property is small.

The soft market conditions are likely to result in a protracted marketing period for the subject property. We expect that a reasonable marketing period for subject would be six months or longer. [emphasis added]

Turner Drake also prepared, at the request of the Bank, a valuation based upon forced sale value.

This concept was defined as:

The price the property would bring if sold at public auction, or by tender, after limited advertising in local newspapers.

This valuation was calculated as follows:

VALUATION
FORCED SALE VALUE

Methodology

We have estimated the Forced Sale Value of the property on the basis that it would be acquired by a speculator intent on holding the property and eventually reselling it at the market value of \$564,000. The holding period is unlikely to be less than a year given the soft real estate market and we have used 1 year as the time horizon in this case.

It is assumed that a speculator would carry the building vacant for 6 months before it is successfully leased. After 12 months it will be resold at its full market value. No net rental income is included since it is assumed to be given away as free rent or as tenant inducement. The valuation is set out below:

Potential Re-Sale Price		\$564,000.
Holding and Selling Costs		
Realty taxes	\$10,047.	
Insurance	\$1,200.	
Heating (5,214 ft. ² @ \$1.00/ft. ²)	\$5,214.	
Total Annual Holding Costs	\$16,461.	
Anticipated vacancy period	x 6 months	
	\$8,231.	
Commission on re-sale @ 4%	\$22,560.	
Legal costs on re-sale @ 1%	\$5,640.	
Developers Profit @ 15%	\$84,600.	
Total	\$121,031.	\$121,031.
		\$442,969.
Deferred for 1 year @ 15%		x 0.8696
		\$385,206.
Deduct		
Transfer taxes on purchase @ 3.25%	\$12,009.	
Legal costs on purchase @ 1%	\$3,695.	
Total	\$15,704.	\$15,704.
Total Indicated Value		\$369,502.
Rounded to		\$370,000

Conclusion

The Forced Sale Value is estimated to be \$370,000. This value equates to \$70.06/ft.² of gross floor area. The value is consistent with the forced sale value indicated by Comparable No. 2 on the Building Sales Schedule on the preceding pages. This sale indicated a price of \$78.61/ft.² overall. However, the price also reflects the value of the restaurant equipment. The adjusted sale price after deducting the value of equipment equates to \$63.94/ft.².

Civil Procedure Rule 47.10

A review of **C.P.R. 47.10** is essential to an understanding of this matter.

It reads:

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, disbursements authorized by the mortgage instrument, interest and costs, and the mortgagor is a defendant, the plaintiff shall be entitled to an order for payment of the deficiency (together with interest on that amount at the rate provided for in the mortgage from the date of the sale to the date of the order), if such relief has been claimed.

(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.

(3) An application for deficiency judgment pursuant to sub-paragraph (2), unless otherwise ordered by the court, shall be made within six months from the date of the Sheriff's Sale on ten days notice and any deficiency judgment allowed shall not exceed the difference between the amount realized by the plaintiff from the Sheriff's Sale and the amount owing to the plaintiff at that date determined in accordance with the provisions of the order for foreclosure and sale.

Position of the Bank

In support of Ms. Lindsay's conclusion that the resale price of \$325,000 for the Property well exceeded the opinions of value by both the Bank and the Silvers, Ms. Lindsay deposed, or testified, that:

- The Turner Drake appraisal of March 1992 determined a forced sale value of \$370,000, which she considered included equipment. By the spring of 1994 she was convinced that the value of the Property was "significantly less" based on her knowledge of market conditions;
- The Silvers had been involved in an "extensive effort to attract investors and had failed to do so even though the Bank and the Bank of Montreal were prepared to write off substantial portions of the secured debts";
- The Silvers were prepared to negotiate a settlement of the Mortgage debt at \$338,000;
- On March 29, 1994, Mr. Silver had advised in writing that a new appraisal had established a value of \$254,000, and he stated, as well, his belief that such was the correct value;

- As a consequence of Mr. Silver's representations to the Assessment Appeal Court, the assessed value of the Property was reduced from \$380,000 to \$280,000 in March of 1994;
- The lack of public interest leading up to the Sheriff's Sale of June 16 further supported her opinion;
- None of the three businessmen who, she considered might have an interest in purchasing the Property, expressed any interest.

Position of the Silvers

The Silvers submitted the Property as a "going concern", together with the equipment, had a value in excess of \$600,000;

In support of that position, they argue:

- The forced sale value of \$370,000 should not be the value to be considered by the Court in determining whether the Bank is entitled to a deficiency, rather the Court should be determining market value;
- The forced sale value determined by Turner Drake in the 1992 appraisal did not include any value for equipment. It, as well, did not include a 200 square foot addition to the Property which would have increased market value by \$25,000;
- The forced sale value was determined by Turner Drake by deducting approximately \$200,000 from a market value estimated by at \$564,000. Many deductions, including realty taxes, developer's profit, commission, vacancy allowance and heating expense, were not in fact incurred by the Bank as it disposed of the Property in July 1994, a few months after assuming possession;
- The Bank did not carry out any advertising of the Property, did not list it with a broker, did not leave it exposed to the market for a reasonable time, and did not make a concerted effort to seek prospective purchasers;
- The Bank did not secure an up-to-date appraisal from Turner Drake or any other

expert valuer; Ms. Lindsay's response (she did not feel an updated appraisal would have come in at "anything higher" than the 1992 appraisal and hence the cost of an appraisal update was unwarranted) does not satisfy the burden cast upon a mortgagee seeking a deficiency judgment after foreclosure sale;

- While Mr. Silver expressed his belief that a confidential valuation carried out in March of 1994 reflected a current value of \$254,000 and that this was a "correct valuation", this assertion must be taken with a grain of salt as he was actively negotiating to acquire the Property from the Bank at the best possible price; he testified that he was not qualified to appraise commercial property, and did not know who prepared the "confidential valuation" referred to in his letter of March 25, 1994.

Findings of the Trial Judge

The trial judge pointed out that Civil Procedure Rule 47.10 was introduced in 1984 as a direct consequence of the judgment of Hart, J.A., of this Court in **Central Trust Company v. Adshade et al** (1983), 60 N.S.R. (2d) 414.

In **Adshade**, Justice Hart cited with approval the following comments of Cowan, C.J., in **Briand v. Carver** (1965-69) 4 N.S.R. 141:

The appropriate authorities might well give consideration to an amendment to the **Real Property Act**, R.S.N.S. 1954, c. 244, to provide that on any application for a deficiency judgment, the applicant should present to the court appraisals made by independent appraisers as to the fair market value of the mortgaged property and that a deficiency judgment might, in the discretion of the court, be limited to the difference between the amount owing on the mortgage, plus taxes, expenses of sale and taxed costs, after deducting an amount equal to the fair market value of the mortgaged property over and above prior encumbrances, as determined by the court. [emphasis added](at 423)

The Chambers judge also referred to the judgment of Roscoe, J.A., on behalf of the Court in **Royal Trust Corporation v. Offman** (1994), 132 N.S.R (2d) 306, and in particular, the following:

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 mortgagee 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. (emphasis added)

It was evident that the Bank could not come within the provisions of C.P.R. 47.10(2)(a) as no independent appraisal had been secured to determine value at the critical time (ie. June 16, the date of the public auction) hence the Chambers judge was directed to C.P.R. 47.10(2)(b) and concluded, correctly, the critical issue before him to be:

"Was the price of \$325,000 reasonable?"

In the course of concluding that it was not reasonable, the Chambers judge

wrote:

However, the court must examine the transaction for its integrity and reasonableness. The burden is on the mortgagee, who seeks a deficiency judgment, to advance proof that the request is reasonable. The rules of court require evidence sufficient to establish the market price. As stated by Roscoe, J.A., in the **Offman** case, the market determines the fair market value under Rule 47.10(2)(b). In the proceeding before me, the market had no opportunity to set the value. There was no advertising and the direct approach of Ms. Lindsay was limited to three persons. In my judgment it is not sufficient to prove fair market value to rely on the assessed value, the expressions of value of one of the defendants who is attempting to purchase the property, or the absence of bidders at the Sheriff's Sale. The court should have evidence of the market value.

The property was sold quickly and without adequate publicity. It may be that Ms. Lindsay's evidence that market values had depreciated in 1994 is accurate, but I would require more substantial evidence than that statement before offering the difference on the judgment. I set the value of the property at the time of the Sheriff's Sale at \$370,000.00 and will sign an order for deficiency judgment of \$109,909.08. (emphasis added)

Opinion

Fair market value is the controlling concept stipulated by **Civil Procedure Rule 47.10(2)**.

When fair market value is not obtained at the Sheriff's Sale, a mortgagee, who seeks a deficiency judgment, is required to establish fair market value.

C.P.R. 47.10(2) sets out two ways this may be accomplished:

- (a) by independent appraisal, or
- (b) by resale, if the price obtained was, in the opinion of the Court, reasonable.

The Court will only consider the resale price to be reasonable if market conditions support the price as evidence of fair market value.

This will be accomplished when the property is exposed to the market for a significant period of time, a number of offers are received, the Purchaser is at arm's

length from the vendor, and vigorous marketing efforts have been undertaken (**Offman**, *(supra)*).

The Chambers judge concluded that the resale by the Bank, pursuant to the agreement of June 15th, was not for a "reasonable price", because the market had not determined fair market value.

The evidence supports this conclusion.

The property was only on the market for a short period of time and virtually no marketing efforts were undertaken.

Turner Drake emphasized the importance of exposure and marketing in the 1992 report:

It is assumed that the property will be exposed for sale, and will be advertised, on the open market for a reasonable period of time ... We expect that a reasonable marketing period would be six months or longer.

If the mortgagee fails to satisfy the Court that a fair market value has been determined either under **C.P.R. 47.10(2)(a)**, or **(b)**, the Court nevertheless may award a deficiency judgment, if convincing evidence is introduced establishing the fair market value of the property at the time of the auction.

The key question, in this appeal, is whether the Bank has satisfied that burden. In my respectful opinion, it has not.

The opinions of value held by Ms. Lindsay, or by the Silvers, do not assist in establishing fair market value.

The Chambers judge determined, and I agree, that Ms. Lindsay's evidence fell short in establishing fair market value, and that the evidence of the Silvers, in their negotiations to purchase the property from the Bank, should be discounted.

The Chambers judge set the value of the property at the time of the Sheriff's Sale at \$370,000.00.

He did not set out the process by which he arrived at this figure, and the reasons

for doing so, are not readily determinable.

It happens to be the same value determined by Turner Drake in March, 1992, for a forced sale.

Reliance on the Turner Drake forced sale valuation of \$370,000, presupposes Turner Drake's 1992 estimate of market value of \$564,000, was a reliable estimate of market value.

The evidence before the Chambers judge in support of this estimate of fair market value consisted solely of the Turner Drake appraisal.

It was based upon two approaches to value - the income approach and the comparative sales approach.

The income approach determines a deemed rent for the Property by considering rents paid for other, presumably comparable, restaurant locations in the downtown core.

The comparative approach determines a deemed sales prices for the Property with reference to actual sales, or "asking prices of several commercial buildings" in the locality. Reliance by a valuer on "asking prices" is, in my opinion, not a sound basis on which to determine value.

The subjective opinion of the appraiser in determining values from both the income and the comparative sales approach, as well as determining an "overall capitalization rate", played a critical part in Turner Drake's determination of market value.

Neither of the Turner Drake opinions were supported by affidavit or tested by cross-examination.

The 1992 opinion failed to take into account a 200-square-foot addition at the rear of the property.

It was based on the assumption that renovations completed in September, 1990, cost \$250,000, to \$300,000, when in fact they cost \$500,000.

The market value estimate of \$564,000 was Turner Drake's starting point for calculating the forced sale value of \$370,000.

The calculation of forced sale value was determined by deducting a number of expenses from the market valuation of \$564,000. Many of these expenses were not incurred by the Bank in the resale of June, 1994.

While it is mathematically possible in an attempt to mould the Turner Drake opinion to the evidence, to add \$25,000.00 to the forced sale valuation of \$370,000 to account for the 200-square-foot addition overlooked by Turner Drake, as well as make specific add-ons, respecting those costs not incurred by the Bank in the spring of 1994 because of the diminished period required for resale, the Court should not be required to make these speculative adjustments in order to determine a deficiency.

Even more critical, in my assessment, is the necessity to factor in the change, if any, in determining fair market value between March of 1992, and June of 1994 some twenty-seven months later.

There is no convincing evidence on this issue. The Bank could have obtained an up-dated appraisal from Turner Drake reflecting market value as of the spring of 1994, for minimal cost. The Bank had secured, after all, an up-dated appraisal in 1992 when its security was in less jeopardy.

Why should the Court be satisfied with evidence that is less than compelling when the Bank could have presented cogent evidence respecting fair market value by making a minimal expenditure?

It is of some relevance that the Silvers' total investment in the Property exceeded \$900,000. The Bank's submission that the value of the Property in June, 1994, was almost two-thirds less than the investment by successful restaurateurs less than four years earlier, would require, in my opinion, compelling evidence in support, before it could be accepted.

The Court should not be left in a position of attempting to speculate on the fair

market value of the property as of June 16th, 1994, when this matter is of such vital importance to the Silvers.

The circumstances are not dissimilar to those that existed in **Montreal Trust v. Moriarty** (1993), 117 N.S.R. (2d) 100 where the Chambers judge, in rejecting an application for a deficiency, concluded that there was "very little objective evidence on which to base a decision regarding market value... There is none of the usual market listing and buyer response history available for this property."

Counsel for the Silvers has submitted in his factum, in the alternative, that the Bank was under a "fiduciary duty to make its best efforts to realize the greatest amount possible on the sale of the (Property), and that it failed to do."

This argument was not raised in the Notice of Appeal.

While the classes of relationships which have been recognized by the Courts to be fiduciary in nature have been extended over the past few years, the relationship between the Bank and the Silvers was essentially commercial in nature. That type of relationship does not fall into one of the traditional categories raising a fiduciary obligation.

The leading case on the question of fiduciary relationships and the obligations that arise therefrom, is **Lac Minerals Ltd. v. International Corona Resources Ltd.**, [1989] 2 S.C.R. 574.

Sopinka, J., with whom two of the remaining four sitting judges concurred, stated at p. 595:

The consequences attendant upon a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. ..."

Despite the obvious "vulnerability" of the Silvers' position in view of the Bank's pre-auction agreement of June 15th, I do not find it necessary to conclude whether a fiduciary relationship has been established or, if established, breached.

In my opinion, the Bank fails in its claim for a deficiency, because it did not satisfy the onus imposed on it to establish fair market value of the Property on June 16th, 1994.

If a mortgagee seeking a deficiency, is going to bypass the guidelines set out in **Offman**, the mortgagee is taking a calculated risk, that it may not be able to convince the Chambers judge, that it resold the property for fair market value. While the Court's decision in **Offman** was filed on June 27, 1994, and hence after the June 15th resale by the Bank, the principles in **Offman**, should have been anticipated by any party experienced in foreclosure practice, such as the Bank. The steps to be taken to obtain fair market value were, in addition, clearly expressed by Turner Drake in both the 1990 and 1992 reports.

When the Chambers judge set the value of the property at \$370,000.00, he was drawing an inference from the evidence. This Court is as well placed to draw inferences from primary facts, as is the Chambers judge, and we may properly draw a different inference, and make a different finding from that of the Chambers judge. (**Sherman v. Monarch Chrome Furniture Ltd.** (1959), 15 D.L.R. (2d) 6 (Ont. C.A.); **Lessard v. Paquin**, [1975] 1 S.C.R. 665).

With respect, the critical issue in this appeal is not whether there was any evidence to support the conclusion reached by the trial judge; the issue is whether there was cogent evidence before the trial judge satisfying the burden imposed on the Bank to establish fair market value of the Property.

In my opinion, the Bank has not satisfied that burden.

Disposition

I would allow the appeal, set aside the order for a deficiency judgment, award costs of the Chambers application to the Silvers on Scale 3 with the amount involved

set at \$235,000.00 (i.e. the deficiency originally requested by the Bank). The Silvers shall be entitled to their costs of appeal in the amount of \$2,500.00 plus disbursements.

J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

SILVER SPOON DESSERTS
ENTERPRISES LIMITED et al)

appellants)

REASONS FOR
JUDGMENT BY:

- and -)

BATEMAN, J.A.

FEDERAL BUSINESS
DEVELOPMENT BANK)

PUGSLEY, J.A.
(Dissenting)

respondent)