NOVA SCOTIA COURT OF APPEAL
Citation: *MacGillivary v. Brown*, 2024 NSCA 31

Date: 20240314
Docket: CA 523484
Registry: Halifax

Between:

William MacGillivary

Appellant

v.

Stephen Brown and Brenda Brown

Respondents

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	January 17, 2024, in Halifax, Nova Scotia
Subject:	Mortgages – Assignment of mortgages – Foreclosure and sale – Equity of redemption – Setting aside deed at foreclosure sale
Cases Cited:	*CIBC Mortgages Inc. v. Dima Estate*, 2019 NSSC 61; *Gough v. Leslie Estate*, 2022 NSCA 25; *Santley v. Wilde*, [1899] 2 Ch 474; *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*, [1914] AC 25; *Royal Bank of Canada v. Murphy*, 2023 NSSC 253; *Municipal Savings & Loan Corp. v. Wilson*, [1981] O.J. No. 118 (Ont. C.A.); *Campbell v. Holyland* (1877), 7 Ch.D. 166; *Pew v. Zinck*, [1953] 1 S.C.R. 285; *Oceanus Marine Inc. v. Saunders* (1996), 156 N.S.R. (2d) 287; *Stevens v. Theatres Ltd.*, [1903] 1 Ch. 857; *Petranik v. Dale*, [1977] 2 S.C.R. 959; *Noakes v. Rice*, [1902] A.C. 24; *Atlantic Trust Co. Ltd. v. H. & E. General Stores Ltd*., (1977), 25 N.S.R. (2d) 526 (NSSC TD);
Statutes and Rules Cited:	*Civil Procedure Rule* 72; *Land Registration Act*, S.N.S. 2001, c. 6;

Authors Cited:	Joseph Roach, *The Canadian Law of Mortgages*, 2nd ed (LexisNexis: Markham, 2010);
Summary:	TD Bank obtained an Order of Foreclosure and Sale against Mr. MacGillivary. The judge fixed the amount due under the mortgage. TD then assigned the mortgage to the Browns and discontinued their action. The Browns sued for foreclosure or foreclosure and sale. They included their costs for acquisition of the assigned mortgage in their claim. Mr. MacGillivary repeatedly asked to redeem, but was never given the figure initially fixed by the first foreclosure order. A second foreclosure order was granted for a substantially greater amount. The property was then sold at public auction. The Browns purchased the property. Mr. MacGillivary appealed, but did not seek a stay until he was evicted. He then successfully applied for a stay from the Court of Appeal. The stay was conditional on payment in trust of the amount set by the first foreclosure order. Mr. MacGillivary made that payment.
Issues:	(1) Was the assignment from TD after the first foreclosure order valid? (2) If so, did the Browns frustrate Mr. MacGillivary's right to redeem the assigned mortgage? (3) What impact would the original Foreclosure and Sale Order have on the court's ability to grant a second order? (4) If the second order was improperly granted, can the deed to the Browns be set aside?
Result:	Appeal allowed. Assignment from TD was valid. The Browns frustrated Mr. MacGillivary's right to redeem. Mr. MacGillivary was never given an opportunity to redeem for the sum originally set in the first order with appropriate adjustments. The first action was not properly discontinued because no leave of the court was obtained. The second order should not have been granted, nor should it have set a higher amount due on the mortgage.

The Browns were not innocent third parties. The deed should be set aside. Mr. MacGillivary should be given an opportunity to redeem for the correct amount due. By Supplementary Reasons (2024 NSCA 56), the Court fixed the redemption amount and that was paid by Mr. MacGillivary.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 91 paragraphs.

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Appellant

v.

Stephen Brown and Brenda Brown

Respondents

Judges:	Farrar, Bryson, and Beaton JJ.A.
Appeal Heard:	January 17, 2024, in Halifax, Nova Scotia
Held:	Appeal allowed, subject to final order, per reasons for judgment of Bryson J.A.; Farrar and Beaton JJ.A. concurring
Counsel:	William MacGillivary, appellant, on his own behalf Harvey McPhee, K.C. and Kelly O'Brien, for the respondents

Reasons for judgment:

Introduction

[1] William MacGillivary appeals the March 10, 2023 unreported decision of Justice Patrick J. Murray granting the Browns an Order for Foreclosure, Sale, and Possession against Mr. MacGillivary's cottage property on the Bras d'Or Lakes in Cape Breton Regional Municipality. Fundamentally, Mr. MacGillivary complains that he has never been given an opportunity to pay out the mortgage.

[2] This unfortunate odyssey begins in 2013 when Mr. MacGillivary mortgaged his cottage to Toronto Dominion Bank. All went well until he defaulted in 2019. TD then sued for their money and foreclosure. By the summer of 2021, nothing had been paid for almost two years. On July 19, 2021 Justice D. Timothy Gabriel granted TD an order for foreclosure and sale. Simultaneously, he granted default judgment of $106,011.29 in favour of the Bank. That judgment has never been set aside.

[3] Arrangements were made to sell the MacGillivary property by way of public auction. The property was advertised for sale on Wednesday, September 8, 2021 at the courthouse in Sydney. The Bank was in discussions with Mr. MacGillivary to pay out the mortgage, as well as with Mr. MacGillivary's neighbours, the Browns, who wished to buy it.

[4] Ultimately, there was no public auction. Rather than proceeding with the action, TD assigned their mortgage to the Browns.

[5] Mr. MacGillivary and the Browns were unable to reach agreement about payout of the assigned mortgage so in December 2021 the Browns started their own action for foreclosure and sale. TD discontinued its action shortly thereafter.

[6] The Browns' foreclosure motion was eventually heard by Justice Patrick Murray. He raised the effect of the July 19, 2021 foreclosure order on his ability to grant a new Order for Foreclosure, Sale, and Possession. Unfortunately, having raised the issue, he never resolved it before granting a second Order for Foreclosure, Sale, and Possession on March 23, 2023, amended April 20, 2023.

[7] For reasons that follow, the appeal should be allowed, the Amended Order for Foreclosure, Sale, and Possession granted by Justice Murray should be set aside and Mr. MacGillivary should have the opportunity to redeem his property upon

payment of what he owes, together with interest, and any other appropriate adjustments.

Factual Summary

[8] In 2012, Mr. MacGillivary and the Browns purchased their respective properties in Islandview, Cape Breton Regional Municipality. Shortly after, Mr. MacGillivary granted the Browns a right of first refusal over his property.

[9] In 2012, Mr. MacGillivary mortgaged his property to the Toronto Dominion Bank.

[10] Following Mr. MacGillivary's 2019 default on his mortgage with TD, the Bank commenced legal action. No defence was filed. The July 19, 2021 Order followed.

[11] Mr. MacGillivary says he became aware of TD's enforcement efforts when his brother called him in August of 2021 to report that his property was advertised for public auction. Thereafter, he contacted TD.

[12] Mr. MacGillivary alleges he had an agreement with counsel for TD in September 2021 for payment of the mortgage. In an email from Mr. MacGillivary to the Browns' lawyer of September 3, 2021, Mr. MacGillivary says:

> It is a two step process whereby the arrears get paid on or before September 7. I have arranged funds from the US to be sent to my Canadian account to cover the $30,000 Canadian amount. The same is the case for the balance of the mortgage which I'm awaiting final figures from TD.

[13] Mr. MacGillivary deposes that on September 7, 2021, he spoke to TD's lawyer and "followed up with an email to him on September 14 regarding the total payout agreed upon between myself and TD Bank".

[14] If there was an agreement to pay out the mortgage, there is no evidence from TD Bank respecting the terms for doing so. Moreover, it is evident that Mr. MacGillivary did not pay any money to TD on September 7 as he claimed he would in the September 3 email to the Browns' lawyer.

[15] During early September 2021, the Bank was also in discussion with the Browns who wanted to buy the mortgage. Mr. MacGillivary deposes that on

September 15, 2021 he had a conversation with TD's lawyer in which he learned that the Bank had "decided to go with the Browns' offer".

[16] On September 24, 2021, the Browns paid TD $118, 231.81 in return for an assignment of the mortgage. There was some delay in obtaining an assignment document. That was eventually provided on November 18, 2021.

[17] In a September 10, 2021 letter to the Browns' lawyer from TD's lawyer, the breakdown of the $118,100.69 was as follows:

Payout as of September 9:	$106,925.09
Per Diem Interest as of September 13 ($11.92 x 4 days):	$47.68
Property Management Fees (estimate):	$40.25
Tax Account Balance:	$4,137.15
Internal TD Legal Fees:	$200.00
Legal Fees, Disbursements, and HST to September 10:	$6,450.52
Legal Fees, Disbursements, and HST to Complete (estimate):	$300.00

[18] On October 21, 2021, the Browns' lawyer, Mr. Darren Morgan, wrote to Mr. MacGillivary advising that the payout of the assigned mortgage was $125,413.20. This figure was broken down as follows:

Payout to TD Bank:	$118,231.81
Per Diem Interest as at October 21, 2021 ($11.92 x 27 days):	$321.84
Legal Fees, Disbursements, and HST to October 21, 2021:	$5,859.55
Legal Fees, Disbursements, and HST to Complete (estimate):	$1,000.00

[19] Mr. MacGillivary was informed that if the $125,413.20 was not paid by November 5, 2021, the Browns would "commence legal proceedings in the Supreme Court of Nova Scotia to extinguish your interest in the property and recover possession and ownership of it". No mention was made of the July 19, 2021 Foreclosure and Sale Order.

[20] Although Mr. MacGillivary was interested in paying out the mortgage, he queried the amounts claimed and in particular, objected to the claims for interest and legal costs.

[21] Mr. MacGillivary did offer to pay the amount the Browns paid to TD for the assignment ($118,231.81), but no agreement was reached. Mr. MacGillivary never

tendered the $118,231.81 to the Browns, nor did they say they would accept that sum.

[22] On December 3, 2021, the Browns sued for foreclosure, and alternatively, foreclosure, sale and possession.

[23] In Nova Scotia, the significance of the difference is this: a simple foreclosure extinguishes the mortgagor's equity of redemption and the mortgagee becomes owner of the property. No sale is involved. No deficiency may be claimed. A foreclosure and sale involves a public auction and sale of the property. Thereafter, the mortgagee may claim any deficiency.[1]

[24] On January 7, 2022, Mr. MacGillivary filed a defence to the Browns' action. He admitted most of the claim, including that the $118,231.81 paid to TD was due on the mortgage, but disputed interest and costs. Although he initially informed the court that he would be retaining counsel, Mr. MacGillivary never did so. In light of later events, that was almost certainly a mistake.

[25] A series of ultimately fruitless hearings followed in 2022 on January 31, March 7, May 30 and June 13.

[26] On March 7, 2022, during an interim motion before Justice Robin Gogan, Mr. MacGillivary expressed concern about growing interest. He asked:

> […] if I put the funds in trust today for the balance will it sort of adjust the amount I owe if, if the resolution comes to the fact that, you know, where there is a number that I pay for the amount to redeem the mortgage.

[27] At that point, the judge told Mr. MacGillivary that there was a process to "make a payment into court". The judge referred Mr. MacGillivary to *Rule* 72, which Mr. MacGillivary said he was aware of. The judge also referred him to the Foreclosure Practice Memorandum. *Civil Procedure Rule* 72.18(1) allows a mortgagor to start an action to obtain a redemption order or make that claim in an existing action. Mr. MacGillivary did neither.

[28] Justice Gogan adjourned to May 30, 2022 at which time she was no doubt hoping for compliance with *Rule* 72 and the Foreclosure Practice Memorandum. She was to be disappointed. Mr. Morgan was not ready to proceed on May 30. The matter was adjourned to June 13, 2022.

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[1] *CIBC Mortgages Inc. v. Dima Estate*, 2019 NSSC 61 at ¶21 [*Dima*]; *Civil Procedure Rule* 72.

[29] June 13 arrived. Mr. Morgan was still not ready to proceed. He was late filing what the *Rules* required and the court had requested. The question of a proper payout was raised but not resolved.

[30] At the October 31, 2022 appearance Justice Murray asked about payout of the mortgage. The Browns' new counsel, Harvey McPhee, knew nothing of previous discussions about a payout. He reiterated the foreclosure relief sought by the Browns. Justice Murray again asked about the impact of the previous foreclosure order. He had received no submissions on that issue, although it had been a recurring theme.

[31] During argument, the judge also noted he had no motion before him to set aside the MacGillivary defence.

[32] At the conclusion of the October 31 hearing, Justice Murray asked for submissions on his authority to "grant the current order" for foreclosure in light of the previous order. Written submissions followed.

[33] In oral submissions, the Browns had taken the position that the filing of the Notice of Discontinuance by TD disposed of that action and rendered the previous foreclosure order a "nullity". They offered no authority for that proposition. Alternatively, they argued in their written brief that the Gabriel order was not final and court was not *functus*.

[34] For his part, Mr. MacGillivary said that he wanted to pay out the mortgage. The judge asked him whether he had approached the Browns' new counsel with an offer to pay the mortgage and Mr. MacGillivary conceded he had not done so.

[35] On November 21, 2022, the Browns applied to set aside the defence and for summary judgment, an order for foreclosure only or, alternatively, foreclosure and sale.

[36] Mr. MacGillivary did not attend the summary judgment motion on November 21, 2022, although he had notice of it.

[37] Justice Murray reserved his decision which he rendered on March 10, 2023.

[38] On March 20, 2023, Justice Murray granted an Order for Foreclosure, Sale, and Possession. The order was immaterially amended on April 20, 2023.

[39] Justice Murray settled the amount due on the mortgage at $126,379.70 with interest on $118,231.21 at 4.5% from March 13, 2023 plus costs of $16,855.73.

[40] On April 27, 2023, Mr. MacGillivary appealed.

[41] Mr. MacGillivary did not initially seek a stay. His property was sold at public auction on May 29, 2023. He did not attend. The Browns were the successful bidders and a deed was executed transferring title to them.

[42] On June 29, 2023, with the assistance of Sheriff Services, Mr. MacGillivary was evicted from the property.

[43] On June 30, 2023, Mr. MacGillivary made an emergency motion before this Court seeking a stay. Justice David Farrar granted a temporary stay pending a hearing between the parties. That hearing went forward on July 13, 2023. On September 7, 2023, Justice Cindy A. Bourgeois granted a stay pending appeal, conditional on Mr. MacGillivary promptly depositing with counsel for the Browns the mortgage debt as determined in the order of Justice Gabriel of July 19, 2021 of $106,011.29. Mr. MacGillivary did so.

Issues

[44] In his Notice of Appeal, Mr. MacGillivary claims:

1. That the Browns' lawyer had no authority to negotiate with him prior to assignment of the TD mortgage to the Browns.

2. The judge ignored settlement offers made by him to the Browns.

3. Numerous interim court proceedings throughout 2022 were caused by the Browns' lawyer failing to provide requested information in a timely manner.

4. The conduct of the Browns' first lawyer (not counsel on appeal) prevented resolution of the mortgage debt in 2021 and caused the delays which added to costs with the interim hearings in 2022.

5. The judge failed to consider the Browns to be "a new lender" who interfered with "the original arrangement with TD Canada Trust" thus preventing payment of the debt in 2021.

[45] Mr. MacGillivary adds in his factum:

1. The assignment to the Browns did not accord with the two remedies in the original foreclosure and sale order of Justice Gabriel and precluded Mr. MacGillivary from redeeming his property "as per agreement between myself and TD Bank counsel".

2. The judge erred in accepting the assignment as valid. There should have been a new contract with him and the Browns.

3. The judge should not have struck down his original Statement of Defence and should have given him an opportunity to amend his defence.

[46] The respondents say the issues are:

1. Was the assignment of the TD mortgage to the Browns valid at the time of the October 21, 2021 demand for payment?

2. What impact, if any, does the assignment's validity have on the foreclosure proceeding?

3. What impact, if any, do Mr. MacGillivary's "offers to settle" have on the foreclosure proceeding initiated by the Browns?

4. Did Justice Murray's exercise of discretion in allowing the Browns' costs result in an error of principle or amount to a manifest injustice?

5. Assuming the Court will entertain it, did the Gabriel order preclude issuance of a further Order of Foreclosure, Sale and Possession following discontinuance of the original TD proceeding?

6. Assuming the Court will entertain it, should Justice Murray have provided Mr. MacGillivary with an opportunity to amend his Statement of Defence before striking it?

[47] An additional issue raised by Justice Murray and not resolved by him was the impact of the order of Justice Gabriel on Justice Murray's ability to grant a new foreclosure and sale order.

[48] The Browns object to the Court entertaining any grounds of appeal argued by Mr. MacGillivary in his factum that were not set out in his Notice of Appeal. Mr. MacGillivary did not move to amend his Notice of Appeal but he is not a lawyer and it is unsurprising that he did not do so.

[49] The Court will consider an issue not explicitly claimed in a Notice of Appeal if it arises from the appealed issues and if the respondents are not thereby prejudiced or an injustice could otherwise result: *Gough v. Leslie Estate*.[2] In this case, the respondents have fully argued all issues raised by Mr. MacGillivary as well as the issue raised by Justice Murray. They do not say they are prejudiced because they cannot adequately respond. There is no evidence that they have been so prejudiced.

[50] It is not necessary to consider all the grounds addressed by the parties to resolve this appeal. The following issues are adequate to dispose of the appeal:

1. In light of the original foreclosure order granted by Justice Gabriel, was TD able to assign its mortgage to the Browns?

2. If so, did the Browns frustrate Mr. MacGillivary's attempts to redeem the assigned mortgage?

3. What impact would the original foreclosure order have on the court's ability to grant a second foreclosure order in favour of the Browns?

4. If the second foreclosure order was improperly granted, can the deed to the Browns be set aside?

Validity of the Assignment

[51] A common law mortgage is a conveyance of property to secure payment of money or discharge of an obligation: *Santley v. Wilde*.[3] A mortgage creates both a

[2] 2022 NSCA 25 at ¶17-18.
[3] [1899] 2 Ch 474 per Lindley M.R.

personal obligation by contract and grants a proprietary interest. At common law, a mortgage constituted a transfer of legal title to the lender, but equity always recognized the reality of the situation as one of security and so allowed the mortgaging party to redeem title upon payment of the mortgage debt or satisfaction of the obligation secured. The equitable right to redeem arises on failure to exercise the contractual right of redemption and is commonly referred to as the equity of redemption: *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.*[4]

[52] In Nova Scotia foreclosure and sale practice, the mortgagor's equity of redemption is not extinguished until the property is sold.[5]

[53] Under the *Land Registration Act*,[6] the mortgagor no longer conveys legal title to the mortgagee. Rather, the *Act* provides that the mortgage creates a security interest in the mortgaged property in favour of the lender. The *Act* otherwise leaves law and equity untouched.[7]

[54] As a commercial interest and an interest in land, the TD mortgage was assignable by TD at any time prior to termination of that interest.[8] It has always been possible to buy the mortgagee's interest even after a decree nisi[9] (equivalent to our Order for Foreclosure and Sale).[10]

[55] As in this case, the usual order granted neither extinguishes the mortgage nor the equity of redemption until the sale of the property:

> 3. ***All the interest and equity of redemption*** of the defendant, William MacGillivary and of all persons claiming through the defendant in the lands described in the mortgage ***are forever barred and foreclosed***, and shall be sold by the sheriff, […] at a public auction […] ***unless before the time of sale the amount due, together with costs, are paid to the plaintiff***. […]
>
> [Emphasis added.]

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[4] [1914] AC 25 at p. 48 *per* Lord Parker.
[5] *Royal Bank of Canada v. Murphy*, 2023 NSSC 253 at ¶26.
[6] S.N.S. 2001, c. 6.
[7] *Ibid*, s. 52(1); see discussion in Joseph Roach, *The Canadian Law of Mortgages*, 2nd ed (LexisNexis: Markham, 2010) at p. 15.
[8] *Municipal Savings & Loan Corp. v. Wilson*, [1981] O.J. No. 118 (Ont. C.A.) at ¶8 [*Wilson*] and see Roach, *supra* at p. 471 and following.
[9] *Campbell v. Holyland* (1877), 7 Ch.D. 166 cited in *Pew v. Zinck*, [1953] 1 S.C.R. 285 at p. 293; *Oceanus Marine Inc. v. Saunders* (1996), 156 N.S.R. (2d) 287 at ¶6 [*Oceanus*].
[10] *Dima*, *supra* at ¶27.

[56] Until its debt was paid or the property was sold, TD continued to hold a valid security interest which it could assign to a third party. That does not dispense with the foreclosure order. Assignees step into the shoes of the assignor. The assignment could not place the Browns as assignees in a better position than that of the Bank, whose interest they acquired.

[57] The assignment did not impair the original foreclosure order and did not dispose of Mr. MacGillivary's equity of redemption, because no sale occurred.

Effect of the July 19, 2021 Order for Foreclosure and Sale

[58] Before Justice Murray, the respondents successfully argued that a discontinuance of a proceeding under *Rule* 9.07 did not prevent a subsequent proceeding "for the same or essentially the same cause". That may be, but is beside the point.

[59] The question is not the effect of the discontinuance on any subsequent proceeding, but whether the first proceeding could be unilaterally discontinued by TD without addressing the outstanding foreclosure order.

[60] Our *Rules* are silent on whether discontinuance without leave is permissible once any type of relief has been ordered. But *Rule* 9 and former *Rule* 40 on discontinuance originate with the English rules promulgated after the *Judicature Acts* of the 19th century. The English rules on which ours were initially based, did not permit unilateral discontinuance once a judgment was obtained.[11] That would embrace interim relief which incidentally accorded the defendant some advantage, even in an undefended action (¶64 below).

[61] A Notice of Discontinuance cannot now be filed once any kind of substantive relief has been granted, without resort to the court. A substantive order does not disappear because the plaintiff no longer wants the relief it has sought and obtained. That relief can only be dispensed with by application to the court that granted it.

[62] In *Oceanus*, the North American Trust Company sued for foreclosure. A defence was filed, but later a Consent Order was granted fixing the amount due on the mortgage. The mortgage was then assigned to Oceanus which started its own action. A defence was filed. The court later granted Oceanus' application for leave

[11] *Fox v. The Start Newspaper*, [1898] 1 Q.B. 636; aff'd [1900] A.C. 19 (H.L.).

to discontinue the second action, substituting Oceanus as plaintiff in the first, commenting that the second action should never have been started. Saunders unsuccessfully appealed, among other things, the discontinuance and the substitution of Oceanus for North American Trust. Although the appeal did not focus on these points, the judge's orders were affirmed.

[63] In *Stevens v. Theatres Ltd.*,[12] the mortgagee obtained judgment with a "reference" to settle the debt. Later the mortgagee purported to sell the property to a third party under its power of sale. The court held the power of sale could not be exercised once the mortgagee had obtained the foreclosure judgment, because that allowed the mortgagor to redeem. That is apposite here because the order of Justice Gabriel allowed redemption upon payment of $106,011.29 plus interest, approved protective disbursements, and costs. TD could not unilaterally deprive Mr. MacGillivary of that right without leave of the court.

[64] *Stevens* was favourably considered by the Supreme Court of Canada in *Petranik v. Dale*[13] in which, like here, the mortgagee obtained a default judgment. The mortgagor neither defended nor sought to redeem. The mortgagee then abandoned the foreclosure action and sold the property. The Supreme Court upheld the trial judge who voided the sale because the purchaser was aware of the foreclosure order. The Court found the mortgagee's equity of redemption survived until the foreclosure became final. It could not be unilaterally discarded by the mortgagee ignoring the court's order and pursuing an alternative remedy.[14]

[65] As a party, TD could always seek to remove itself from the legal proceeding it had started because it had resolved its claim by assigning it. The Browns could have taken their place as plaintiffs. A second action was unnecessary and arguably an abuse of process.

Did the Browns frustrate Mr. MacGillivary's equity of redemption?

[66] The equity of redemption is not a mere personal right. It is an interest in property, arising from equity's recognition that a mortgage is not a conveyance, but a security interest.

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[12] [1903] 1 Ch. 857.
[13] [1977] 2 S.C.R. 959 [*Petranik*].
[14] See discussion in Roach, *supra* at pp. 156-160.

[67] That reality was described by the Ontario Court of Appeal in *Wilson*:[15]

> [4] […] The mortgage is security only: the mortgagee's principal right is to its money: Lord Nottingham in *Thornborough v. Baker* (1675), 3 Swans, 628 at p. 630, 36 E.R. 1000. If the mortgagee elects to resort to its security, then equity steps in to protect the mortgagor and, if he is able to pay the money, permits him to do so and get his land back.

[68] Courts have always generously protected the borrower's right to redeem a mortgage:

> Redemption is the very nature and essence of a mortgage.[16]

[69] These sentiments were recapitulated by Justice Dickson in *Petranik*:[17]

> I conclude by reiterating that an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land [authorities omitted] and that equity has always jealously guarded the mortgagor's right to redeem.

[70] In this case, the Browns have not afforded Mr. MacGillivary the opportunity to redeem his mortgage for the amount fixed in the original order of foreclosure, together with any appropriate adjustments.

[71] As earlier described, after TD had been paid, the Brown's lawyer wrote to Mr. MacGillivary telling him that the mortgage could be redeemed in return for the payment of $125,413.20. Counsel's letter of October 21, 2021 referred to the payout from the Browns to TD of $118,231.81 together with the Browns' legal fees and a per diem interest rate to arrive at the $125,413.20 total. The cost of acquiring the mortgage from TD would be for their own account. That did not form part of the mortgage debt and it was improper to demand an amount which included acquisition costs as a condition for release of the mortgage.

[72] Mr. MacGillivary's equity of redemption was not extinguished by the first foreclosure order. The $125,413.20 demanded by the Browns' lawyer was rightly questioned by Mr. MacGillivary. This sum exceeded by almost $20,000.00 the payout fixed by Justice Gabriel on July 21, 2021. The excessive demands did not stop there.

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[15] *Wilson*, *supra*.
[16] *Noakes v. Rice*, [1902] A.C. 24 at p. 30.
[17] *Petranik*, *supra* at p. 995.

[73] After the Browns started their own action, there were repeated requests by Mr. MacGillivary and the court for the parties to agree on the amount due or at least forward to the court their different views on that amount. Nothing came of any of this.

[74] On more than one occasion, the court raised with counsel for the Browns the significance of the Order for Foreclosure and Sale that had already been granted by Justice Gabriel. But importantly, up until June of 2022, a persistent issue was the amount Mr. MacGillivary would pay to redeem the mortgage. The June 13, 2021 hearing before Justice Gogan confirms as much:

> **MR. MORGAN:** … um, we, ***we agree that the determination of the amount owing, or the amount owing for redemption, the redemption figure we'll call it, that that is really the only, the issue at hand here***, the issue in dispute and we're in agreement, ah, that, ah, if it please the court, we would be prepared in lieu of rescheduling today's hearing, we would be in agreement with, um, that I could, I would provide written submissions to the court, ah, written argument to the court with respect to what that figure should be and then what that figure, the figure…the amount at which that figure should be determined to be. And then in response, Mr. MacGillivary would have the opportunity to file written submissions in response to my argument and if it pleases the court, as I say, then, ah, Your Ladyship could then issue a written decision with respect to a determination of that figure. […]
>
> [Emphasis added.]

[75] Unfortunately, no steps were taken to settle the amount due on the mortgage.

[76] On October 31, 2022, the parties appeared before Justice Murray. Mr. Harvey McPhee was new counsel for the Browns. They were seeking an order of simple foreclosure. Alternatively they asked for foreclosure, sale and possession.

[77] Justice Murray returned to the prevalent theme of payout of the mortgage:

> **THE COURT:** And what was proposed, and as I understood accepted by the court, was that ***Mr. Morgan would file written, a written submission containing that amount and the reason*** or the amount that, I guess, the, the applicant felt was the appropriate figure, and then ***Mr. MacGillivary would have an opportunity to then respond*** to, to that and, and ***then the court would make* [*its*] *decision***…set the matter, set the matter down and make a determination of that amount and then set the date for the final hearing confirming the sale. And at that point, of course, Mr…the rationale, as I listened to the tape, and the, and the

> court record was that Mr. MacGillivary would then know the amount he, he would have to pay should he decide to redeem the property. ***Has any of that happened?***
>
> [Emphasis added.]

[78] The short reply to Justice Murray's question was "no".

[79] Mr. McPhee seemed unaware of any previous such suggestions. He reiterated the relief the Browns sought.

[80] Mr. MacGillivary can be faulted for not availing himself of the summary relief under *Rule* 72 whereby he could have forced, by application, determination of the correct amount due. Had he a lawyer, perhaps that would have happened. Alternatively, the Browns could have done so. Their first counsel suggested as much but never acted on that intention. In the result, there was a second application for foreclosure and alternatively for foreclosure and sale which ultimately produced the order of Justice Murray on March 20, 2023. By this time, the sum claimed by the Browns had ballooned to $146,494.35, including costs of $22,218.49.[18] There is no evidence that the Browns put any other figure to Mr. MacGillivary once efforts to secure another order of foreclosure or foreclosure and sale resumed in the fall of 2022.

[81] The correct amount due on the mortgage had been fixed by Justice Gabriel in July of 2021. That amount—together with interest, costs and any appropriate adjustments—should have been put to Mr. MacGillivary so he could exercise his right of redemption. That never happened.

[82] The figure for redemption ignores Justice Gabriel's ordered amount. Failing to begin with that figure was an error of law.

Can the Deed to the Browns be set aside?

[83] Following Justice Murray's Order for Foreclosure and Sale, a public auction occurred on May 29, 2023. Mr. MacGillivary was notified but did not attend. The Browns did and purchased the property for $320,000.00. They took steps to occupy. They purchased home insurance, changed the Nova Scotia Power account, paid off an outstanding property tax bill, paid deed transfer tax, registered their deed and, with the help of the sheriffs, occupied the property.

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[18] Decision, Appeal Book, Part I, p. 28.

[84] The equity of redemption is extinguished by sale at a public auction, ordered pursuant to an order of foreclosure and sale: *Pew v. Zinck*.[19]

[85] Although the sale extinguishes the equity of redemption, this does not mean the purchaser always receives indefeasible title. The court retains jurisdiction to set aside a foreclosure sale in appropriate circumstances. As Justice Rand confirmed in *Pew v. Zinck*:[20]

> On what grounds, then, may the court refuse to confirm? Although it would be impossible to enumerate them all, fraud, mistake, misconduct by the purchaser, error or default in the proceedings are well established. But the controlling fact to which these grounds give emphasis, is that the purchase can be defeated only by juridical action. To hold, on the other hand, that the court, acting otherwise than in setting aside the sale, can destroy such a right would be to attribute to it the repudiation of its own contract without proper cause.

[86] An obvious example of where the court is unlikely to set aside a purchase at a foreclosure and sale, is if the purchaser is an innocent third party (*Atlantic Trust Co. Ltd. v. H. & E. General Stores Ltd*.).[21]

[87] In this case, the Browns are not third parties. They purchased the TD mortgage. As assignees, they stepped into TD's shoes. They pursued the proceedings that followed in which Mr. MacGillivary was prevented from redeeming the mortgage for an appropriate payment. The court retains jurisdiction to set aside the Deed they acquired at a public auction which they had sought.

[88] The Browns did not give Mr. MacGillivary a correct figure to redeem his mortgage. He should be given that opportunity. On the other hand, Mr. MacGillivary has asserted his right to redeem without taking legal steps to implement that right.

[89] Mr. MacGillivary's right to redeem should begin with the figure fixed by Justice Gabriel on July 21, 2021 of $106,011.29 together with interest of 5% a year from July 19, 2021, until payment. To that sum should be added reasonable costs of obtaining that relief. Six thousand five hundred dollars, inclusive of disbursements, is appropriate. But Mr. MacGillivary's indolence comes with a price. He did not attend the motion to set aside his defence. He did not attend the sale ordered by Justice Murray. He did not apply for a stay until after the sale and

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[19] [1953] 1 S.C.R. 285.
[20] *Ibid* at p. 289.
[21] (1977), 25 N.S.R. (2d) 526 (NSSC TD).

his eviction from the property. His conduct has put the Browns to unnecessary expense. As a condition of exercising our equitable discretion to set aside the sale, Mr. MacGillivary should pay the Brown's non-legal expenses resulting from his inertia. Mr. MacGillivary should repay any unrecoverable expenses of the Browns associated with their purchase of the property.

[90] At this time, the Court will issue no order pending the following: Mr. McPhee, on behalf of the Browns, will put to Mr. MacGillivary the Browns' calculation of interest and unrecoverable expenses on the assumption that Mr. MacGillivary will pay out the mortgage and a deed reconveying the property to Mr. MacGillivary will be required. He must do so by April 29, 2024. Mr. MacGillivary must reply by May 6, 2024. If Mr. MacGillivary does not agree to the sum claimed or does not reply, each party will write to the Court with submissions, not exceeding eight pages, on what the correct amount should be. They must do so by May 13, 2024. All calculations should take into account the monies placed in trust in accordance with the stay granted by Justice Bourgeois. The Court will then fix the sum and date for redemption.

[91] The Court's Order will be held in abeyance pending advice about whether Mr. MacGillivary has redeemed on the redemption date, as determined by the process set out in this decision. The Court then will issue a final Order. There will be no costs of the second foreclosure proceeding. Costs on appeal will be reserved until the outcome of redemption is known.

Bryson J.A.

Concurred in:

Farrar J.A.

Beaton J.A.