2000 **S. H. No. 162865**

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: CIBC Mortgage Corporation v. Jordan, 2001 NSSC28

BETWEEN:

CIBC MORTGAGE CORPORATION, a body corporate

PLAINTIFF

- and -

J. WILLIAM JORDAN and MARGARET R. JORDAN

DEFENDANTS

- and -

N/A

DEFENDANT/GUARANTOR

D E C I S I O N

HEARD BEFORE: **The Honourable Justice John M. Davison, Supreme Court of Nova Scotia, on February 7th, 2001, at Halifax, Nova Scotia, in Chambers**

DECISION: **February 12th, 2001**

COUNSEL: **Mr. James Musgrave, for the Plaintiff**
Mr. William Jordan, Q. C., for the Defendants

Davison, J.:

[1] This is an application for foreclosure and sale of a mortgage signed in February, 1980, with a number of subsequent renewals. The last renewal was in November, 1999 with a maturity date of May 1st, 2000.

[2] There has been major default in payment of the terms stipulated in the mortgage. The mortgagee has not received any payments since November, 1999. There are substantial arrears.

[3] When the mortgage matured on May 1st, 2000, it was not renewed. The mortgagee seeks an order for foreclosure and sale pursuant to ***Civil Procedure Rule* 47**.

[4] It is the submission of the mortgagor that the court is able to effect a discontinuance pursuant to s. 42 of the ***Judicature Act***. This section reads as follows:

> 42 (1) In this Section, "mortgagor" means the original mortgagor to a mortgage document and includes any person deriving title through him.
>
> Discontinuance of Foreclosure Proceeding
>
> (2) A mortgagor, who is in default of a mortgage
>
> (a) either
>
> (i) in failing to make a payment of principal or interest or

a payment otherwise due under the mortgage, or

(ii) in failing to observe a covenant or term of the mortgage; and

(b) if, as a result of the default referred to in either subclause (i) or (ii) of clause (a) or both, the whole of the balance of the outstanding principal and interest secured by the mortgage has become due and payable,

may before the granting of an order for foreclosure or foreclosure and sale make an application to the Supreme Court to have any proceedings commenced by the mortgagee for the order for foreclosure or foreclosure and sale discontinued.

Conditions for Discontinuance

(3) The Supreme Court may grant an order of discontinuance conditional upon

(a) the payment of all arrears of principal and interest and any other payments due under the mortgage;

(b) the performance of the covenant in default;

(c) the payment of any costs and expenses incurred by the mortgagee and allowed by the Supreme Court; and

(d) the performance of the conditions of the order within such time as the Supreme Court may allow.

One order only for each mortgage

(4) The Supreme may not grant more than one order pursuant to this Section in respect of the same mortgage.

[5] Mr. Jordan stated during the hearing he will receive sufficient fees in March 2001 to pay the arrears and will then apply to another lender to pay to the mortgagee the balance owing on the mortgage.

[6] Section 42, which was formerly s. 38(A), was considered by Justice Glube, as she then was in ***Credit Foncier Franco-Canadien v. Fort Massey Realties Ltd. and Spiropoulos*** (1981), 46 N.S.R. (2d) 383. Justice Glube stated at page 400:

> It would normally be anticipated that the section would apply to a mortgagor in default of a mortgage which has an unexpired term. This seems to be the natural interpretation of the section based on subs. 3 which allows the court to grant an order of discontinuance conditional on the payment of all arrears of principal and interest in default.
>
> In the present case I am unable to find that there are any arrears. What has occurred is that the 5-year mortgage has ended and the whole of the principal and interest was due. I am unable to order the plaintiff to enter negotiations to renew the mortgage under this section. The parties negotiated for a considerable period of time following September 1, 1979, and have been unable to reach agreement. Although several payments were accepted after the September 1 date, I find this has not created a new mortgage, nor continued the old mortgage. The parties were trying to reach agreement on a new mortgage, but were unsuccessful. I find that this section is not applicable in the present case.

[7] I agree with that reasoning. The mortgage and the renewals of mortgage are ended. All of the balance of principal and interest is outstanding. Even if the mortgagor

was not in default, the mortgagee has the right to seek and obtain the full amount owed under the mortgage.

[8] I would note that even if the mortgage had not matured, no relief could be advanced under s. 42 until all arrears of principal and interest and any other payments due under the mortgage had been paid pursuant to s. 42(3)(a). There has been no payment and there is only a promise to pay, sometime during the month of March, 2001.

[9] Section 42 has been referred to as a "second chance" section. Because the mortgagee can apply for foreclosure when the mortgagor defaults in a payment and, under a standard form of mortgage, require the mortgagor to pay the full amount owing under the mortgage, this section permits reinstatement of the mortgage. As stated by the Law Reform Commission in its report on mortgage foreclosure and sale:

> This reflects the second chance given by the law of equity to a borrower who missed payment but could make them up within a reasonable time.

[10] In my opinion, the court is not able to give a discontinuance of the foreclosure proceeding because:

(1) Section 42 is not applicable to a mortgage whose terms have ended;

(2) There has been no payment of arrears;

(3) The legislature did not intend that section should apply to the factors in this present proceeding.

[11] Although not clearly expressed by Mr. Jordan, it appears he is really seeking an adjournment of the proceedings and the mortgagee refuses to agree to that adjournment. An issue that arises is whether the court should grant an adjournment to the mortgagor by exercising the inherent jurisdiction that rests with the court.

[12] In ***ABN Bank Canada v. NsC Diesel Power Inc.*** (1991), 101 N.S.R.(2d) 361, the Nova Scotia Court of Appeal considered an order given by a chambers judge who set aside a foreclosure order on the grounds of "fairness". Hallett, J.A., stated at page 363:

> There is an inherent jurisdiction in the court to take appropriate action where justice requires the court's intervention.

[13] The Court of Appeal found that the chambers judge did not properly exercise his inherent power by not considering all the facts and applying proper principles to support such an order. It was determined that the chambers judge had a duty to review all of the material and apply proper principles before setting aside the order. He did not do that and that rendered his assessment not to be fair.

[14] An inherent jurisdiction should only be exercised when it is just and equitable to do so. In this proceeding, it seems clear that the mortgagee has been patient and the mortgage is fourteen months in arrears. In my view I should not exercise any inherent jurisdiction that the court may have and grant an adjournment merely on the statement of the mortgagor that funds will be available in four to six weeks and that he will be obtaining funds from another lender to pay off the existing mortgage. Such a decision would not be fair to the mortgagee when you couple it with the fact that the mortgage has matured and full payment should be received by the mortgagee under the terms of the mortgage.

[15] The order for foreclosure and sale will be granted.

J.