IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Bridgewater Bank v. George, 2008 NSSC 351

Date: 20081124
Docket: S.H. 283067
Registry: Halifax

Between:

Bridgewater Bank, a body corporate

Plaintiff

and

Mark George and Michelle Edwards

Defendants

Judge: Associate Chief Justice Deborah K. Smith

Heard: In Chambers, June 26th and September 15th, 2008, in Halifax, Nova Scotia

Last Written Submissions: September 19th, 2008

Written Decision: November 24th, 2008

Counsel: W. Glenn Hodge, Esq. - Counsel for the Bridgewater Bank
Mark George and Michelle Edwards - No one appeared

By the Court:

[1] This matter involves an application by the Bridgewater Bank, as mortgagee, for a deficiency judgment against Mark George and Michelle Edwards in relation to a property located at 9 Harris Road, in Dartmouth, Nova Scotia.

BACKGROUND

[2] On May 3rd, 2006, Mark George and Michelle Edwards (hereinafter referred to as "the Defendants") mortgaged the property in question to the Bridgewater Bank as security for indebtedness in the principal amount of $142,290.00. The mortgage eventually fell into arrears. On July 9th, 2007 a foreclosure action was commenced against the Defendants. On September 4th, 2007 this Court issued an Order for Foreclosure, Sale and Possession in relation to the property pursuant to which the Bank was granted the right to apply to assess the amount of any deficiency.

[3] On April 9th, 2008 the Bank filed an application for a deficiency judgment against the Defendants. The matter was scheduled to be heard in regular chambers on April 29th, 2008. At the time that the application was filed the property was owned

by the Bank (the Bank having purchased the property at a Sheriff's sale on October 11th, 2007 for $3,995.46.)

[4] Between the filing of the application and the date that the matter was scheduled to be heard, the Bank entered into an Agreement of Purchase and Sale in relation to the property. Accordingly, the hearing of the application was adjourned.

[5] On May 16th, 2008 the Bank sold the property for $109,000.00. On June 26th, 2008 the Bank proceeded in Chambers requesting a deficiency judgment against the Defendants in the amount of $56,302.24. At the time of the hearing the Court raised a number of issues in relation to the application many of which were resolved in Chambers. However, the following issues remained:

(1) The value of the property for the purpose of calculating the deficiency;

(2) Cleaning charges;

(3) Repairs to the back deck; and

(4) A charge of $685.00 plus GST [total of $780.90] for adding Glycol to the hot water heating system.

[6] Additional evidence was filed by the Bank in relation to these issues and the matter returned to Chambers on September 15th, 2008. The issue of repairs to the back

deck was resolved to the Court's satisfaction. However, the other issues (the value of the property for the purpose of calculating the deficiency, cleaning charges and the charge of $780.90 for adding Glycol to the hot water heating system) remained outstanding.

[7] A further Supplementary Affidavit was filed with the Court by the Bank on September 19th, 2008.

[8] **ISSUES**

(a) Is the Bank entitled to a deficiency judgment?

(b) If so – what is the value of the property for the purpose of calculating the deficiency judgment?

(c) Protective disbursements.

(a) Is the Bank entitled to a deficiency judgment?

[9] On May 3rd, 2006 the Defendants mortgaged the property in question. The Order for Foreclosure, Sale and Possession issued by the Court on September 4th, 2007 allowed for the sale of the property, established that the amount due to the Bank at that

time pursuant to the mortgage was $133,543.15 plus interest and permitted the Bank to apply to assess the amount of any deficiency after the sale.

[10] Civil Procedure Rule 47.10 (1) deals with deficiency judgments and provides:

> **Order for deficiency judgment**
>
> **47.10.** (1) Where in the case of sale pursuant to rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest, and disbursements, as authorized by the mortgage instruments, and costs, and the person against whom the deficiency is claimed is a defendant, the plaintiff may be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency.
>
> **.....**

[11] In this case the Bank purchased the property at the Sheriff's sale and subsequently sold it to a third party. The amount received on the sale was significantly less than the amount owing to the Bank. I am satisfied that the Plaintiff is entitled to a deficiency judgment against the Defendants. The amount of the deficiency judgment will be dealt with below.

(b) <u>What is the value of the property for the purpose of calculating the deficiency judgment</u> ?

[12] The Bank seeks a deficiency judgment based on the difference between the price paid by the third party following the Sheriff's sale and the amount outstanding on the mortgage adjusted to account for sale costs and expenses, protective disbursements, legal fees and interest.

[13] In September of 2007, the Bank commissioned a "drive-by" appraisal of the property which indicated that the property's market value at that time was between $120,000.00 and $140,000.00. In March of 2008, the Bank commissioned a full appraisal of the property which indicated that the market value at that time was $119,000.00. Less than two months later the Bank sold the property to a third party for $109,000.00. After adjustments on closing the Bank received $109,115.20 from the sale. The Bank proposes to use this latter figure (of $109,115.20) when calculating the deficiency judgment.

[14] In the case of **Royal Bank of Canada v. Marjen Investments Ltd. et al.** 1998 NSCA 37 Bateman, J. A. reviewed the history of foreclosure practice in this province and stated at pp. 27-28:

> As Hallett, J.A. said in **England, supra**, the mortgagee on a resale is not obliged to obtain the 'fair market value' for the property, as projected in an appraisal report, but

> rather *the Court is to assess whether the sale price is reasonable in the circumstances*. The new wording of **Rule 47.10(2)** permits the judge to deem the sale price to be 'fair market value' but 'fair market value' is not necessarily synonymous with the appraised value. The **Rule** does not distinguish, as did its predecessor, between a circumstance where the mortgagee applies for a deficiency before reselling the property and that where the mortgagee applies after the property is resold. *When the property has been resold, the judge, in the proper exercise of his or her discretion, must consider all of the circumstances, which includes evidence of the resale price and the market activity as well as other relevant details surrounding the foreclosure.* A market appraisal is simply one estimate of 'fair market value'. Provided the mortgagee has, in the circumstances, made reasonable efforts to resell the property the Court should not without good reason depart from that price as the true indicator of value.....Notwithstanding the amendment to the **Rules**, *the duty of the Court remains to assess whether the price obtained by a mortgagee who resells the property is a reasonable price in the circumstances and, thus, should be the amount used to calculate the deficiency*.....
>
> [Emphasis added]

[15] In order to determine whether a sale price was reasonable the Court requires evidence of all relevant circumstances surrounding the sale including the price that the property was listed for, any offers that were received, how long the property was on the market and any other relevant information that would assist the Court in determining whether the sale price was reasonable.

[16] In the original materials filed in support of this application the Court was provided with evidence concerning the amount that was paid by the Bank for the property at the Sheriff's sale, the two appraised values of the property and the amount that a third party eventually paid for the property. However, the Court was not given

any evidence concerning the price that the property was listed for sale at, what offers were received on the property or how long the property was on the market. I therefore requested, and subsequently received, this additional information.

[17] According to the affidavit of Desneige Lougheed filed on September 19th, 2008 the property was listed for sale on November 9th, 2007 for $149,900.00. Between November 9th and December 13th, 2007 the property was shown on four separate occasions but no offers to purchase were made.

[18] On December 13th, 2007 the listing price was reduced to $144,900.00. According to Ms. Lougheed's affidavit, between December 13th, 2007 and January 11th, 2008 the property was shown four additional times, however, no offers to purchase were made during this period.

[19] On January 11th, 2008 the listing price was reduced to $135,000.00. Between January 11th and February 5th, 2008 the property was shown, however, no offers to purchase were made.

[20] On February 5th, 2008 the listing price of the property was reduced to $129,900.00. On February 18th, 2008 the Bank received its first offer to purchase in the amount of $105,000.00. The Bank countered with an offer of $125,000.00. The perspective purchaser filed a counter-offer in the amount of $108,000.00 which was not accepted.

[21] On February 21st, 2008 the Bank received a second offer in the amount of $110,000.00. A counter-offer was made in the amount of $122,000.00. No agreement was reached.

[22] On February 25th, 2008 an offer was received in the amount of $115,000.00 from the same party that had offered $110,000.00 on February 21st, 2008. That offer was declined.

[23] On March 31st, 2008 the same prospective purchaser offered to buy the property again for $115,000.00. That offer was accepted by the Bank, however, the purchaser was unable to obtain insurance to complete the sale as the roof on the property did not pass inspection.

[24] On April 16th, 2008 the same prospective purchaser offered to buy the property for the sum of $105,000.00. The Bank countered with an offer of $109,000.00 which was accepted.

[25] I am satisfied from the evidence presented, in particular, the history of the marketing of the property as provided in Ms. Lougheed's supplemental affidavits, that the sale price that the Bank received in the amount of $109,000.00 (adjusted on closing to $109,115.20) was reasonable in the circumstances and, accordingly, should be the amount used to calculate the deficiency judgment.

(c) Protective disbursements

[26] The Court's focus on an application for a deficiency judgment is to insure that the mortgagee recovers no more than "is just and reasonable" (per Bateman, J.A. in **Royal Bank of Canada v. Marjen Investments Ltd. et al.**, *supra*, at p. 15.)

[27] In **Marjen**, *supra*, the Nova Scotia Court of Appeal confirmed that **reasonable** expenses incurred by a mortgagee while preserving a property for resale are properly

recoverable on an application for a deficiency judgment. Bateman, J.A. stated at pp. 31-32:

> It has been the practice in Nova Scotia to allow a mortgagee on a deficiency application to claim reasonable expenses incurred up to the date of the application and to require the mortgagee to account for any income earned on the property during that same period. In **Nova Scotia Savings and Loan Co. v. MacKay et al.** (1980), 41 N.S.R. (2d) 432 Hallett, J., as he then was, at p. 437, explained the rationale for so doing:
>
> > '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. *This court has therefore imposed certain obligations on the mortgagees before a deficiency judgment will be granted and it would seem only just that coincident with these obligations mortgagees should, where the mortgagee has purchased at the Sheriff's Sale, if the mortgagor has so contracted and the mortgagee has so pleaded, have the right to expend moneys to protect the property and to recover the same on a claim on the covenants so long as the expenditures were properly and reasonably incurred to realize the best price possible so as to minimize a claim for a deficiency against the mortgagor. In particular, a mortgagee should, if the mortgage so provides, be entitled to claim on the covenants to reimburse the mortgagee for real estate commissions actually paid and reasonable legal fees on the resale plus costs of maintenance, repairs and taxes during the period the property is held by the mortgagee after purchase at the foreclosure sale and prior to disposing of the same, less any revenue from the property. It goes without saying that the mortgagee must manage the property*

> *prudently and make reasonable efforts to dispose of the property at the best price that can be obtained at the earliest possible time. The foregoing expenses should be allowed by the Court in calculating the ultimate deficiency where it does not exceed the deficiency on the Sheriff's Sale.'*
>
> [Emphasis in the original]

[28] The obligation is on the mortgagee to provide the Court with evidence which will allow it to determine whether the expenses claimed were properly and reasonably incurred. Guidance in this regard is found in Practice Memorandum No. 13 which deals with foreclosure applications and provides as follows in relation to an application for a deficiency judgment:

> **III. Applications For Deficiency Judgment or Distributions of Surplus**
>
> .....
>
> 3.3 General Provisions
>
> (a) The originals or true copies of all invoices or receipts relating to the claim must be available in court for inspection. The plaintiff's solicitor shall file an accompanying memorandum explaining and justifying each item claimed.
>
> (b) .....Particulars of protective disbursements and taxable disbursements are to be set out in an affidavit and must include sufficient detail to show work done or material

provided, the necessity of work or material, the necessity of other kinds of charges and the recoverability of the charges.

.....

3.5 Claim for Deficiency

(a) .....Where the mortgagor has so contracted and the mortgagee has so pleaded, the mortgagee has the right 'to expend moneys to protect the property and to recover the same on a claim on the covenants so long as the expenditures were properly and reasonably incurred to realize the best price possible so as to minimize a claim for a deficiency against the mortgagor.' (*Nova Scotia Savings and Loan Co. v. MacKay and MacCulloch*, [1979] N.S.J. No. 768, 41 N.S.R. (2d) 432 (T.D.) at para. 16 quoted with approval in *Royal Bank of Canada v. Marjen Investments Ltd.,* [1998] N.S.J. No. 4, 164 N.S.R. (2d) 293 (C.A.) at para 59.) The Court will allow only those items which: (a) are authorized by the mortgage; (b) were necessarily expended for the purpose of preserving and protecting the property; and (c) are demonstrated *by evidence* to have been necessary and reasonable, the specifics of which are set out in an affidavit of the mortgagee or its officer.

.....

3.7 Commentary on Protective Disbursements

A claim for a protective disbursement must be supported by evidence and explained in a chambers memorandum. A claim for a protective disbursement will not be allowed unless the mortgage provides for both the payment and its inclusion in the mortgage debt. The memorandum should refer to the term relied upon and if its meaning is in any way open to interpretation, the memorandum should provide a submission for interpretation mindful that the term is part of an

> adhesion contract. The affidavit on behalf of the mortgagee must contain sufficient detail so the Court can ascertain whether the disbursement is within the wording of the mortgage, whether the expenditure was necessary and whether the amount was reasonable.....
>
> [Emphasis in the original]

[29] As is seen from the above, on an application for a deficiency judgment the Court must be provided with **evidence** upon which it can satisfy itself that the expenses claimed were **properly** and **reasonably** incurred. It is not enough to simply state that an expense was incurred. Evidence must be presented which satisfies the Court that the expense was both proper and reasonable.

[30] I turn now to the protective disbursements claimed in this application that caused the Court concern.

[31] In the original affidavit filed by the mortgagee in support of this application a claim was made at paragraph 9 for "cleaning" in the amount of $5,699.43. At paragraph 17 of the same affidavit the following is stated in relation to this expense:

> 17. THAT on October 30, 2007, the Property was cleaned at a cost of $4,999.50 plus HST (total cost of $5,699.43). This cleaning consisted of removing interior and exterior debris left at the property as shown in the photographs at Exhibit "J", and general cleaning of the interior and exterior of the property. Significant fees were incurred in the removal of [a] lean-to located

> at the front of the Property. Upon securing, Keyfacts noted the Order to Remedy Dangerous or Unsightly Conditions posted at the Property by Halifax Regional Municipality dated October 9, 2007, which required the removal of the lean-to. A copy of this Order is attached hereto as Exhibit "L".

[32] In addition, the Court was provided with photographs of the premises which showed a state of disarray.

[33] A supplementary affidavit was filed with the Court by the mortgagee prior to the hearing of the application. Attached to that affidavit was a detailed invoice relating to this claim in the amount of $5,699.53 [incorrectly referred to in the mortgagee's affidavit as $5,699.43.] This invoice disclosed that the claim being advanced was not solely for cleaning the property but also included a number of repairs to the property.

[34] According to this invoice, the sum of $1,075.25 was charged for removing all debris from inside the home and to "scrub and shine" the interior of the home. In addition the sum of $1,275.00 was charged for removing all exterior garbage from the yard (and inside the lean-to) and to demolish the lean-to and take it to the landfill. These figures add up to $2,350.25. GST [at the then rate of 14%] on this amount is an additional $329.03. The mortgagee is therefore claiming $2,679.28 for these expenses relating to clean up of the property.

[35] The mortgagee referred the Court to clauses 9, 17 and 19 of the mortgage in question in support of its claim for protective disbursements. These clauses read as follows:

> 9. It is further stipulated, provided and agreed that the Mortgagee may pay the amount of any encumbrance, lien or charge now or hereafter existing, or to arise or to be claimed upon the said lands having priority over this mortgage, including any taxes or other rates on the said lands or any of them, and may pay all costs, charges and expenses which may be incurred in taking, recovering and keeping possession of the said premises, and all solicitor's charges or commissions for or in respect of the collection of any overdue instalments or any other moneys whatsoever payable by the Mortgagor hereunder, as between solicitor and client, whether any action or other judicial proceedings to enforce such payment has been taken or not, and the amount so paid and insurance premiums for fire or other risks or hazards and any other moneys paid hereunder by the Mortgagee shall be added to the debt hereby secured and be a charge on the said lands and shall bear interest at the rate aforesaid and shall be payable forthwith by the Mortgagor to the Mortgagee, and in the event of the Mortgagee paying the amount of any such encumbrance, lien or charge, taxes or rates, either out of the moneys advanced on the security of this mortgage or otherwise, the Mortgagee shall be entitled to all the rights, equities and securities of the person or persons, company, corporation or Government so paid off, and is hereby authorized to retain any discharge thereof, without registration, for a longer period than six months if the Mortgagee deems it proper to do so.
>
> 17. The Mortgage [*sic*] or its agent or agent from Canada Mortgage and Housing Corporation (herein called "CMHC") may at any time before or after default, and for any purpose deemed necessary by the Mortgagee or CMHC, enter upon the mortgaged premises to inspect the lands and the buildings thereon. Without in any way limiting the generality of the foregoing, the Mortgagee or CMHC (or their respective agents) may enter upon the said lands to conduct any environmental testing, site assessment, investigation or study deemed necessary by the Mortgagee or CMHC and the reasonable costs of such testing, assessment, investigation or study, as the case may be, with interest at the mortgage rate, shall be payable by the Mortgagor forthwith and shall be a charge upon the mortgage [*sic*] premises. The exercise of any of the powers enumerated in this clause shall not deem the

> Mortgagee, CMHC or their respective agents to be in possession, management or control of the said lands.
>
> 19. The Mortgagor covenants and agrees with the Mortgagee that in the event of default in the payment of any instalment or any instalment or any other moneys payable hereunder by the Mortgagor or on breach of any covenant, provisio or agreement herein contained, after all or any part of the moneys hereby secured have been advanced, the Mortgagee may, at such time or times as the Mortgagee may deem necessary and without the concurrence of any person, enter upon the said lands and may make such arrangements for completing the construction of, repairing or, putting in order any buildings or other improvements on the mortgaged premisses, or for inspecting, take care of, leasing, collecting the rents of and managing generally the mortgaged property as the Mortgagee may deem expedient; and all reasonable costs, charges and expenses, including allowances for the time and service of any employee of the Mortgagee or other person appointed for the above purposes shall be forthwith payable to the Mortgagee and shall be a charge upon the mortgaged property and shall bear interest at the mortgage rate until paid.

[36] The evidence provided to the Court established, to my satisfaction, that it was necessary for the mortgagee to have someone clean the property. I was also satisfied that the mortgage in question allowed for recovery of the type of protective disbursements being claimed. Unfortunately, however, I was unable to determine whether the expenses that were incurred for this clean up were reasonable as I was not provided with the number of hours that it took to clean the property nor was I provided with the cost per hour that was charged for these cleaning services. I therefore requested this additional information.

[37] In a further supplementary affidavit filed by the mortgagee the Court was advised that the interior clean up of the property involved two persons working a total of 16 hours [eight hours each] at a rate of $67.20 per hour per person. This rate included the cost of cleaning materials.

[38] The exterior cleaning of the property (including the required demolition of the lean-to and the removal of all exterior garbage from the property) involved four people working three hours each [a total of 12 hours] at a rate of $106.25 per hour per person. This hourly rate included materials (although no evidence was given concerning the materials that were required) as well as transportation of the debris to the landfill and dumping fees (although no evidence was given concerning the amount of the transportation charges or of the dumping fees.)

[39] As indicated previously, I am satisfied from the evidence presented that it was proper for the mortgagee to incur expenses for the cleaning of this property. The photographs that have been tendered show that the home was left in a state of disarray. It was, in my view, proper and reasonable for the Bank to clean up the property in order to list it for sale.

[40] In addition, I have no difficulty with the number of hours that were spent on the clean up. The photographic evidence supplied to the Court satisfies me that the amount of time spent on the clean up of this property was reasonable.

[41] I have not, however, been given sufficient evidence to satisfy me that it was reasonable for the mortgagee to pay a rate of $67.20 per hour per person for interior clean up of this property. Nor have I been given sufficient evidence to satisfy me that it was reasonable for the mortgagee to pay a rate of $106.25 per hour per person for the demolition of the lean-to or the removal of garbage from the yard and inside the lean-to.

[42] No evidence was presented which would suggest that this property required specialized cleaning or that the individuals involved required specialized training. Absent such evidence it is difficult to understand why the mortgagee would agree to pay $67.20 per hour per person for the cleaning of floors, scrubbing of bathrooms, etc. or $106.25 per hour per person for removal of garbage and the dismantling of a lean-to. It is acknowledged that these rates included materials, transportation and dumping fees but no evidence was provided to the Court concerning the amount of these expenses.

[43] As stated above, protective disbursements claimed by a mortgagee on an application for a deficiency judgement must be both properly and reasonably incurred. I am unable to conclude, based on the evidence presented, that a rate of $67.20 per hour per person for interior clean up and $106.25 per hour per person for exterior clean up and removal of the lean-to was reasonable. While the Bank is free to pay these rates for such services should they choose to do so – they cannot, in my view, expect to pass these charges on to the Defendants unless they provide the Court with evidence which supports the suggestion that such rates are reasonable.

[44] The Bank's claim for clean up in the amount of $2,679.28 is denied.

[45] As indicated above, I am satisfied that it was proper and reasonable for the Bank to clean up the property prior to listing it for sale and I am also satisfied that the number of hours spent cleaning the property were reasonable. I am prepared to award the Bank the sum of $1,000.00 (inclusive of tax) for this expense. While I acknowledge that this figure is somewhat arbitrary, it is the best that the Court can do with the evidence that has been presented.

[46] That takes me to the charge of $685.00 + GST (total of $780.90) for adding Glycol to the hot water heating system.

[47] In the original affidavit filed by the Bank in relation to this application no reference is made to this expense. The figure of $780.90 was, however, included in the $5,699.43 claimed for "cleaning". In addition, in paragraph 13 of Ms. Lougheed's original affidavit reference is made to the following:

> 13. THAT I am advised by Cheryl Nussli and do verily believe that the Property was winterized on October 31, 2007 at a cost of $70.00 + HST (total of $79.80). It is the policy of the Plaintiff to instruct its inspectors to winterize properties when secured. We believe that it is necessary in order to preserve and protect the Property because without winterization, water pipes can freeze and burst causing unnecessary damage to the Property.

[48] Attached to Ms. Lougheed's first supplementary affidavit is the invoice (referred to in ¶ 33 above) in the amount of $5,699.53. This invoice refers to "Glycol hot water oil furnace – $685.00". No further information was provided to the Court concerning this expense.

[49] At the original hearing held on June 26th, 2008, I inquired about this expense and requested further information concerning this claim. The Bank then filed a further

supplementary affidavit sworn to on July 11th, 2008. At paragraph 4 of that affidavit Ms. Lougheed states:

> 4. THAT item 14 of Exhibit "A" to my Affidavit of June 13, 2008, reads "Glycol hot water oil furnace". I am advised by the property manager, KeyFacts Canada Ltd., that Glycol was added to the hot water heating system (i.e. furnace, pipes and baseboard heaters) as part of the winterization process to protect the heating system. This was reasonable and necessary in order to protect the property from damage caused by freezing and to generally preserve the value of the property.

[50] The Court was not given any evidence concerning what Glycol is. I assume for the purpose of this decision that it is antifreeze. In addition, the Court was not given sufficient evidence as to what was involved in carrying out this process (Why did it cost over $750.00 (including tax) to add Glycol to the hot water heating system? Did the pipes in the house have to be drained? How many hours does this process take? What did the mortgagee pay per hour for someone to perform this function?) Nor was the Court given any evidence as to why it was necessary to add Glycol to the hot water heating system if the property was winterized on October 31st, 2007 at a cost of $70.00 plus HST (total of $79.80.)

[51] While there may be some expenses that the Court is able to determine are reasonable on their face (for example a reasonable fee for mowing a lawn) a fee of $780.90 for adding Glycol to a hot water heating system is not one of them.

[52] The Bank's claim for this expense is denied.

[53] During the course of the hearing on September 15th, 2008 counsel for the mortgagee offered to withdraw his client's claim of $79.80 for winterizing the property in light of the fact that $780.90 was being claimed in relation to the Glycol. I am satisfied that the sum of $79.80 for winterizing the property was properly and reasonably incurred. In light of my conclusion in relation to the Glycol, I will allow the claim in the amount of $79.80 even though an offer was made to withdraw this amount from the deficiency judgment.

[54] There is one additional matter that I wish to comment upon. During the course of this application the Court identified various areas where there was, in the Court's view, insufficient evidence provided. For example, the Court was not given any evidence concerning the price that the property was listed for after the Sheriff's sale, what offers were received in relation to the property, etc. In addition, the Court was

not given sufficient evidence to allow it to determine whether some of the protective disbursements claimed were reasonable (I should indicate that the mortgagee had a different solicitor at the time that the original documents in support of this application were filed.) Counsel for the mortgagee was therefore requested by the Court to obtain additional information and two additional supplementary affidavits were subsequently filed.

[55] This practice – of the mortgagee filing its materials in support of a deficiency judgment application – the Court identifying the areas where insufficient evidence has been given – and the mortgagee filing supplementary materials to "fill in the gaps" should not be expected or relied upon by the Bar. A party coming before the Court, including an applicant for a deficiency judgment, should present all relevant evidence to the Court at the time of the hearing and expect a ruling based on the evidence presented. If insufficient evidence is given in relation to a claim (for example, insufficient evidence that a protective disbursement was properly or reasonably incurred) it is likely that the claim will be denied. Counsel should not expect a list of deficiencies from the Court and then an opportunity to submit further evidence.

CONCLUSION

[56] The deficiency judgment will be calculated using the price actually obtained by the mortgagee from the sale that occurred on May 16th, 2008 ($109,115.20.)

[57] The mortgagee's claim in the amount of $2,679.28 for expenses relating to the clean up of the property is reduced to $1,000.00 (inclusive of tax).

[58] The mortgagee's claim of $780.90 for adding Glycol to the hot water heating system is denied.

[59] In all other respects the application for a deficiency judgment is granted subject to the various adjustments that were made in court on June 26th, and September 15th, 2008.

[60] An Order will issue accordingly.

Deborah K. Smith
Associate Chief Justice