Date: 20000510
Docket: S.H. 146609
S.H. 146610
S.H. 146611

IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: Royal Trust Corporation of Canada v. Pentagon Investments Ltd., 2000 NSSC 115

BETWEEN:

Royal Trust Corporation of Canada — Plaintiff

- and -

Pentagon Investments Limited and James Chen — Defendants

and BETWEEN:

Royal Trust Corporation of Canada — Plaintiff

- and -

Pentagon Investments Limited, James Chen and May Yin Chen — Defendants

and BETWEEN:

Royal Trust Corporation of Canada — Plaintiff

- and -

Pentagon Investments Limited and James Chen — Defendants

DECISION

Heard Before: The Honourable Justice John M. Davison

Place Heard: Halifax, Nova Scotia

Date Heard: May 3, 2000

Decision Date: May 3, 2000 (Orally) WRITTEN RELEASE: May 10, 2000

Counsel: Stephen Kingston, for the Plaintiffs

No appearance for the Defendants

DAVISON, J:

[1] The plaintiffs sought a deficiency judgment against the defendants following foreclosure of mortgages on three properties in Dartmouth, Nova Scotia known as civic numbers 7, 9 and 14 Jackson Road. The application came before me in chambers on April 29, 1999.

[2] The major issue relates to extensive expenses incurred by Jacques Whitford Ltd., an engineering company, with respect to environmental assessments and the remedy of environmental damage effected to the properties. The particulars of the claim with respect to the environmental difficulties are as follows:

7 Jackson Road	$785,388.34
9 Jackson Road	36,622.12
14 Jackson Road	270,621.50
	$1,092,631.96

The work performed by Jacques Whitford Limited was done in phases. Phase 1 involved an assessment which indicated environmental damage had occurred to civic numbers 7 and 14 Jackson Road. There was no damage discovered with respect to the premises known as civic number 9 Jackson Road.

[3] At the time of the application for deficiency judgments I expressed concern about the considerable amount being claimed against the defendants for environmental matters and further concern that the individual defendant, James Chen, had not received notice of the application for deficiency judgment. Pentagon Investments Limited advised the solicitor for the plaintiff it was not interested in the application for deficiency judgment and according to the advices of counsel for the plaintiff, that company is now bankrupt.

[4] At the hearing I questioned how the court could determine that the amount of the costs sought by the mortgagee was reasonable, and a discussion took place with counsel for the plaintiff about the need for the appointment of a court expert pursuant to *Civil Procedure Rule* 23.01 which reads:

> 23.01 (1) Where independent technical evidence would appear to be required, the court may at any time appoint one or more

> independent experts to inquire and report on any question of fact or opinion not involving questions of law or construction.
>
> (2) Unless the parties otherwise agree, a court expert shall be nominated by the court and his instructions shall be settled by the court.
>
> (3) The court may from time to time make such further orders as it deems necessary to enable the court expert to carry out its instructions, including the making of experiments and tests.

[5] By way of background, it should be noted the originating notices and statements of claim were issued in April 1998 and served on the corporate defendant, Pentagon Investments Limited, on April 14, 1998. On May 7, 1998 the court granted an order for substituted service with respect to service on James Chen, formerly of 930 Young Avenue in Halifax, Nova Scotia. The order provided service by registered mail at 930 Young Avenue, service on two former solicitors of James Chen and service on James Chen's son, Jason Chen. These requirements for substituted service were effected.

[6] The order for foreclosure, sale and possession was granted on June 19, 1998. On September 17, 1998 the sheriff sold the properties to the plaintiff which later discovered environmental problems and retained Jacques Whitford Limited for assessments and remedial work. Briefly stated, the source of the problems was said to be petroleum hydrocarbon contamination present near the site of underground fuel oil storage tanks that were removed from the site in 1997. There was also reference in the reports to flourescent light ballasts possibly containing PCB, the presence of asbestos and the presence of lead in paints.

[7] The proceedings have been delayed for a number of reasons. At one point it was indicated the plaintiff did not wish to proceed with recovery of environmental costs in the deficiency judgment. Subsequently, it was determined the plaintiff did want to proceed on that basis but there were further delays because of attempts to serve James Chen and his wife who was a guarantor on the mortgage on 9 Jackson Road. There was an order of the court granted December 9, 1999 to serve pleadings on Joyce Chen, daughter of James Chen and Joyce Chen resided in Las Vegas, Nevada.

[8] The proceeding was continued on May 3, 2000 not to determine the amount of the deficiency judgment but to determine whether the environmental work was a protective disbursement and to appoint an independent expert to examine and give opinions with respect to the account of Jacques Whitford Limited.

[9] The Nova Scotia Court of Appeal has made reference to protective disbursements in *Royal Bank of Canada v. Marjen Investments Ltd.* (1998), 164 N.S.R. (2d) 293 where Bateman J.A. stated at p. 310:

> It has been the practice in Nova Scotia to allow the 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 and MacCulloch (1980), 41 N.S.R.(2d) 432; 76 A.P.R. 432 (T.D.), 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 and the evidence indicated that it was worth $5,500, 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. 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 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."

And later, at p. 312:

> . . . There is no mention in that Memorandum that a mortgagee could no longer claim expenses and need not account for income. While the default judgment is to be entered not later than twenty days after the Sheriff's sale, the amount due is not entered until the deficiency, if any, is determined by the court. When the mortgagee has purchased the property at the Sheriff's sale, with intention to resell it, it is unlikely that the resale will occur within the twenty-day period. The mortgagor, however, is entitled to the benefit of the deficiency calculated on the resale price, if higher than that paid by the mortgage at the Sheriff's sale. It is illogical, and unfair, in those circumstances to require the mortgagee to bear the burden of any reasonable expenses incurred while preserving the property for resale. Against those expenses should be offset any income derived from the property. A deficiency judgment is intended to provide to the mortgagee a judgment for the amount by which the proceeds from the security fell short of the amount owing on the mortgage. The

> mortgagor benefits from the mortgagee reselling the property because the higher price obtained lowers the deficiency judgment.

[10] In *Nova Scotia Savings and Loan v. MacKay et al.* (1980), 41 N.S.R. (2d) 432 Justice Hallett stated at p. 438:

> . . . 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.

[11] There are provisions in the mortgage giving the plaintiffs rights of repair and in particular I refer to the following clauses:

> If the Mortgagor defaults after any part of the principal has been advanced, the Mortgagee may enter in to complete, repair or manage the property and recover all reasonable expenses with the interest as part of the mortgage.
>
> ...
>
> It is further covenanted and agreed that the Mortgagee may pay ... all costs, charges and expenses which may be incurred in taking, recovering and keeping possession of the said premises, ... and the

> amounts so paid ... 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; ...

[12] Counsel for the plaintiff has referred me to *C.I.B.C. Mortgage Corporation v. Antonsen,* [1999] B.C.J. No. 1385 (B.C. S.C.) where environmental remedial costs were accepted as protective disbursements. In that case the court said at paras. 8, 9 and 10:

> 8 I agree with Van City that the question of whether remediation costs could be added to the redemption amount of the mortgage was an issue before the court. The Master assumed, without deciding, that any costs incurred by Van City in removing pollutants from the property would be added to the redemption amount on the mortgage. This assumption is correct in law: The Waterloo Manufacturing Co. Ltd. v. Holland, [1917] 3 W.W.R. 198 at 199 (Sask. S.C.); Commerce Capital Trust Co. v. Neufeld et al. (1978), 9 B.C.L.R. 321 at 328 (B.C.S.C.). The Master assumed, as well, that remediation costs incurred by Van City would be recoverable pursuant to the amount the borrowers covenanted to pay pursuant to the mortgage. This assumption is borne out by the terms of the mortgage contract, specifically the Borrower's Covenants to (i) keep the land in good condition and repair; (ii) not to do anything that would decrease the value of the land; (iii) to ensure the land does not contain hazardous or noxious substances; and (iv) to remove any such substances and to indemnify and save harmless the lender from all costs and expenses connected with any breach relating to such substances. Under Lender's Remedies, where a default has occurred the lender has the option to compel the borrower to adhere to all of the Borrower's covenants. I agree with Van City that this includes compelling clean-up of the property. The mortgage contract itself anticipates the remedy sought by Van City.
>
> 9 The Master concluded the application should be dismissed because the costs of remediation were not protective disbursements incurred to preserve and protect the value of the property but would serve merely to improve the property and enhance its value. I conclude the Master was clearly in error having regard to: (i) evidence of the existence of Pollution Abatement and Pollution

> Prevention Orders in existence since 1991; (ii) evidence of the decrease in value of the property; and (iii) evidence of an adverse effect on prospective purchasers, supported by evidence that there have been no offers to purchase to date. It is clear that remediation of the property is essential to preserve and protect the value of the property, even though it may have the effect of improving and enhancing the value. The property is not marketable in its present state.
>
> 10 ... The mortgage contract allows Van City to implement a remediation plan at the expense of the borrowers whether or not such cost increases the value of the property and whether or not the result may be an increased liability to the borrower, in this case Mrs. Antonsen.

[13] The liability of secured creditors for rehabilitation of contaminated premises is set out in the *Environmental Act* S.N.S. 1994-95 c. 1. I refer to s. 165 which reads in part as follows:

> (3) Notwithstanding anything contained in this Act or any other enactment, a secured creditor is responsible for rehabilitation at a contaminated site if
>
> (a) the secured creditor at any time exercised care, management or control, in whole or in part, of the site or imposed requirements on any person regarding the manner of treatment, disposal or handling of a substance and the care, management or control or requirements, in whole or in part, caused the site to become a contaminated site; or
>
> (b) subject to subsection (4), the secured creditor becomes the registered owner of the real property at the contaminated site unless an agreement is entered into pursuant to Section 89,
>
> but a secured creditor is not responsible for rehabilitation where it acts primarily to protect its security interest, including, without restricting the generality of the foregoing, where the secured creditor
>
> (c) participates only in purely financial matters related to the site;

> (d) has the capacity or ability to influence any operation at the contaminated site in a way that would have the effect of causing or increasing contamination, but does not exercise that capacity or ability in such a way as to cause or increase contamination;
>
> (e) imposes requirements on any person if the requirements do not have a reasonable probability of causing or increasing contamination at the site; or
>
> (f) appoints a person to inspect or investigate a contaminated site to determine future steps or actions that the secured creditor might take.
>
> (4) Notwithstanding clause 3(b), a secured creditor is not responsible for the rehabilitation of a contaminated site beyond the value of the assets the secured creditor is administering.
>
> (5) Nothing in this Section exempts a secured creditor, receiver, receiver manager, trustee, executor or administrator from any duty to report or make disclosure imposed by a provision of this Act. 1994-95, c. 1, s. 165.

[14] In the present proceeding there was found environmental contamination on two of the sites. I find the remedy of these deficiencies was essential to preserve and protect the property with a view to recovery by the plaintiffs of some of its claim on the covenants. I will direct that recovery of a reasonable amount for this remedial work be classified as protective disbursements. The plaintiffs entered possession of the property before foreclosure and bought the properties at the sale. It paid the full cost of the remedial work which was necessary for the re-sale of the property. The steps taken by the plaintiff were reasonable, and I will consider the report of an independent engineer to determine a reasonable cost.

[15] I accept the suggestion of Mr. Kingston to have Cameron Ells and Andrew J. Blackmer of Dillon Consulting appointed under *Civil Procedure Rule* 23.01. My direction to these engineers is to examine the charges of Jacques Whitford Ltd. and determine whether they were "properly and reasonably incurred to realize the best price possible" to use the words of the Court of Appeal.

[16] The concern which I expressed to counsel during the hearing was whether the cost of assessing premises for environmental damage should be considered a protective disbursement so that recovery can be had for these assessments from a defaulting mortgagor notwithstanding no damage was found. In my view such assessments on properties where it is not reasonable to believe there is contamination does not come within that which I consider to be protective disbursements. The mortgagee must show an assessment was necessary to preserve and protect the property for resale before the assessment could be properly termed a protective disbursement. Otherwise, a practise could develop that many defaulting mortgagors would be responsible for unnecessary assessments.

[17] In this particular situation it is clear that contamination was found on two properties which rendered the assessment of all the properties, to be reasonable and a necessary step to preserve and protect the property for resale. On those facts and those facts alone I am prepared to include the assessment costs of civic number 9 Jackson Road as a protective disbursement.

[18] Counsel may wish to have further details with respect to the order under *Civil Procedure Rule* 23.01. In particular I do note that counsel advances the suggestion that there be an initial spending limit of $5,000 to be established with the further suggestion that if that proved insufficient, the court could consider submissions regarding an increase. It is noted the proposed experts are experts for the court and not for a party. The court has to make an assessment of a judicial nature, and it is imperative that experts retained by the court appreciate the need for them to act in a manner which will assist the court in performing that duty.

J.