

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** iNova Credit Union v. Giamac Inc, 2012 NSSC 431

**Date:** 20121211

**Docket:** Hfx No. 382080

**Registry:** Halifax

**Between:**

iNova Credit Union

Plaintiff

and

Giamac Inc.

Defendant

and

Gerald Giovannetti

Defendant/Guarantor

and

Attorney General of the Province of Nova Scotia

Intervenor

and

Alfred Smithers and Edward Webber

Parties to the Motion

**Judge:** The Honourable Justice Michael J. Wood

**Heard:** December 10, 2012 in Halifax, Nova Scotia

**Decision:** December 11, 2012 (Orally)

**Written Release  
of Decision:** December 14, 2012

**Counsel:** Lloyd R. Robbins, for iNova Credit Union, the plaintiff  
Paul B. Miller, for Giamac Inc., defendant, and Gerald  
Giovannetti, defendant/guarantor  
Richard Arab, for the Attorney General of Nova Scotia,  
intervenor  
Gavin D. F. MacDonald and Mark Mills (Articled  
Clerk), for Alfred Smithers, a party to the motion  
Blair Mitchell, for Edward Webber, a party to the motion

**By the Court:** (Orally)

[1] This motion arises out of the somewhat unusual situation of a foreclosure sale with multiple bidders prepared to pay more than the total owing to the plaintiff mortgagee. The Sheriff sold the property to the second highest bidder when the person who made the highest bid failed to provide the required deposit within the time period set by the Sheriff. This motion challenges the Sheriff's conduct of the sale and, in particular, his disqualification of the high bidder for failure to provide the required deposit.

**BACKGROUND**

[2] Giamac Inc. was the owner of property at 1175 Bedford Highway in Halifax, Nova Scotia. In October, 2009, it mortgaged the property to the plaintiff, iNova Credit Union Limited. Gerald Giovannetti was a principal of Giamac Inc. and guaranteed the mortgage.

[3] iNova commenced these foreclosure proceedings in February, 2012. This Court issued an order for foreclosure, sale and possession on June 1, 2012 and settled the amount due on the mortgage at approximately \$416,000.00.

[4] The plaintiff scheduled a foreclosure sale to take place by public auction at the Law Courts in Halifax on July 10, 2012 at 12:30 p.m. Notice of that sale was sent to Mr. Giovannetti on June 1, 2012. In accordance with that notice, the terms of sale were as follows:

Ten per cent (10%) deposit payable by cash, certified cheque, or solicitor's trust cheque at the time of sale, remainder within fifteen days upon delivery of deed.

[5] In the week prior to the sale, Mr. Giovannetti had discussions with Mr. Alfred Smithers, a local businessman, about potential arrangements with an investor which could have provided sufficient funds to prevent the foreclosure sale from taking place.

[6] At 11:50 a.m. on July 10, 2012, the date of the foreclosure sale, Mr. Giovannetti telephoned Mr. Smithers and advised him that the investor had not provided funds and the foreclosure sale would be proceeding. Mr. Smithers asked Mr. Giovannetti to act as his agent and bid at the sale. Mr. Smithers advised that

he would ensure that funds would be in place for the sale and he instructed his executive assistant to contact his bank and alert them to the fact that money might be required for that purpose.

[7] When Mr. Giovannetti arrived at the Law Courts shortly before 12:30, he spoke with Deputy Sheriff Legere who would be conducting the sale. He asked for permission to bid on behalf of someone who was not present, but could be contacted by telephone. The Deputy Sheriff indicated that this was permissible provided the person stayed on the telephone throughout the sale. Deputy Sheriff Legere asked Mr. Giovannetti if he brought the required down payment with him and was told that he did not. He responded that this was required at the time of sale and he had concerns about this. He said that he advised Mr. Giovannetti that they would “see how the sale went”.

[8] The sale started as scheduled at 12:30 p.m. on July 10. There were between nine and twelve people in the room. In addition to representatives of iNova Credit, there were three other people who bid at the sale. Mr. Stephen Ling dropped out after a bid of \$498,000.00 and Mr. Edward Webber stopped bidding at \$500,000.00. Following Mr. Webber’s bid, Mr. Giovannetti, on behalf of Mr. Smithers, entered his first bid in the amount of \$501,000.00. There were no further bids and the Deputy Sheriff knocked down the property to Mr. Smithers at that price.

[9] Following the completion of bidding, there were discussions amongst a number of people present about whether Mr. Smithers should be given time to obtain the required deposit called for by the terms of sale (i.e. \$50,100.00 payable by cash, certified cheque or solicitor’s trust cheque). There were a number of time periods suggested during these discussions. Counsel for iNova objected to Mr. Giovannetti being given any time to obtain the deposit for Mr. Smithers. He referred to Mr. Giovannetti as being “the reason we are here”. The Deputy Sheriff testified that he felt pressured by counsel for iNova, but ultimately advised Mr. Giovannetti at 12:37 p.m. that he would give him until 1:00 o’clock to obtain the deposit funds.

[10] In his evidence, Deputy Sheriff Legere said that he would usually allow no more than 20-25 minutes for a purchaser to obtain the necessary deposit. He understood that this was the local practice. He also said that normally there were

no competing bidders and so no prejudice that would result from an extension. In those cases, if an extension was not granted, the sales to third parties would be lost.

[11] On July 10, 2012, the Deputy Sheriff said he was concerned about losing the other competing bidders, both of whom had been prepared to pay an amount sufficient to satisfy the plaintiff's mortgage debt and leave a surplus to distribute to subsequent encumbrancers. If that were to happen, he felt it would be prejudicial to iNova Credit.

[12] Mr. Giovannetti left the courthouse at 12:42 p.m. and went to the Toronto Dominion Bank to obtain Mr. Smithers' deposit. While he was doing so, he sent several text messages to Mr. Craig Wells, who had attended the sale with him, informing him of his progress.

[13] By 1:00 p.m. Mr. Stephen Ling had left and Mr. Webber indicated to Deputy Sheriff Legere that the deadline had passed and he wanted bidding to be reopened.

After determining that Mr. Giovannetti had not returned, the Deputy Sheriff requested further bids for the property and Mr. Webber bid \$500,000.00. At that time, Mr. Wells, who Deputy Sheriff Legere did not know, advised that Mr. Giovannetti had the cheque but was waiting for a signature from a bank official and needed more time. This request was refused. Having received no other bids, the Deputy Sheriff sold the property to Mr. Webber for \$500,000.00.

[14] Mr. Wells testified he advised the Deputy Sheriff that Mr. Giovannetti was on his way with the cheque, but it is not clear whether this was before or after the property had been sold to Mr. Webber.

[15] Once the sale was concluded, the Deputy Sheriff and Mr. Webber completed the written Acknowledgement of Purchase and Mr. Webber provided a bank draft in the amount of \$50,000.00. It was noticed that it was payable to "iNova Credit" and it was suggested that the two iNova representatives who were present could endorse it so that it could be deposited by the Sheriff's office.

[16] After the draft was endorsed by the iNova Credit representatives, the Deputy Sheriff took it to the Court Administration office for delivery to the

Accounting office. According to the Deputy Sheriff, the deposit would take place the next day. Upon delivery of the draft to the administration office, Deputy Sheriff Legere was told that it would be “preferable” to have the draft replaced with one that was payable to the Sheriff’s office in trust. He returned and advised Mr. Webber of this who agreed to provide a replacement. Deputy Sheriff Legere retained the original draft. Ultimately, a replacement was provided by Mr. Webber the next day.

[17] Mr. Giovannetti returned to the courthouse with Mr. Smithers’ draft and saw the other parties to the foreclosure sale leaving the building. He says that it was approximately 1:08 p.m. He was advised by Mr. Wells that the property had been sold to Mr. Webber. When Mr. Giovannetti spoke with Deputy Sheriff Legere, he was told that the sale had proceeded because he did not return with the deposit funds by the deadline of 1:00 p.m.

## **CONDUCT OF FORECLOSURE SALES IN NOVA SCOTIA**

[18] The procedure for foreclosure sales is governed by the *Civil Procedure Rules* and, in particular, Practice Memorandum No 1, which incorporates the standard procedure for sheriff’s sales. According to s. 2(b) of that procedure, the terms of payment are as follows:

The purchaser at the time of sale shall pay to the sheriff a deposit of ten percent of the amount of the purchase price by cash, bank draft, solicitor’s trust cheque, or certified cheque.

[19] Section 2(c) states that within fifteen days of the sale, the purchaser shall pay the balance of the purchase price to the sheriff, who will then deliver a deed. Section 4 instructs the sheriff what to do with the sale proceeds, and it states:

The sheriff shall, after payment of sheriff’s fees and property taxes, pay out of the remaining proceeds of the sale, by disbursing to the plaintiff or the solicitor the amount due on the mortgage foreclosed, costs as taxed, and any balance to the prothonotary until further order.

[20] The Nova Scotia Department of Justice has developed Standard Operational and Administrative Policy and Procedures for sheriff services. This includes

guidelines with respect to the conduct of sheriff sales. These policies and procedures include the following statements:

66.17 The Sheriff or his/her designate is to perform Sheriff's Sales in a manner that exhibits understanding, diplomacy, and professionalism.

....

66.19 The Sheriff or his/her designate is to ensure all potential bidders have equal opportunity to bid on the land or property.

66.20 The Sheriff or his/her designate has a duty to the judgement debtor (mortgagor) and the judgement creditor (mortgagee) and to the members of the public bidding at the sale, and is to ensure the land or property is sold to the highest bidder.

....

66.23 The Sheriff or his/her designate is to inform the bidder(s) of the terms of the sale ...

66.24 The Sheriff or his/her designate is to notify the public attending the Sheriff's Sale the land or property is to be sold to the highest bidder.

....

66.28 The Sheriff or his/her designate is to have the successful bidder sign the Acknowledgement (sic) of Purchase immediately following the sale, and is to:

- (a) collect 10% of the purchase price at the time of the sale, as per the terms under the Notice of Public Auction.

....

66.36 The Sheriff or his/her designate is to ensure the disbursements as outlined in the Sheriff's Report are paid (sic) out and/or disbursed according to the Order of Foreclosure.

....

66.38 The Sheriff or his/her designate is to credit any surplus funds after disbursements are made to the Accountant General for the province of Nova Scotia.

[21] There is nothing in the *Civil Procedure Rules*, the order of foreclosure, sale and possession or the policy and procedures for sheriff services which direct what is to happen if the highest bidder at the sale does not have the required deposit at the time their bid is accepted. Jurisprudence indicates, that in these circumstances, the sheriff has a discretion to deal with the issue provided they act reasonably and the procedure chosen does not conflict with the court's order or the *Civil Procedure Rules*. These principles have been developed in cases where the conduct of such a judicial sale has been challenged.

[22] Once a sale has been completed by a judicial officer, such as a sheriff, it should only be set aside in limited circumstances. The Supreme Court of Canada in *Zinck v. Lobster Point Realty Corp.*, [1953] 1 S.C.R. 285 described the circumstances as follows at para. 11:

11 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 purchaser 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.

[23] This Court considered an application to set aside a foreclosure sale in *Atlantic Trust Company v. H. & E. General Stores Limited*, [1977] N.S.J. No. 28. In that case, the solicitor for the mortgagee did not attend the foreclosure sale due to a mechanical breakdown of his car. The sale proceeded in his absence and the property was purchased by the second mortgagee for \$1,000.00. Evidence was adduced to show that the property had a value of between \$13,000.00 and \$19,000.00, and that the second mortgagee was aware that the first mortgagee intended to bid up to \$12,500.00. Justice Hallett, as he then was, exercised his discretion to set aside the sale in the circumstances. He described his rationale at para. 14 as follows:

14 On the facts before me, I find that the sale price as stated was "shockingly inadequate" and should likely be set aside on that ground alone. However,

coupled with the other circumstances I have referred to, there are adequate grounds to exercise my discretion and set the sale aside. I do so on the principles enunciated in 35 *Corpus Juris* at p. 103, as follows:

The general rule against setting aside of (sic) vacating a sale for inadequacy of price does not apply where in connection with the inadequacy of price there are other circumstances having a tendency to cause such inadequacy, or any apparent unfairness or impropriety. Even though such additional circumstances are slight and, if unaccompanied by inadequacy of price, might not furnish sufficient ground for vacating the sale, they furnish the ground when coupled with the inadequacy.

[24] As noted in the following comments of Justice Hallett at para. 20, it is only in special circumstances that the court's discretion should be exercised.

20 It is only where there are special circumstances that the Court's discretion should be exercised and I am satisfied that this is a case where such discretion should be exercised and the sale set aside.

[25] Four years later, Justice Hallett again dealt with an application to set aside a foreclosure sale in *Nova Scotia Savings & Loan Company v. Hill and Hill*, [1981] N.S.J. No. 400. In that case, the sheriff conducting the sale repeatedly asked the parties present if there were any further bids. She followed this procedure for twenty-five advances on the bid and then, hearing no further bids, knocked down the property to a Mr. Baker for \$26,000.00. The complaint was that she did not indicate to the bidders that she was about to sell the property to the last bidder. Justice Hallett concluded that, based upon the procedure followed at the sale, it was reasonable for those in attendance to believe that she would have provided such notice before accepting any bid. As a result, Justice Hallett concluded that the sheriff failed to exercise her duty in a reasonable manner. He also stated that the best price had not been obtained because there was evidence of at least one other bidder who was ready, able and willing to bid up to \$36,000.00. It was the combination of the inadequate price and the unreasonable manner in which the sale was conducted that led Justice Hallett to set it aside (see para. 34).

[26] In *Maritime Form Work v. Sea Star Developments Limited*, [1997] N.S.J. No. 295, this Court dealt with another application to set aside a foreclosure sale. Among the problems alleged was that the sheriff permitted the required down payment to be made after the time of sale and by an uncertified cheque, which was

alleged to be unauthorized and not part of the public advertisement. In that case the sheriff announced the terms of sale, which were that the purchaser would have to deliver a ten percent deposit “by cash, certified cheque or solicitor’s trust cheque”. There were a number of people present, but only one bid was received. The sheriff knocked down the property to that bidder. The circumstances surrounding the payment of the deposit are set out in paras. 26 and 27 of the decision, which state:

26 Representatives of the media immediately converged upon Armoyan. The Sheriff maintained eye contact with him until the Solicitor for Armoyan and Spatz approached. The Solicitor tendered a cheque to the Sheriff in payment of the required deposit. Gregory Cooper, Solicitor for one of the creditors, Zenon Environmental Systems Inc., who was also present at the time, asked to inspect the tendered cheque, and noted that it was drawn on the general account of the Solicitor’s firm and was neither a certified cheque nor a Solicitor’s trust cheque. Cooper objected to the Sheriff and submitted that the sale should be cancelled. However, the Sheriff accepted the cheque.

27 The Sheriff then met in another room with the Solicitor for the purchaser, the Solicitor for the mortgagee, and Cooper. Cooper renewed his objections. The Solicitor for the purchaser showed the Sheriff the certified cheque in the amount of \$75,000.00, payable in trust to the Solicitor’s firm, which he had obtained from Armoyan. The Sheriff requested the Solicitor for the purchaser to arrange for certification of the cheque drawn on the firm general account. The Solicitor telephoned his firm’s bank in Halifax and arranged for certification to be effected at the Bridgewater branch of the Toronto-Dominion Bank. Thereupon, the Sheriff and the Solicitor independently travelled there. The Sheriff maintained continuous possession of the cheque until he presented it for certification to an official of the branch. The cheque was certified at 12:45 p.m.

[27] The Court described the role of the sheriff in a judicial sale at para. 56:

56 The Sheriff, as an officer of the Court, cannot disregard a Rule, Court order, practice memorandum or standardized procedure. A Sheriff cannot follow his own or any local procedure in preference to that which he is directed to follow by the Rules or by the Court. If he does so, he opens himself and, possibly, his employer, the Province of Nova Scotia, to potential personal liability. However, the standardized procedure is not a complete code. It does not purport to be such. Where a local practice is not in contravention of the standard procedure, there is no reason why it should not and cannot be used to supplement the standard procedure. It will be noted that the Standard Procedure for Sheriffs’ Sales by

Public Auction - is further headed "Instructions to the Sheriff". The Sheriff is required to treat those instructions as mandatory. However, he may supplement that standard procedure by local practice which is not inconsistent with the standard procedure, where the circumstances are appropriate and the supplementary practice is reasonable.

[28] The conclusion of the Court was that the sheriff's conduct was reasonable and the sale should not be set aside. The Court's rationale is summarized at paras. 61 and 62:

61 In the circumstances which existed in the present fact situation, it was not possible for payment to be effected to the Sheriff at the moment he knocked down the property to the purchaser. As an interim measure, he accepted a cheque in an appropriate amount drawn upon a law firm's general account and requested the Solicitor to arrange for it to be certified. It might have been better if, instead, the Solicitor for the purchaser had given to the Sheriff the purchaser's certified cheque. But it makes no difference in the end because the cheque which was handed over was retained continuously by the Sheriff until it was made to conform to the requirement of a certified cheque within a period of approximately 20 minutes after the Sheriff knocked down the property to the purchaser. That is when the Sheriff demanded payment. I consider it to be within a reasonable interval after the Sheriff knocked down the property.

62 The Sheriff was satisfied. There was no prejudice to the mortgagee or anyone else. There were no other bidders. If the mortgagee wanted to attempt to achieve a higher price, it could have and should have bid. It is common practice in Nova Scotia for mortgagees to bid at foreclosure sales in order to protect their interests by aiding the process of attracting the highest bids. Those who do not bid open the door to bargain hunters. When the creditors for whom this mortgagee was acting as trustee previously decided not to bid, the die was cast, and what happened might have been anticipated. The mortgagee did not bid, there were no other competing bidders, and the property was knocked down for the minimum bid which was permissible and acceptable by the Sheriff.

[29] In my view, these authorities establish clearly that a sheriff has the discretion to deal with a situation where a purchaser does not have the required deposit immediately available at the conclusion of the sale. In exercising that discretion, they must act reasonably. Circumstances such as the number of bidders, adequacy of the sale price and potential prejudice to the mortgagee or others, are all relevant considerations.

[30] I will now consider the conduct of the July 10, 2012 foreclosure sale in light of these principles.

## **ANALYSIS OF THE JULY 10, 2012 SALE**

[31] The challenge to the foreclosure sale by Mr. Giovannetti and Mr. Smithers has two components. First, they challenge the reasonableness of the Sheriff's imposition of a deadline of 1:00 p.m. for providing the required deposit funds. The second complaint relates to the adequacy of the deposit provided by Mr. Webber and the manner in which it was handled by the Sheriff.

### **The 1:00 p.m. Deadline**

[32] On July 10, 2012, Deputy Sheriff Legere was faced with a situation where the high bidder was not physically present, but had participated by telephone through an agent who happened to be the principal of the defaulting mortgagor. At the conclusion of bidding, the agent advised that he did not have the deposit funds and needed time to go to the bidder's bank to obtain a certified cheque.

[33] It is clear that the sheriff has a discretion in deciding how to deal with a bidder who does not have their deposit. They must act reasonably in exercising that discretion. It goes without saying that there is no automatic right to be given time to obtain a certified cheque or bank draft if a bidder attends the sale without one. In my view, the range of reasonable options available to a sheriff in this situation runs from outright rejection of the bid, to giving a period of time in order to obtain some or all of the deposit funds.

[34] In order for me to set aside the sale on the basis of the 1:00 p.m. deadline, I must conclude that the procedure followed by the Deputy Sheriff was unreasonable. I should not substitute my view of what I would have done, particularly with the benefit of hindsight and with knowledge of facts unknown to the Deputy Sheriff at the time. In my opinion his decisions and actions are entitled to a high degree of deference.

[35] Here there are a number of circumstances which are relevant and different from those cases where foreclosure sales have been set aside. First, there were multiple bidders, three of which offered amounts well in excess of the secured debt. The second and third highest bids were less than one percent below the bid of Mr. Smithers. The mortgagee strongly objected to the request for time and

wanted the property awarded to the second bidder which would have paid the mortgage debt in full. The Sheriff was concerned that delay might prejudice the mortgagee if the deposit could not be obtained and the other bidders withdrew.

[36] Deputy Sheriff Legere elected to give Mr. Smithers until 1:00 p.m. to obtain the necessary deposit, which was twenty-two minutes after the bidding had closed. In my view, there is nothing unreasonable in his decision to do so, particularly in light of the position of the mortgagee that no extensions should be granted. If a delay caused the sale to be lost because other bidders left, it was the mortgagee who stood to be prejudiced. The objection by the mortgagee and the existence of a second bid sufficient to pay them out in full distinguishes this case from the *Maritime Form Work* decision.

[37] Having made the decision that there should be a 1:00 p.m. deadline, the Deputy Sheriff proceeded on those terms. When Mr. Smithers' agent did not return with the deposit at 1:00 p.m., he reopened the sale. The fact that some person unknown to the Sheriff advised him that the cheque was on its way did not cause him to change his plan, nor should it have. By the time Mr. Giovannetti returned with the cheque, the other parties had left and there was nothing else that the Sheriff could or should have done.

[38] In *Atlantic Trust Company, supra*, the Court recognized that foreclosure sales could be set aside if special circumstances existed. In that case, the "shockingly inadequate" sale price, the unforeseen breakdown of the solicitor's motor vehicle and the bidder's knowledge that the plaintiff intended to bid at the sale were sufficient to justify the exercise of the Court's discretion. By contrast, the sale was not set aside in *Royal Bank of Canada v. Bonnar*, 2007 NSSC 377 where the solicitor for the plaintiff did not attend the sale as a result of being distracted by a coyote sighting at his home earlier that day. That was not a special circumstance sufficient to set aside the sale.

[39] In this case, we have two experienced businessmen, Mr. Smithers and his agent, Mr. Giovannetti, who knew or ought to have known that the terms of sale required a deposit to be paid at the time of sale. This was stated in the notice provided to Mr. Giovannetti six weeks before the sale and reiterated by the Sheriff shortly before bidding. There is no representation or conduct by the Sheriff or anyone on behalf of the plaintiff to suggest that a bidder would be given time to

secure the required deposit. Mr. Smithers obviously took a calculated risk that he would be given a chance to provide the necessary funds after the fact. He has offered no explanation as to why the deposit was not available at the time of sale.

[40] It would have been open to Mr. Smithers to provide Mr. Giovannetti with a certified cheque or a bank draft in an amount sufficient to cover ten percent of any anticipated bid. If that meant that he paid a deposit of greater than ten percent of the bid amount, there is no prejudice as that would simply be credited to the ultimate purchase price which would be paid fifteen days after the foreclosure sale.

[41] In my view, there are no special circumstances here as that term has been used by the courts. The integrity of the sale process is important and should only be set aside in clear cases where the interest of fairness and justice demand. This is not one of those cases.

### **The Webber Deposit**

[42] The bank draft provided by Mr. Webber after acceptance of his bid was in the proper amount of \$50,000.00. It was payable to iNova Credit and this was recognized by the Sheriff. He was told that it could be endorsed by the two representatives of the plaintiff who were in attendance at the sale, and he accepted that.

[43] When Deputy Sheriff Legere delivered the endorsed draft to the Court Administration office he was told that they “preferred” a draft where the payee was the Sheriff’s office in trust. He requested that Mr. Webber provide a replacement and he agreed. At this point, Mr. Giovannetti had not yet returned to the courthouse.

[44] The Deputy Sheriff retained the original endorsed bank draft to be provided in exchange for the replacement when Mr. Webber returned. The Deputy Sheriff testified that he believed that the bank draft was still negotiable as it was.

[45] During the hearing, it was argued that the draft was dated September 10, 2012 and, therefore, could not have been deposited on July 10. There was no evidence from the financial institution which issued the draft indicating whether it

would have been honoured if tendered. Deputy Sheriff Legere did not notice the September date when he received the draft in July. It is not known whether the date was part of the reason that the Court Administration office requested a replacement, but it does not appear to have been.

[46] As with the initial question of Mr. Smithers' deposit, I need to consider the reasonableness of Deputy Sheriff Legere's actions in dealing with the Webber deposit. Counsel for Messrs. Smithers and Giovannetti argue that reasonableness requires equal treatment of the two and since Mr. Smithers was only given twenty-two minutes to obtain the deposit, Mr. Webber should have been given an equivalent time to replace his draft. I do not accept that submission. I believe that the Deputy Sheriff's conduct needs to be considered in the circumstances which existed at the time.

[47] There is no evidence that the endorsed draft provided by Mr. Webber would not have been processed by the issuing financial institution if it had been tendered. I believe that the burden is on the party challenging the sale to provide such evidence if it exists. There was nothing unreasonable about the Deputy Sheriff accepting the endorsed draft, particularly where this procedure was acceptable to the mortgagee and its solicitor.

[48] Once the Court Administration office requested a replacement, the sale had been concluded and the parties were dispersing. Even if he had wanted to, the Sheriff could not have reconvened the sale. In addition, there was no sign of Mr. Giovannetti with Mr. Smithers' deposit. In this situation, the Deputy Sheriff retained the initial draft and requested the replacement as instructed by the Court Administration office. There was no prejudice to anyone in following this procedure and certainly not the plaintiff mortgagee who was seeking to be paid out.

[49] Even if it could be argued that the Sheriff's handling of the Webber deposit was unreasonable for some reason, I do not believe this would have resulted in any prejudice to either Mr. Smithers or Mr. Giovannetti. Mr. Smithers had already failed to comply with the terms of sale and was therefore out of the running. Mr. Giovannetti, as guarantor, and Giamac Inc., as mortgagor, could not possibly be prejudiced by the Sheriff accepting a bid of \$500,000.00 compared to the earlier

Smithers bid of \$501,000.00. The incremental difference in the surplus funds which might be available to them is negligible.

## **CONCLUSION**

[50] For the reasons outlined above, I am satisfied that the decisions made and procedures followed by the Deputy Sheriff on July 10, 2012 were reasonable. In addition, I do not believe there are any special circumstances that would justify setting aside this judicial sale and, therefore, the motion by Giamac Inc. and Mr. Giovannetti is dismissed.

[51] I will receive submissions from the parties on the issue of costs if an agreement cannot be reached.

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Wood, J.