SUPREME COURT OF NOVA SCOTIA
Citation: *Royal Bank of Canada v. Murphy*, 2023 NSSC 253

Date: 20230809
Docket: **Hfx** No. 499897
Registry: Halifax

Between:

Royal Bank of Canada

Plaintiff

v.

John Douglas Murphy and Lockena Florella Murphy

Defendants

AND

Between:

Hfx No. 499985

Royal Bank of Canada

Plaintiff

v.

BDO Canada Limited, trustee in Bankruptcy for the Estate of Annie Francis Presseau, also known as Fran Presseau, a Bankrupt and Annie Frances Presseau, also known as Fran Presseau and Joseph Robert Presseau, also known as Robert Joseph Presseau

Defendants

AND

Between:

Hfx No. 508024

Royal Bank of Canada

Plaintiff

v.

Adam Gillis and Alysa Vincent

Defendants

AND

Between:

Hfx No. 513855

Bank of Montreal

Plaintiff

v.

Derrick P. Spooney

Defendant

AND

Between:

Hfx No. 516415

League Savings and Mortgage Company

Plaintiff

v.

Ernest Matthew Jewells and Lisa Leanna Jewells

Defendants

Judge:	The Honourable Justice John A. Keith
Written Decision:	August 9, 2023
Counsel:	Joshua J. Santimaw, Douglas W. Schipilow and Luke G. Godin, for the Royal Bank of Canada Andrew Rankin, for Bank of Montreal and League Savings Stephen Kingston, A Friend of the Court Defendant(s), Not participating and previously noted in default

By the Court:

I. INTRODUCTION AND ISSUE

[1] In a typical financing for residential property, the lender advances money and, in exchange, is granted a mortgage over the borrower's property to stand as security for the loan. In the event of default (e.g. the borrowers fails to make payments when due under the mortgage agreement), the lender may commence an action for repayment of the outstanding debt. This action to compel payment of the mortgage debt is sometimes called "suing on the covenant". The lender may also realize upon its mortgage security (and recover against the debt owing) by foreclosing upon the borrower's interest and selling the mortgaged property. The market value realized through the foreclosure sale process is applied against the mortgage debt. This process is known as "foreclosure and sale".

[2] Under the traditional model of foreclosure and sale, the lender begins by realizing upon its mortgage security through the remedy of foreclosure and sale. The amount of mortgage debt owing at the time is initially "settled" in the Order for Foreclosure, Sale, and Possession; however, that “settled” debt amount is not yet final and binding against the borrower. It is subject to upwards adjustments based on certain allowable costs and charges allowed under the terms of the mortgage and accrued after the Order is granted. The mortgaged property is then typically (not always) sold to an arms-length purchaser acting in good faith at a public auction.[1] If the foreclosure sale fails to generate sufficient funds to repay the mortgage debt in full, the difference is called the “deficiency”. The lender may then apply for a deficiency judgment. As part of the deficiency judgment process, a judge quantifies the final, ultimate mortgage debt (including any upwards adjustments) and then reconciles that amount against the market value of the mortgaged property as revealed through the foreclosure sale process. The deficiency judgment is binding against the borrower.

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[1] The mortgaged property is not always sold at public auction. There is an option to sell the mortgaged property by private sale – not public auction. Any such private sale must be approved by a judge under Rule 78.02. This proceeding does not involve a request for a private sale so it is unnecessary to discuss that option further. As well, a public auction does not always attract sufficiently high bids from an arms-length purchaser. In those cases, the lender acquires absolute title to the mortgaged property and may re-sell it. This possibility is recognized in Rules 72.11(3)(a) and 72.11(6)(a). See also Practise Memorandum No. 1, section 3.3(a). Where necessary, I re-visit this option below.

[3] In or around 2017, lenders began using a variant of the foreclosure and sale process called the "two-track" or “hybrid” process with increasing frequency. This model operates in circumstances where the borrower failed to defend the lender's action within the deadlines established under Nova Scotia's *Civil Procedure Rules*.

[4] Under the hybrid model, the traditional foreclosure and sale process describe above is flipped. The lender begins by obtaining judgment against the borrower. Because the borrower has not defended the action, it's a default judgment. The default judgment fixes the mortgage debt owing by the borrower for a specific, monetary amount owing at the time the judgment is granted. The judgment is binding on the borrower. With the default judgment in hand, the lender then obtains an Order for Foreclosure, Sale, and Possession. The default judgment and the Order are normally granted by the same judge on the same day - one after the other. The market value of the mortgaged property as realized through the process of foreclosure and sale is then credited against (and reduces) the amount of the default judgment debt previously granted. If the default judgment debt is greater than the credits realized through the foreclosure sale process, the difference is called the "deficiency". The borrower remain liable for the deficiency.

[5] In very simple terms, under the traditional model, it's Foreclosure Sale Process first and Final Judgment against the borrower (assuming a deficiency) second. Under the hybrid model, it's Final Judgment against the borrower first and Foreclosure Sale Process second. Assuming a deficiency, the amount of the Final Judgment is reduced so that the borrower remains liable only for that deficiency.

[6] Because the standard Order for Foreclosure, Sale, and Possession was crafted specifically for use in the traditional model and because the hybrid model flips or reverses the foreclosure and sale process, amendments to the standard Order needed to be made.

[7] Attention initially focussed on paragraph 8 of the standard Order for Foreclosure, Sale, and Possession because it was clearly premised on the presumption that judgment would only granted against the borrower at the end of the process, in the form of a deficiency judgment – assuming there was a deficiency. That presumption did not apply in the hybrid model because default judgment was granted at the beginning (not end) of the process.

[8] In or around March 2018, an amended version of paragraph 8 was proposed. It stated:

> The Plaintiff has entered Judgment against the Defendant for the same debt as secured by the mortgage. The Plaintiff shall give credit to the Defendant as against such judgment debt for the market value of the mortgaged property less such charges and costs as allowed by Rule 72.13, Practice Memorandum No. 1 and relevant case authority, and it shall file a statement with the Prothonotary detailing the calculation of such credit no later than six (6) months following the date of the public auction.

[9] The transcript of the motion where this amended paragraph 8 was initially conceived reveals a surface discussion of the underlying issues. The transcript also confirms that the new Order amending paragraph 8 was supposed be a "one-off", pending further consideration. However, through the sheer power of repetition more than anything else, this "one-off" paragraph became commonplace in the hybrid Order for Foreclosure, Sale, and Possession and somehow became cloaked with the appearance of thoughtful precedent.

[10] Over time, additional questions and concerns began to emerge. In particular, the evidence in the matters at bar revealed that lenders interpreted the new paragraph 8 as meaning that they were no longer required to seek judicial approval of the deficiency[2] left owing by the borrower at the end of the day. Rather, their counsel could calculate the amount of "credit" to which the borrower was entitled and then file a "statement" with the Prothonotary confirming that calculation. According to this interpretation, any deficiency amount shown on this "statement" would be deemed the final and binding judgment amount owing by the borrower, even though this final judgment amount reflecting the alleged deficiency was subject to no court oversight. In other words, under this interpretation, the new paragraph 8 transferred the responsibility and authority for overseeing and approving the calculation of the deficiency left owing by the borrower to counsel who was acting for the lender but also acting as an Officer of the Court.

[11] This motion was brought on the Court's initiative for an interpretation of the new paragraph 8 in the context of the Orders for Foreclosure, Sale, and Possession granted in the matters before me, and to address certain specific requests made to the Prothonotary for Certificates of Judgment and, in two cases, Execution Orders. Lying at the heart of these questions are concerns around those basic equitable principles which animate the foreclosure remedy, and the degree to which the court

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[2] The word "deficiency" simply means the difference between the amounts realized through the foreclosure sale process and the mortgage debt. That basic concept applies equally to both the traditional model and the hybrid model. However, the manner in which the "deficiency" is calculated and the inputs which apply to the calculation change depending on whether the lender elected to proceed under the "traditional" or hybrid model. I return to these differences below.

exercises oversight when determining how much the borrower owes the lender after the foreclosure sale process is completed.

II. BRIEF PROCEDURAL HISTORY

[12] The following five actions were brought to my attention by Court Administration:

1. Hfx No. 508024 - *Royal Bank of Canada v. Adam Gillis and Alysa Vincent*;

2. Hfx No. 499985 - *Royal Bank of Canada v. BDO Canada Limited and the Bankrupt Estates of Annie Presseau and Robert Presseau et al.*;

3. Hfx No. 499897 - *Royal Bank of Canada v. Murphy et al.*;

4. Hfx No. 516415 - *League Savings and Mortgage Company v. Ernest Jewells et al.*; and

5. Hfx No. 513855 - *Bank of Montreal v. Spooney*.

[13] The first three files identified above (Hfx Nos. 508024, 499985 and 499897) are referred to below as the "Royal Bank Actions". The last two files identified above (Hfx Nos. 516415 and 513855) are referred to as the "Other Actions". All of these cases involved the hybrid model and therefore, by definition, were undefended.

[14] This decision relates to all five separate actions but is referenced using a single citation (2023 NSSC 253) in recognition of the common issues and for convenience.

[15] By way of brief background:

1. In each case, the mortgagee opted for the hybrid approach and:

   (a) Obtained default judgment for the mortgage debt based on the borrower's covenant;

   (b) Obtained an Order for Foreclosure, Sale and Possession which included the amended paragraph 8, reproduced above.

2. With respect to the Royal Bank Actions, after selling the mortgaged property through public auction, the lender requested a Form 46 authorizing

> the Prothonotary to register a Certificate of Judgment against the borrower. The amount of judgment reflected the deficiency amounts claimed to be owing by the borrower in the "statement" filed by the lender under the amended paragraph 8;
>
> 3. With respect to the Other Actions, the lender asked the Prothonotary to issue both a Form 46 Certificate of Judgment to be registered against the borrower for the amount of the default judgment amount and an Execution Order against the borrower for the same amount. Counsel for the lender agreed that the request for an Execution Order may be withdrawn having regard to concerns expressed by the Court.

[16] These files were brought to my attention by Court Administration. The request for a Form 46 in the Royal Bank Actions and the request for an Execution Order in the Other Actions sparked my concern as to how the lenders were interpreting the amended paragraph 8 in the Order for Foreclosure, Sale, and Possession.

[17] I brought a motion on the Court's initiative under the Court's inherent jurisdiction and Civil Procedure Rule 22.10 for an interpretation of the amended paragraph 8 in the context of the Orders granted and to address the specific requests being made by the lenders for Certificate of Judgments and, in two cases, Execution Orders.

[18] Because of the potentially broad implications on foreclosure practice, I invited other members of the foreclosure bar to participate as friends of the Court.

III. BASIC FORECLOSURE PRINCIPLES

[19] In a typical mortgage financing, the lender advances money to the borrower. In exchange, the borrower agrees to repay the debt and grants a mortgage over the borrower's property as security. At law, upon granting the mortgage, legal title to the mortgaged property is transferred to the lender.

[20] Centuries ago, if a borrower defaulted under the terms of its mortgage, the common law's response was harsh. The lender retained legal title to the mortgaged property and also retained the right to full repayment of the outstanding debt. The borrower not only lost the mortgaged property but was not given any credit for the value of the lost property. Effectively, the lender achieved a form of double recovery.

[21] The Courts of Equity sublimated these unjust results to a higher purpose by inventing the following abstract legal concepts designed to fairly balance the competing interests:

> 1. The Equitable Right of Redemption: Although a mortgage transferred legal title of the secured property to the lender, the Courts of Equity conferred upon the borrower a legal device called the "equitable right of redemption". This meant that, despite default, the borrower retained an entitlement to "redeem" the breached agreement by completely discharging all mortgage obligations, including payment of the outstanding debt. If the mortgage was redeemed, the lender's interests were satisfied and the borrower reclaimed legal title to the mortgaged property; and
>
> 2. Foreclosure: The Courts of Equity did not leave lenders at the mercy of borrowers. Lenders were not compelled to wait indefinitely while the borrower invoked the equitable right of redemption. If the borrower failed to discharge its mortgage obligations within a reasonable period of time, the borrower's equitable right of redemption was forever extinguished or "foreclosed", and absolute title to the mortgaged property vested in the lender.

[22] These basic concepts became the footings upon which modern foreclosure law is built. For a more comprehensive review of the history and evolution of foreclosure and the equitable right of redemption, see *Pew v. Zinck*, [1953] 1 S.C.R. 285 ("***Pew***"); *Central Trust Company. v. Adshade*, [1983] N.S.J. No. 56 (N.S.C.A.) at paragraphs 15 - 29 referred to below as "***Adshade***"; *Toronto-Dominion Bank v. MacLean*, 2016 NSSC 221 referred to below as "***MacLean***" at paragraphs 28 - 44 and 55-68; and *CIBC Mortgages Inc. v. Dima Estate*, 2019 NSSC 61.

[23] In Nova Scotia, generally speaking, there are two basic types of foreclosure: simple foreclosure and foreclosure, sale, and possession.

[24] Nova Scotia's remedy of "simple foreclosure" originates in English law where the lender realizes upon its security through the remedy of foreclosure alone. The original order granting foreclosure includes a reasonable deadline set by the court for the borrower to exercise the equitable right to redeem. If the borrower fails to redeem with the court-imposed deadline, the lender takes absolute title to the mortgaged property and the borrower's interest in the property is extinguished. At the same time, the borrower ceases to have any continuing obligations under the

mortgage. The lender abandons the right to pursue the borrower for any further amounts under the mortgage and the underlying debt vanishes.

[25] By contrast, the remedy of foreclosure, sale, and possession is rooted in Irish law and imported into Nova Scotia by Nova Scotia's first Chief Justice Jonathan Belcher. Under Irish procedures, the lender realizes upon its security by foreclosing upon the borrower's interest in the mortgaged property and then selling the property. The foreclosure sale normally occurs at a public auction.[3]

[26] Foreclosure and sale is a form of security enforcement whose primary purpose is to realize market value for the mortgaged property and apply that value against the borrower's mortgage debt. As a result, the borrower's equitable right of redemption is equally tied to the foreclosure sale process. In other words, and unlike simple foreclosure, the borrower's interest in the mortgaged property is only extinguished when the property is sold. Thus, paragraph 3 of the court-approved Order for Foreclosure, Sale, and Possession states, *inter alia*:

> All the interest and equity of redemption of the [mortgagor/defendant name] and of all persons claiming through the [mortgagor/defendant name] in the lands described in the mortgage are forever barred and foreclosed, and shall be sold by the sheriff, the sheriff's nominee, or another person appointed by the court at a public auction conducted in accordance with the Instructions for Conduct of Foreclosure Auction, which is incorporated by reference except only to the extent varied by this or further order of the court, unless before the time of sale the amount due, together with costs, are paid to the plaintiff.
>
> [Emphasis added]

(See also *MacLean* at paragraph 30 and *Pew* at paragraph 1.)

[27] The matters before me all involve the remedy of foreclosure and sale. The procedural and substantive law of foreclosure and sale in Nova Scotia can appear intricate and labyrinthine, partly because it is driven by an interconnected weave of caselaw, civil procedure rules, practice memorandum and related court-approved forms. The following preliminary comments help explain the overall legal structure:

1. As indicated, the substantive and procedural law governing foreclosure and sale in Nova Scotia is ultimately grounded in the court's

[3] The mortgaged property could also be sold under a private agreement or acquired by the lender at the public auction and then re-sold. See footnote 1 above.

equitable jurisdiction. There is little statutory impact on that jurisdiction. Rather, the guiding principles that govern the process (including the exercise of a judge's discretion) are revealed mainly in the caselaw, the Civil Procedure Rules, Practice Memorandum No. 1 and the court-approved forms attached to Practice Memorandum No. 1;

2. Civil Procedure Rule 72 (Mortgages) is particularly significant. It begins by confirming that "This Rule establishes procedures for the remedies of foreclosure, sale, and possession by auction or by private sale, simple foreclosure, redemption, and other remedies in relation to mortgages";

3. Practice Memorandum #1 is entitled "Foreclosure Procedures". It describes a "simplified procedure" approved by the Judges of the Nova Scotia Supreme Court and used in most foreclosure proceedings (Section 1.2). Under the "simplified procedure", the lender proceeds by way of action and only uses the court-approved forms (Practice Memorandum #1, section 1.4(a)). I refer to these court-approved forms as the "standard forms". These forms are referenced in Practice Memorandum #1 and posted on the court's website.[4] A lender may opt out of the "simplified procedure" and elect what's called the "alternative procedure" where the standard forms are amended as necessary. If a lender elects the "alternative procedure" and amends the standard forms, it must submit to the court "a memorandum explaining and justifying each and every deviation" (Practice Memorandum #1, Section 1.4(b)). In the matters before the court, and unless otherwise noted, the forms used by the lenders were the same standard forms attached to Practice Memorandum #1 and used in connection with the traditional model of foreclosure and sale, but with only one notable amendment developed in response to the hybrid model: paragraph 8 in the Order for Foreclosure, Sale, and Possession; and

[4] There is one exception. Practice Memorandum #1 refers to an attached form of "Sheriff's Report". This is the report which must be prepared after the foreclosure sale by the person who conducted the foreclosure sale - either the Sheriff or a lawyer. It provides basic information regarding the results of the sale. No court-approved form of report is actually attached to Practice Memorandum. That said, in the matters before me, all of the foreclosure sales were conducted by the lawyer who all prepared a report following public auction. All of the reports in evidence before me adopted a consistent format and contained the same basic information. In short, despite the lack of a court-approved form of report, a standardized form of report emerged, apparently by custom. Interestingly, however, the same format and content of these reports is used regardless of whether the lender proceeded under the traditional model or the hybrid model. I return to this issue below as it is relevant to the proper interpretation of paragraph 8.

4. The Rules and Practice Memorandum #1 reflect, but do not supplant or eliminate, the Court's jurisdiction. The court maintains an important supervisory role over the foreclosure process. Court approval of the lender's actions and claims is required at key stages along the way.

IV. THE COURT'S EQUITABLE JURISDICTION IN FORECLOSURE, OVERSIGHT AND THE EXERCISE OF JUDICIAL DISCRETION

[28] Historically, judges played a prominent role at virtually every key step in the foreclosure and sale process. For example, judges presided over requests to grant:

1. the original order for foreclosure and sale;

2. the confirming order which provided assurances as to title by ratifying that foreclosure sale process unfolded in accordance with the court's directions; and

3. any deficiency judgment against the borrower which included finalizing the mortgage debt owing by the borrower - including any additional allowable costs and charges accrued by the lender after the Order for Foreclosure and Sale was granted.

[29] All of these decisions engaged the court's broad equitable jurisdiction over foreclosure and the related importance of judicial discretion within that jurisdiction.

[30] The starting point for the modern line of caselaw is *Briand v. Carver* (1967), 66 D.L.R. (2d) 169 (NSSC (TD)), referred to below as "***Briand***"). In this case, the lender sought an order confirming the sale of the mortgaged property at public auction. That matter (as with the matters at bar) was undefended. Nevertheless, Chief Justice Cowan exercised his equitable jurisdiction and interceded. He refused to confirm the Sheriff's report which certified the results of the sale process. The Sheriff's report indicated that the mortgaged property was sold to the lender's solicitor for $50.00. Cowan CJ described this outcome as "obviously and grossly inadequate" and he refused to allow that value to stand as the basis for a deficiency judgment against the borrower (at paragraph 37).

[31] In *Nova Scotia Savings & Loan Co. v. MacKay et al.* (1980), 41 N.S.R. (2d) 432, [1979] N.S.J. No 768 (NSSC (TD)), referred to below as "***MacKay***"), Hallett J (as he then was) expounded upon the principles identified by Cowan CJ in *Briand*

although, in this case, the Court focussed more on those costs incurred by the lender to protect (and preserve value in) the mortgaged property. Once again, the matter was undefended. The Court asserted its equitable authority in any event and re-affirmed its discretion to review and approve these costs.

[32] Hallett J confirmed that a lender is entitled to claim certain additional costs and charges as part of the mortgage debt when determining the amount of any remaining debt still owing by the borrower after the foreclosure sale process has concluded. In assessing any additional expenses claimed by the lender, the controlling criterion is reasonableness. Hallett J determined that the Court would approve such allowable costs that 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. [At paragraph 16]

[33] In *Adshade*, the Court's attention turned to both the sale price achieved at the public auction and certain additional costs and charges claimed by the lender as part of the mortgage debt.

[34] As to the sale price, and echoing the conclusions made in *Briand*, the issue was whether the public auction process succeeded in achieving fair value for the mortgaged property. Hart JA identified some of the factors which guide the Court's discretion. After reviewing a line of nineteenth- and early-twentieth century authorities, Hart JA reached the following conclusion:

> It can be seen from the decided cases that apart from the decision of Chief Justice Cowan [in *Briand*] there is a strong tendency to accept the amount bid at the judicial sale as determinative of the subsequent deficiency. A review of the English jurisprudence reveals, however, that equity has always looked behind the procedure followed to determine that no unfair advantage is obtained by any party to the transaction. The judicial sale is normally a fair method of valuing a property but, in my opinion, there is always a possibility that such a sale might not accomplish the purpose for which it is held….It is therefore the responsibility of the judge when exercising his equitable jurisdiction in matters such as these to

> have regard to all such factors when deciding the amount, if any, of a deficiency judgment that should be approved. [At paragraph 27, emphasis added.]

[35] With respect to additional costs and charges accrued by the lender, Hart JA went on to confirm that:

> … 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. [At paragraph 28]

[36] Hart JA concluded that following these basic principles "would be, in my opinion, in accord with the equitable principles that have always intervened in disputes between mortgagors [borrowers] and mortgagees [lenders]" (at paragraph 28).

[37] In *Royal Bank of Canada v. Marjen Investments Ltd.*, 1998 NSCA 37 ("***Marjen***") the Court of Appeal considered an amendment to the Civil Procedure Rules which purported to replace an obligation to award a deficiency with a discretion to award a deficiency. Bateman JA wrote that this discretion merely reflected the same discretion that otherwise existed in equity. She wrote:

> [P]ursuant to its equitable jurisdiction, the Court has always had a discretion to refuse the application for a deficiency. In this regard, the change does no more than to codify the existing jurisdiction of the Court. [At paragraph 30]

[38] In *MacLean*, Moir J reinforced the central importance of the court's equitable jurisdiction and judicial discretion in the process of foreclosure and sale and, more specifically, when determining deficiency judgments. The decision is worth citing at length:

> 56 First, the kinds of issues we have been confronting in this field since the 1995 reforms came to us in assessments of damages. The issue of whether to grant a deficiency judgment is covered in the order for foreclosure, sale, and possession. The order provides for judgment "subject to later qualification". So, the discretion is exercised in the context of an assessment of damages.
>
> 57 Second, the discretion is not based on the inherent jurisdiction and it arises in every deficiency assessment. With great respect, I have to take issue with Justice Hallett's statement at para. 59 of *England's Warehouse* that "It is only the inherent equitable jurisdiction of the court that can be invoked and then only in the most extraordinary circumstances...". (Of course, I accept and apply the holding in that

> case that a mortgagee ordinarily is entitled to rely on the amount paid by an independent purchase at the foreclosure auction.)
>
> 58 In the eighteenth century, Chancery overrode the courts of law on penalties and forfeitures. Law found its own way to avoid unjustly contracted penalties, but to this day the equitable approach governs forfeiture. At its most general and most basic, that approach grants a discretion to equity judges to relieve against forfeiture.
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> 59 The discretion is not without limit. Over the centuries, courts have developed some principles that give a measure of certainty for predicting the exercise of the discretion. However, it is a discretion.
>
> …
>
> 63 The equitable discretion to relieve against forfeiture is not measured by the Chancellor's foot. There are established limits: *Can-Euro Investments Ltd. v. Industrial Alliance Insurance*, 2009 NSSC 20 at para. 30. The case cited by Justice [Beveridge] (now of the Court of Appeal) discusses relief against forfeiture under leases and mortgages: *Union Eagle Ltd. v. Golden Achievement Ltd.*, [1997] 2 All E.R. 215 (P.C.).
>
> 64 The limits cannot be rigid or the discretion is as pretense. And, if made rigidly by an appeal level court, they remove an ancient discretion that belongs to equity judges at first instance.
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> 65 The propositions that a deficiency judgment assessment always involves discretion and that the discretion is not limited to "most extraordinary circumstances" follow from the foundation of the cluster of equitable remedies associated with mortgage default.

[39] These decisions reinforce the importance of oversight and the exercise of judicial discretion in foreclosure.

[40] Those issues (judicial oversight and judicial discretion) are particularly and forcefully engaged when the Court is asked to assess and determine costs and charges claimed by a lender in connection with the foreclosure. In *Bank of Nova Scotia v. Allen*, 2010 NSCA 47, Chief Justice MacDonald offered a more expressive term for describing the court's role. He wrote that "…under our *Civil Procedure Rules*, the court serves as a watchdog, overseeing every expenditure claimed by the mortgagee." (at paragraph 14).

[41] The word "watchdog" has been repeated often, particularly in the context of reviewing "protective disbursements" claimed by lenders. See also *MacLean* at paragraph 54; *Toronto-Dominion Bank v. Stevens*, 2011 NSSC 343 at paragraph

25; *Jaskolka v. Penney*, 2014 NSSC 400 at paragraph 36 and *Bank of Montreal v. Dukeshire*, 2019 NSSC 58 at paragraph 46.

[42] With that background, I turn to the process in the traditional model for initially settling the mortgage debt in the Order for Foreclosure, Sale, and Possession, and then adjusting that debt to account for certain additional, allowable costs and charges.

V. THE TRADITIONAL MODEL: CLAIMING ADDITIONAL COSTS AND CHARGES, CONFIRMING ORDERS, DEFICIENCY JUDGMENTS

[43] The mortgage debt is initially determined in the Order for Foreclosure, Sale, and Possession. The evidentiary requirements are stringent and the process is subject to judicial oversight - all of which is consistent with the court's "watchdog" role. I note the following:

> 1. Rules 72.05(1) lists a number of specific pieces of evidence that the lender must present when requesting an Order for Foreclosure, Sale, and Possession. They include "a statement of account" proving the mortgage debt as at the date the Order is granted. Furthermore, the statement of account:
>
> > (a) must be attached to an affidavit from the lender or its agent who swears it to be true; and
> >
> > (b) must contain "a summary of the statement of account that accurately states the total of the charges and credits on the statement and shows a total that reconciles with the amount claimed."
>
> (Rules 72.07(5)(1)(e) and (f))
>
> 2. Rule 72.05(1) further emphasizes that the lender's "statement of account" "…must establish, and show the calculation of, the amount of the mortgage debt, and it must include details of all payments made since the most recent of the following dates:
>
> > (a) the date of the mortgage;
> >
> > (b) the date of the last renewal or assumption agreement;

(c) the date of an agreement, or acknowledgement, signed by the mortgagor and any surety, settling, or acknowledging, the balance of the mortgage debt."

3. Sections 2.5(d) and 2.6(c) and (d) of Practice Memorandum #1 provide further details as to the comprehensive information that must be included in the lender's sworn evidence as to the statement of account (i.e. the amount of the mortgage debt);

4. Based on the lender's evidence, Rules 72.07(2) and 72.07(4)(a) confirm that only a judge may issue an Order for Foreclosure, Sale, and Possession. That judge must settle the mortgage debt and that specific debt amount must be incorporated into the Order for Foreclosure, Sale, and Possession.[5]

[44] The wording of Rule 72.07(2) is worth repeating. A judge "must *settle* the amount of the mortgage debt" owing at the date the Order for Foreclosure, Sale, and Possession is granted (emphasis added). Under the traditional model, the mortgage debt is not definitively determined or reduced to a judgment against the borrower when the Order for Foreclosure, Sale, and Possession is granted. There are two reasons:

1. Under the traditional model, the final mortgage debt owing by the borrower is only determined at the end of the process, as indicated. If the foreclosure sale process does not yield sufficient amounts to fully repay the debt, the deficiency is quantified by the Court and the lender is entitled to a formal deficiency judgment against the borrower;

2. Paragraph 1 of the standard Order for Foreclosure, Sale, and Possession confirms that the lender is entitled to advance additional claims for certain allowable costs and charges under the mortgage. These allowable costs and charges form part of the mortgage debt. They include:

(a) Additional interest at the mortgage rate up until the "effective date"[6]; and

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[5] Rule 72.07(2) allows a judge to refer the taking of accounts to a referee although, as a practical matter, this rarely occurs.

[6] The term "effective date"' is defined in Rule 72.11(3). The "effective date" is either 15 days after the public auction if the lender acquires the property, or 15 days after the purchase price is fully paid if somebody other than the lender acquires the property at public auction. As indicated in footnote 1 above, the mortgaged property may be

> (b) "[A]ny other charges and protective disbursements, as approved by the court, and costs to be taxed."

[45] The notion that these additional, allowable costs and charges will increase the mortgage debt is reinforced in section 3.3(c) of Practice Memorandum #1 which begins: "The amount [of mortgage debt] will be determined by adjusting the mortgage debt as settled in the Order for Foreclosure, Sale, and Possession. … " By invoking the concept of "adjusting" the mortgage debt, Practice Memorandum #1 acknowledges that the mortgage debt "settled" in the Order for Foreclosure, Sale, and Possession does not represent a final judgment against the borrower. It is subject to upwards adjustments or increases based on the categories listed above. As importantly, it is also subject to the market value achieved through the foreclosure sale process.

[46] Rule 72.13(2)(b) - (d) provides a more detailed list of additional costs and charges beyond the principal amount owing under the mortgage which may be claimed by the lender up to the "effective date". They are:

> 1. Mortgage interest to the effective date of the default judgment;
>
> 2. Interest under the *Interest on Judgments Act* after the effective date; and
>
> 3. Reasonable expenses authorized by the mortgage instrument and incurred before the effective date.

[47] Rule 72.13(3) establishes further restrictions on the "reasonable expenses" that may be claimed where they involve protective disbursements related to the protection of the mortgaged property.

[48] Rule 72.11(6) also provides a very narrow list of additional costs and charges which may be claimed by the lender as part of the mortgage debt even if they are accrued after the "effective date". They are:

> 1. direct expenses of a sale to a third party, such as a real estate agent's commission; and

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sold under a court-approved private agreement. In that case, there is a different "effective date" but that scenario is beyond the scope of this decision.

> 2. expenses deducted on an accounting for income that results in a net credit against the mortgage debt, such as expenses of renting out mortgaged property that are deducted from gross rent to produce a credit to the mortgage debt.

[49] None of these additional, post "effective date" charges are being claimed in the matters before me.

[50] Soon after the decision in *Adshade* (1986), the foreclosure and sale process began to evolve in ways which somewhat loosened the need for judicial oversight. These reforms allowed for greater efficiencies and reduced the demand on judicial resources.

[51] For example, in 1986, amendments to the Civil Procedure Rules authorized a Prothonotary to ratify and confirm the Sheriff's report which must be filed after the sale (Rule 51.05(1)(c)(ii) of the former Civil Procedure Rules).

[52] In 2009, Nova Scotia's *Civil Procedure Rules* underwent a wholesale revision. Like the former Rule 51.05(1)(c)(ii), Rule 72.10 allowed a Prothonotary to confirm a sale by public auction upon being satisfied "that the order for foreclosure, sale, and possession, the court's instructions, and the terms of the advertisement of sale have been complied with" (Rule 72.10(2)). This authority is re-affirmed in Rule 82.04(1)(e).

[53] The purpose of the confirming order is to ensure that, after the borrower's equity of redemption was foreclosed, absolute title passed. In other words, it provides assurances as to title upon the Court being satisfied that the terms of the foreclosure order were fully honoured. See, for example, *N.S. Trust Co. v. Western N.S. Elec. Co.*, 1929 CarswellNS 82 (SC) at paragraphs 15 – 16, and in *First City Developments Ltd. v. Dartmouth (City)*, 29 N.S.R. (2d), 78 (NSSC (TD)) at paragraphs 14 – 15, referring to the earlier decision in *Pew*.[7]

[54] That said, there are two other features of the Prothonotary's confirming order that are worth mentioning:

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[7] Despite their significance in the foreclosure process, confirming orders were historically a creature of the common law. Thus, Rule 47 Part II *Foreclosure, Sale and Possession* of Nova Scotia's Civil Procedure Rule (1972) does not even refer to a motion for a confirming order even though it was (and always had been) an important part of foreclosure process.

1. When considering a confirming order request, the Prothonotary examines only four specific categories, and no others: additional interest owing under the mortgage, legal fees, auctioneer fees, and specific costs associated with any municipal taxes owing on the mortgaged property.[8] The prescribed detail and quality of evidence which must be presented by the lender in support of a confirming order are consistent with the detailed evidentiary requirements imposed upon the lender when seeking to settle the mortgage debt as part of the Order for Foreclosure, Sale, and Possession. Overall, a Prothonotary's decision to grant (or deny) a confirming order is transparent; does not involve any meaningful exercise of discretion; is readily verifiable; and is supported by such strong evidence as to render these particular claims abundantly accurate and reasonable in the circumstances. The Prothonotary's role is effectively reduced to performing certain basic mathematical functions and checking that the evidence filed conforms with the standards established under Practice Memorandum #1.[9]

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[8] A Prothonotary's authority to grant confirming order is strictly construed. Rule 72.10 restricts the Prothonotary's authority to examining compliance with "the order for foreclosure, sale, and possession, the court's instructions, and the terms of the advertisement of sale". See also Rule 82.03.

[9] An in-depth analysis of how the Prothonotary approaches these four specific categories of costs and charges is unnecessary for the purposes of this decision. Very quickly:

1. **Interest**: Paragraph 1 of the Order for Foreclosure, Sale, and Possession confirms that a lender may claim the rate of interest payable under the mortgage to the "effective date of the default judgment". Thereafter, the lender is entitled to interest under the *Interest on Judgments Act* (Rules 72.13(2)(b) and (c)). This same paragraph 1 was part of each Order for Foreclosure, Sale, and Possession issued in the matters at hand. The Prothonotary readily verifies the interest being claimed by performing the required calculation.
2. **Auctioneer Fees**: The auctioneer fee is also confirmed in advance in a letter from the auctioneer and attached as an exhibit to the affidavit material filed in support of the Order for Foreclosure, Sale, and Possession. In effect, the Prothonotary is doing little more than ensuring the auctioneer's fee already approved by a judge is, in fact, the same amount certified in the auctioneer's report after the public auction is completed. See also sections 2.5(f), 2.9(f) and Instructions for Conduct of Foreclosure Auction in Practice Memorandum #1; and paragraphs 3 and 4 of the standard Order for Foreclosure, Sale, and Possession.
3. **Municipal Taxes**: The standard Order for Foreclosure, Sale, and Possession incorporates the Instructions for Conduct of Foreclosure Auction in Practice Memorandum #1 and specifically directs the auctioneer to ensure these particular costs and charges are paid as "Terms of sale". These instructions similarly direct that the lender's affidavit filed with the Prothonotary when requesting a confirming order must attach the Auctioneer's Report as an exhibit. Again, the Prothonotary is merely cross-checking amounts certified by the auctioneer.
4. **Legal Fees**: The standard Order for Foreclosure, Sale, and Possession incorporates the Instructions for Conduct of Foreclosure Auction in Practice Memorandum #1 which directs that the lender's affidavit filed with the Prothonotary in support of the confirming order must attach, as an exhibit, a true copy of the plaintiff's certificate of taxation of legal costs deemed to be reasonable by a taxing master. See also Practice Memorandum No.1, section 2.9(a). Here again, the Prothonotary has the capacity to quickly cross-check the amounts claimed against reliable, readily verifiable evidence.

> 2. There are other costs and charges which a lender may claim under the traditional model but are *not* considered by the Prothonotary as part of the confirming order process. One such category is called "protective disbursements".[10] It is clear that the lender is entitled to claim "protective disbursements"[11]; however, these claims may only be advanced before a judge as part of a motion for a deficiency judgment. On this, contrast section 2.9 of Practice Memorandum #1 listing the evidence which must be placed before the Prothonotary when seeking a confirming order with section 3.3(c) of Practice Memorandum #1 which identifies the evidence as being necessary for a judge in a deficiency motion.

[55] It is helpful to review the reasons why protective disbursements are approached with such a heightened degree of caution and vigilance.

[56] Protective disbursements have attracted attention over the years mainly because of a controversial subset of protective disbursements called "property management fees". Recent case law has repeatedly exposed very serious problems with claims being advanced by lenders for "property management fees". In *Nova Scotia v. Dukeshire*, 2019 NSSC 58, Smith ACJ (as she then was) characterized the evidence advanced in support of a claim for property management fees as misleading and an abuse of process (at paragraphs 52 - 54). In *Scotia Mortgage Corporation v. Chudobskyi-Walker*, 2017 NSSC 236, Moir J. similarly criticized property managers for lack of candor and for presenting patently insufficient evidence, despite clear directions in Practice Memorandum #1. Justice Moir concluded that:

> I will refuse property management fees until a person in authority with the property manager convinces me, through testimony, that I can rely on them or another judge reaches such a conclusion. So far, neither has happened even though I presided in chambers for three months in 2016 and six this year. [at paragraph 12]

[57] Similar concerns were expressed in *CIBC Mortgages Inc. v. Samson-Hahn*, 2015 NSSC 149; *Scotia Mortgage Corporation v. Fogarty*, 2016 NSSC 52; *Bank*

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[10] There are other types of claims which are not put before a Prothonotary in support of a confirming order request and must be approved by a judge. They include, for example, real estate commissions and related fees if the mortgaged property is sold to the lender at the public auction and then re-sold within the time permitted under the Civil Procedure Rules. No such additional claims were made by the lenders in the matters before me.

[11] See Rules 72.13(2), (3), and (5); sections 3.3(b) and (c) of Practice Memorandum #1; and Paragraph 1 of the standard Order for Foreclosure, Sale, and Possession.

of Nova Scotia v. Hatcher, 2017 NSSC 257; and *Bridgewater Bank v. Viner*, 2019 NSSC 363.

[58] This bring me to the final aspect of the traditional model that merits discussion: the motion for a deficiency judgment. The amounts realized through the foreclosure sale process may not be sufficient to fully pay the mortgage debt. To the extent there is a deficiency, the lender is entitled to a deficiency judgment.

[59] On this, I note that in certain, rare cases it may not be immediately apparent whether there actually is a deficiency at the end of the foreclosure sale process. For example, the funds realized through the foreclosure sale process may exceed the mortgage debt initially settled in the Order for Foreclosure, Sale, and Possession. Those excess funds may or may not be sufficient to cover the amount of the additional costs and charges above the amount "settled" in the original Order for Foreclosure, Sale, and Possession - which amounts are only claimed by a lender after the Order for Foreclosure, Sale, and Possession is granted because they are only accrued by the lender after that date. If the excess funds are sufficient to pay these additional claims such that the mortgage is "fully paid", any residual pool of funds is called the "surplus" (Rule 72.14(1)). If any excess funds are insufficient to pay these additional claims, there is a deficiency.

[60] It is important to conceptually separate the excess funds from the surplus pool of funds because the lender may initially assert a claim against the excess funds. However, once the mortgage is fully paid from those excess funds, the lender has no further claim against the remaining surplus pool of funds. Rather, the surplus is available for distribution to other subsequent creditors and the borrower, having regard to the priority of their respective interests (*Xceed Mortgage Corporation v. Baker*, 2012 NSSC 221).

[61] In my view, under the current Civil Procedure Rules, the lender may proceed with a claim against those excess funds as part of a motion for a deficiency judgment, or as part of a motion for a Form 46 Certificate of Judgment on the understanding that any such motion for a Form 46 must ultimately be brought before a judge. I appreciate that lenders are entitled to apply for the Form 46 before a Prothonotary under Nova Scotia's *Land Registration Act* and the *Land Registration Administration Regulations*. In these particular circumstances, the lender would be required to ask that the Prothonotary refer the matter to a judge under Rule 22.10 - and the Prothonotary would be required to do so in any event. The point is that any such claim must be subjected to judicial scrutiny for the reasons discussed above.

[62] Returning to the deficiency motion itself, Rules 72.11 - 72.13 inform the deficiency judgment motion. The following comments are relevant to the matters before me:

1. Rules 72.11(4) states that the deficiency judgment must be assessed by a judge. Rule 72.13(1) similarly states that only a judge must calculate the amount of any such deficiency using the following formula:

    a. the total amount of the mortgage debt; minus

    b. either:

        i. The amount realized from the secured property, if it has been sold to an arms-length purchaser; or

        ii. The value of the secured property, if it is in the control of the lender.[12]

2. With respect to the first variable in this deficiency formula, Rule 72.13(2) confirms that this debt is the sum of:

    a. The principal of the outstanding mortgage;

    b. Plus interest under the mortgage up to the "effective date";

    c. Plus interest under the *Interest on Judgments Act* after the "effective date"; and

    d. Plus the allowable costs and charges described above (e.g. auctioneer fees, municipal taxes, taxed legal costs and protective disbursements).

[63] The Civil Procedure Rules and Practice Memorandum #1 provide clear and strict instructions as to the nature and quality of the evidence that must be adduced to establish additional claims beyond those already settled in the Order for Foreclosure, Sale, and Possession. See, for example, Rules 72.13(3) and (5) and sections 3.3 and 3.5 of Practice Memorandum #1.

[12] Rule 72.13(4) provides further instruction as to how these offsetting amounts (i.e. amounts realized from sale to an arms-length purchaser or the "value" of the secured property) are to be determined.

[64] With that background, I turn to the hybrid process and the amended paragraph 8.

VI. THE HYBRID PROCESS AND THE ORIGINS OF THE AMENDED ORDER FOR FORECLOSURE, SALE, AND POSSESSION

[65] As mentioned, in or around 2017, the hybrid process became an increasingly popular vehicle for foreclosure and sale.

[66] In response to that shift, paragraph 8 of the standard, court-approved form of Order for Foreclosure, Sale, and Possession was amended.

[67] Paragraph 8 in the standard form Order was prepared in the context of the traditional model. So, it contemplates a deficiency judgment (if required) at the end and after the foreclosure sale process is complete - not judgment before the foreclosure sale process begins, as occurs in the hybrid model.

[68] The original paragraph 8 reads:

> The plaintiff shall have judgment for the mortgage debt against the [name of each defendant liable on the covenants excluding any bankrupt defendant] effective as of the day payment of sale proceeds is made to the plaintiff or, if no payment is to be made, fifteen days after the day of the sale. Interest is to be calculated under the *Interest on Judgments Act* afterwards. Enforcement of the judgment is stayed until the plaintiff establishes that there is a deficiency and the court determines the amount of the deficiency. [Note: If all defendants are bankrupt, paragraph 7 shall be deleted.]

[69] In recognition of the hybrid model's distinguishing features, paragraph 8 was eventually amended to read as follows:

> The Plaintiff has entered Judgment against the Defendant for the same debt as secured by the mortgage. The Plaintiff shall give credit to the Defendant as against such judgment debt for the market value of the mortgaged property less such charges and costs as allowed by Rule 72.13, Practice Memorandum No. 1 and relevant case authority, and it shall file a statement with the Prothonotary detailing the calculation of such credit no later than six (6) months following the date of the public auction.

[70] The evidence filed in this proceeding helps explain the origins of the amended paragraph 8.

[71] In an affidavit filed by Stephen Kingston, a senior member of the Foreclosure Bar in Nova Scotia, there is a reference to a "Bar-Bench meeting involving members of the foreclosure bar and certain Justices of this Honourable Court" in or around 2017 (Affidavit of Stephen Kingston filed January 23, 2023, paragraph 5). Mr. Kingston further attests that:

> 6. During the course of this meeting, there was a discussion regarding the process whereby a mortgagee [lender] could first obtain judgment against the debtor [borrower] secured by the mortgage and thereafter foreclose on the mortgage.
>
> 7. It was recognized during the discussion that, in such cases, the mortgagee [lender] would need to give credit to the judgment debtor [borrower] for the net proceeds generated by the foreclosure sale (or subsequent re-sale if the mortgagee "bought in") - and that no Motion for Deficiency Judgment would be necessary as the mortgagee already had judgment.

[72] This evidence is hearsay, made more complicated by the fact that the statements in question are being attributed to unknown "members of the foreclosure bar and certain Justices of this Honourable Court." Nevertheless, Mr. Kingston's recollections reflect three basic principles which are otherwise self-evident:

> 1. That the hybrid process was a legitimate method of realizing upon mortgage security in Nova Scotia (*Credit Union Atlantic Ltd. v. Bonang* (1995), 145 N.S.R. (2d) 175 (CA) and *Behner v. Bank of Montreal*, 2010 NSCA 54);
>
> 2. Amendments to paragraph 8 of the standard Order for Foreclosure, Sale, and Possession was predicated upon the assumption that the foreclosure sale process would occur and be completed before any judgment was taken against the borrower. That assumption does not apply in the hybrid model where default judgment for a fixed amount is taken before the foreclosure sale proceeding begins; and
>
> 3. The original concern expressed by the court related to ensuring the borrower was given full credit for the market value of the mortgage property as realized through the foreclosure sale process.

[73] Based on the evidence before me, the pivotal event which led to the amended paragraph 8 occurred in the context of a hearing on March 15, 2019 in *The Bank of Nova Scotia v. Kraig Campbell Reid*, Hfx No. 480499. Mr. Kingston represented the lender bank who elected to pursue the hybrid process. Wood J (as

he then was) presided. No written decision flowed from this appearance but counsel helpfully provided a transcript of this hearing for my review.

[74] The on-the-record discussions related primarily to the content of what was described as a "new paragraph 8". Justice Wood asked for an explanation as to how the proposed calculation would work in practice and focussing on those "charges and costs as allowed by Rule 72.13, Practice Memorandum No. 1 and relevant case authority". Justice Wood referred to the standard foreclosure costs, real property taxes and legal costs - all matters that are now covered in a Prothonotary's confirming order. Mr. Kingston mentioned real estate commissions payable if the lender obtains the property at the foreclosure sale and immediately re-sells it, noting "Typically, [the lender] would have that." It is also clear from the transcript that there was a debate around the issue of protective disbursements.

[75] Ultimately, the discussion neither involved a thorough and comprehensive review of the law nor was particularly conclusive. Justice Wood indicated that he viewed the new paragraph 8 as a "one-off, not necessarily an indication of how it is going to unfold in the future. Because it may be that with more thought and with more input from other members of the Bar and from the Bench, that something different is the outcome." And it was on that basis that Justice Wood was prepared to proceed.

[76] As it turned out, paragraph 8 was not a one-off. Through the power of repetition, it became entrenched in the commonly used hybrid Order for Foreclosure, Sale, and Possession and achieved an appearance of precedent that it did not deserve, in the circumstances. Indeed, despite section 1.4(b) requiring lenders to explain each and every deviation from the standard form of Order, the written submissions filed by the lenders in support of the Order for Foreclosure, Sale, and Possession in the matters before me either did not mention the new paragraph 8 at all or simply indicated in passing that new paragraph 8 had been approved in the past.

VII. INTERPRETING THE AMENDED PARAGRAPH 8

[77] The Orders for Foreclosure, Sale, and Possession in the matters before me all include the amended paragraph 8. Those Orders were not appealed and the time for appeal has long passed. They are final and binding. My task is not to amend the new paragraph 8 in the Orders for Foreclosure, Sale, and Possession before me. My task is to interpret it.

[78] Principles of interpretation similar to those governing statutes and contracts apply. As Forgeron J. stated in *Garnier v. Garnier*, 2021 NSSC 116:

> Orders must be interpreted contextually. Words are to be "read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the [order], the object of the ... [order] and the intention of the ... [court]"; and a "judicious meaning consistent with the text (read in context) is preferred over an unreasonable result: *Mastin v. Mastin*, 2019 NSSC 248, para 43, quoting from *Royal Bank v. Robertson*, 2016 NSSC 176, paras. 20 - 21 and *Djuric v. Dellorusso*, 2019 NSSC 95, paras 38 and 39.

[79] There is an important, preliminary point that must be made when beginning this interpretive process. All of the Orders for Foreclosure, Sale, and Possession in the matters before me were issued by a Judge of the Nova Scotia Supreme Court. None were appealed. They are final and binding. This decision neither seeks to re-open these orders nor suggest that they were "wrong". However, I do have the jurisdiction to consider any ambiguities or internal inconsistencies within these Orders as part of the interpretive process.

[80] The lender's first obligation in the amended paragraph 8 is to give the borrower "credit". Paragraph 8 continues by stating that a "credit" is the "the market value of the mortgaged property less such charges and costs as allowed by Rule 72.13, Practice Memorandum No. 1 and relevant case authority".

[81] An obvious ambiguity surfaces. This definition of a "credit" incorporates the calculation of a deficiency under the traditional model - not the hybrid model. However, those "costs and charges as allowed by Rule 72.13, Practice Memorandum No. 1 and relevant case authority" form part of the mortgage debt. They are not characterized as a "credit". Indeed, under Rule 72.13(1) the term "credit" is used only and exclusively in reference to the market value of the mortgaged property. Under paragraph 72.13, market value is ***not*** reduced by any costs and charges because, as indicated, those costs and charges are embedded into the mortgage debt.

[82] The ambiguity becomes more acute when comparing the amended paragraph 8 to paragraph 1 of the same Order. Paragraph 1 in the standard form Order created for the traditional model and adopted in all the matters before me states:

> The amount due to the plaintiff on the mortgage under foreclosure is settled at $ with interest on $ [insert the amount upon which interest is claimed in paragraph

> 5(a) of the statement of claim] at the rate of % a year from , 20 up to:
>
> > a. fifteen days after the day of sale by public auction, if the mortgagee purchases the property; or
> >
> > b. fifteen days after the day the balance of the purchase price is paid to the sheriff or other person conducting a sale by public auction, if a person other than the mortgagee purchases the property;
>
> together with any other charges and protective disbursements, as approved by the court, and costs to be taxed.

[83] Thus, under paragraph 1, the costs and charges that the lenders characterize as credits in the hybrid model are described in the very same order as being part of the mortgage debt - not credits applied against the mortgage debt.

[84] The ambiguity deepens further when one considers the impact of the lender's default judgment. Under the hybrid model, the full mortgage debt becomes fixed and recorded in the default judgment as a single, specific monetary amount. Once judgment is signed, issued and entered, the presiding judge is *functus officio*. Re-opening, amending or correcting the judgment is complex and highly unusual (*Burke v. Sitser*, 2002 NSCA 115 at paragraphs 7 - 9; *Griffin v. Corcoran*, 2001 NSCA 73 at paragraph 62 and Rule 78.08).

[85] By the time the time this Order is granted, the mortgage debt is fixed and firm. Although paragraph 1 speaks to increasing the mortgage debt by reference to costs and charges in question, the default judgment precludes that from occurring. Having taken default judgment, it is not legally permissible to add these costs and charges to the mortgage debt. And yet, under paragraph 8, these same costs and charges are now re-characterized as "credits" that might yet be taken into account.

[86] How are these ambiguities and internal inconsistencies to be resolved?

[87] Certain lenders argue that these apparent ambiguities and inconsistencies are merely procedural in nature. They contend that the issue of whether the costs and charges in question are characterized as credits or part of the mortgage debt is contractually and legally insignificant. For all practical purposes, they are legally, contractually and mathematically identical. These lenders state:

> There are no legal or contractual differences between Further Claims and the claims confirmed in the Default Judgment. As indicated above, we submit that there are procedural differences depending on which orders are sought to remedy a mortgage in default. When a Default Judgment is obtained, the mortgagee is not

> seeking to pursue Further Claims but rather seeking to provide a credit on the amount owing under the Default Judgment. [Burchells' written submissions, page 3]

[88] Respectfully, I disagree.

[89] As indicated above, the hybrid model flips the traditional model around. Under the traditional model, the lender first enforces its security through foreclosure and sale. The lender then takes judgment against the borrower at the end, if there is a deficiency. Under the hybrid model, the process is reversed. The lender takes judgment against the borrower first, in the form of default judgment. The lender then enforces its security through foreclosure and sale, in an effort to recover against that judgment debt. The market value of the mortgaged property realized through the foreclosure sale process is applied as a credit against the judgment debt. The borrower remains liable for any deficiency under the existing judgment.

[90] From one perspective, quantifying a "deficiency" in the hybrid model is similar to quantifying a "deficiency" in the traditional model of foreclosure. The simple formula is: (Debt) – (Credit for Market Value Realized from Foreclosure Sale Process). If the debt is greater than the credit, the difference is the deficiency.

[91] Despite this basic similarity, however, there are important legal and conceptual differences which separate the hybrid model from the traditional model. These differences reflect the fact that the traditional model is the reverse of the hybrid model. Respectfully, those differences are not insignificant or merely procedural. They have a significant impact on the manner in which a deficiency is quantified. The key questions become:

> 1. What are the legal and conceptual differences between "debt" accrued after the Order for Foreclosure, Sale, and Possession in the hybrid model versus the traditional model?
>
> 2. What are the conceptual and legal differences between "credits" applied after the Order for Foreclosure, Sale, and Possession in the hybrid model versus the traditional model?

[92] As to the debt:

> 1. In the traditional model and as indicated, the "debt" is only "settled" in the Order for Foreclosure, Sale, and Possession. It is not a fixed and final

amount recorded in a judgment. It is more complicated because the "settled" debt is subject to allowable, upwards adjustments for certain costs and charges subsequently accrued by the lender and as defined in paragraph 1 of the standard Order for Foreclosure, Sale, and Possession. See also the factors that bear upon the definition of "market debt" under Rules 72.11(5) (6) and Rules 72.13(2), (3) and (5).

2. By contrast, in the hybrid model, the "debt" is not just "settled". It is firm and fixed for a specific monetary amount and recorded in a binding default judgment. It is not subject to adjustment and change absent, perhaps, a motion to vary or re-open the Order under Rule 82.22. I note that the only paragraph amended to address the hybrid model was paragraph 8. Paragraph 1 of the standard Order for Foreclosure, Sale, and Possession remains in place. In my view, this created some of the confusion and ambiguity that precipitated this motion, because paragraph 1 presumes that the mortgage debt is subject to future increases based on, for example, additional interest as well as any other charges and protective disbursements, as approved by the Court. This creates confusion because, again, the amount of the mortgage debt is fixed by the default judgment. I return to this issue below.

[93] As to the "credits" applied against the debt:

1. In the traditional model, the credit is simply the market value of the property as realized through the foreclosure sale process. This fact is made clear in Rule 72.13(4);

2. In the hybrid model, the question of applicable "credits" is more complicated. The main component is the market value of the mortgaged property as realized through the foreclosure sale process. However, that value may then be reduced by certain allowable costs and charges accrued after the Order for Foreclosure, Sale, and Possession that:

a. are allowed under the mortgage and the applicable law; and

b. necessarily and reasonably facilitate the foreclosure sale process specifically. So, for example, the lender is entitled to claim the auctioneer's fee as a "credit" because it is allowed under the mortgage and under Practice Memorandum #1. It also necessarily and reasonably facilitates the foreclosure sale process specifically. I note that certain lenders appear to implicitly acknowledge this aspect of the

> test in their written submissions when they state that additional, allowable costs and charges under the hybrid model include "the cost of facilitating the sale of the property that must be taken into account to properly and accurately provide a credit against the judgment debt" (Burchells' written submissions at page 2).[13]

[94] There are certain costs and charges which may form part of the "debt" in the traditional model and may also form part of the "credit" in the hybrid model. Again, I use the example of auctioneer fees. In the traditional model, the auctioneer's fees are a reasonable and allowable component of the mortgage debt. In the hybrid model, the same fee is an allowable part of the credit applied against the mortgage debt, as indicated.

[95] In my view, and *subject to my comments below regarding judicial oversight*, a lender may claim as a credit in the hybrid model:

1. The costs and charges reviewed by the Prothonotary in the confirming order[14];

2. Protective disbursements; and

3. The costs associated with a re-sale, if the lender acquires the mortgaged property at the public auction.

These are all allowable under the mortgage. And they are necessarily and reasonably connected to the foreclosure sale process specifically.

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[13] I note that certain lenders implicitly acknowledge the relevance of this issue in that they contend certain additional, allowable costs and charges under the hybrid model include "the cost of facilitating the sale of the property that must be taken into account to properly and accurately provide a credit against the judgment debt" (Burchells' written submissions at page 2).

[14] In my view and in *obiter*, the specific costs and charges confirmed by the Prothonotary under Rule 72.10 (confirming order) are presumptively valid. The presumption is rebuttable and a judge retains the ultimate discretion. However, revising the amounts already accepted by the Prothonotary should be extremely rare given the numerous procedural guardrails which protect the integrity of the process and legitimize the specific costs and charges reviewed as part of the Prothonotary's confirming order. See footnote 9 above. I recognize and confirm that the purpose of a confirming order is different and related to providing assurances as to title. However, to disregard this part of the Prothonotary's work in granting a confirming order would risk unnecessary duplication and run afoul of the Supreme Court of Canada's call in *Hyrniak* v. *Mauldin*, 2014 SCC 7 for a culture shift that promotes timely, efficient and affordable access to justice.

[96] That said, there are other costs and charges accrued after the Order for Foreclosure, Sale, and Possession that form part of the mortgage debt in the traditional model, but do not form part of the credit in the hybrid model. For present purposes, the most significant example is interest owing under the mortgage rate.

[97] In my view, the lender in a hybrid process is not entitled to claim additional interest at the mortgage rate as a "credit" after taking default judgment. My reasons include:

> 1. At law, the mortgage rate of interest does not apply to a default judgment debt. Under Nova Scotia's *Interest on Judgments Act*, post-judgment interest is statutorily prescribed and it overrides any contractual rate. Indeed, in all of the matters before me, both the report filed by the person who conducted the public auction and the "statement" filed by the lenders in compliance with the amended paragraph 8 all very clearly and properly include additional interest as part of the mortgage debt, or total "claim" – not part of the "credit" applied against that debt;
>
> 2. Interest charged at the mortgage rate does not reasonably and necessarily facilitate the foreclosure sale process. In rough terms, interest is the amount being charged by the lender in exchange for the original advance of money. It is no more related to the foreclosure process after the Order for Foreclosure, Sale, and Possession was issued than it was before; and
>
> 3. The Civil Procedure Rules and the standard Order for Foreclosure, Sale, and Possession only allow for interest under the mortgage rate up to the "effective date" of the judgment to which the lender is entitled on a motion for deficiency. From that point forward, post-judgment interest under Nova Scotia's *Interest on Judgments Act* applies. The same view of post-judgment interest must apply consistently in both the traditional model and the hybrid model.

[98] I recognize that paragraph 1 of the Order for Foreclosure, Sale, and Possession in all the matters before me state that the lender is entitled to interest at the mortgage rate up until the effective date. In my view, this is part of the ambiguity and confusion that prompted this motion. I return to this issue below.

[99] In sum, the traditional model and the hybrid share a common basic formula for quantifying any deficiency owing by the borrower (Debt minus Credit for

Market Value Realized). However, they are conceptually and legally distinct. It is important to recognize those distinctions and that the underlying rationale which legitimize these costs and charges is very different depending on the model adopted by the lender (traditional or hybrid). Thus, there may be overlap between certain costs and charges which form part of the credit in the hybrid model and certain costs and charges which form part of the debt in the traditional model. But the overlap is not perfect because the reasons for including these cost and charges are not the same.

[100] This brings me to the lender's second obligation in the amended paragraph 8. The lender must also "file a statement with the Prothonotary detailing the calculation of such credit no later than six (6) months following the date of the public auction."[15]

[101] Here again, an ambiguity arises that calls for interpretation and clarity. What is the meaning and import of filing this statement with the Prothonotary detailing the calculation of such credit?

[102] Certain lenders argue that this provision:

> …largely removes judicial oversight in calculating the deficiency balance. However, the mortgagor/judgment debtor may question or dispute the plaintiffs calculation, as stated in the accounting filed with the Prothonotary as required under paragraph 8. We submit that the court could have some level of judicial oversight should the mortgagor contest these calculations. Judgment debtors are able to contest the accounting of the Judgment creditor in a variety of ways, including under Rule 79.22 (1) or 82.22 (1). Both of these rules would bring the accounting to the attention of the Court who would then scrutinize the accounting of the Judgment creditor. [Burchells' written submissions at page 7]

[103] The same lenders maintain that the amended paragraph 8 means:

> As Officers of the Court, counsel is entrusted with the substantial responsibility to ensure that the Judgment Creditor they represent only collects what is owed and also ensure that any credits, costs, or interest are appropriately accounted for without assistance or supervision from the Court.

[104] With respect, I disagree with this interpretation. My reasons include:

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[15] It is unclear why these orders refer to the date "six months following the date of the public auction". Presumably, the intention was to refer to the "effective date" and not the date of the public auction given that Rule 72.11(7) states that claims for the deficiency judgment are extinguished "six months after its effective date, unless a notice of motion for an assessment of the amount of the deficiency is filed."

1. The foreclosure and sale remedy is built upon the court's equitable jurisdiction. There is nothing in the amended paragraph 8 that ousts that jurisdiction;

2. The lender's interpretation offends the equitable protections that have been repeatedly confirmed by this Court. This Court has clearly delineated its oversight role in scrutinizing costs and charges claimed against a borrower in a foreclosure proceeding - regardless of whether the action is undefended. Respectfully, an Order conceived as a "one-off" could not become so ennobled as to fundamentally change the controlling jurisprudence and the manner in which the Court historically exercised its equitable jurisdiction. The fact that this interpretation is being applied to "protective disbursements" only amplifies the concern. By 2017, the hybrid model was emerging at the same time that claims for property management fees had become a lightning rod for judicial scrutiny. As indicated, this new paragraph 8 was devised in the midst of serious concerns being expressed by the Court about protective disbursements and, more specifically, property management fees. It is not at all plausible the Court would so strongly condemn the way in which these costs and charges were being claimed in the traditional model and yet, at the same time:

   a. Suddenly and arbitrarily eliminate any form of judicial scrutiny over these same charges in the unique context of the hybrid system;

   b. Entrust counsel for the lenders as officers of the Court (but who also owe a duty of loyalty to their clients) with the "substantial responsibility to ensure that the Judgment Creditor they represent only collects what is owed and also ensure that any credits, costs, or interest are appropriately accounted for without assistance or supervision from the Court". On this issue, I note that the calculation of interest in all of the Royal Bank Actions was not only wrong in that it claimed post-judgment interest at the mortgage rate but it also consistently involved an element of double counting. The Prothonotary's confirming order calculated interest owing at the mortgage rate up to the effective date. In its statements filed with the Court, the lender took that same figure as the baseline and began by adding additional interest owing at the mortgage rate to the effective date again – i.e. a second time. Absent any form of scrutiny the likelihood of these types of mistakes increases; and

c. Allow that "substantial responsibility" to be fulfilled by merely filing a one-page "calculation" which does not include any supporting documents or invoices.

3. There is no doubt that judges (not the Prothonotary and not court administration) take on a "watchdog" role in the traditional model, scrutinizing the amount of deficiency claimed by lenders. It does not stand to reason that the Court is fully engaged when quantifying a deficiency in the traditional model and yet detached and indifferent in the hybrid model. The Court is not a "watchdog" in the traditional model but only a "sleeping dog" in the hybrid process. To suggest otherwise implies that the Court arbitrarily offers full equitable procedural protections to borrowers facing foreclosure and sale under the traditional model but abandons borrowers facing the same remedy under the hybrid model. Overall, the hybrid model does not give lenders the right to claim certain costs and charges while relieving them of any responsibility to seek judicial scrutiny of those claims;

4. The reference to Rule 72.13 (Calculation of deficiency) in the amended paragraph 8 reinforces the view that the purpose of paragraph 8, properly interpreted, seeks to *replicate* (it cannot duplicate) the deficiency calculation approval and evidentiary *standards* in both the traditional and hybrid models, with such adjustments as may be reasonably required having regard to the unique features of that model. The intention was *not* to eliminate critical components of the deficiency calculation process, such that one model is subject to significant judicial scrutiny while the other model is subject to none;

5. The amended paragraph 8 imposes upon the lender certain procedural obligations. In simple terms, the lender was required to give the borrower credit and the lender was further required to file its calculation of this credit with the Court. There is nothing in the amended paragraph 8 which states, implicitly or explicitly, that the Court was pre-approving the lender's statement, whatever it might say. On this, I recognize that the amended paragraph 8 requires the lender to file this statement "no later than six (6) months following the date of the public auction" and that Rule 72.11(7) confirms that claims for a deficiency judgment are extinguished "six months after its effective date, unless a notice of motion for an assessment of the amount of the deficiency is filed." The fact that the Order allows a lender to file its statement just before claims for a deficiency judgment expire under

Rule 72.11(7) does not assist the lender. The amended paragraph 8 does not refer to Rule 72.11 and, in any event, Rule 72.11 relates to a deficiency judgment which is inapplicable in a hybrid proceeding. In any event, in my view, the fact that a claim may expire does not excuse a lender from having to bring a proper motion for judicial approval in advance of that deadline.

6. There are other interested parties who depend upon judicial scrutiny in the hybrid model. For example, as indicated in paragraphs 58 – 59 above, if the foreclosure sale generates excess funds, it may become necessary to determine whether the lender is entitled to claim against those excess funds. Any remaining funds then become the pool of surplus funds available to others such as the borrower, but not the lender. In equity, the lender is not entitled to simply file a "statement" and somehow finalize their claim to any such excess funds without any form of judicial scrutiny, and perhaps to the prejudice of others with a claim over the surplus;

7. While this decision focusses on the costs and charges associated with the calculation of any deficiency, the scope of the Court's jurisdiction and the influence of judicial discretion within that jurisdiction is not limited to an assessment of those costs and charges. The amended paragraph 8 also refers to the mortgaged property's "market value". Judges review and approve the market value of the mortgaged property being claimed by lenders when determining and quantifying any claimed deficiency. I note that the burden placed on lenders to establish market value is relatively low, particularly when exposed to the market through a public auction. Thus, the sale price obtained from an arms-length purchaser acting in good faith at a public auction is given significant weight as a valid expression of market value on the strength of the reasonable proposition that honouring and complying with the Court's instructions results in a sale process which will generate fair market value. (See, for example, *Marjen* at paragraph 51). Nevertheless, it remains an important component of the Court's jurisdiction which was not swept away by the amended paragraph 8; and

8. The lenders' argument that their "statement" is still subject to challenge under Rules 79.22(1) (Stay and expiry of execution order) or 82.22(1) (Varying order or re-opening proceeding) is, respectfully, more theoretical and illusory than real. In the first place, it is unclear as to how borrowers (or any other interested party) would ever become aware of either the "statement" or the entitlement to challenge the "statement" filed.

> Secondly, even if an interested party were to somehow become aware of the "statement", the tests for a stay under Rule 79.22(1) or re-considering a binding order under Rule 82.22(1) are onerous. Indeed, Rule 82.22(3) states that a party may only seek to re-open a final order "in the limited circumstances in which the re-opening is permitted by law." These restrictive procedural options do not satisfy the concerns of equity as repeatedly reinforced by the jurisprudence and summarized above.

[105] In sum, and in my view, lenders adopting the hybrid system are obliged to subject their claims for a credit to judicial scrutiny - and approval is required for quantifying any and all alleged deficiencies claimed in the context of the hybrid model. Simply filing a statement with the Prothonotary does not satisfy that requirement. That said, in my view, I am satisfied that the motion can be brought on an *ex parte* basis, given the borrower's prior default.

[106] I recognize that the Civil Procedure Rules do not currently contain a particular motion designed especially for lenders using the hybrid model to quantify any alleged deficiency or, for that matter, any claim against excess funds generated through the foreclosure process.

[107] Lenders may not rely on this fact as a basis for ousting the court's equitable jurisdiction and eliminating judicial scrutiny in respect of these matters.

[108] Moreover, lenders were not left without any form of procedural alternatives. Lenders were (and are) fully entitled to move before a judge to adjudicate upon these matters. Recall that Nova Scotia’s prior Civil Procedure Rules (1972) did not include a rule for confirming orders. This did not mean that motions for confirming orders did not exist. On the contrary, they were a fixture in the foreclosure process. In this case, I note the Court's general discretion under Rule 2.03 and inherent jurisdiction to entertain a motion for judicial approval. Alternatively, lenders may seek a confirming order with an accompanying request to confirm the deficiency. To the extent the request is filed with the Prothonotary, the lender may ask that it be referred to a judge under Rule 22.10. Alternatively, lenders in the hybrid model could bring a motion for judicial approval as a precondition of issuing a Form 48 created under Nova Scotia's *Land Registration Act* and the *Land Registration Administration Regulations* partially releasing an existing judgment. I appreciate that the Form 48 does not require judicial approval under the *Land Registration Act* and the *Land Registration Administration Regulations*. However, given the unique overarching equitable jurisdiction of the court in foreclosure and sale, seeking such

approval is justified and consistent with the jurisprudence. In any event, procedural options are available.

[109] Applying these conclusions to the particular matters before me:

1. The Royal Bank Actions (Hfx No. 508024, Hfx No. 499985, and Hfx No. 499897):

a. The lender is granted leave to bring a motion seeking judicial approval of the deficiency claim made in the statement previously filed. If approved, the lender would be entitled to the requested Form 46 Certificate of Judgment. The motion may be brought on an *ex parte* basis. To the extent it is necessary, I exercise my discretion under Rule 2.02 to extend the deadlines established under Rule 72.11 on the understanding that the motion be brought promptly and within 3 months of the date of this decision;

b. The lender previously filed certain evidence related to the protective disbursements claimed. The lender is not required to re-file this evidence, but will be required to file evidence regarding the market value realized;

c. As indicated, the lender's claim for interest under the mortgage rate is not allowed under the hybrid proceeding. The lender is entitled to post-judgment interest under Nova Scotia's *Interest on Judgments Act*; and

d. To ensure appropriate consistency with the traditional model and ensure the integrity of the foreclosure process, enforcement of any deficiency is stayed pending judicial approval of the deficiency. See paragraph 1 of the standard Order for Foreclosure, Sale, and Possession.

2. The Other Actions (Hfx No. 516415 and Hfx No. 513855):

a. The lenders are entitled to the requested Certificate of Judgment for the default judgment amount. The lenders are further granted leave to bring a motion seeking judicial approval of the deficiency claim made in the statement previously filed. The motion may be brought on an *ex parte* basis. To the extent it is necessary, I exercise my discretion under Rule 2.02 to extend the deadlines established

under Rule 72.11 on the understanding the motion be brought promptly and within 3 months of the date of this decision;

b. As indicated, counsel appropriately agreed that the request for an Execution Order in the amount established by the default judgment would be withdrawn. Enforcement is stayed pending a determination of the motion for judicial approval to quantify any deficiency remaining owing under the default judgment. This ensures appropriate consistency between the traditional model and protects the integrity of the foreclosure process. See paragraph 1 of the standard Order for Foreclosure, Sale, and Possession; and

c. As indicated, the lender's claim for interest under the mortgage rate is not allowed under the hybrid proceeding. The lender is entitled to post-judgment interest under Nova Scotia's *Interest on Judgments Act*.

Keith J