

**Date: 20021010**  
**Docket: S. H. No. 182673**

**IN THE SUPREME COURT OF NOVA SCOTIA**  
[Cite as: Royal Bank of Canada v. Gaetz, 2002 NSSC 228]

**BETWEEN:**

**ROYAL BANK OF CANADA**

**PLAINTIFF**

**- and -**

**THOMAS A. GAETZ**

**DEFENDANT**

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**D E C I S I O N**

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**HEARD:** At Halifax, Nova Scotia (in Chambers) before the  
Honourable Justice C. Richard Coughlan on September 19,  
2002

**DECISION:** October 10, 2002

**COUNSEL:** Andrew S. Wolfson, Q.C., for the Plaintiff  
No one appearing for the Defendant

**COUGHLAN, J.:**

- [1] The plaintiff applies for an order for foreclosure, sale and possession pursuant to Civil Procedure Rule 47.
- [2] The mortgage sought to be foreclosed is a collateral mortgage - collateral to a promissory note dated June 14, 2001, which provides:

**VARIABLE RATE PERSONAL LOAN**

**June 14, 2001**

**\$ 51,000.00**

**ON DEMAND AFTER DATE FOR VALUE RECEIVED I PROMISE TO PAY TO ROYAL BANK OF CANADA OR ORDER AT ROYAL BANK OF CANADA, PORTER'S LAKE BRANCH, PO BOX 40, PORTER'S LAKE NS, PORTER'S LAKE NS, THE SUM OF Fifty One Thousand DOLLARS WITH INTEREST THEREON CALCULATED AND PAYABLE MONTHLY AT A RATE EQUAL TO ROYAL BANK OF CANADA'S PRIME INTEREST RATE PER ANNUM IN EFFECT FROM TIME TO TIME PLUS 0.5% PER ANNUM AS WELL AFTER AS BEFORE MATURITY, DEFAULT AND JUDGEMENT, WITH INTEREST ON OVERDUE INTEREST AT THE SAME RATE AS ON THE PRINCIPAL. AT THE DATE OF THIS NOTE, SUCH PRIME INTEREST RATE IS 6.250000% PER ANNUM. THE UNDERSIGNED HEREBY WAIVE(S) PRESENTMENT FOR PAYMENT OF THIS PROMISSORY NOTE.**

PRIME INTEREST RATE IS THE ANNUAL RATE OF INTEREST ANNOUNCED FROM TIME TO TIME BY ROYAL BANK OF CANADA AS A REFERENCE RATE THEN IN EFFECT FOR DETERMINING INTEREST RATES ON CANADIAN DOLLAR COMMERCIAL LOANS IN CANADA.

(signed - Thomas A. Gaetz)

**Thomas A. Gaetz**

[3] The plaintiff used the simplified procedure set out in Practice Memorandum 13 in drafting the statement of claim. The only reference to the mortgage being collateral is in clause 2(f):

2. Particulars of the mortgage are:

.....

(f) Interest Chargeable : Interest on the subject Collateral Mortgage is calculated and payable monthly at a rate equal to the Royal Bank of Canada's prime interest rate per annum in effect from time to time, plus 0.5% per annum, as well after as before maturity, default and judgment, with interest on overdue interest at the same rate as on the principal sum; at the date of the Collateral Mortgage, such prime interest rate was 6.250% per annum

- [4] The issue for the Court is whether it is appropriate to use the simplified procedure when foreclosing a collateral mortgage.
- [5] Practice Memorandum 13 provides, in part:

## II Applications for Foreclosure, Sale and Possession

....

3. The simplified procedure is unlikely to be suitable in applications involving:

(a) collateral mortgages;

- [6] The mortgage contains the following provisions:

1.01 In this Collateral Mortgage, unless the context otherwise requires:

....

(c) “Indebtedness” means the sum of Fifty-One Thousand Dollars DOLLARS (\$51,000.00), together with any accrued interest thereon which may from time to time remain unpaid;

(d) “Promissory Note” means the promissory note attached to this Collateral Mortgage as Schedule “A” and any extensions, substitutions and renewals thereof;

- (e) “Interest Rate” means the interest rate set out or determined in accordance with the provisions of the Promissory Note.

4.01 The Mortgagors and the Bank covenant with each other as follows:

- (a) This Mortgage shall be void if the Mortgagors well and truly pay the indebtedness in accordance with the terms of the Promissory Note and upon payment of any other sums and interest thereon paid by the Bank under the provisions hereof;

- (b) This Mortgage is collateral security for payment of the indebtedness evidenced by the Promissory Note and the Bank may from time to time extend the time for payment of the Indebtedness or any part thereof and may renew the Promissory Note so that the time for payment of the indebtedness is extended without in any way affecting the liability of the Mortgagors hereunder and without in any way affecting or prejudicing the security hereby created and nothing but the actual payment of the indebtedness shall discharge the Mortgagors;

[7] The mortgage is completely linked to the promissory note given by the defendant. Yet nothing in the statement of claim sets out that the note was demanded or dishonoured. The liability of the maker of a demand note arises upon default and subsequent demand. The particulars of the default and demand should be pleaded; otherwise there is no evidence of the default to permit the foreclosure to proceed.

[8] In dealing with a foreclosure of a collateral mortgage, the Court of Appeal in *Credit Union Atlantic Ltd. v. Bonang* (1996), 145 N.S.R. (2d) 175 commented at p. 179:

However, as noted by the learned Chambers judge, the standard form of statement of claim used in foreclosure proceedings, and as used by the appellant, should have been modified to disclose the fact that the mortgage was collateral to the promissory note ...

[9] No demand was found to be necessary in *Apple Investments Ltd. v. Royal*

*Bank of Canada*, [1984] N.S.J. No. 208 (N.S.S.C.-A.D.), but that case can be distinguished because of the particular terms of the agreement between the bank and the other party in which the requirement of a demand was waived.

[10] In dealing with the foreclosure of a mortgage collateral to a promissory note, absent special circumstances, the statement of claim should include details of the presentment of the note, dishonour of the note and the demand.

Therefore, amendments must be made to the simplified procedure. In this case the maker of the note waived presentment of the note.

[11] The application is dismissed and the statement of claim should be amended and served on the defendant.

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**C. Richard Coughlan, J.**