

## FORECLOSURES - RECENT DEVELOPMENTS

Prepared By Martin W. Jones, Huestis Holm

I have been asked to prepare a brief outline with respect to recent developments with respect to foreclosures. These highlights are as follows:

1. Revised Rules and Precedents - A review of foreclosure practice and procedure is now being completed by a joint committee of practitioners and judges. A simplified procedure is proposed which is expected to be suitable for most applications for foreclosure, sale and possession. An alternative procedure will also be available if required. Other recommendations involve:

- a. the requirement to submit originals or true copies of all invoices or receipts for protective disbursements and other charges;
- b. the abbreviated descriptions must also contain a brief description of any prior mortgage or other encumbrance, rights-of-way and easements;
- c. the notice period has been reduced to at least 20 days before the public auction.
- d. the purchaser shall pay the balance of the purchase price not later than 20 days following the date of the Sheriff's Sale;
- e. specific instructions will be provided to the Sheriff with respect to postponing sales.

These proposals should be finalized and distributed within the next few months, and every practitioner should review these changes.

2. Royal Trust Corporation of Canada v. Offman (1994) 132 N.S.R. (2d) 306 (C.A.) - In this case, the Nova Scotia Court of Appeal considered the issue of the proper amount of a deficiency judgment after a mortgage foreclosure and sale. Justice Roscoe described Civil Procedure Rule 47.10(2) as follows:

Rule 47.10(2) presents alternative methods of determining the amount of a deficiency where fair market value is not obtained at the sheriff's sale. Each method involves the

fixing of a 'deemed' sale price. In the first, provided for in subs. (a), the court must value the property based on the fair market value as established by independent appraisal. This method should be utilized when the deficiency application is made at a time when the mortgagor still holds the property. With this method, it is necessary to rely on the appraisers' opinions of fair market value because the actual fair market value is not known. Fair market value is generally recognized to be the price which would be expected to be received by a willing vendor from a willing buyer on the open market. The second method, provided for in subs. (b), should be used by the court if the mortgagor has resold the property, which is the situation here. Subsection (b) provides that the resale price should be the deemed sale price if the court is satisfied that the resale price is reasonable. In this event, the market has determined the fair market value and the opinions of the experts, which are invariably based on estimates and assumptions about future events, although useful, are not determinative. If the property has been exposed to the market for a significant period of time, a number of offers received, the purchaser is at arm's length from the vendor, and vigorous marketing efforts have been undertaken, the court should not be hesitant to find that the price obtained was reasonable, unless there is some persuasive evidence to the contrary. It should also be noted that in this case the appellant also had the property for sale for several months prior to the foreclosure sale.

Justice Roscoe held that, in light of the extensive exposure of the property to the market, it was not necessary to consider the bidding, or lack thereof, at the Sheriff's sale to determine the fair market value of the property. Justice Roscoe held that there was sufficient objective and independent evidence of the property's value, and that the amount bid at the Sheriff's sale was not relevant. Although a figure of \$851,000.00 was necessary to the mortgage debt and expenses at the time of the sale, Justice Roscoe held that the Trial Judge was in error by not using a re-sale price of \$262,500.00.

This decision followed two trial decisions which previously had considered the manner in which a deficiency judgment should be calculated. In the case of *Canadian Imperial Bank of Commerce v. Simon et al* (1992) 111 N.S.R. (2d) 404, Justice Tidman stated he was not satisfied with the appraisal evidence because the appraisal submitted was obtained by the Third Party Purchaser, and was "no doubt used to support his offer of the mortgage. That appraisal can hardly have the independence necessary for the Courts dependency" (p. 407). The deficiency judgment was calculated on the bid price of Forty-eight Thousand Dollars (\$48,000.00).

In the decision of *Montreal Trust Company of Canada v. Moriarity* (1992) 117 N.S.R. (2d) 100 (S.C.), Justice Gruchy held that ordinarily the deemed sale price would be the fair market value determined by independent appraisal or the re-sale price of the property. Using an "unusual features" test, Justice Gruchy held that the Court could reject either of these two values, "if neither appears on the evidence to reflect accurately the fair market value of the property" (p. 104). The application was subsequently denied for the following reasons:

There are in this application enough 'unusual' features that I am exercising my equitable jurisdiction to deny the application for deficiency judgment. The combination of the seeming arbitrariness of the appraisal procedure followed here, the resulting low appraised value, the incredibly fast and private resale to a speculator, and the identity of interest of agent, purchase and, arguably, vendor creates too much doubt in my mind for judicial comfort about the fairness of the transaction to the defendants. Should the plaintiff choose to reapply for a deficiency, which it is free to do, it should be prepared to address these issues.

3. Supporting Documentation - Deficiency Claims - In the *Simon* decision which was previously cited, Justice Tidman stated that an application for a deficiency judgment should include detailed information with respect to the actual bidding which took place at the Sheriff's Sale. It has been my experience that this practice is not currently followed in many deficiency claim applications. The Committee reviewing the foreclosure procedures has not issued draft documentation with respect to deficiency claims, and presumably, they will consider this matter.