SUPREME COURT OF NOVA SCOTIA

Citation: *Canadian Imperial Bank of Commerce v. Conrad*, 2019 NSSC 37

Date: 20190205
Docket: Hfx No. 450983
Registry: Halifax

Between:

Canadian Imperial Bank of Commerce

Plaintiff

v.

Jerry Dean Conrad, Susan Alice Devanna-Conrad and The 2001 Jerry Dean Conrad and Susan Alice Devanna Conrad Trust

Defendants

Judge:	The Honourable Justice Ann E. Smith
Heard:	August 9, 2018, in Halifax, Nova Scotia
Final Written Submissions:	August 13, 2018 (Defendants)
Counsel:	Jeffrey P. Flinn, for the Plaintiff Laura H. Veniot, for the Defendants

By the Court:

INTRODUCTION

[1] On May 4, 2016 the Canadian Imperial Bank of Commerce ("CIBC") filed a Notice of Action in Debt against the defendants. The defendants filed a defence to the action on September 16, 2016, disputing both the validity of CIBC's debt claim as well as the quantification of the debt. The debt arises from CIBC's foreclosure and sale of the defendants' property, which had secured a line of credit on which the Conrads defaulted.

[2] CIBC moved for summary judgment.

[3] Coady J. of this Court granted CIBC's motion for summary judgment and dismissed the defendants' defence by Order dated June 12, 2018, with damages to be assessed.

[4] This Court heard CIBC's motion for an assessment of damages on August 9, 2018.

[5] CIBC seeks judgment against the defendants in the amount of $125,839.36.

[6] The defendants maintain that they only owe CIBC the sum of $32,706.25. The calculation used to arrive at this figure assumes that this Court accepts that CIBC failed to sell their former real property for a fair and reasonable price.

EVIDENCE ON THE MOTION

CIBC's Evidence

[7] CIBC filed a *Rule* 55 report of Kenneth T. Young. Mr. Young conducted an appraisal of the property.

[8] CIBC also filed the affidavit of Tracy Estey, a legal assistant at the law offices of CIBC's counsel.

The Conrads' Evidence

[9] The Conrads filed the affidavit of Jerry Dean Conrad.

[10] The Conrads also filed the affidavit of Philson Kempton, real estate appraiser. Mr. Kempton prepared an appraisal report of the Property on July 16, 2018, with the cooperation of the Property's then owner, Peter Tupper.

[11] The Conrads also filed the affidavit of Stan Rose, real estate agent.

[12] Each of the Affiants was cross-examined in court on their affidavits.

BACKGROUND

[13] In 2004, Jerry Dean Conrad and Susan Conrad ("the Conrads") purchased a two-acre property with a house and barn on Heckman's Island, in Lunenburg County, Nova Scotia for the sum of $285,000 ("the Property" or "the Heckman Island house" or "the house"). A CIBC mortgage made up part of the purchase price.

[14] In 2009, CIBC advanced a $200,000 line of credit to the Conrads with a collateral mortgage on the house. The balance owing on the original mortgage at that time was approximately $150,000.

[15] In 2011 or 2012, the Conrads decided to return to their native California and sell the Property. The Property proved difficult to sell despite several reductions in price. It was originally listed for $419,000. By May of 2014, the Property was listed for $360,000 (the lowest it had been listed).

[16] In November 2013, the Conrads defaulted on their line of credit, leading to CIBC's demand in December 2013 for payment of the full balance and accrued costs.

[17] Prior to commencing its foreclosure action, CIBC retained Kenneth T. Young of Young & Associates Real Estate Appraisals & Consultants to prepare a "Drive By Appraisal" of the Property. Mr. Young provided CIBC with an appraised market value range for the Property of $163,500 - $247,000.

[18] On February 27, 2014, the Conrads' realtor, Stan Rose, learned of a potential buyer for the property who was considering an offer of $295,000. The following day, Mr. Conrad sent an email to CIBC's solicitor, asking if the bank would permit a sale in which the net proceeds fell short of the total debt, also known as a short sale. Through their solicitor, CIBC advised Mr. Conrad on March 5, 2014 that the bank would potentially permit a short sale.

[19] On March 7, 2014, CIBC filed an action seeking foreclosure on the Heckman Island house.

[20] On March 13, 2014 the potential buyer communicated through her realtor that she wanted to make an offer on the Property for $295,000. The following day, she communicated that she was willing to offer $310,000, but would need an answer by the end of the day.

[21] During this time, Mr. Conrad made several unsuccessful attempts to reach CIBC through its solicitor's office. On April 14, 2014, CIBC advised Mr. Conrad through its solicitor that the bank would approve the sale for $310,000 if the Conrads would consent to a judgment for the balance. However, by this time, the potential buyer had moved on.

[22] CIBC obtained an Order for Foreclosure, Sale and Possession on October 17, 2014.

[23] Prior to the December 4, 2014 public auction of the Property, Kenneth Young prepared a "Full Appraisal" of the Property, appraising the Property as of November 15, 2014 with a market value of $240,000.

[24] At the time of the "Full Appraisal" performed by Kenneth Young on November 15, 2014, the defendants were renting the Property to tenants and having relatives maintain the Property.

[25] CIBC purchased the Property at the public auction on December 4, 2014 for $221,000. There were competing bids at the auction.

[26] CIBC listed the Property in March 2015 for $299,900.

[27] On April 21, 2015, CIBC received an offer to purchase the Property from Peter Tupper for a purchase price of $250,000.

[28] CIBC provided a counter offer of $260,000 which Peter Tupper accepted.

[29] CIBC applied $103,058.36 from the proceeds of the May 20, 2015 sale of the Property to the defendants' outstanding CIBC line of credit.

[30] The Conrads argue that CIBC could have mitigated its damages if it had made a timely reply to the potential offer of $310,000.00, as "the offer" exceeded the eventual sale price by $50,000 and would, they say, have saved thousands in foreclosure-related expenses. The Conrads' expert, Mr. P. Kempton, opined that the

Property was likely worth $300,000 when it was sold in 2015, for $40,000 more than the actual resale price.

[31] The Conrads rely on their expert's appraisal as evidence that the resale price was not just and reasonable, since the property was listed for "slightly less than fair market value."

[32] CIBC notes that the Conrads unsuccessfully tried to sell the Property between September 2013 and December 2014. They did not receive a single offer in that time period. The appraisal CIBC obtained of the Property as of November 15, 2014, while the Conrads were still in possession of the Property was $240,000; CIBC purchased the Property at the public auction on December 4, 2014 for $221,000, with competing bids, and after listing the Property for sale with a real estate agent, negotiated with the eventual purchaser to obtain a higher price, selling the Property for $260,000 on May 20, 2015.

THE ISSUES

1. What is the extent of a mortgagee's duty to a mortgagor? Did CIBC fail to meet that duty when it did not respond promptly to an inquiry on behalf of a potential purchaser?
2. If CIBC met any duty owed to the Conrads, what is the quantum of its damages?

Issue 1: What is the extent of a mortgagee's duty to a mortgagor? Did CIBC fail to meet that duty when it did not respond promptly to an inquiry on behalf of a potential purchaser?

THE LAW

[33] The Conrads' defence hinges on the proposition that CIBC had a positive duty to make a prompt reply to a sale inquiry even prior to taking possession of the property. This argument suggests that CIBC was obligated not only to obtain a price within the range of fair market value for the property at the chosen time of sale, but was required to conduct the sale in such a manner and at such a time as would optimize the potential market value. Counsel for the Conrads provided this Court with no support in statute or case law for a mortgagee's duty to sell a mortgaged property at the time most beneficial to the mortgagor.

[34] For a mortgagee in possession, both its management of the property and the eventual resale efforts may attract judicial scrutiny if there are grounds to doubt that the resale price reflects fair market value. In the present case, although CIBC had initiated foreclosure proceedings before the prospective offer was made, it did not yet meet the definition of mortgagee in possession previously adopted by this Court:

> In *Nova Scotia Savings & Loan Co. v. Mackay* (1979), 41 N.S.R. (2d) 432 (N.S. T.D.) Hallett J., as he then was, at p. 437, explained the rationale for requiring the mortgagee to account for any income earned prior to the deficiency application.
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> 28 Falconbridge on Mortgages (4th ed., 1977), p. 643 in describing a mortgagee in possession says:
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> > A mortgagee takes possession when he deprives the mortgagor of the control and management of the mortgaged property. [*First City Development Ltd. v. Central Mortgage & Housing Corp.*, 1981 CarswellNS 96, 130 D.L.R. (3d) 175)]

[35] The Conrads' tenant continued to live on the Property under the control and management of the Conrads until the Sheriff's sale in December 2014. Even after that date, CIBC took no steps to deprive the Conrads of management and control until January 2015, when their counsel wrote to Susan Conrad to inquire about gaining access to the Property. As such, CIBC was not yet a mortgagee in possession when the prospective offer was made in March 2014 nor when CIBC responded in April 2014.

[36] Surely the duty of a mortgagee to a mortgagor prior to taking possession does not exceed the duty of a mortgagee following possession. Even so, the jurisprudence on the duty of a mortgagee in possession may serve as a useful guide.

[37] The language used to describe the duty of a mortgagee in possession varies among Canadian common law jurisdictions. Several provinces have explicitly adopted the English Court of Appeal decision in *Cuckmere Brick Co. Ltd. and another v. Mutual Finance Ltd.*, [1971] 2 All E.R. 633., in which the Court found that a mortgagee in possession has a duty of care to obtain "true market value" of the mortgaged property at the point of sale.

[38] In Nova Scotia, the duty of a mortgagee in possession does not rise to the standard of a prudent owner. This Court explicitly stated so in *V. Rankin's Mechanical Contracting Ltd. v. First City Developments Ltd.*, 1985 CarswellNS 107 (N.S.S.C., T.D.), where Hallett J. (as he then was) stated, at para. 50:

> There is one further issue that was not raised in argument; that is, whether a mortgagee in possession should have a higher duty of care imposed upon him following the sheriff's sale than he owed under the common law to his mortgagor. The law is clear that the duty of a mortgagee in possession to his mortgage is not to be grossly negligent. He does not have to act as a prudent owner would: Halsbury's Laws of England (4th ed.), Vol. 32, p. 321, para. 702, quoted in first decision at p. 17. Whereas, if the mortgagee, who is in possession between the date of the sheriff's sale and closing, is in a position analogous to that of a vendor to his purchaser pending closing, a mortgagee in possession has a duty to exercise reasonable care which would be equated with the degree of care that would be exercised by a prudent owner. I have concluded that the question is academic in the context of this case as I am satisfied that CMHC's failure to winterize the premises or, alternatively, to allow First City to do so amounted to gross negligence. It would seem to me that the time has come for making a mortgagee in possession liable to his mortgagor for ordinary negligence.
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> [emphasis added]

Commercial Reasonableness

[39] In *Atlantic Sporting Distributors Ltd. (Trustee of) v. Bank of Montreal*, 1998 CarswellNS 344 (N.S.S.C., T.D.) this Court quoted favourably the interpretation found in *Bennett on Receiverships* of the seminal *Cuckmere* decision. Rather than a prudent owner, Bennett characterizes the duty of a mortgagee in possession as "commercial reasonableness" (paras. 139-141). Both Bennett and this Court agreed that the duty of a prudent owner is too onerous for a mortgagee and would subject lenders to the whim of debtors and subsequent encumbrancers. The proper test, that of "commercial reasonableness" should ask whether the lender conducted itself in a commercially reasonable manner under the attendant circumstances. Tidman J. in *Atlantic Sporting Distributors* stated:

> 139 *Bennett on Receiverships* (The Carswell Company Limited, 1985) points to the *Cuckmere* case as establishing a change in the standard of care owed by a Receiver in disposing of debenture or mortgage security. At page 166, Bennett says that prior to the *Cuckmere* case the legal duty imposed upon the security holders was only to exercise a power of sale in a *bonafide* manner and to take reasonable precautions to obtain the best possible price in the circumstances. Bennett says that Lord Salmon in *Cuckmere* raised the standard of care by holding that a mortgagee, in exercising a power of sale, owes the duty of obtaining the true market value of the mortgaged property. Bennett says the *Cuckmere* decision extends the duty of taking reasonable precautions to include claims for negligence and failing to obtain the true market value of the property. Bennett points to the *Cuckmere* case as a forerunner of a group of Canadian cases which impose a correspondingly higher duty upon a Receiver in disposing of borrowers assets. He points out that *Saren v.*

> *Victoria Trust Company* (1984), 49 O.R. (2d) 6 (Ontario High Court), holds that a mortgagee, in realizing on his security, must act not only in good faith, but must also use the same care and caution that a prudent owner would use in selling his own goods, and take steps to carry out the sale under conditions that would produce the best possible price.
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> 140 Bennett, in his text on *Receiverships*, at page 172, says it is clear to him that it was not the intention of Lord Salmon in *Cuckmere* to impose upon a mortgagee the onerous duty of taking the same care and precaution in obtaining the true market value of property as would a prudent man in selling his own property. Bennett says, and I agree, that such a duty is too onerous, and if imposed upon lenders would subject them to challenges at the whim of debtors and subsequent encumbrancers.
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> 141 Bennett suggests that the proper test is one akin to the test of "commercial reasonableness" as set out in Ontario's *Personal Property Securities Act*. The test of commercial reasonableness may be summarized as imposing upon a lender in disposing of security the duty to act in a commercially reasonable manner under the circumstances then existing. [Section 66(2) of the *Nova Scotia Personal Property Security Act*, SNS 1995-96, c. 13 encoded the common law duty of "commercial reasonableness" on any party exercising a right or obligation under the *Act*.]
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> [emphasis added]

[40] The Nova Scotia Court of Appeal considered *Cuckmere* in *Canadian Imperial Bank of Commerce v. R. England's Warehouse Ltd.*, 1996 NSCA 22, at para. 73 wherein Hallett J.A. found the mortagee's duty in English law is to obtain

> the best price possible under the circumstances or true market value at the time of the sale and in judging whether true market value had been obtained a mortgagee will not be adjudged to have failed in that duty unless he is clearly 'on the wrong side of the line.'

[41] When comparing the English standard to Nova Scotia, the Court noted its own equitable jurisdiction to impinge on the mortgagee's right to a deficiency, and the duty on a mortgagee to obtain a reasonable price. Yet since a mortgagor's default caused the foreclosure action, a price must clearly be unreasonable under the circumstances in order to fall short of the mark (paras. 74-75):

> 74 The sum of these statements with respect to the practice in England is that the mortgagee must not act recklessly but with reasonable care to obtain a fair price in the circumstances. The duty on a mortgagee conducting a resale in Nova Scotia can be no higher because the Court, through the exercise of its equitable jurisdiction in a line of cases, created the duty on the mortgagee who buys in at a Sheriff's Sale to obtain a reasonable price on a resale (*Nova Scotia Savings & Loan Co. v. MacKay and MacCulloch* (1980), 41 N.S.R. (2d) 432, 76 A.P.R. 432; *Central Trust Co. v. Conway* (1983), 56 N.S.R. (2d) 208). The Court, by imposing this duty in the exercise

> of its equitable jurisdiction impinged on the mortgagee's right to a deficiency as provided for by the mortgage contract with the borrower and by *Rule* 47.10(1).
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> 75 *Rule* 47.10(2) requires only that the mortgagee obtain a reasonable price on a resale. The onus of proof on this issue is on the mortgagee. The mortgagee should not be adjudged to have failed the duty unless the price obtained on the resale is clearly unreasonable in the circumstances. This must be so because the mortgagor's default put the mortgagee in the position that action to realize on the security was required. Secondly, the result of the Sheriff's Sale will have already demonstrated a lack of interest in the property. Under such circumstances appraisals of fair market value are often shown to have been overstated.
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> [emphasis added].

[42] An independent appraisal report will assist the Court in determining whether the price obtained at public auction or by resale is reasonable, though appraisals are not determinative. In *Royal Bank v. Marjen Investments* (*supra*), at para. 28, the Nova Scotia Court of Appeal describes appraisal reports as a comparator which may affirm the fairness of the auction or resale price, or may call for further scrutiny:

> The primary purpose of the appraisal reports, on an application for a deficiency, is to assist the Court in fixing a fair value when the mortgagee has purchased the property at the Sheriff's sale, often for a nominal amount, and has not resold it. Where the property has been resold, an appraisal report provides the Court with a hypothetical value to which to compare the price actually realized. If there is little difference, the inquiry into the reasonableness of the resale price is simplified. Where, however, there is a significant difference in the two values, the Court will more closely scrutinize the circumstances surrounding the resale.

[43] LeBlanc J. followed the *Marjen* decision in *Armshore Investments Ltd. v. Goode*, 2017 NSSC 130, (N.S.S.C.) ("*Armshore*") giving special emphasis to the passage which indicates that despite the utility of property appraisals for comparison purposes, it is the market, not appraisal reports that best determines fair market price when the property has been resold:

> Where the property has not been resold, the best evidence of value is generally established through appraisals. When the property has been resold, however, and, particularly, when subjected to vigorous marketing efforts, as in *Offman, supra*, the Court should generally not depart from the selling price. Appraisal reports are a best guess, albeit by a person experienced in the real estate field. It is the market that actually determines the value of the property.
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> [emphasis added by LeBlanc J.]

[44] Determining fair value through the actual activity of the marketplace reflects not only the broad range in results that professional appraisals yield, as evidenced

by the estimates offered in the present case, which range from $240,000 by CIBC's expert and $300,000 by the Conrads' expert, nor simply the inherently speculative nature of appraisals. The preference also underscores the mortgagee's prerogative to dispose of the mortgaged property at such a time as they see fit. Market demand for a particular property will fluctuate, often in unpredictable ways. Whether a resale price is reasonable is a question of market demand for the particular property at the time when the resale takes place.

[45] Based on all of the evidence before this Court, I find that CIBC obtained a reasonable price, and indeed a commercially reasonable price, for the Property.

[46] The Conrads claim that CIBC had a duty to mitigate losses arising from the breach of contract, relying on the Supreme Court of Canada decision in *Southcott Estates Inc. v. Toronto Catholic School Board*, 2012 SCC 51. The 2012 decision has not been cited in a reported foreclosure decision, but the Nova Scotia Court of Appeal noted in *Global Maxfin Investments Inc. v. Crowell*, 2015 NSCA 9, at para. 12, that the key finding in that case is that "the burden of proof on the issue of mitigation lies with the defendants."

[47] The duty to mitigate contractual damages was reviewed by LeBlanc J. (as he then was) of this Court in *Musgrave v. Ford*, 2016 NSSC 157, at para. 65, where he noted that the defendants bear the burden of demonstrating on a balance of probabilities whether the mortgagee's actions were not within the spectrum of reasonable conduct. Further, whether the loss could have been avoided is a finding of fact (para. 66).

[48] In *Musgrave*, at para. 64, LeBlanc J. quoted Waddams in *The Law of Damages* (Canada Law Book, looseleaf) at 15.140 in support of the position that the plaintiff must receive the benefit of the doubt:

> The plaintiff is barred from recovering in respect of loss that could have been avoided by acting reasonably. What is reasonable has been called a question of fact depending on the particular circumstances of the case. However, as with remoteness, a finding that the plaintiff ought to have mitigated is not a simple question of fact because it involves a legal conclusion. In case of doubt, the plaintiff will usually receive the benefit, because it does not lie in the mouth of the defendant to be over-critical of good faith attempts by the plaintiff to avoid difficulty caused by the defendant's wrong...
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> It has been said that the measures which a plaintiff may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after

> an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.
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> See *McGregor on Damages*, 16th ed (London: Sweet and Maxwell, 1997) at 326, cited in *North Sydney Associates v. United Dominion Industries Ltd.*, 2005 NSSC 206, at para. 116, affirmed at 2006 NSCA 58.
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> [emphasis added]

[49] I find that CIBC did not act unreasonably regarding the potential offer. It had no written offer in hand. There is no evidence that earlier action would have minimized CIBC's loss. The burden of proving failure to mitigate lies with the Conrads. They have not proven that but for the CIBC's response in April rather than a month or so prior, the potential offer would have materialized into an actual sale at the proposed price. CIBC did not fail to mitigate its damages.

[50] I also find that the Conrads have not proven that CIBC failed to keep the Property in good repair. There was some evidence about a deck collapsing, but the reason for the collapse, and when it happened were not proven.

Issue 2: If CIBC met any duty owed to the Conrads, what is the quantum of its damages?

[51] The Conrads have not offered a competing quantification of the outstanding debt, apart from one based upon CIBC approval of the sale of the Property for $310,000.

[52] CIBC is entitled to judgment against the Conrads in the amount of $125,839.36.

COSTS

[53] Costs of $2,000 are payable to CIBC.

[54] I ask counsel for CIBC to provide the Court with a draft form of order.

Smith, J.