

SUPREME COURT OF NOVA SCOTIA

Citation: CIBC Mortgages Inc. v. Melanson, 2009 NSSC 291

Date: 20090929

Docket: Hfx. No. 287723

Registry: Halifax

Between:

CIBC Mortgages Inc.

Applicant

v.

Stanley Charles Melanson

Respondent

Judge:

The Honourable Justice Arthur J. LeBlanc.

Heard:

March 12, 2009, in Halifax, Nova Scotia

**Final Written
Submissions:**

March 26, 2009

Written Decision:

September 29, 2009

Counsel:

Glenn Hodge, for the Applicant
Respondent, not in attendance

By the Court:

[1] This is an application for a deficiency judgment arising from the foreclosure sale of the defendant's property pursuant to Rule 47.10 of the *Civil Procedure Rules (1972)*.

[2] The Order for Foreclosure and Sale fixed the amount owing by the defendant to the plaintiff at \$24,679.04, together with interest at 6.1%. The property was sold at public auction by the Sheriff on May 9, 2008, and was purchased by the plaintiff for \$2,834.59. The Plaintiff, as of the date of this application, had title to the property. The claim for deficiency is in the amount of \$24,882.02, particularized as follows:

| | |
|---|-------------|
| Balance as of Sheriff's sale: | \$28,519.75 |
| Gross Expenses: | |
| Protective disbursements: | \$11,942.47 |
| Sheriff's fees and commissions, tax certificate and municipal taxes: | \$2,834.59 |
| Appraisal: | \$406.44 |
| Taxed costs: | \$3579.61 |
| Less appraised value: | \$22,000.00 |

| | |
|----------------------------|-------------|
| Less Expenses not claimed: | \$994.40 |
| Interest at 6.1% 20 days: | \$81.18 |
| Interest at 5%: | \$512.38 |
| Total deficiency: | \$24,882.02 |

[3] The protective disbursements of \$11,942.47 represent the expenses incurred after the Sheriff's sale, other than \$28.50 respecting an inspection effected prior to the sale. I have concluded that there is no issue with respect to the portion of the deficiency judgment for the taxed costs, Sheriff's fee and commission, municipal taxes and the cost of the appraisal. Although the appraised value of the property is less than the amount of the original mortgage of \$26,000, I do not have any evidence upon which to reject the appraisal. The issue that remains is whether the remaining claim for protective disbursements, in the amount of \$11,913.97 (after deduction of \$28.50) should be allowed. The Applicant has agreed to reduce the amount sought to a balance of about \$11,000.00.

[4] Isabel Fraser, the Applicant's representative, states in her affidavit that after the Sheriff's sale, the property was inspected and determined to be vacant. The property required two new locks. The Applicant instructed the inspection company

to do biweekly inspections, including interior and exterior views of the property, to ensure that no damage occurred, such as vandalism, fires, or break-ins. The inspection company charged a weekly maintenance fee covering replacement of smoke detectors, preparation of reports, and arranging for repairs, lawn care and other services.

[5] Ms. Fraser states that the property was cleaned after the Sheriff's sale in July 2008 in order to remove garbage from inside and outside the house. The cleanup included the removal and disposal of hazardous material and debris.

[6] In addition to securing the property, Ms. Fraser stated, it was necessary to carry out reasonable and necessary repairs prior to placing the property for sale. The exterior deck and stairs were repaired. Faceplates on switches and outlets were installed. The electrical wiring was upgraded prior to Nova Scotia Power agreeing to reconnect the power. Mouldy panelling and ceiling tiles were discovered, which required the removal and replacement.

[7] Ms. Fraser summarizes the nature and amount of the protective disbursements and expenses incurred at para. 9 of her affidavit:

| | Date | Description of Expense | Amount |
|----|-----------------|--|--------------------|
| 1. | October , 2007 | Occupancy Check | \$28.50 |
| 2. | May, 2008 | Securement of Property, Inspection x 2, Maintenance x 3 | \$418.10 |
| 3. | June, 2008 | Inspections x2, Maintenance x 4 | \$237.30 |
| 4. | July, 2008 | Inspection x 2, Maintenance x 4, Cleaning and debris removal, Repairs - install faceplates, light bulbs, railings on back deck, new steps and handrails. Repair - deck and stairs | \$4,346.72 |
| 5. | August, 2008 | Inspection x 2, Maintenance x 5 | \$282.50 |
| 6. | September, 2008 | Inspection x 2, Maintenance x 4 | \$237.30 |
| 7. | October, 2008 | Inspection, Maintenance x2, Repairs - electrical upgrades necessary to obtain permit from NSPI to re-connect power, Repairs - removal and disposal of mouldy paneling, insulation and ceiling tile from mud room | \$6,932.50 |
| 8. | May 9, 2008 | Sheriff's Fees and commission, Tax Certificate and municipal taxes | \$2,834.59 |
| 9. | August 20, 2008 | Appraisal | \$406.44 |
| | TOTAL | | \$15,183.50 |

[8] The cost of electrical repairs was \$4639.88 and the cost of removing the mouldy panelling and insulation was \$911.80.

[9] *Civil Procedure Rule 47.10* governs applications for deficiency under the 1972 Rules. It provides:

Order for deficiency judgment

47.10. (1) Where in the case of sale pursuant to rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest, and disbursements, as authorized by the mortgage instruments, and costs, and the person against whom the deficiency is claimed is a defendant, the plaintiff may be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency.

(2) Where a plaintiff or a party related in interest is the purchaser at a sale pursuant to rule 47.08, and it appears that the price paid was less than the fair market value of the property at the time of the sale, the court, in determining the amount of the deficiency, may deem the sale price to have been the fair market value of the property at the time of the sale.

(3) An application for deficiency judgment shall be made to the court within six (6) months from the date of the Sheriff's Sale, on ten (10) days notice.

[10] *Civil Procedure Rule 72.13* (2009) has replaced Rule 47.10. However, the new Rule, as the previous Rule, does not specify the type of circumstances in which the Court should grant a deficiency. Rather it appears to be a codification of

the principles set out by the Court of Appeal in *Royal Bank v. Marjen Investments Ltd.*, [1998] N.S.J. No. 4. The new rule provides:

Calculation of deficiency

72.13 (1) A judge may calculate the deficiency by subtracting one of the following amounts from the outstanding principal, mortgage interest, judgment interest, reasonable charges authorized by the mortgage instrument, and costs:

- (a) the balance of the sale price paid to the mortgagee, if the property is sold by public auction or approved agreement to a person other than the mortgagee;

- (b) the amount reasonably realized on resale, if the property is sold by public auction to the mortgagee or its agent, it is resold by the mortgagee, and the resale price received by the mortgagee is both reasonable and greater than the bid;

- (c) the amount bid by, or on behalf of, the mortgagee, if the property is sold by public auction to the mortgagee and the resale price or the value of the property is less than the bid;

- (d) the value of the property, in all other circumstances.

(2) A mortgagee who claims that an expenditure is a reasonable charge authorized by the mortgage instrument must demonstrate the claim by evidence specifically set out in an affidavit of the mortgagee, or its agent, showing all of the following:

- (a) the term in the instrument authorizing the expenditure to be made and charged to the mortgage debt;

(b) the necessity of the expenditure for preserving or otherwise protecting the mortgaged property;

(c) the reasonableness of the amount of the expenditure both in its fairness for the work done or materials supplied, and its value for protecting the property.

[11] Where the property is sold by the plaintiff prior to the application for a deficiency, the plaintiff is entitled to recover reasonable protective disbursements incurred up to the date the property is sold to a third-party . In *Marjen*, for example, the Court of Appeal held that the mortgagee had a right to reimbursement of reasonable protective disbursements incurred to maintain and preserve the property. The mortgagee sold the property to a third party prior to the application for deficiency. Bateman, J.A. stated, at para. 59:

It has been the practice in Nova Scotia to allow a mortgagee on a deficiency application to claim reasonable expenses incurred up to the date of the application and to require the mortgagee to account for any income earned on the property during that same period. In *Nova Scotia Savings and Loan v. MacKay et al.* (1980), 41 N.S.R. (2d) 432 Hallett, J., as he then was, at p. 437, explained the rationale for so doing:

In *Briand v. Carver et al.* (1968), 66 D.L.R. (2d) 169, where the mortgagee purchased the property at the Sheriff's Sale for \$50.00 and the evidence indicated that it was worth \$5,500.00, the mortgagee's claim for deficiency of \$4,561.78 was refused. The Court exercised its discretion and, relying on equitable principles, held that to allow the deficiency under the circumstances would have been inequitable in that the plaintiff would have had both the property and a judgment for the deficiency. Since that time,

mortgagees, when applying for deficiencies, have followed the practice of supporting their claims with affidavits of realtors as to the market value of the property at the time of the sale so that the Court could assess the adequacy of the price obtained at the Sheriff's Sale when considering the application for the deficiency judgment. This Court has therefore imposed certain obligations on the mortgagees before a deficiency judgment will be granted and it would seem only just that coincident with these obligations mortgagees should, where the mortgagee has purchased at the Sheriff's Sale, if the mortgagor has so contracted and the mortgagee has so pleaded, have the right to expend moneys to protect the property and to recover the same on a claim on the covenants so long as the expenditures 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. The foregoing expenses should be allowed by the Court in calculating the ultimate deficiency where it does not exceed the deficiency on the Sheriff's Sale.

[12] Bateman, J. continued, at para. 61 of *Marjen, supra*:

...There is no mention in that Memorandum that a mortgagee could no longer claim expenses and need not account for income. While the default judgment is to be entered not later than twenty days after the Sheriff's sale, the amount due is not entered until the deficiency, if any, is determined by the Court. When the mortgagee has purchased the property at the Sheriff's sale, with intention to resell it, it is unlikely that the resale will occur within the twenty-day period. The mortgagor, however, is entitled to the benefit of the deficiency calculated on the resale price, if higher than that paid by the mortgagee at the Sheriff's sale. It is illogical, and unfair, in those circumstances to require the mortgagee to bear the

burden of any reasonable expenses incurred while preserving the property for resale. Against those expenses should be offset any income derived from the property. A deficiency judgment is intended to provide to the mortgagee a judgment for the amount by which the proceeds from the security fell short of the amount owing on the mortgage. The mortgagor benefits from the mortgagee reselling the property because the higher price obtained lowers the deficiency judgment.

[13] In this instance, I am satisfied that the mortgage instrument authorizes expenditures to be made and charged to the mortgage debt. Paragraph 25(a)(ii) sets out additional terms and conditions of the mortgage. However, that is not conclusive.

[14] In *Bank of Montreal v. Kennedy* (2006), 243 N.S.R. (2d) 126, MacAdam J. considered an application by a mortgagee for a deficiency judgment when the mortgagee still had title to the property. The deficiency covered expenditures incurred prior to the application being filed, including taxed costs, protective disbursements, sheriff's fees and the differential value determined by appraisal. The protective disbursements included occupancy and security checks, snow removal, lawn maintenance, cleaning up and removing garbage, attendances to secure property, utilities, administrative fees, winterization, and minor repairs. MacAdam, J. approved the appraisal of \$10,000.00. He did not have jurisdiction to recalculate the legal fees and disbursements, which had been addressed by the

Small Claims Court. He was concerned about a reduction in the value of the property from \$29,568.75 (the original amount of the mortgage) to \$10,000.00 on a second appraisal, reflecting a decrease of about \$20,000.00.

[15] The mortgagee in *Kennedy* relied on *Marjen* in support of its claim for the deficiency judgment, including protective disbursements. MacAdam, J. referred to Justice Bateman's tracing (in *Marjen*) of the development of earlier versions of Rule 47.10, including Rule 47.10(2), as originally enacted in 1984. He noted the distinction between a situation where a third party purchased the foreclosed property at the Sheriff's sale, and where the property was sold by the mortgagee prior to making an application. He stated, at paras. 22-23:

Until the 1995 amendment, it is clear the calculation of the deficiency judgment differed, depending on whether the mortgagee had resold the property prior to the time of the application. Where the property was resold, Rule 47.10(2)(b) was applicable and the amount realized on the resale, if reasonable, was used in calculating the deficiency. Also to be taken into account was any income derived from the property prior to the resale as well as any costs of resale and expenses reasonably incurred to derive income from the property, as well as any costs reasonably incurred to protect or preserve it. On the other hand, where the property was not resold, the mortgagee remained the owner as of the date of the application. In such a circumstance Rule 47.10(2)(a) was applicable and the deficiency was based on a calculation using an appraisal made as of the date of the sheriff's sale. As the property continued to be owned by the mortgagee from that date forward, any changes, alterations, improvements, and additions, were, and remained, to its own account. If, following the determination of the deficiency, the mortgagee was successful in selling the property, then any proceeds realized from such sale were to the account of the mortgagee. There was

no duty on the mortgagee, in such a circumstance, to account to the mortgagor, or anyone else, in the event it was successful in achieving a higher price, having regard to the effort and expenses it incurred, nor, for that matter, could it attribute to the mortgagor, or anyone else, any loss it may have sustained in the event it was unsuccessful in realizing an amount greater than the value as of the date of the sheriff's sale, together with adjustments reflecting any income or expenses incurred in the interim. The property was the mortgagee's from the day it completed the terms of the purchase at the sheriff's sale until it was later able to sell the property. If the resale occurs subsequent to the application for deficiency, there is, of course, no sale price, reasonable or otherwise, to bring to the attention of the court in determining the deficiency. The property is owned by the mortgagee until it decides to sell it.

There is, of course, a logical reason for the long standing difference in assessing the "fair market value of the foreclosed property" when it has been resold by the mortgagee with the circumstance when the mortgagee owns the property. In the former, as noted in the authorities, the mortgagor obtains the benefit of the mortgagee's expenditures in preserving and protecting the property. In the latter, the benefit is solely for the account of the mortgagee. Once the foreclosure proceeding is completed, and if the mortgagee continues to own the property, it receives, with no obligation to account to the mortgagor, the amount of any realization, in the event the property is subsequently sold.

[16] MacAdam, J. went on to cite further comments from *Marjen* respecting the application of Rule 47.10 after its amendment in 1995. He said, at paras. 24-25:

As noted by Justice Bateman, in *Marjen*, at para. 29, Civil Procedure Rule 47.10 was re-enacted effective as at September 1, 1995. The Rule now reads:

47.10(1) Where in the case of sale pursuant to rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, interest, and disbursements as authorized by the mortgage instruments, and costs, and the person against whom the deficiency is claimed is a defendant, the plaintiff may be entitled, if such relief was claimed in the Originating Notice, to an order for payment of the deficiency.

(2) Where a plaintiff or a party related in interest is the purchaser at a sale pursuant to rule 47.08, and it appears that the price paid was less than the fair market value of the property at the time of sale, the court, in determining the amount of the deficiency, may deem the sale price to have been the fair market value of the property at the time of the sale....

In *Marjen* at paras. 30 and 31, Justice Bateman continued:

In subparagraph (1), the word "may" has been substituted for "shall". The change in the wording of Rule 47.10(1), *inter alia*, purports to remove the court's obligation to award a deficiency, and substitutes a discretion. This does not, however, effect a substantive change in the law since, pursuant 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.

The court's focus on an application for deficiency judgment on foreclosure is to ensure that the mortgagee recovers no more than "is just and reasonable" (*per* Hart, J.A. in *Adshade*, [1983] N.S.J. No. 56, *supra*). When the mortgagee has purchased the property at the Sheriff's sale, and applies for a deficiency judgment, prior to resale, it is reasonable for the court to look to objective evidence of value (*per* Hallett, J.A. in *Nova Scotia Savings and Loan Co. v. MacKay and MacCulloch* (1980), 41 N.S.R. (2d) 432; 76 A.P.R. 432 (T.D.)). It may be that the price paid by the mortgagee at the sale is an acceptable amount, particularly where there has been competitive bidding. On the other hand, the purchase price may be nominal, in which case, it is appropriate to assign a more realistic value. This ensures that the mortgagee does not, after obtaining a deficiency judgment, resell the property for an amount greater than the price paid at the Sheriff's sale and thereby effect double recovery. 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 ... 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.

[17] MacAdam, J. emphasized that Bateman, J.A. did not consider the amendments and the new Practice Memorandum to have effected any change in the law respecting valuation of property for the purpose of calculating a deficiency judgment (paras. 26 - 27). He went on to refer to Justice Bateman's comments on the chambers judge's decision to use the appraisals, rather than the resale price, as the basis for determining market value (para. 28). She said, at para. 54 of *Marjen*:

... The Rule does not distinguish, as did its predecessor, between the circumstance where the mortgagee applies for a deficiency before reselling the property and that where the mortgagee applies after the property is resold. When the property has been resold, the judge, in the proper exercise of his or her discretion, must consider all of the circumstances, which includes evidence of the resale price and the market activity as well as other relevant details surrounding the foreclosure. A market appraisal is simply one estimate of "fair market value". Provided the mortgagee has, in the circumstances, made reasonable efforts to resell the property the court should not without good reason depart from that price as the true indicator of value. With respect, in my view, the Chambers judge erred, in these circumstances, in equating the appraised value with "fair market value" ...

[18] MacAdam, J. cited Justice Bateman's observation that it was Nova Scotia practice to "allow the mortgage on a deficiency application to claim reasonable expenses incurred up to the date of the application and to require the mortgagee to account for any income earned on the property during that same period," taking the

view this comment related to situations where the property has been resold, as in *Marjen*, rather than where the mortgagee still held the property, as in *Offman* (para. 30). He continued, at paras. 31-34:

Nowhere in the reasons of Justice Bateman is it suggested the failure of the Supreme Court in 1995, to stipulate a new procedure for deficiency judgments resulted in the law remaining the same where the mortgagee has resold the property but changed where the mortgagee has not resold the property. Such an inconsistency is nowhere evident in the reasons of Justice Bateman. To permit mortgagees to enter judgment against mortgagors for expenditures designed to improve the value of the foreclosed property, which they then own, and where the mortgagor does not receive the benefit of any such enhanced value is unconscionable. Nor is it an adequate response that appraisals, as at the date of the application, will sufficiently compensate the mortgagor for these costs. Historically, even in periods of increasing property values, appraisals filed on deficiency applications have not shown increases in value commensurate with the costs and expenses being claimed by mortgagees. As observed by Justice Bateman "appraisal reports are a best guess, albeit by a person experienced in the real estate field." The appraisals filed on this application only serve to confirm the concern in relying on appraisals when other means of setting values are available.

Admittedly the court, in the circumstance where the bid at the sheriff sale is less than the fair market value, will have to rely on an appraisal made as of that date. There is no other alternative. However, mortgagees should take note that when the tendered appraisal value is markedly less than the original principal amount of the mortgage, they may be required to substantiate the basis for such reduced value.

If, as a result of the 1995 Rule changes the law relating to deficiency application was not changed, it was not changed in respect to the distinction that existed between the circumstance where the mortgagee resold the property prior to the deficiency application and where it has not resold the property. Neither equity, fairness, *Marjen* or common sense suggests otherwise.

Such a conclusion is consistent with the general tenor of the reasons in *Marjen* that the law in respect to deficiency applications has not been altered by the 1995 amendment. If, as suggested, the law in respect to deficiency applications is unchanged by the amendment and the subsequent new Practice Memorandum, then the absence of change would presumably apply to both the circumstance where the property has been resold, as well as the circumstance where the property has not been resold by the mortgagee, as of the time of the deficiency application. There is nothing in the reasons of Justice Bateman to suggest, whereas the law in respect to the entitlement of the mortgagee to claim expenses as well as the obligation to account for income in the circumstance where the property has been resold has not been changed by the 1995 amendments, on the other hand, in the circumstance where the property has not been resold, the absence of any entitlement to claim expenses or obligation to account for income has been changed by the 1995 amendment.

[19] The deficiency sought before MacAdam, J. exceeded the amount of the mortgage, although \$6000.00 had been paid on the mortgage, and the plaintiff had title, with the “the right to retain the realization from any future sale of the property” (para. 38). He concluded, at para. 40:

In respect to the plaintiff's application I have, although expressing concerns, in respect to the credibility of the appraisals submitted on this application, indicated I would allow a deficiency claim. However, in determining the amount, all of the expenses claimed that were incurred in respect to the property subsequent to the day of the sheriff's sale are not allowed. Counsel for the plaintiff has suggested the mortgagor is the beneficiary of some of these disbursements because of the increased appraisal value shown in the second appraisal ..., suggesting the increase in value between March and August may have related to the cleaning of the property. That may indeed be the case, although, apart from counsels suggestion, there is no evidence to support such a position and I am not satisfied the evidence substantiates such a conclusion. If indeed that was the case then it was always available to the plaintiff to file an affidavit by the appraiser making such an assertion and outlining the basis of the same. The onus is on the applicant and I am not satisfied that onus has been met in the present circumstance.

[20] Counsel for the applicant concedes that there are similarities between the present circumstances and the facts in *Kennedy*, but maintains that there are material differences, and says I should allow all of the protective disbursements incurred to the date of the application as part of the deficiency.

[21] Counsel for the applicant states that the appraised value of the property, determined by a drive-by appraisal, was greater than the amount of the mortgage. The drive-by appraisal valued the property at \$29,000.00. The appraiser did not have access to the interior of the home, but assumed that there was no contamination inside the home or on the property, contrary to the findings on the second appraisal. Notwithstanding this discrepancy, the plaintiff's representative attended the sheriff's sale with instructions to bid on the property to an amount of \$29,000.00, based on the drive-by appraisal. The plaintiff ended the bidding at \$26,000.00. There were no other bidders. The plaintiff maintains that it was necessary to rely on the drive-by appraisal, because the appraiser did not have access to the property, which was occupied at the time.

[22] It was only after purchasing the property at the sheriff's sale that the Plaintiff determined the condition of the home, specifically, that there were significant

deficiencies that had to be corrected prior to offering the property for sale. There were interior and exterior repairs to be done, and garbage to be removed from the property, including an abandoned car. There was hazardous material present on the property. Counsel for the plaintiff maintains that the exterior decks and stairs were repaired or replaced and handrails were installed, to eliminate safety hazards.

[23] The plaintiff also says that once the home was secured, it was determined that Nova Scotia Power had disconnected the electricity. NSPI advised that it would not reconnect the power unless the wiring was upgraded to Code compliance. The Plaintiff maintains that this was reasonably necessary to remove safety concerns and maintain power. In addition, the property manager discovered mould on the wall panelling, ceiling tile and insulation. There was no choice but to have effect repairs. Therefore, it is submitted, a significant portion of the expenditures were remedial and did not result in an increased value for the house. The Plaintiff's counsel maintains that without these expenditures, the house would not be available for sale.

[24] In contrast to *Kennedy*, the Plaintiff submits, the deficiency claim does not exceed the amount of the mortgage. Further, in *Kennedy*, the Plaintiff had secured

the property and incurred protective disbursements before the Sheriff's sale, and thus knew the condition of the home, while in this case, the mortgagor occupied the home until the sale and the mortgagee had "no idea of the true state of the interior of the property at the time it attended the Sheriff's sale." Upon taking possession, the Plaintiff thus became aware that the mortgagor had "allowed the property to fall into significant disrepair." This was evident from "the debris located inside and outside the home...." As such, it is argued, the Defendant placed the Plaintiff in the position of incurring protective disbursements in order to make the house saleable, and is thus the beneficiary of the Plaintiff's protective disbursements.

[25] In the main, the arguments advanced by counsel for the Plaintiff would be appropriate in instances where the property had been purchased by a third party prior to the application. I am mindful, however, that Kennedy appears to support the view that expenditures incurred after a foreclosure sale where the mortgagee purchases the property are to the benefit of the mortgagee and need not be accounted for by the mortgagor on a deficiency judgment.

[26] In this case, I find that the Plaintiff, as mortgagee, had an opportunity to inspect the premises prior to obtaining the order for foreclosure and sale. Paragraph 17 of the *Additional Terms and Conditions* of the mortgage authorized the mortgagee to “enter [the] property at all reasonable times to inspect and repair,” without becoming a mortgagee in possession. In addition, I am satisfied that the *Civil Procedure Rules* would have allowed the Plaintiff to seek an order allowing it to inspect the property after the foreclosure proceeding was commenced, even if the mortgagor remained in possession at the time. Such an inspection would have permitted the Plaintiff to determine the true state of the property.

[27] As to the expense of reconnecting the power, it is logical to assume that there was full power on the premises at the time when the Plaintiff gave the mortgage. This does not mean that the connection was necessarily up to Code standard. It appears that Nova Scotia Power took the position that the power had to be upgraded to Code before a connection would be allowed. The nature of the expenditure, as evidenced by Ms. Walker’s affidavit, was an upgrade and repair necessary to obtain a permit to reconnect the power. I would view this as an improvement of the premises.

[28] In addition, there were issues raised with respect to the quality of interior and exterior railings. In my view, this is a defect that could have been discovered on an inspection prior to the sale, and repairs effected pursuant to para.17 of the Additional Terms and Conditions. I take the same view of the quantity of rubbish and debris that was present on the property. As to the remaining protective disbursements incurred after the foreclosure sale, I take the view that these likewise should not be reimbursed to the mortgagee, being expenditures on its own property for which the Plaintiff would not be required to account for on the sale of the property. Therefore, I apply *Kennedy* in respect of all the post-Sheriff's sale protective disbursements.

[29] Accordingly, I do not allow the protective disbursements incurred after the foreclosure sale to be included in the deficiency judgment. I allow interest at the rate of 5 per cent to the date of these reasons, as well as \$1000.00 in costs.

J.