

foreclosure order in respect of a mortgage on a commercial property in New Minas owned by the appellant, Mrs. Offman. The mortgage was dated August 1, 1990 and was in the principal amount of \$750,000. The land subject to the mortgage included approximately 35,000 square feet of land and a two-story wood-frame building consisting of approximately 15,000 square feet. It was originally developed for the operation of a tavern by the owner and associated rentable retail space plus a two-bedroom apartment. The premises also included a 30-car underground parking garage which was thought to be necessary to service the tavern. The owners were unable to obtain a liquor licence for the operation of a tavern and the project was never successful. Although initially rented, the property did not have any paying tenants from August 1991 to the date of the foreclosure.

On the day scheduled for the sheriff's sale, August 24, 1992, the solicitor for Royal Trust, Frank Powell, contacted the appellant's solicitor, Andrew Wolfson, and asked if the mortgagor was intending to bid at the sale. He was informed that she would not be attending the sale. Mr. Powell indicated that he would be cancelling the sale because he did not have appraisals done yet. Mr. Powell went to the sale, determined that no other bidders were present and proceeded with the sale. He purchased the property on behalf of Royal Trust for the amount of \$46,600.20. No objection to this was taken by the appellant until the deficiency application was brought in November, 1992.

As a result of the conversation with Mr. Wolfson on the day of the sale, two acquaintances of the appellant's son changed their plans to attend the sale. The information they were given, which was confirmed by Mr. Powell's secretary, was that the sale would be cancelled. Although they had intended to attend the sale, neither of these people indicated how much they would have been prepared to bid at the sale, nor did either of them make any approach to Royal Trust after the sale to express an

interest in purchasing the property.

Before the sale, the property was severely damaged by the appellant's husband acting as her agent. Most fixtures such as toilets, sinks, light fixtures and carpets were removed from the property. Many of these items were returned to the property but not installed. In addition, the apartment contained in the building was vandalized by person's unknown after Royal Trust took possession.

After purchasing the property at the foreclosure sale, Royal Trust received five unsolicited offers to purchase the property, which ranged in amounts from \$150,000. to \$275,000. The highest of these offers was accepted but the sale was not completed because the offerors were unable to obtain financing. On January 29, 1993, Royal Trust listed the property for sale with an asking price of \$350,000. and it was exposed to the market for several months. Two offers were received in June 1993, one for \$250,000. and one in the amount of \$290,000. The latter offer was conditional upon Royal Trust taking back a first mortgage for 90% of the purchase price at 8% for a five year term. Neither of these offers was accepted. The property was eventually sold for \$262,500. on July 29, 1993.

On the deficiency application before Anderson, J., which commenced prior to the sale by Royal Trust, he was advised that the appellant was not seeking to have the sale set aside because of the irregularities on the day of the sale. He had four appraisals before him: two were presented by Royal Trust, one prepared by Eric Picott, of Coastal Real Estate Appraisals in the amount of \$285,000 and the other by Charles Hardy Appraisals Limited in the amount of \$350,000. The appellant presented an appraisal done by Stephen North of East Coast Appraisals Ltd. in the amount of \$886,000. These three appraisals expressed the value the property as of August-September, 1992. The appellant also filed the appraisal report which was prepared prior to the mortgage in June, 1990 which valued the property at \$1.6 million

Royal Trust initially sought a deficiency judgment of \$511,353.92, based on a deemed sale price of the property of \$350,000. The amount of the claim was later varied and based on the actual sale price of \$262,500. The appellant claimed that Royal Trust should not be entitled to any deficiency because of the circumstances surrounding the sale.

Anderson, J. concluded his decision as follows:

" I must give some consideration to the fact of the unusual circumstances surrounding the sheriff's sale. I must consider the original appraisal value for mortgage purposes of the property, the wide divergence in price of the appraisals for deficiency. I set the fair market value of this property at \$500,000.00 and would grant the plaintiff a deficiency judgment on that basis."

Earlier in the decision, he expressed a lack of confidence in the appraisals because of the great differential in value between the various experts. He also remarked that in his view "the sale price between a willing buyer and willing seller is indicative of but not necessarily the fair market value."

This conclusion resulted in a deficiency judgment of \$392,517.86, plus interest from the date of the foreclosure order.

The appellant raises the following issues on appeal:

1. Did the trial judge err at law by failing to find that the irregularities of the sale and subsequent actions of the respondent precluded the respondent from obtaining a deficiency judgment?

2. Did the trial judge err by improperly determining the value of the property?

3. Did the trial judge err by allowing interest on the deficiency amount?

The respondent, in the notice of contention, asks that the value of the property be set at \$ 262,500. and that the deficiency judgment be varied accordingly.

Civil Procedure Rules 47.10(1), (2) and (3) are applicable:

" 47.10. (1) Where in the case of a sale pursuant to Rule 47.08 the amount realized is insufficient to pay the amount found to be due to a plaintiff for principal, disbursements authorized by the mortgage instrument, interest and costs, and the mortgagor is a defendant, the plaintiff shall be entitled to an order for payment of the deficiency (together with interest on that amount at the rate provided for in the mortgage from the date of the sale to the date of the order), if such relief has been claimed.

(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

(a) the fair market value of the property at the time of the sale as established by independent appraisal; or

(b) the amount realized upon a resale of the property if the court is satisfied that the price obtained was reasonable, but in that event any income derived from the property before resale shall be added to the price obtained and there shall be deducted therefrom the costs of resale (including real estate commission paid to a third party), expenses reasonably incurred to derive income from the property and other costs reasonably and necessarily incurred to protect or conserve it.

(3) An application for deficiency judgment pursuant to sub-paragraph (2), unless otherwise ordered by the court, shall be made within six months from the date of the Sheriff's Sale on ten days notice and any deficiency judgment allowed shall not exceed the difference between the amount realized by the plaintiff from the Sheriff's Sale and the amount owing to the plaintiff at that date determined in accordance with the provisions of the order for foreclosure and sale."

In my view there is no merit to the appellant's claim that the respondent should not be entitled to any deficiency judgment because of the improprieties on the day of the sale. The appellant specifically refused the offer of Justice Anderson to pursue the remedy of having the sale set aside. In addition, the price obtained at the sheriff's sale is no longer relevant to the amount of the deficiency. The respondent is

not attempting to prove that fair market value was obtained at the sheriff's sale. There is absolutely no evidence that anyone who received inaccurate information about the cancellation of the sale was prepared to bid an amount close to the amount owing on the mortgage. The submission that one or more of those people may have paid more than fair market value as a result of the psychology of an auction is, in my opinion, pure speculation, but if the respondent held that view, an application to set aside the sheriff's sale should have been made. It is important to note that a bid of more than \$851,000. was necessary in order to satisfy the mortgage debt and expenses.

There is no evidence that any unfair advantage was obtained by the mortgagee as a result of the communications on the day of the sale. There is nothing on the record to indicate that the second mortgagee, the Bank of Nova Scotia, was prepared to make a bid at the sale. In light of the extensive exposure of the property to the market after the sale, the offers to purchase received by Royal Trust, and the four appraisals, it is not necessary to consider the bidding, or lack thereof, at the sheriff's sale to determine the fair market value of the property. There is sufficient objective and independent evidence of the property's value that the amount bid at the sheriff's sale is not relevant.

The appellant submits in the alternative that the fair market value as determined by the trial judge was in error and that this court should substitute the figure of \$886,000. On this point, the respondent agrees that the trial judge erred but submits that the resale amount of \$262,500. should be used to calculate the deficiency. Counsel for the respondent did admit during the argument that some credit should be allowed for the damage done to the apartment while the property was under the control of Royal Trust, and suggested the appropriate amount would be between \$10,000. and

\$30,000., based on the estimates of the appraisers.

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 ss.(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 ss.(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.

In this case the appraisers admitted that the property was unique and therefore difficult to appraise because of the lack of similar comparables in the vicinity.

In addition, since the property was vacant and damaged, unable to be used for the purpose for which it was designed, i.e. a tavern, and the vacancy rate for commercial premises in the immediate area was very high, the appraisers were not able to say with any degree of certainty or accuracy what the expected income from the property would be. Nor of course were they able to precisely predict when the current recession would end. Additionally, they each agreed that market response was the most reliable indicator of value for commercial property. In my view, the trial judge correctly declined to rely only on the appraisers' opinions of value in fixing the deemed sale price. However, by not using the resale price as indicative of its value, he was in error. The additional amount allowed by the trial judge, presumably because of the miscommunication on the date of the sale, is not justified on the record. It appears as though the trial judge gave the appellant a quarter million dollar credit as a result of the flawed sheriff's sale.

The foreclosure order provided for interest payable at the rate of 9% on the amount outstanding until payment. The trial judge was not in error in allowing interest until the date of his decision.

The appeal should be dismissed, and the ground of contention allowed. The appellant should be entitled to credit in the amount of \$30,000. representing the damage to the building after it was in the possession of the mortgagee. The deficiency judgment should be calculated on the basis of a deemed sale price of \$292,500. The respondent should be entitled to its costs on the appeal, fixed in the amount of \$2000.00, plus reasonable disbursements. Counsel are asked to prepare the order based on this decision and present it to the court for approval within ten days.

Roscoe, J.A.

Concurred in:

Matthews, J.A.

Pugsley, J.A.