

SUPREME COURT OF NOVA SCOTIA
Citation: *Ackerman v. Deckman Trust*, 2014 NSSC 335

Date: 2014/09/22

Docket: Antigonish No. 429713, 415134

Registry: Antigonish

Between:

Michael Ackerman and Shirley Ackerman

Plaintiffs

v.

The Deckman Trust

Defendant

and

Jackie Strongman and Edith Strongman

Defendants-Guarantors

Revised Decision: The original decision has been corrected according to the attached erratum dated October 30, 2014.

Judge: The Honourable Justice N. Scaravelli

Heard: July 30, 2014, in Pictou, Nova Scotia

Final Written: September 22, 2014

Counsel: Donn Fraser, for the Michael Ackerman
and Shirley Ackerman
Dennis James, for the The Deckman Trust

By the Court:

[1] The plaintiffs in this action, as mortgagees have motioned for Summary Judgment on the evidence seeking an order for foreclosure, sale, and possession as well as judgment against the defendant guarantors who have not filed a defence.

[2] The mortgage in question was executed and registered in the Guysborough Registry of Deeds on October of 2003. In May, 2013 the plaintiffs commenced foreclosure proceedings on the property as a result of payments having fallen in arrears. As set out in the Statement of Claim the plaintiffs seek payment of the total outstanding, together with the interest at the rate set out in the mortgage on the sum of \$27,861.73 from April 30, 2013 to the date of judgment. The plaintiffs also seek costs.

[3] On August 2, 2013 the defendant, Deckman Trust tendered the amount of \$28,017.57 which it calculated as follows:

Principle Balance	\$27,308.49
Interest to July 31	\$ 713.56
Less Payment Received	<u>\$ 1,000.00</u>
Sub Total	\$27,022.05
Add 2 Days Per Diem Interest	\$ 5.07
Legal Costs	\$ 750.00
Filing Fee and Law Stamp	<u>\$ 240.45</u>

[4] The plaintiffs accepted the payment as part payment only, claiming the defendants are responsible to pay costs as between solicitor and client, as per the terms of the mortgage. The Deckman Trust filed a defence claiming solicitor and client costs were not pleaded in the Statement of Claim and are not allowed in law.

[5] *Civil Procedure Rule 13.04* deals with Summary Judgment on the evidence:

13.04 (5) A judge hearing a motion for summary judgment on evidence may determine a question of law, if the only genuine issue for trial is a question of law.

[6] *Civil Procedure Rule 72.07 (1)* specific to foreclosure provides:

72.07 (1) A judge who hears a motion on default of defence or an application for an order for foreclosure, sale, and possession that is uncontested, or a motion for the order after issues in contest have been determined, may grant the order on such terms as are just.

[7] The parties agree there are no material facts in dispute and the only question to be determined is a matter of law.

[8] The issue in dispute is whether the plaintiffs are entitled to costs as between solicitor and client. At the hearing counsel for the plaintiff acknowledged a release of mortgage would be executed in the event the claim for costs, as between

solicitor and client, was unsuccessful. Should the motion be successful costs would be taxed at a later date.

[9] The relevant paragraph of the mortgage contract between the parties, relied upon by the plaintiff, states:

PROVIDED that the Mortgagee may pay the amount of any encumbrance, lien or charge now or hereafter existing or to arise or to be claimed upon the said lands, having priority over this mortgage, including any arrears of taxes or other rates on the said lands or any of them, and may pay all costs, charges and expenses which may be incurred in taking, recovering, and keeping possession of the said premises and **all solicitor's charges or commissions for in respect of the collection of any overdue interest, principle, insurance premiums or any other monies whatsoever payable by the Mortgagor hereunder, as between solicitor and client, whether any action or any judicial proceedings to enforce such payment has been taken or not** and the amount so paid shall be added to the debt hereby secured and be a charge on the said lands and shall bear interest at the same rate and shall be forthwith payable by the Mortgagor to the Mortgagee and the non-payment of such an amount shall entitle the Mortgagee to exercise the powers exercisable for breach of the covenant first here and before contained. In the event the Mortgagee paying the amount of any such encumbrance, lien or charge, taxes or rates, either out of the monies advance on this security or otherwise, they shall be entitled to all rights, equities and securities of the person or persons, company, corporation or Government so paid off. (Emphasis added)

POSITION OF THE PARTIES

[10] The plaintiff submits the contractual language of the subject clause, allowing costs as between solicitor and client, entitles the plaintiff to party and party costs

on a more generous scale. *Canada Trustco Mortgage Co. v. Homburg* [1999] N.S.J. 266 (*Homburg*); *R v. Innocente* [2003] N.S.J. 174 (*Innocente*); *NMF Group (trustee of) v. Kennedy* [2004] N.S.S.C [NMF]. 112; *Xceed Mortgage Corp. v. Jesty* [2014] N.S.S.C. 51 (*Xceed*).

[11] The Deckman Trust submits the plaintiff is not entitled to costs as between solicitor and client, as the subject clause does not apply to foreclosure proceedings, as stated in *Craig v. de Oliveria E Sousa* [1984] N.S.J. 387 (*Craig*). The defendant relies on *Craig* as the applicable law in Nova Scotia. It submits the principle of *stare decisis* requires that the Court of Appeal decision be followed.

HISTORY OF AUTHORITIES

[12] In *Central Trust vs. Conway* [1982] 56 N.S.R. (2d) 208 (*Conway*) the mortgagee sought a deficiency judgment after foreclosure and sale. The mortgage clause was virtually identical to the clause in the present mortgage as it related to collecting solicitor's charges as between solicitor and client. Nathanson, J. stated that the provision appeared to encompass foreclosure proceedings and therefore "must be given affect as to a covenant in a contract between the mortgagor and the mortgagee." However, in *Craig*, where the mortgage language was virtually

identical, the Court of Appeal held the clause did not in any way apply to or affect costs that may be ordered by a Judge. Referring to the clause the court stated:

[3] The clause clearly does not apply to taxable costs in foreclosure proceedings. It merely says that collection charges or commissions actually paid by the mortgagee to his own lawyer during the currency of the mortgage may be added to the mortgage debt and collected on foreclosure as part of that debt. It has nothing to do with what happens after the mortgage debt has been crystallized and is the subject of foreclosure proceedings. It thus cannot affect the taxable costs that the trial judge in her discretion could order paid nor can it limit that discretion.

[13] The court appeared to find that the phrase “whether any action or other judicial proceeding to enforce such payment has been taken or not”, did not draw in legal costs arising from a foreclosure proceeding. *Conway* was not referenced in *Craig*.

[14] Subsequently the same language was found in a mortgage in *Theoharopoulos v. Pillitteri* [1986] 77 N.S.R. (2d) 206 (*Theoharpulous*). In that case Nathanson, J., who had also been the Judge in *Conway*, referred to the *Craig* decision and stated:

[7] In Nova Scotia, the general rule is that costs are in the discretion of the court: see Civil Procedure Rule 63.01 (1). The legal basis for a solicitor-and-client claim is, therefore, not contractual. No doubt one of the factors the court would take into consideration in deciding whether to award solicitor-and-client costs would be whether there is any contractual aspect to the claim but, even if there was, it would be a rare case in which the court would be likely to exercise its discretion to award costs of that kind ...

[8] In my opinion, the relevant provision in the mortgage being foreclosed here is not sufficient to warrant the court awarding solicitor-and-client costs. Even if that were not so, the court has not been made aware of any special circumstances that would justify such an award in this case.

[15] In *CIBC Mortgage Corp v. Mann* [1987] 82 N.S.R. (2d) 181 [*Mann*] a mortgagee sought a deficiency order after foreclosure and sale, including solicitor and client costs based on language similar to that in the present case. Richard, J. observed that the Nova Scotia practice was to exercise the courts discretion to award solicitor and client costs only in “very exceptional circumstances” citing, *Inter Alia, Craig, and Theoharopoulos* noting that those cases ought to have been sufficient to put to rest the argument that solicitor and client costs award was contractual. Ordering that costs be taxed on a party and party basis, he stated:

7 Costs are clearly in the discretion of the court. I am of the view that this discretion cannot and should not be usurped by a clause in a contract. Therefore, such clauses should be given no weight and the court ought deal with the question of costs quite apart from any contractual provisions.

8 To find otherwise would be to expose a mortgagor (or others in similar contractual situations) to liability for costs over which he could exercise no control and would place him in the insidious position of being totally at the mercy of the other party and its solicitor. This is the sort of thing that could lend itself readily to excess and abuse.

[16] The authorities relied upon by the plaintiff evolved from the *Homburg* decision in 1999. In that case the mortgagee obtained summary judgment in a foreclosure proceeding. The mortgagor subsequently paid the mortgage but, the mortgagee refused to provide a release without receiving solicitor and client costs. In the event of default, the mortgage permitted the mortgagee to send an inspector to inspect and report on the condition of the premise and a solicitor report on title.

4 ... and all expenses incurred in so doing, together with the costs and charges (including solicitor and client costs) which the Mortgagee may incur or pay in collecting or attempting to collect any moneys payable hereunder, or enforcing or attempting to enforce any of the remedies and powers herein contained, and of recovering or attempting to recover possession of and keeping possession of the Mortgaged Premises or any part thereof, (including, without limitation of the generality of the foregoing, solicitor and client costs in any proceeding for foreclosure and sale) shall be payable forthwith by the Mortgagor, shall bear interest at the rate aforesaid computed from the time of payment, and shall be a charge upon the Mortgaged Premises. (Emphasis Added)

[17] This language made specific reference to solicitor – client costs (not costs “as between solicitor and client”) and to a foreclosure proceeding. Davison, J. distinguished *Craig* on the basis of the language of the mortgage provision. Whereas the provision in *Craig* did not address what happened after crystallization of the debt and the commencement of foreclosure proceeding, the *Homburg* clause clearly stated that “after default, the mortgagor shall pay the mortgagees legal expenses on a solicitor and client basis with respect to collecting money payable under the mortgage”. The issue was the effect of a judge’s judicial discretion in light of this clause. Davison, J. noted that the question of discretion had not been of concern in *Craig*, where the court’s reasoning was based on the language of the mortgage. He concluded with the following summary of the law:

40 In my view, the law in Nova Scotia is that where a mortgage stipulates the mortgagor pays to the mortgagee costs on a solicitor and client basis, costs should be awarded on that basis except in special circumstances. The court has an overall discretion as to costs, but that discretion should not deprive the parties to that which they have agreed, except when those special circumstances exist.

[18] The first case to consider *Homburg* was *Innocente* where two mortgagees sought solicitor - client costs. The property was subject to a *Criminal Code* restraint order. The mortgagor defaulted and Citifinancial commenced foreclosure proceedings to which Clarica, the other mortgagor, consented. An order for foreclosure, sale, and possession was obtained. The foreclosure proceeding ended short of a sheriff's sale, after the court permitted the mortgagor to list the property for sale, which was arranged. The Clarica mortgage provided:

[7] ... The mortgagor will pay to the mortgagee on demand, all expenses and costs incurred by the mortgagee in enforcing this mortgage. These expenses and costs include the mortgagee's cost of taking and keeping possession of the land, the cost of the time and services of the mortgagee or the mortgagee's employees for so doing, the cost of appraisal, the mortgagee's legal fees and disbursements on a solicitor and client basis, unless the court allows legal fees and disbursements to be paid on a different basis, and all other costs and expenses incurred by the mortgagee to protect the mortgagee's interest under this mortgage. These expenses and costs will be added to the principal amount, be payable on demand and bear interest until they are fully paid. [Emphasis Added]

[19] The Citifinancial Mortgage provided as follows:

[9] ... That the Mortgagee may pay the amount of any taxes, liens, claims, charges or encumbrances now or hereafter existing or to arise or be claimed upon the said lands, having or which the Mortgagee may *bona fide* consider to have priority over this Mortgagee, and all costs, charges and expenses (as between solicitor and client) which may be incurred in negotiating this loan, investigating title and registering this mortgage along with any other necessary deeds or documents, or in negotiating and/or effecting a renewal of this mortgage / or in securing or retaining or realizing or attempting to procure possession of the said lands, or in any proceeding judicial or otherwise to protect or to realize upon this security ... [Emphasis Added]

[20] LeBlanc, J. characterized the prior case law as containing two lines of authority: *Craig*, *Theoharopoulos*, and *Mann* which suggested that “such clauses should have little or no weight” and *Homburg* which indicated the court has an overall discretion as to costs, but that discretion should not deprive parties to that to which they have agreed, except when special circumstances exists. LeBlanc, J. did not explicitly accept or reject either line of authority. He concluded:

37 In my view, the law in Nova Scotia is that where a mortgage stipulates the mortgagor pays to the mortgagee costs on a solicitor and client basis, costs should be awarded on that basis except in special circumstances. The court has an overall discretion as to costs, but that discretion should not deprive the parties to that which they have agreed, except when those special circumstances exist.

38 What are the “special circumstances”? They are situations where the mortgagee uses oppressive or vexatious conduct. They are situations which include the mortgagee causing vexatious delays or unnecessary costs. To quote the Ontario Court of Appeal, they render “the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances”. In my opinion, it should be recognized the mortgagor has no control over the quantum of costs and the court should be cautious in the amount it taxes against the mortgagor because of this lack of control notwithstanding that which may be viewed as an appropriate amount as between the mortgagee and its solicitor.

[21] *Homburg* was considered again in *NMF* where the mortgagee sought costs in accordance with a provision of the mortgage virtually identical to *Craig* and the present case. Edwards, J. reviewed *Homburg* and *Innocente*. He accepted LeBlanc, J.’s statement in *Innocente* that costs as between solicitor and client is considered to be party and party costs but on a more generous scale. Other cases following *Homburg* and *Innocente* include *Xceed Mortgage Corp. v. Jesty* 2014

N.S.J. 56 and *Royal Bank of Canada v. Manor Custom Homes Inc.* 2014 N.S.J.

396. Thus, the recent case law has acknowledged *Homburg* as the leading authority on this issue before the court without reference to *Craig*.

[22] The plaintiff submits that the *Homburg* line of cases represents the law in Nova Scotia. The Court of Appeal decision in *Craig* has no application in the present case, as it was decided *per incuriam* by virtue of the lack of reference to *Conway*. Alternatively, the plaintiff submits the passage of time can cause *stare decisis* to lapse. *Craig*, it is submitted, should be ignored because it is dated and no longer followed. The plaintiff did not offer any authority in support of this position.

[23] The general principle of *stare decisis* is that a subordinate court must not disregard a prior decision of a Superior Court within its territorial jurisdiction. An exception to the rule exists where a decision is reached *per incuriam*. Such a decision ignores case law which would have been binding on the court. *Halsbury's Laws of Canada – Civil Procedure* [2012] Reissue, see also *Smith v. Atlantic Wholesalers Limited* [2012] N.S.J. 17.

[24] Clearly the trial division judgment in *Conway* was not binding on the Court of Appeal. Unfortunately recent case law acknowledging *Homburg* as a leading authority on the point did not address *Craig* in terms of binding authority. In

Homburg, Davison, J. acknowledged that *Craig* was decided on the basis of the specific language in the mortgage and that his reasoning pertained to situations where a mortgage stipulates the mortgagor pays to the mortgagee costs on a solicitor and client basis in proceedings for foreclosure and sale. The cases that followed tended to treat *Homburg* as if it set out a sweeping rule governing any mortgage that permits recovery of legal costs regardless of the specific language.

[25] In my view there is no basis to find that *Craig* does not remain good law. Only a contrary decision of the Court of Appeal or the Supreme Court of Canada can have that effect. It follows that the *Craig* decision governs a mortgage with similar language to that in this case. As such, *NMF* (identical language) would be an outlier to the extent it accepts *Homburg* as a governing authority for a mortgage containing this specific language. Accordingly the defendant is not contractually obligated to pay costs as on an elevated scale between solicitor and client in these proceedings.

[26] As a result, the Motion for Summary Judgment is dismissed. Costs are awarded to the defendant Deckman Trust in the amount of \$750.00.

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Erratum:

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