

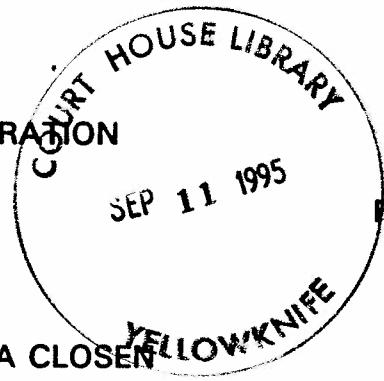
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CIBC MORTGAGE CORPORATION

- and -

KENNY CLOSEN and BRENDA CLOSEN



Plaintiff

Defendants

MEMORANDUM

This matter came before me in Chambers on April 18th 1994 when it was adjourned without date to allow counsel to file written submissions as to costs. Those submissions were filed but no step was then taken to alert the Registry staff to refer the matter to me so that I might consider the matter and come to a decision. It was not until late December 1994 that any such step was taken, by which time it had become necessary to obtain a transcript of the proceedings in April that year.

2 The transcript was not prepared and filed until March 29th 1995. The pressure of other business intervening has since delayed the matter further. Ordinarily, these unopposed foreclosure proceedings would not have required this additional attention and would have been concluded long ago without the extensive and unfortunate delay which has arisen since they were heard in Chambers.

3 Apart from the question of costs, the only point in contention is as to the amount of interest which the defendants are to be required to pay under the mortgage, bearing in mind the fact that the proceedings were unopposed and that this was known by the plaintiff back some months before the matter came on to be heard in April, 1994.

4 The property which is the subject of these foreclosure proceedings has vested in the plaintiff pursuant to an order made in Chambers on December 20th 1993 at the then appraised value of \$125,000, with leave being granted to the plaintiff to seek recovery of any deficiency thereafter due under the mortgage together with such costs as the Court might see fit to award. This order was amended by consent with effect on June 6th 1994 to make good certain omissions from the formal order made on December 20th 1993 (but not entered until January 6th 1994). However, the substance of that order remains unchanged for the purposes of the matter now before me.

5 According to the affidavit material filed, the defendants were married at the time that they entered into the mortgage. They separated in July 1992, at which time payments on the mortgage were up to date. The defendant Brenda Closen moved out of the matrimonial home comprising the mortgaged property, leaving the defendant Kenny Closen in possession on the understanding that he would remain responsible, as between them, for the remaining mortgage payments. The defendants, through their respective counsel, informed the plaintiff early in June 1993

that they were prepared to quit claim the property to the plaintiff if the plaintiff would forego its claim to any deficiency under the mortgage. No response to the letters addressed to the plaintiff on that point by counsel for the defendants was received until November 22nd 1993, when notice was given to the defendants, through their counsel, of the plaintiff's application for the order thereafter made on December 20th 1994.

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It is the contention of the defendants that they should not be obliged to pay interest under the mortgage for the period following their offer to quit claim the mortgaged property to the plaintiff. That offer was evidently never accepted. There is, therefore, no basis in law for this contention.

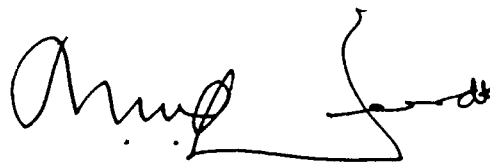
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It is the further contention of the defendants that any interest due under the mortgage after the vesting order was made on December 20th 1994 should be calculated only on the amount of the deficiency, if any, due by the defendants to the plaintiff under the mortgage, as of that date. On the plaintiff's behalf, it is however contended that the interest should continue to be calculated on the entire outstanding balance of the mortgage until the expiry of the appeal period in respect of the December 20th 1994 order on or about January 20th 1995. Given that it was a consent order, I agree with the defendants' position on this point. Interest on the deficiency only after December 20th 1994, is to be calculated as from that date and not after the expiry of the appeal period. No greater amount of interest is therefore due to the plaintiff.

With regard to costs, the defendants ask that the plaintiff be denied its costs in this action on grounds of inequitable conduct by proceeding when it was aware that the defendants were willing to quit claim the mortgaged property to it on condition that the plaintiff would forego any deficiency under the mortgage after realizing the value of the property. Once again, the weakness in the defendants' position is that the plaintiff was under no obligation to forego the deficiency and chose not to do so. Nevertheless, the plaintiff did choose to take its time for almost six months and then chose to proceed, in spite of all absence of any opposition, as if the matter was still actually contentious, when it was not, as the entry of the consent order of December 20th 1994 clearly shows. Thereafter, on the present application, the plaintiff filed written submissions without taking appropriate steps to bring these to my attention. And while the defendants did likewise, apparently sharing with the plaintiff an unfulfilled expectation that Registry staff would forward the submissions without any specific request to do so, it was for the plaintiff to ensure that the matter did not simply rest there, which it failed to do. The matter was brought to my attention only in late December 1994, as I have mentioned, and then that was done by counsel for the defendants and not counsel for the plaintiff.

In these circumstances, the plaintiff having been less than conscientious in its conduct of the foreclosure proceedings, it is in my view only appropriate that it be deprived of its costs and that it should, furthermore, pay the costs of the defendants, as between solicitor and client, throughout. An order shall issue accordingly.

The plaintiff shall have judgment against the defendants, both jointly and severally, for the outstanding interest calculated as I have outlined, subject to deduction of the amount of the defendants' said costs.

A handwritten signature in black ink, appearing to read 'M.M. de Weerd', written in a cursive style.

M.M. de Weerd
J.S.C.

Yellowknife, Northwest Territories
June 20th 1995

Counsel for the Plaintiff: Austin F. Marshall, Esq.

Counsel for the Defendant
Kenny Closen: James T. Floyd, Esq.

Counsel for the Defendant
Brenda Closen: Ms. Katherine D. Dann

CV 04660

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MEMORANDUM
HONOURABLE MR. JUSTICE M.M. de WEERD

