

KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 48**

Date: **2024 03 22**
File No.: QBG-SA-01112-2021
Judicial Centre: Saskatoon

BETWEEN:

SCOTIA MORTGAGE CORPORATION

PLAINTIFF

- and -

JAIMIE KENDRA YAMNIUK
ROYAL BANK OF CANADA

DEFENDANTS

Counsel:

Erica M. Klassen
James P. Kroczyński
No one appearing

for the plaintiff
for Royal Bank of Canada
for Jaimie Yamniuk

FIAT
March 22, 2024

ROTHERY J.

I. INTRODUCTION

[1] Scotia Mortgage Corporation [SMC] sued Jaimie Kendra Yamniuk [Yamniuk] for foreclosure of her mortgage that was granted for the purchase of her property. Royal Bank of Canada [RBC] was added as a defendant to the action because RBC had an enforcement charge registered against the property which was subordinate to the mortgage granted to Yamniuk by SMC.

[2] SMC noted Yamniuk for default of her defence on March 23, 2022. SMC

applied, on a without notice basis, for an Order Nisi for Sale by Real Estate Listing, and obtained that order on April 7, 2022.

[3] Because Yamniuk was unco-operative with the selling officer and listing agent in providing access to the property, SMC was required to apply for immediate possession of the property. That order was granted November 17, 2022.

[4] SMC then was required to apply for substitutional service of the immediate possession order, and that order was granted January 30, 2023.

[5] Counsel for SMC finally obtained its Order Confirming Sale on August 22, 2023. No other relief was sought by SMC on that application regarding the balance of the proceeds of sale.

[6] When counsel for SMC finally applied for an order assessing solicitor-client costs to SMC in the amount of \$14,325.37 on December 5, 2023, the application was opposed by counsel for RBC, the subsequent encumbrancer. Counsel for RBC advised the Court that counsel for SMC had declined to provide him with information confirming the actual principal and interest owed to SMC, the supporting documentation for the property management fees of \$7,325.63 that SMC claims it is entitled to, and separate legal costs SMC claims for the “sale closing costs” of \$1,071.37. Counsel for RBC also noted that the balance of the sale proceeds had not as yet been paid into court.

[7] Given the Court’s supervisory role in judicial sales, counsel for SMC was directed to provide the court with this pertinent information. An adjournment of the application was granted to ensure all of this information was before the Court.

II. ISSUES

[8] The issues resulting from this application to assess solicitor-client costs are:

- (a) The ramifications of an *ex parte* order granted that is not in compliance with the law;
- (b) Whether a mortgagee’s lawyer is entitled to a separate set of legal fees for closing the sale of the mortgaged property;
- (c) Whether the standard solicitor-client costs ought to be increased;
- (d) Whether the mortgagee is entitled to the cost of inspection fees incurred in its claim for property management fees;
- (e) Whether RBC is entitled to costs in this application.

III. ANALYSIS

(a) *The ramifications of an ex parte order granted that is not in compliance with the law*

[9] The supervisory role of the Court in judicial sales has been articulated numerous times, and bears repeating here. Justice Barrington-Foote (as he then was), stated the following at paragraphs 16-17 of *Royal Bank of Canada v Hollmann*, 2017 SKQB 299 [*Hollmann*]:

16 As Hall J.A. noted in *Co-operative Trust Co. of Canada v O’Grady* (1985), 43 Sask R 317 at para 4 (Sask CA) [*Co-operative Trust*] “[j]udicial sale is an equitable remedy and will only be granted in accordance with the rules of equity”. The source of the court’s authority to order a judicial sale is the *Chancery Procedure Amendment Act, 1852*, 15 & 16 Vict, c 86, s. 48 and s. 70 of *The Queen’s Bench Act, 1998*, SS 1998, c Q-1.01 and Rule 10-46: see *Saskatoon Credit Union Ltd v Goertz* (1989), 73 Sask R 81 at paras 11-22 (Sask CA). A judicial sale, like all major remedies of the mortgagee, is subject to supervision by the court pursuant to s. 132 of *The Land Titles Act, 2000*, SS 2000, c L-5.1: *Co-operative Trust* at para 18.

17 That supervision includes fixing costs and determining the amount to be paid to the bank from the proceeds of sale, or for a deficiency. As Rothery J. noted in *Toronto-Dominion Bank v Schell*, 2014 SKQB 344, 461 Sask R 257 where, as here, the net proceeds of sale are paid

in to court, the process is as follows:

16 Monies owed under the mortgage are to be set by the court on further application; the plaintiff does not receive those funds in advance. There may be accounting issues that the defendants may wish to address and the application to confirm the sale allows for this relief. The proper forum to disburse funds is the application to confirm the sale, if the judicial sale process has proved successful.

...

18 Because solicitor-client costs must be assessed by the court on notice of application, it follows that the application for the order confirming sale must also be brought by notice of application. This is the stage in the foreclosure proceeding to not only seek confirmation of the sale, but also to seek the court's direction on the payment of the purchase monies, including costs. It is the stage to set the deficiency amount of the judgment, if any. All these outstanding matters ought to be addressed in one final proceeding.

[10] When this application for assessing solicitor-client costs continued in January 2024, counsel for SMC had provided counsel for RBC and the Court with the necessary information regarding the actual amount of principal and interest owed to SMC, as well as the itemization of the property management fees and the statement of adjustments on the sale of the mortgaged property.

[11] Included in the evidence before the Court was a document that counsel for SMC described as a statement of account for the "expenses of the sale" as set out in paragraph 12(2) of the Order Nisi for Sale by Real Estate Listing. The invoice for \$900.00 plus disbursements, charged by MLT Aikens [MLT] to SMC, is described as follows:

All services rendered in connection with the sale of the property including, but not limited to, searches, phone calls, preparation of required documents, receiving and disbursing sale proceeds, all attendances, correspondence and reporting herein. Total fees: \$900.00

[12] On the strength of this invoice, MLT paid itself a total of \$1,071.37 from the sale proceeds, which included GST, PST and disbursements.

[13] This payment is documented in the “Vendor’s Final Statement of Adjustments” which was filed as an exhibit to the affidavit of the employee of MLT. The net sale proceeds were calculated to be \$145,566.20, once the real estate commission of \$6,788.76 was paid and the MLT statement of account of \$1,071.37 was paid.

[14] The affidavit of the mortgagee’s employee filed in this application states that balance of principal and interest owed to SMC as at September 21, 2023, the date of closing, totalled \$126,296.25.

[15] Counsel for SMC also paid Spencer Edwards, the court-appointed selling officer, the sum of \$1,697.19 for his services.

[16] Thus, by the time that counsel for SMC applied for the solicitor-client costs to be assessed, it continued to hold the balance of sale proceeds, as outlined in the “Schedule of Sale Proceeds Disbursed/to be Disbursed” [Schedule], calculated at \$17,267.79, which was net of the “sale closing costs” already paid to MLT of \$1,071.37. The Schedule also stated that once MLT was paid the solicitor-client costs of \$14,325.37 plus the property management fees of \$7,325.63, there would be a shortfall of what was owed by the mortgagor to SMC of \$4,383.21.

[17] First of all, given the direction of the Court as stated in *Hollmann* and other cases, one wonders why the balance of the sale proceeds, as directed by Rule 10-47(5) of *The King’s Bench Rules*, and the corresponding Form 10-47C (Order Nisi for Sale by Real Estate Listing (for non-matured mortgages)) at paragraph 13, had not already been paid into court. Counsel for SMC asserts that the Order Nisi for Sale by Real Estate Listing granted in this case allows it to do otherwise.

[18] For clarification, the specific paragraph of Form 10-47C pertaining to the proceeds of sale of the mortgaged property states:

13 The proceeds from the sale of the Land received by the selling officer shall be paid in the following order of priority:

- (a) in payment of any property taxes owing on the Land;
- (b) in payment of the expenses of the sale, including the selling officer's costs and the amount due for real estate commissions, including taxes;
- (c) in payment of the principal and accrued interest due to the plaintiff under the mortgage, as stated in this Order;
- (d) the balance, if any:
 - (i) to be paid into Court to the credit of this cause; and
 - (ii) to be paid out or dealt with as may be ordered by the Court, on application of any of the parties.

[19] Rule 10-47(5) and the corresponding Form 10-47C reflect the jurisprudence of the Court, as, for example, outlined in *Hollmann*.

[20] The actual draft order placed before the *ex parte* judge by counsel for SMC in this case states, with certain wording being underlined by counsel:

12 The proceeds from the sale of the Land received by the selling officer shall be paid in the following order of priority:

- 1) In payment of any property taxes owing on the Land;
- 2) In payment of the expenses of the sale, including the selling officer's costs and the amount due for real estate commissions, including taxes;
- 3) In payment of the principal and accrued interest, property taxes, insurance fees, and other fees, due to the plaintiff under the mortgage;
- 4) In payment of post-leave legal costs of this action to the plaintiff on a solicitor-client basis, to be assessed;
- 5) The balance, if any:
 - (i) to be paid into Court to the credit of this cause; and
 - (ii) to be paid out or dealt with as may be ordered by the Court, on application of any of the parties.

[21] Rule 10-47(6) states:

The applicant for an order under this rule shall file a draft order in the applicable form, with all additions, insertions and changes underlined.

[22] In accordance with Rule 10-47(6), counsel for SMC did underline all the additions it proposed to the draft order nisi for sale in its *ex parte* application. However, no corresponding memorandum accompanied the *ex parte* application, alerting the presiding judge that the relief requested was not in accordance with established law.

[23] Both counsel for SMC and for RBC were granted an opportunity to provide the Court with a written brief regarding the obligations of counsel when seeking relief from the *ex parte* judge. Both counsel agree that the binding authority is the *Code of Professional Conduct*, Law Society of Saskatchewan, and specifically s. 5.1-1 and its commentary, which states:

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary:

Role in Adversarial Proceedings:

[6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

5.1-2 When acting as an advocate, a lawyer must not:

...

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

...

(i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party; ...

And see: *Canadian Imperial Bank of Commerce v Knight*, 2023 SKKB 220 at para 32.

[24] Both counsel for SMC and for RBC agree that if relief is sought in an *ex parte* application that is contrary to binding case law, counsel has an obligation to direct

the matter to the presiding judge and should seek to distinguish the case. Otherwise, the Court may be caught unaware.

[25] In *Scotia Mortgage Corp. v Irvine*, 2023 SKKB 171 [*Irvine*], the presiding judge granted an *ex parte* Order Nisi for Sale by Real Estate Listing which was not in accordance with established case law. A draft Order Nisi for Sale by Real Estate Listing had been presented to Justice Layh as the *ex parte* judge. Notably, unlike the instant draft order nisi, the draft order nisi in *Irvine* did not even include any underlined portions to indicate to Justice Layh that the proposed order nisi differed from Form 10-47C. At paragraphs 6-10 of *Irvine*, Justice Layh made the following observations as a result of the Order Nisi for Sale by Real Estate Listing he had previously granted:

6 Although counsel for Scotia Mortgage did not refer to the terms of the order *nisi* (which I granted), one might suggest that I permitted legal fees to be taken from the sale proceeds without the court’s assessment. Clause 11 of the order reads as follows:

11. The proceeds from the sale of the Land received by the selling officer shall be paid in the following order of priority:

- (a) In payment of any property taxes owing on the Land;
- (b) In payment of the expenses of the sale, including the selling officer’s costs and the amount due for real estate commissions, including taxes;
- (c) In payment of the principal and accrued interest, taxes and other fees to the sale closing date, due to the plaintiff under the mortgage;
- (d) In payment of post-leave legal costs of this action to the plaintiff on a solicitor-client basis, to be assessed;
- (e) The balance, if any:
 - i. to be paid into Court to the credit of this cause; and
 - ii. to be paid out or dealt with as may be ordered by the Court, on application of any of the parties.

7 Although clause 11(c) states that “other fees to the sale closing date” may be paid from the sale proceeds, the phrase is modified by the phrase “due to the plaintiff under the mortgage.” Knowing that the only permissible solicitor-client fees under a mortgage are those

specifically assessed by the court - a long-standing principle of Saskatchewan foreclosure law - a law firm cannot remove from the court's scrutiny an assessment of any legal fees that are ultimately payable by the mortgagor. Taking legal fees from the sale proceeds cannot circumvent the court's jurisdiction to assess legal fees in a judicial sale proceeding.

8 Saskatchewan law is clear: only taxed legal fees are permissible under s. 8 of *The Limitation of Civil Rights Act*, RSS 1978, c L-16. Legal fees, whether pre-leave or post-leave, cannot be added to the mortgage without the court's assessment and approval.

9 Justice Danyliuk has frequently cited the court's judicious guarding of the processes of judicial sale, and in particular, the court's supervision of any award of legal fees. In *Royal Bank of Canada v Vilorio*, 2014 SKQB 110, 443 Sask R 121, he wrote:

[23] Finally, an equitable reason behind the court's continued supervision of these matters relates to the mortgagees' claims for costs. Most often, a clause in the mortgage provides a *prima facie* entitlement to seek costs on a solicitor-client basis. Those claims, however, are not unfettered. The court determines the reasonableness of such cost claims, considering all the circumstances of the action. The court does not allow those costs to be excessive. Those costs must be assessed by the court. Rule 11-20 of The Queen's Bench Rules, (Rule 565 of the former Queen's Bench Rules) alerts mortgagees and their counsel that a claim for solicitor-client costs under a mortgage is subject to judicial discretion. [Emphasis added]

A Looming Issue

10 Although I have found that clause 11(c) does not permit taking real estate closing fees from sale proceeds without a judicial assessment, in the future, I will scrutinize proposed draft orders for judicial sale to ensure that counsel appreciates that all legal fees appropriately paid by the mortgagor must be assessed.

[Emphasis in original]

[26] In reviewing the draft Order Nisi for Sale by Real Estate Listing that was presented to Justice Layh in *Irvine* and the draft Order Nisi for Sale by Real Estate Listing granted by the *ex parte* judge in this action, one notices an uncanny similarity in the phrases added to the draft that are not in compliance with the law. One also notices that the plaintiff in both cases is represented by MLT.

[27] I must conclude that any *ex parte* order granted by the Court as a result

of inaccurate submissions by counsel, as observed by Justice Layh in *Irvine*, and present in the instant case, does not preclude the Court from making decisions regarding the sale proceeds of the judicial sale which are in accordance with the law.

[28] The law is clear that solicitor-client costs are assessed after any balance of sale proceeds are paid into court. Monies are not retained by counsel for the mortgagee until after the application for assessment of solicitor-client costs is decided. Future applications that do not comply with the law will be met with appropriate sanctions.

(b) Whether a mortgagee's lawyer is entitled to a separate set of legal fees for closing the sale of the mortgaged property

[29] The other troubling aspect of this case is the situation where MLT rendered a statement of account for “expenses of the sale”, relying on the wording of paragraph 12(2) of the Order Nisi for Sale by Real Estate Listing. Counsel for SMC argues that MLT is entitled to do so, and refers to the ratio in *Irvine* to support its position.

[30] Justice Layh made no findings as to the characterization of the statement of account which is similar to the one presented by counsel for SMC in this case. Oppositely, at paragraphs 4 and 15 of *Irvine*, the learned chambers judge stated:

4 Additionally, as counsel for Scotia Mortgage has disclosed, when the mortgaged property was sold, the legal work was taken from the firm's foreclosure department and assigned to the firm's real estate department. Counsel has provided the firm's “Vendor's Final Statement of Adjustments.” It shows that the law firm took legal fees of \$1,068.22 from the sale proceeds to cover the legal costs to close the sale of the mortgaged property. Counsel for Scotia Mortgage is not seeking the court's assessment of these fees as part of its application. It has taken those fees from the sale proceeds as a simple function of its real estate department to have the title transferred.

...

15 In this application, the “discovery” of closing costs taken from the sale proceeds was rather inadvertent. Neither legal counsel at the

hearing had forewarning that these closing costs might be an issue. Accordingly, this is not the application to make a conclusive finding respecting these fees. Instead, to complete this sale and bring closure to this action, I will take judicial liberty and allow one-half of the closing costs (namely \$534.11) to be added to the standard costs as I would have otherwise assessed.

[Emphasis added]

[31] I must conclude that neither counsel referred Justice Layh to the established case law that has already resolved the issue of legal fees. The law is clear that any costs incurred by counsel for the mortgagee in confirming the sale and providing the Order Confirming Sale to the purchaser's counsel with the requisite trust conditions for submitting it to the Land Titles Office are included in the standard solicitor-client costs to be awarded. The standard amount of solicitor-client costs that the mortgagee is entitled to is explained and set out in *First National Financial GP Corp. v Maurice*, 2021 SKQB 248 [*Maurice*].

[32] By way of historical review, assessing solicitor-client costs in foreclosure actions (as compared to judicial sale actions) only becomes relevant when a mortgagor seeks to redeem or reinstate the mortgaged property. Otherwise, the final order of foreclosure operates in full satisfaction of the debt, as provided by s. 6 of *The Limitation of Civil Rights Act*, RSS 1978, c L-16.

[33] The interplay between a foreclosure action and solicitor-client costs was analyzed in *CIBC Mortgages Inc. v Roberts*, 2006 SKQB 44. That decision was in response to the implementation of Rule 565 of *The Queen's Bench Rules* (now Rule 11-20 of *The King's Bench Rules*) that requires that only a judge of this Court shall assess any costs awarded as between solicitor and client.

[34] Oppositely, all decisions of this Court that have considered the amount of standard solicitor-client costs to be awarded are solely within the context of a judicial sale and the resulting confirmation of sale of the mortgaged land. In the seminal case

on this issue, *CIBC Mortgages Inc. v Greyeyes*, 2017 SKQB 313, 17 CPC (8th) 410, Justice Mills begins his judgment as follows:

[1] This is an application to tax solicitor-client costs as provided for in an order *nisi* for sale following the order confirming sale. ...

And see:

- *Royal Bank of Canada v Lafond*, 2009 SKQB 346, 341 Sask R 195;
- *Royal Bank of Canada v Hollmann*, 2017 SKQB 299;
- *Bridgewater Bank v Mulligan*, 2017 SKQB 208;
- *First National Financial GP Corp. v Maurice*, 2021 SKQB 248.

[35] Thus, the invoice MLT rendered to SMC for \$1,071.37 pertaining to the “sale of the property” is illusory. There is no separate transaction that amounts to the “expenses of the sale”. The issued Order Confirming Sale is the transfer authorization that is submitted to the Land Titles Office for transferring the property to the purchaser. In short, MLT is not entitled to these monies.

(c) *Whether the standard solicitor-client costs ought to be increased*

[36] The ratio in *Irvine* does stand for the proposition of awarding standard solicitor-client costs, plus additional solicitor-client costs being awarded for additional court applications above and beyond the standard legal fees. At paragraphs 28-29 of *Irvine*, Justice Layh increased the standard solicitor-client costs from \$5,000.00 as set out in *Maurice*, to \$5,500.00, taking the rise in the Consumer Price Index into consideration. Justice Layh assessed solicitor-client costs for each additional court application at \$1,000.00 per application.

[37] Given that counsel for SMC in this case was required to bring an application for immediate possession and a subsequent application for substitutional service on the mortgagor, a total amount of solicitor-client costs in this case would be \$7,500.00.

(d) Whether the mortgagee is entitled to the cost of inspection fees incurred in its claim for property management fees

[38] Counsel for SMC seeks an order for the payment of property management fees incurred in the sum of \$6,203.33. Counsel for RBC objects to the inspection fees included in these fees, which are \$1,037.40. Counsel for RBC submits the inspection fees are prohibited from being added to the mortgage account by operation of s. 8(1) of *The Limitation of Civil Rights Act*, and are not recoverable. This principle is explained in *CIBC Mortgages Inc. v Eldstrom*, 2014 SKQB 337 at paras 8-9, 458 Sask R 314. In short, the total property management fees that may be paid to SMC from the sale proceeds are in the amount of \$5,165.93.

(e) Whether RBC is entitled to costs in this application

[39] Counsel for RBC seeks costs in the amount of \$1,000.00 for it being required to seek the Court's assistance in obtaining clarification of what is actually owed to SMC and what SMC is entitled to. Counsel for RBC was also required to respond to the assertions of counsel for SMC that it is entitled to solicitor-client costs of \$14,325.37 plus the invoice MLT rendered to SMC for \$1,071.37. I agree with counsel for RBC. This is a circumstance where costs should be awarded to RBC, as the subsequent encumbrancer. Costs of \$1,000.00 are awarded to RBC, payable by SMC.

IV. CONCLUSION

[40] In summary, SMC is entitled to the following from the sale proceeds:

1. \$7,500.00 for legal fees, plus disbursements and applicable taxes, less the sum of \$1,071.37 MLT has already received, and less the costs of \$1,000.00 payable to RBC;
2. \$5,165.93 for property management fees;

3. The remaining sale proceeds are to be paid forthwith to counsel for RBC, with \$1,000.00 to be credited to RBC for costs, and the remainder to be credited to the outstanding judgment of RBC against Yamniuk.

[41] If any issues arise with respect to implementation of the corresponding order, either party has leave to bring the matter back on short notice.

J.
A.R. ROTHERY