This manner of appointment relies a great deal on the ethical good will of the Bar and while this in no way can be doubted yet by its very nature it would seem that the courts would not want to exploit it. It follows then that MacDonald J. foresees that such appointment of counsel should be the exception rather than the rule.

Perhaps the final analysis of this case can best be made by briefly considering what happened when the accused Roderick A. White again appeared before His Honour Judge C. H. Rolf. Armed with the decision of MacDonald J., the request for counsel to be appointed was again made. Considering the six factors, the court determined that White should have exploited every avenue of appeal in seeking help from Legal Aid. The court felt there was no reason to think that he would receive anything but a fair hearing even without counsel. In addition, the writer submits, the opinion of the court was that our criminal justice system does not wholly operate on an adversary principle; therefore, counsel was not necessary. This is obviously a very narrow application of the criteria outlined by Justice MacDonald and certainly vitiates all that the case stands for. Hopefully, this will not be the final word on the case.

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COSTS IN FORECLOSURE ACTIONS—WHEN CAN A MORTGAGEE BE DEPRIVED OF ITS COSTS?

NATIONAL TRUST COMPANY v. *NORTH AMERICAN MONTESSORI ACADEMY LTD.*[1]

Almost every mortgage executed in Alberta today contains a clause the same as or similar to the following:

> AND THE MORTGAGOR ALSO COVENANTS AND AGREES WITH THE MORTGAGEE THAT:
>
> (d) All proper Solicitor's, Inspector's, Valuator's and Surveyor's fees and expenses for drawing and registering this Mortgage and for examining the mortgaged premises and the title thereto, and for making or maintaining this mortgage a first charge on the mortgaged premises, together with all sums which the Mortgagee may and does from time to time advance, expend or incur hereunder as principal, insurance premiums, taxes, rates, or in or toward payment of prior liens, charges, encumbrances or claims charged or to be charged against the mortgaged premises, or in maintaining, repairing, restoring or completing the mortgaged premises, and in inspecting, leasing, managing, or improving the mortgaged premises, including the price or value of any goods of any sort or description supplied to be used on the mortgaged premises, and in exercising or enforcing or attempting to enforce or in pursuance of any right, power, remedy or purpose hereunder or subsisting, and legal costs as between solicitor and client, and also an allowance for the time, work, and expenses of the Mortgagee, or any agent, solicitor, or servant of the Mortgagee, for any purpose herein provided for whether such sums are advanced or incurred with the knowledge, consent, concurrence or acquiescence of the Mortgagor, or otherwise, are to be secured hereby and shall be a charge on the mortgaged premises, together with interest thereon at the said rate, and all such moneys, shall be repayable to the Mortgagee on demand, or if not demanded, then with the next ensuing instalment payable hereunder, except as herein otherwise provided, and all such sums together with interest thereon are included in the expression 'the mortgage moneys'.

In the above noted case, foreclosure proceedings were commenced by

[1] [1976] W.W.D. 97; reversed in part [1976] W.W.D. 123.

the plaintiff against the defendant which had become mortgagor by virtue of an assumption agreement. At the application for the Order Nisi/Order for Sale, the representative of the defendant company complained of the lack of co-operation by the plaintiff, and the Master, L. D. Hyndman, Esq., Q.C., ordered the plaintiff to supply to the defendant further information to clarify the amount owing on the mortgage. After a further adjournment the amount of arrears owing was agreed upon between the parties and payment of these arrears was made.

All that was left to determine was the amount of costs payable by the defendant pursuant to the clause quoted above. Before the Master, counsel for the defendant argued that the plaintiff was not entitled to all its costs, on the basis that its conduct had prevented the defendant from calculating what was the correct amount owing.

Initial discussions between the plaintiff and defendant had proven fruitless as no records had been produced by the mortgage company to the defendant to enable it to calculate the arrears owing. A statement of claim had been issued, which closely followed the Form Q 1 in the Alberta Rules of Court, without making any allowance for numerous changes in the circumstances of the particular mortgage. As a result some allegations in the statement of claim were confusing, while others could not be substantiated at all.

The subsequent sworn affidavit of default had simply perpetuated some of the errors in the statement of claim, and, even more confusing had claimed a different amount due and owing. This confusion had been compounded when the plaintiff, upon the order of the Master, had produced to the defendant a computer print-out mortgage history report which showed a *third* figure as the amount owing. A difference of over $780.00 existed between the three figures shown in the statement of claim, the affidavit of default and the mortgage history report.

In the light of these inaccuracies and the lack of co-operation by the plaintiff, the Master substantially reduced the plaintiff's costs. In addition the Master refused to tax against the defendant all of the disbursement incurred by the plaintiff in connection with the appraisal report filed as part of the affidavit of value. This appraisal report was a detailed 20-page document which cost the plaintiff $469.72. The Master held that a detailed appraisal such as this was, in the circumstances, quite unnecessary and set the amount payable by the defendant at $100.00.

From the order of the Master the plaintiff appealed and the appeal came on before Steer J. in Chambers. The following cases were cited to his Lordship:

> *Cotterell* v. *Stratton*;[2] *Fleck* v. *Whitehead*;[3] *Mayhew* v. *Adams*;[4] *Manufacturer's Life* v. *Independent Investment Co. Ltd.*;[5] *C.M.H.C.* v. *Conaty*;[6] *C.M.H.C.* v. *Johnson & Chalazan*;[7] *Collins* v. *Forest Hill Investment Corp. Ltd. et al.*;[8] *Confederation Life Association* v. *Leier*.[9]

[2] (1872) 8 Ch. App. 295.
[3] [1924] 3 W.W.R. 470.
[4] [1930] 3 W.W.R. 539.
[5] [1939] 4 D.L.R. 811.
[6] (1967) 59 W.W.R. 11.
[7] [1971] 5 W.W.R. 163.
[8] [1967] 2 O.R. 351.
[9] (1908) 8 W.L.R. 343.

The overriding principle in relation to a mortgagee's costs was stated by Lord Selborne L.C., in *Cotterell* v. *Stratton*:[10]

> The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence or other misconduct, is well established, and does not rest upon the exercise of that discretion of the court which, in litigious causes, is generally not subject to review. The contract between mortgagor and mortgagee, as it is understood in this court, makes the mortgage a security, not only for principal and interest, and such ordinary charges and expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. . . .
>
> These rights, resting substantially upon contract, can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract.

In *Mayhew* v. *Adams*[11] Martin J.A. for the Saskatchewan Court of Appeal restated this principle:

> The general rule in foreclosure and redemption actions is, that the mortgagee is entitled to all his costs; he is to get the money secured by the mortgage free of all costs and expenses, and that although he has not succeeded in establishing the full amount of the claim he has contended for. A mortgagee, however, who has been guilty of vexatious or oppressive misconduct, may be deprived of his costs or some part of them.

In accordance with the above stated principles, Steer J. was of the opinion that . . .

> . . . the mortgagee who is taking proceedings is entitled to all his proper costs and disbursements in these proceedings unless there is a vexatious or oppressive set of circumstances either in whole or in part.

His Lordship held that, in the case before him, the conduct of the plaintiff had not been "vexatious" or "oppressive" with the exception of one instance. Costs were accordingly allowed on a solicitor-client basis for all legal services save those related to that one instance.

This one exception related to the sending by the plaintiff of a mortgage history report to the defendant in compliance with the direction of the master. This report consisted in a computer print-out statement, as both the Master and Steer J. agreed, would make no sense to the mortgagor without an accompanying explanation, which was not provided, and in any event the report contained several inaccuracies. The added confusion caused by this report was held by Steer J. to amount to vexatious conduct and the plaintiff was accordingly deprived of its costs for the adjournment and the subsequent meeting which were made necessary by the sending of this confusing report.

In connection with the Master's decision to reduce the amount of the disbursement for the appraisal that was taxable against the defendant, Steer J. found himself unable to agree:

> . . . I sympathize with what the Master expressed as his thoughts with regard to that valuator's report. In my mind, however, it is impractical to expect a mortgagee to assess each and every situation and come to court with a detailed report that it thinks may be sufficient to satisfy the situation at a particular time. As a result I think with great respect to the Master, he was wrong with regard to that aspect of his reasons for judgment and I rule that the mortgagee should have the full amount.

One final argument was advanced by counsel for the plaintiff. It was submitted that in view of Rule 697 of the Rules of Court the Master had no power to exercise his discretion in taxing the costs. Rule 697 states as follows:

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[10] (1872) 8 Ch. App. 295 at 302.

[11] [1930] 3 W.W.R. 539 at 541.

> Notwithstanding anything contained elsewhere in these Rules, costs as between parties in all foreclosure actions shall be determined in accordance with Schedule C with the appropriate column thereof to be applied dependant on that amount claimed in the foreclosure actions, except that the fee for commencement of proceedings in Item 1, shall not exceed the amount fixed in Column 3.

Steer J. rejected the plaintiff's contention that Rule 697 was mandatory:

> I think there was a discretion in the Master and in any judge with regard to the matter of costs within the limits laid down in the cases.

The "limits" referred to by his Lordship are presumably those described above in *Cotterell* v. *Stratton*. In the ordinary course of events the court does not have the power to tax or reduce the mortgagee's costs.[12] These costs are a matter of contract between the mortgagee and mortgagor and they must be paid in accordance with the terms of the contract. Only when "vexatious or oppressive misconduct" is proved, does the court have any discretion which would enable it to reduce or deny the mortgagee its costs. What is "vexatious or oppressive misconduct" is a question or fact in every case, but it is clear, from the cases cited above and from this decision of Steer J. that something more than inaccurate statements and lack of co-operation by the mortgagee must be shown before the mortgagee will be deprived of its costs.

—FRANCIS C. R. PRICE*

[12] *See also Confederation Life Association* v. *Leier*, (1908) 8 W.L.R. 343, 344.

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RENEWAL OF A STATEMENT OF CLAIM UNDER RULE 11: *IRENE MIASEK AND HENRY MIASEK* v. *JAMES BUCHHOLZ* [1]

This is a decision of A. D. Bessemer Esq., Q.C., Master in Chambers in Calgary, which is as yet unreported.[2] In this case, the Master sets out a new test as to when applications for renewal of statements of claim pursuant to Supreme Court Rule 11 will be granted, and further discusses some explanations tendered to the court in order to constitute "sufficient reason" under the Rule.

The action here was based on an automobile accident occurring February 18, 1972, whereby the plaintiff husband claims property damage to his vehicle and the plaintiff wife claims for personal injuries. The plaintiffs issued a statement of claim on February 12, 1974 (six days before the limitation period expired), but service thereof was never effected. The defendant claimed that he first found out about the action in March, 1975, when the plaintiff's solicitor, N, telephoned the adjuster for defendant's insurer. In the interim, it appeared from affidavit evidence that N was awaiting further medical reports and, while he was in communication with the adjuster, M, the existing reports were not disclosed. M claimed that he had checked the Court House two weeks before the limitation period expired under the mistaken impression that

[1] (Unreported) S.C. 113272, Sept. 30, 1976.

[2] The Review is deeply indebted to the Master for supplying these decisions.