UNREPORTED PRACTICE CASES*

SECURITY FOR COSTS—COMPANIES ACT—APPLICABILITY OF RULE 594

A Defendant applied for security for costs against a corporate Plaintiff. An affidavit was taken, complying in terms with section 291 of The Companies Act, stating that there was reason to believe that the company would be unable to pay the costs of the Defendant if successful. The question arose as to whether or not the affidavit must also comply with Rule 594, which requires proof of a good defence to the action on the merits "specifying the nature thereof". The Appellate Division of the Supreme Court of Alberta held, from the Bench, that the Rule did apply, and an application for security for costs under The Companies Act must comply with the Rules of Court.

It may be noted that the same result was reached in a Saskatchewan decision: *Midtown Draperies Ltd.* v. *Prairie West Construction Ltd. et al* (1970) 73 W.W.R. 69. That case referred to *Brown Investments Co.* v. *Hulbert* (1923) 2 W.W.R. 1132, a decision of the Alberta Appellate Division, but it does not appear that the issue was squarely raised in that case.

(Galahad Securities etc. v. *Bank of Montreal,* S.C.A.A.D., Nos. 5745 and 8640, Sept. 15, 1971.)

FORECLOSURE—CORPORATE MORTGAGE—FORM OF ORDER NISI

The Plaintiff was the mortgagee of a mortgage given on commercial property by the Defendant Alberta corporation.

A Notice of Motion for an Order for final foreclosure was taken out by the plaintiff, although no Order Nisi in the usual form had been applied for, and no sale proceedings taken. Counsel argued that because of Sec. 35 of The Judicature Act, the plaintiff did not need to obtain an Order Nisi/Order for Sale.

The Master held that Alberta practice has always recognized the existence of a period of redemption available to mortgagors and Sec. 35 of The Judicature Act does not mean that no period of redemption is to be established by the court. The Master further held that in the case of a mortgage given by a corporation, the particular statutory periods found in Sec. 32(h) do not apply. The Master held that the court could set such redemption period as seemed appropriate having regard to the special circumstances of the case.

The Master went on to hold that the same considerations did not necessarily apply to sale procedures. The requirements of offering for sale as provided in Sec. 34(18) need not necessarily be followed in the case of foreclosure proceeding involving a mortgage given by a corpora-

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tion. For example, in a case where there is no possible equity in the defendant, the court could dispense with the need for sale. On the other hand, where there is an obvious or probable equity in the land, the court should order sale proceedings and only consider application for final order of foreclosure if those sale proceedings proved to be abortive. The matter of sale procedure rests not in statutory requirements, but in the discretion of the court and the particular circumstances of the case.

(Melnyk v. *Manning Central Auto Body Ltd.,* S.C.A., J.D.E., No. 71662, November 9, 1971; L. D. Hyndman, Q.C., Master).

Editor's Note: Subsequent to the granting of the Order above mentioned, Counsel for the Mortgagee applied at the expiry of the redemption period for an order for foreclosure. This was granted by the Master, who pointed out that if the Mortgagor had been represented and raised the point that there was some real equity to be preserved, a sale might be ordered. The Master pointed out that to his knowledge this was the first time that there had been a foreclosure without an attempted sale, in Edmonton, since the amendments to The Judicature Act.

DEFAULT JUDGMENT—RULE 148—ELECTION AGAINST ONE DEFENDANT

In an action in which the Statement of Claim alleged joint and several liability against the defendants (a principal of a company and the company itself), the plaintiffs took default judgment against the company and went to trial against the individual. At the trial it was found as a fact that the liability was not joint but alternative and the plaintiff having elected to take judgment against the corporation could not have judgment against the individual.

The plaintiff relied on Rule 148, but the court followed *Morel Bros. & Co. Ltd.* v. *Westmoreland* [1904] A.C. 11, holding the Rule which is equivalent to Rule 148 does not apply so as to permit judgment against more than one defendant where the claim is an alternative claim. The court also cited *Morgan* v. *Lifetime Building Supplies Ltd. et al.* (1967), 59 W.W.R. 414 (Alta. A.D.), where it was said a judgment cannot be obtained against both the principal and agent. The court refused to follow *Sarbit* v. *Booth Fisheries* (1951) 1 W.W.R. (N.S.) 115, or *Imrie* v. *Eddy Advertising* (1917) 12 O.W.N. 27. The latter two cases failed to consider the distinction made in the *Morel* case between joint and alternative liability.

(Fritz Plumbing Co. Ltd. v. *Guasp & El Bodegon Restaurant Ltd.,* D.C.D.N.A., J.D.E., No. 127730, November 18, 1971, Belzil D.C.J.)