



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Corbo v. Snook*, 2026 NLSC 65

Date: May 15, 2026

Docket: 202301G3796

BETWEEN:

**SEBASTIEN CORBO, DOUGLAS
DANIELS AND CANADIAN
MORTGAGES INC., a body corporate**

FIRST APPLICANTS

AND:

**CMI HIGH-YIELD OPPORTUNITY
FUND CORP., a body corporate**

SECOND APPLICANT

AND:

**WILLIAM SNOOK AND KIMBERLEY
ANN SNOOK, also known as KIM
SNOOK**

RESPONDENTS

Before: Justice Sandra R. Chaytor

Place of Hearing:

St. John's, Newfoundland and Labrador

Date of Hearing:

October 28, 2024

Summary:

The Applicants sought vacant possession of mortgaged property occupied by the Respondent mortgagors. The Court found that the Applicants, Sebastien Corbo, Douglas Daniels and CMI-High-Yield Opportunity Fund Corp., as

mortgagees under the subject mortgages, were entitled to seek vacant possession of the mortgaged property.

The Court found that the Respondents had defaulted on the terms of the mortgages and were given sufficient notice of the default by the mortgagees. Therefore, Sebastien Corbo, Douglas Daniels and CMI-High-Yield Opportunity Fund Corp. were entitled to vacant possession of the property.

The Court found that Canadian Mortgages Inc. was not a mortgagee and therefore was not entitled to seek vacant possession of the property.

The Court further found that there had not been a proper sale of the property through the power of sale process.

Held: Sebastien Corbo, Douglas Daniels and CMI-High-Yield Opportunity Fund Corp. are entitled to vacant possession of the property.

The Respondents shall vacate the property within 45 days of the filing of the Order.

Due to mistakes in the Application and the circumstances surrounding the power of sale process, the Court did not award costs to the successful Applicants.

Appearances:

Joshua J. Santimaw	Appearing on behalf of the Applicants
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Sarah Clarke	Appearing on behalf of the Respondents
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Authorities Cited:

CASES CONSIDERED: *11346 (Nfld) Limited v. Hynes Construction*, 2018 NLSC 255; *Montreal Trust Co. of Canada v. R M Holdings Ltd.* (2001), 198 Nfld. & P.E.I.R. 31, 595 A.P.R. 31 (Nfld. S.C. (T.D.)) *Montreal Trust Co. of Canada v. R M Holdings Ltd.*, 2002 NFCA 29; *TCG Mortgage v. Fitzgerald* (10 October 2018), St. John's, 201801G2730 (NLSC) [Unreported Decision]; *Asphalte ABC Rive-Nord Inc. v. AG of Canada*, 2013 FC 1287

STATUTES CONSIDERED: *Conveyancing Act*, R.S.N.L. 1990, c. C-34

RULES CONSIDERED: *Rules of the Supreme Court*, 1986, S.N.L., 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

CHAYTOR, J.:

INTRODUCTION

[1] This is an Application by Sebastien Corbo, Douglas Daniels and Canadian Mortgages Inc. (“First Applicants”) and CMI High Yield Opportunity Fund Corp. (“Second Applicant”) seeking vacant possession of the property located at 16 Madison Place, Paradise, Newfoundland and Labrador (“Property”).

[2] William Snook and Kimberley Ann Snook occupy the Property as their matrimonial home.

[3] The Snooks admitted in the response to the Application that the First Applicants and Second Applicant provided financing to them and that the loans were secured by two mortgages on the Property (“Mortgages”).

[4] A mortgage deed dated February 9, 2021 identifies the Snooks as the mortgagors and the mortgagees as “Sebastien Corbo and Douglas Daniels whose address for service is c/o Canadian Mortgages Inc.” (“First Mortgage”).

[5] A second mortgage deed dated November 1, 2021 identifies the Snooks as the mortgagors and the Second Applicant as the mortgagee (“Second Mortgage”).

[6] The role of Canadian Mortgages Inc. and its right to seek vacant possession is an issue in the Application.

[7] The Application is supported by affidavits of Sonia Kumar, a default officer of Canadian Mortgages Inc., affidavits of Douglas Schipilow of counsel for the Applicants, and an affidavit of Sarah Fitzgerald, the lawyer retained to conduct a public auction of the Property.

[8] The Response is supported by affidavits of Kimberly Snook and Robert Regular of counsel for the Snooks.

[9] The Snooks sought to cross-examine Kumar on her affidavits. I allowed the cross-examination pursuant to Rules 48.10 and 29.09(2) of the *Rules of the Supreme Court, 1986*, S.N.L., 1986, c. 42, Sch. D, to assist the Court in its fact-finding function.

[10] The Applicants contended this is a straightforward application for vacant possession. They submitted the Snooks defaulted on the Mortgages and they are entitled to vacant possession of the Property in either common law or pursuant to the *Conveyancing Act*, R.S.N.L. 1990, c. C-34 (*Act*).

[11] The Snooks submitted that the Applicants are not entitled to vacant possession because (1) the Applicants failed to prove the Snooks were in default on the Mortgages; (2) the Applicants failed to comply with the *Act* including the requisite notice requirements; and (3) there was irregularity in the power of sale process.

[12] This is not a routine application for vacant possession because while it involves typical evidentiary issues regarding whether default was proven and proper notice given, it also involves: (1) issues as to the identity of the mortgagees; (2) the interpretation of provisions of the *Act*; and (3) a contested power of sale proceeding arising from the Snooks' solicitor bidding at the public auction and the Applicants' solicitor first accepting that bid but later rejecting it.

[13] In addition to these issues, the Applicants admitted that there were errors in the Application and the affidavits filed in support of it. Three affidavits of Kumar, were ultimately filed because of mistakes in the filing of the first two affidavits. This included twice attaching the wrong mortgage documents as exhibits to the affidavits.

[14] The Application itself also contains mistakes. It cites and relies upon a section of a mortgage which is not contained in either of the mortgage deeds. Furthermore, Rule 16 of the *Rules* is cited to ground the Application. Rule 16 governs default judgment, which is not applicable in this case where a response was filed, and the Application vigorously contested.

[15] All of this is to emphasize that care must be taken in all matters, even those that may be considered straightforward or routine.

[16] The Applicants bear the burden on the Application to prove on a balance of probabilities that they are entitled to vacant possession of the Property.

[17] I will now decide whether, despite the challenges identified, the Applicants succeeded in meeting their burden.

ISSUES

[18] I am to decide whether the Applicants proved entitlement to vacant possession of the Property.

[19] To determine this issue, I must decide the following sub-issues:

1. Are any of the Applicants entitled to vacant possession pursuant to the terms of the Mortgages?

2. Did the Applicants who are entitled to seek vacant possession establish that (a) the Snooks defaulted on either or both mortgages; and (b) they gave proper notice of default to the Snooks so as to entitle them to vacant possession?
3. If so, did the power of sale process change who is entitled to vacant possession because the Property was sold to a separate party?

DISPOSITION

[20] For the reasons that follow, I find:

1. Pursuant to the terms of the Mortgages, Corbo, Daniels and the Second Applicant, as mortgagees, are entitled to seek vacant possession of the Property. Canadian Mortgages Inc. is not a mortgagee and therefore is not entitled pursuant to the Mortgages to seek vacant possession.
2. Corbo and Daniels and the Second Applicant established default on the terms of the Mortgages and are entitled to vacant possession of the Property.
3. The power of sale process did not change the entitlement of Corbo, Daniels and the Second Applicant to vacant possession of the Property.

[21] Therefore, Corbo, Daniels and the Second Applicant are entitled to vacant possession of the Property.

[22] If there is dispute amongst them as to the right to vacant possession, Corbo and Daniels, as the mortgagees of the First Mortgage shall have vacant possession in priority to the Second Applicant.

[23] The Snooks shall vacate the Property within 45 days of the filing of the Order.

[24] There shall be no Order as to costs.

ANALYSIS

Sub-Issue 1: Are any of the Applicants entitled to vacant possession pursuant to the terms of the Mortgages?

[25] I begin with a review of the terms of the Mortgages to determine what the parties contractually agreed upon regarding the Applicants' right to possession of the Property upon default.

[26] Both mortgages contain the same clauses pertinent to the Applicants' entitlement to vacant possession. Those are enumerated as clauses 3, 7 and 8.

[27] Clause 3 is entitled: "Possession". It reads:

Until the occurrence of event of default in accordance with clause 7, the Mortgagor may have possession of the lands and, **upon direction by the Mortgagor** after such an occurrence, the Mortgagees may enter and have quiet enjoyment of the lands.

[emphasis added]

[28] Clause 7 is entitled “Default”. It defines the events that constitute default under the Mortgages. Clause 7(a) reads:

You fail to comply with any one of your obligations to the Mortgagees, including specifically, if you default in any term of the Commitment Letter.

[29] The Mortgages included commitment letters describing, amongst other things, the amount of the loans, interest rates and monthly payment amounts.

[30] Clause 8 of the Mortgages is entitled “Remedies”. Clause 8(a) reads:

8. If the Mortgagors default under this mortgage or fails to make payment or fails to rectify a default upon demand or requisition being made, the Mortgagees may immediately exercise any remedy as may be available to it in law or equity and it may exercise any of the following remedies:

(a) Without limiting the rights of the Mortgagees pursuant to clause 3, the Mortgagees may take possession of the lands or any part of them and upon doing so the Mortgagees may do such things as it deems advisable in order to maintain, protect or preserve the lands, it may make improvements or alterations to the lands and the Mortgagees may lease the lands to third parties on such terms as the Mortgagees deem advisable;

[31] Clause 3 indicates that the parties contracted to limit the mortgagees’ right to possession of the Property upon default by requiring the direction of the Snooks to enter and have quiet enjoyment of the Property after default.

[32] There is no evidence that the Snooks gave direction to the Applicants to enter upon the Property. In fact, the Snooks have strenuously opposed the Application for vacant possession.

[33] Clause 8(a) however provides a broad remedy for the mortgagees to take possession of the Property where there has been default or the Snooks fail to rectify

the default. This broad remedy is not limited by the wording of clause 3 which would require the direction of the Snooks to do so.

[34] I am satisfied that the terms of each mortgage are such that once the respective mortgagee establishes failure by the Snooks to make required payments on the mortgage, then the mortgagee is entitled to vacant possession.

[35] This gives rise to the question: Who are the mortgagees under each mortgage deed?

[36] I find: (1) the mortgagees of the First Mortgage are Corbo and Daniels; (2) the Second Applicant is the mortgagee of the Second Mortgage; and (3) Canadian Mortgages Inc. is not a mortgagee under either mortgage.

[37] The first page of each mortgage identifies the parties. Corbo and Daniels are identified as the mortgagees of the First Mortgage and the Second Applicant is identified as the mortgagee of the Second Mortgage.

[38] With respect to the First Mortgage, the commitment letter identified Canadian Mortgage Inc., in Trust or its Assign, as the mortgagee. Further documentation sent by the Applicants in the vacant possession and power of sale processes also identified Canadian Mortgages Inc. as a mortgagee. This included the demand letter sent to the Snooks and the notice sent to the Snooks after the public auction.

[39] Canadian Mortgages Inc. is not however named as a mortgagee under either mortgage deed nor does the evidence support that it was a mortgagee.

[40] Kumar testified that Canadian Mortgages Inc. was not a mortgagee with respect to either mortgage. Rather she said Canadian Mortgages Inc. administers the

First Mortgage on behalf of Corbo and Daniels and the Second Mortgage on behalf of a pool of investors represented by a mortgage investment corporation.

[41] I find that Canadian Mortgages Inc. was the administrator of the Mortgages - not a mortgagee.

[42] Because Canadian Mortgages Inc. is not a mortgagee, it is not entitled to demand vacant possession of the Property under the Mortgages. Later in this decision, I will deal with whether Canadian Mortgages Inc. is entitled to vacant possession as a purchaser as a result of the power of sale process.

[43] I now turn to the question of whether Corbo, Daniels or the Second Applicant established default on either mortgage and, if so, whether they provided the Snooks with proper notice of the default.

Sub-Issue 2(a): Did the Applicants who are entitled to seek vacant possession establish that the Snooks defaulted on either or both mortgages?

[44] The Applicants alleged that the Snooks defaulted on the Mortgages because they failed to make the requisite mortgage payments.

[45] I find that the Applicants established default under the Mortgages. I will explain why.

[46] The only evidence adduced by the Applicants to prove default was that of Kumar as an employee of Canadian Mortgages Inc. No evidence was adduced from the mortgagees, Corbo, Daniels or the Second Applicant.

[47] The Snooks submitted that because Kumar was not a mortgagee or an employee of one of the mortgagees, I should not accept her evidence to prove default.

[48] To establish default on a vacant possession application, it is preferable, and in most cases, necessary, to have evidence directly from the mortgagees.

[49] However, having heard Kumar's evidence about the role of her employer, Canadian Mortgages Inc. in the administration of the Mortgages, I am satisfied that she was in a position to provide the Court with evidence on the issue of default.

[50] Kumar attested that the Snooks defaulted on the terms of the Mortgages. She said that the arrears occurred in 2021 and that both mortgages matured in March 2022.

[51] With respect to the First Mortgage, Kumar provided a list of seventeen missed payments between October 2021 and January 2023.

[52] On cross-examination, counsel for the Snooks pointed out to Kumar that the Second Mortgage was entered into in November 2021 and prepaid for four months so there could not be arrears in 2021. Ms. Kumar acknowledged this to be correct and that she had made a mistake.

[53] However, Kumar further attested that the Snooks did not make any payment on the Second Mortgage after March 2022. The mortgage matured and it was not renewed.

[54] The Snooks contended that the Applicants did not establish default. Kimberley Snook attested to the truth of the contents of the Responses filed. The Responses include statements to the effect that the Snooks:

- deny having defaulted on the terms of the Mortgages;
- deny the accuracy of the transaction histories attached to Kumar's affidavit indicating that they had not paid anything towards the Mortgages since December 2021; and
- made payments during that time and the Applicants have continued to take mortgage payments from their account since that date.

[55] Kimberley Snook's affidavit included as an exhibit a copy of a portion of the Snooks' bank account records which she attested showed "mortgage payments" being deducted by "Canadian Servic Bus". The exhibit depicts a series of withdrawals in the same amount, twice per month between March 1, 2023, and June 13, 2023.

[56] Kumar testified that "Canadian Servic Bus" was a related company to Canadian Mortgages Inc. She denied however that the withdrawals claimed by Kimberley Snook had occurred. She testified that these were merely attempts to receive payment from the Snooks' bank account and although money appeared to be withdrawn, it was returned. That was why, she said, a second attempt at withdrawal is shown each month.

[57] Although Kimberley Snook provided evidence of mortgage payments being withdrawn from the Snooks' bank account for a period in 2023, she did not attest that those payments were such that the Snooks could not have been in default on the Mortgages.

[58] On the other hand, Kumar's evidence established specific default dates regarding the First Mortgage between December 2021 to January 2023. The Snooks did not adduce their bank account statements for that period, or other evidence, so as to contradict Kumar's evidence of default.

[59] I accept Kumar's evidence on default of the First Mortgage. I am satisfied that the Applicants established default on the First Mortgage.

[60] With respect to the Second Mortgage, Kumar acknowledged on cross-examination that the Snooks had pre-paid four months of the mortgage payments. Kumar conceded that as the mortgage was entered into in November 2021, and matured in March 2022, the Snooks did not default in mortgage payments during the term of the Second Mortgage.

[61] However, I accept Kumar's evidence that the Snooks made no payment on the Second Mortgage after the pre-payments or after the mortgage matured.

[62] Therefore, I find that the Snooks defaulted on the terms of the Second Mortgage because they did not redeem the mortgage when it became due and owing and it was not renewed.

[63] I am satisfied that the Applicants established default on the terms of the Mortgages.

Sub-Issue 2(b): Did the Applicants who are entitled to seek vacant possession establish that they gave proper notice of default to the Snooks?

[64] The Snooks raised several issues with the notice they received regarding default under the Mortgages. They submitted that the Applicants:

- (1) failed to specify the basis upon which a power of sale was sought. Specifically, whether the Applicants were relying on subsection 6(a), 6(b) or 6(c) of the *Act*;

- (2) failed to state the amount of the mortgage money required to bring the Mortgages into good standing within the notice period;
- (3) wrongly advised the Snooks that they had 10 days to remedy the default rather than the 30 days required by the *Act*; and
- (4) failed to properly identify which mortgage was required to be redeemed to avoid the sale of the Property.

[65] Section 6 of the *Act* stipulates as follows:

Power of sale

6. A mortgagee shall not exercise the power of sale conferred by this Act unless written notice is first given to the mortgagor and another registered encumbrancer or guarantor

- (a) requiring payment of the mortgage money and there has been a default in payment for 30 days after the giving of the notice;
- (b) requiring that interest under the mortgage that is in arrears and unpaid be paid and there has been a default in payment for 30 days after the giving of the notice; or
- (c) requiring that a breach of a provision contained in the mortgage deed, or in this Act, and on the part of the mortgagor or of a person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest on the mortgage money be remedied and that breach remains unremedied for not less than 30 days after the giving of the notice.

[66] The Snooks also raised that the Applicants did not show that they gave written notice to other registered encumbrancers.

[67] The other encumbrancers, however, are the same mortgagees who gave joint notice of default to the Snooks and, through the same legal counsel, brought the

Application. Therefore, I cannot find the Applicants failed to comply with section 6 of the *Act* on that basis.

[68] I will now deal with the alleged defects in the process raised by the Snooks but first I will address the Applicants' argument that as mortgagees they have a common law right to take possession of the Property upon default.

[69] The Applicants submitted this right is separate and distinct from the right to sell the Property. As such, the Applicants contended that any errors they may have made in the power of sale process (including whether they met the notice requirements stipulated in section 6 of the *Act*) should not affect their common law right as mortgagees to vacant possession of the Property.

[70] In making this assertion, the Applicants relied upon *11346 (Nfld) Limited v. Hynes Construction*, 2018 NLSC 255.

[71] In *Hynes*, the Court determined that the effect of sections 5 and 13, read together, is that a mortgagee must comply with the requirements of sections 6 through 12 when it sells mortgaged property. However, a mortgagee and mortgagor can vary or extend those statutory requirements but cannot agree to a provision that is contrary to sections 6 through 12 (*Hynes* at paragraphs 30 and 31).

[72] At paragraph 35 of *Hynes*, the Court stated there was no indication that the legislature intended for the *Act* to be a complete and stand-alone codification of the rights and obligations of mortgagees and mortgagors. Rather the *Act* recognizes that parties can conclude their own contracts with respect to the sale and mortgage of real property. In particular, section 5(2) allows parties to vary or extend provisions of the *Act* relating to powers of sale in the mortgage deed.

[73] In *Hynes*, the Court further stated that section 13 of the *Act* only provides that the parties may not opt out of the minimum requirements contained in sections 6 through 12. There is nothing in the language of the *Act* to suggest that the legislature

intended those sections to have any further effect on the parties' rights to contract under a mortgage or their rights in respect of the common law.

[74] Section 13 of the *Act* states:

Mortgage deed overridden

The provisions contained in sections 6 to 12 apply to a sale of mortgaged property, notwithstanding a provision to the contrary contained in a mortgage deed.

[75] Parties to a mortgage deed cannot contract to do other than the minimal requirements of the *Act* when they sell mortgaged property.

[76] Power of sale proceedings and Applications for vacant possession are life changing and stressful events for homeowners. They may lose their home. In my view, mortgagors must meet the notice requirements of the *Act* when they seek vacant possession whether through power of sale proceedings or otherwise.

[77] Regardless of whether the Applicants have a common law right to vacant possession distinct from the power of sale proceedings, the Applicants clearly sought vacant possession in the context of seeking to sell the Property following default by the Snooks. The Applicants gave the Snooks notice to vacate following a purported sale of the Property through a power of sale proceeding.

[78] I find the Applicants were required to comply with the notice provisions of the *Act* in seeking vacant possession.

[79] I will now address what is required to meet the notice requirements set out in section 6 of the *Act*.

[80] The Applicants submit that section 6 merely requires that the notice given was such that the Snooks were able “to glean” which mortgages were being referenced.

[81] In making this submission, the Applicants rely on *Montreal Trust Co. of Canada v. R M Holdings Ltd.* (2001), 198 Nfld. & P.E.I.R. 31, 595 A.P.R. 31 (Nfld. S.C. (T.D.)).

[82] In *Montreal Trust*, the Court considered section 6 at paragraph 59, writing:

The purpose of s. 6 is simply to give notice of the potential power of sale proceedings and to give the mortgagor or guarantor some time in which to remedy the default; it is a straightforward notice provision, no more no less. The recipient should be able to glean from the notice the property and the mortgage in question. This is all that is required for the recipient to consider whether to take any remedial action. The details of the mortgage documentation such as the interest rate and the recitation of any previous renewals, extensions or amendments are not required to perfect the notice contemplated by s. 6.

[83] The Snooks submitted that section 6 of the *Act* was not complied with, in part, because the notice given to them by the Applicants did not tell them the amount of money outstanding on the Mortgages.

[84] In making this argument, the Snooks relied upon the unreported decision, *TCG Mortgage v. Fitzgerald* (10 October 2018), St. John’s, 201801G2730 (NLSC). In that case, the Court found the mortgagee’s failure to include payment information in the notice was a breach of section 6. The Court nullified the power of sale proceeding.

[85] *Montreal Trust* was upheld on appeal (*Montreal Trust Co. of Canada v. R M Holdings Ltd.*, 2002 NFCA 29). In its decision, the Court of Appeal clarified the requirements of a section 6 notice. The Court of Appeal stated that the notice must include a demand for payment of the mortgage money owing, together with interest.

[86] In reference to the conclusion contained in paragraph 59 of the trial decision, the Court of Appeal in *Montreal Trust* wrote at paragraphs 15, 16 and 17:

15 This conclusion is supported by the language of section 6 of the Act. Under that provision, **the notice of intent to exercise the power of sale must include a demand for payment of the mortgage money owing, together with interest.** No other particular information is specified. However, there is an obvious inference that the notice must also contain sufficient information to enable the guarantor to identify the mortgage under which the demand is made.

16 It follows that failure by the mortgagee to provide particular details, or an error with respect to a detail, will open the door for the guarantor to assert that the notice did not enable him to ascertain the mortgage in question. For this reason, the mortgagee is well advised to provide accurate information in the notice. **However, a failure to provide detailed information not specifically required by the Act, or an error in a detail, will not invalidate the notice** if the guarantor was able to identify the mortgage to which the notice referred.

17 In this case, the trial judge concluded, at paragraphs 59 and 62, that the February 4, 1998 notice to Mr. Hickman was sufficient to adequately identify the mortgage and property in question, and to alert the guarantor to the proceedings that would be undertaken if payment was not received. The correct amounts of the principal balance, accrued interest and daily interest accruing were stated in the notices of February 4th and 9th. **Relying on additional surrounding circumstances**, the trial judge determined that Mr. Hickman was under no misapprehension regarding the events taking place, including the potential sale of the property at auction. In support of this conclusion, at paragraph 62 of the decision, reference is made to evidence Mr. Hickman gave at the examination for discovery. Indeed, counsel for Mr. Hickman did not challenge this finding. His position, which is incorrect in law, was that it was irrelevant that Mr. Hickman was not under any misapprehension as to the proceedings.

[Emphasis added]

[87] In *Montreal Trust*, the Court of Appeal specifically noted that the notice given by the lender to the guarantor included the principal balance, accrued interest and the daily interest rate. The alleged deficiency in the notice was with respect to different interest rates and an extension of the mortgage. It was in that context that the applications judge stated the lender needed only to give enough details to identify the mortgage and property in question.

[88] Therefore, section 6 requires that the notice given by mortgagees to mortgagors must be sufficient for them to know not only the property and the mortgages in question but also the amount owed (together with interest). Further, the mortgagee must provide this information at least 30 days prior to the power of sale proceeding so as to allow the mortgagors sufficient time to take remedial action if they choose to do so.

[89] I will now determine if the Applicants met this test.

[90] I find that there were several errors in the demand and notice given by the Applicants to the Snooks. However, despite these errors I am satisfied that the demand was sufficient to give the Snooks requisite notice.

[91] I will explain why.

[92] The Applicants' solicitor sent a demand letter to the Snooks on February 3, 2023. The letter identified Canadian Mortgage Inc. as the "Lender". It stated that the "mortgage" is currently in arrears and if contact is not made with the law firm by February 13, 2023 to arrange payment of the arrears, the entire amount secured under "the mortgage" is due and owing.

[93] This notice is clearly deficient in that it: (1) suggests only one mortgage is in arrears and does not identify which mortgage that is; (2) identifies Canadian Mortgages Inc. as the lender and does not reference the actual mortgagees; (3) does not advise the Snooks how much money is owed; and (4) provides 10 days for the Snooks to contact the lawyers to make arrangements to pay the arrears – as opposed to 30 days.

[94] The Applicants' solicitor included, however, with the demand, a Notice of Intent which I find rectified some of the defects. It clarified that both mortgages were in default and identified both mortgages by date and registration number. It further referenced the requisite 30-day notice period to pay the outstanding balance or

Canadian Mortgage Inc. would proceed to sell the Property pursuant to the *Act*. The outstanding amount, however, was not provided.

[95] Schipilow's affidavit of November 21, 2023, included an email dated February 13, 2023, from Regular, as counsel for the Snooks to Joshua Santimaw of Applicants' counsel. In this email Regular confirmed that the Snooks had received the demand letter and Notice of Intent.

[96] In the email, Regular pointed out that the notice did not comply with the section 6(a) of the *Act*. He asked for a full and complete accounting of the amounts claimed to be owed on each mortgage.

[97] Santimaw replied to Regular on February 21, 2023 attaching a copy of the payout letter for each mortgage and the payment history to date. Santimaw also advised of the amount owed by the Snooks as of February 14, 2023 and advised the auction was scheduled for March 23, 2023.

[98] On March 6, 2023, Applicants' counsel sent correspondence by regular and registered mail to the Snooks further advising of the location and date of power of sale proceedings. This letter referenced the demand letter of February 3, 2023 and that there was default under both mortgages. It provided the correct dates and registration numbers for the Mortgages.

[99] I find that the Snooks were given sufficient information to know that both mortgages were in default and through communications with their solicitor, they were under no misapprehension as how much mortgage money was owed. This information was provided by the Applicants over 30 days prior to the power of sale proceeding.

[100] Kimberley Snook and Regular attended the public auction for the sale of the Property on March 23, 2023. Regular attested that he bid on the Property in an effort to secure it for his clients to live in until they could buy it back. I find in those

circumstances, the Snooks acknowledged they were in default on the Mortgages, aware of what was happening and that the Applicants had a right to take the power of sale proceedings.

[101] In *Montreal Trust*, at paragraph 62, the Court noted that the question of compliance with section 6 of the *Act* requires only an assessment of the content of the notice. However, as in that case, I am satisfied that based on other evidence before the Court of the surrounding circumstances, the Snooks were under no misapprehension as to what was taking place and why.

[102] Therefore, while the original demand letter was deficient, I find the notice ultimately given was sufficient to satisfy the requirements of section 6 of the *Act*.

[103] As I have found that default was shown and satisfactory notice given, the First Applicants, Corbo and Daniels, and the Second Applicant are entitled to vacant possession pursuant to the terms of the Mortgages. This remains so unless a valid sale of the Property was subsequently made which entitles the successful purchaser to possession of the Property.

[104] I will now deal with that question.

Sub-Issue 3: Did the power of sale process change who is entitled to vacant possession because the Property was sold to a separate party?

[105] To answer this question, it is important to consider what transpired at the public auction and afterward in the context of the terms of the auction and the requirements of the *Act*.

[106] The terms of auction were attached as an exhibit to Schipilow's affidavit. It reads as follows:

TERMS OF AUCTION/TENDER: The highest bidder/tenderer shall not necessarily be the purchaser. The successful bid and any tender must be accompanied by a deposit of 5% of the purchase price with the balance to be paid on closing. All amounts shall be paid by bank draft or certified cheque payable to "BOYNECLARK LLP in Trust". The transaction shall be completed within 30 days of March 23, 2023. The mortgagee reserves the right to bid in the auction, to reject any and all bids or tenders, to reserve a decision on the highest bid/tender received, and to cancel the auction or tendering process.

[107] First, I will consider whether the Property was sold to Regular.

[108] The auction proceeded as scheduled on March 23, 2023.

[109] Fitzgerald and Regular filed affidavits about what happened at the auction and its aftermath. Their evidence as to what happened at the auction did not differ significantly.

[110] Only two people attended the auction, Regular and Kimberly Snook.

[111] Fitzgerald attested that Boyne Clarke hired her as agent to conduct the power of sale auction for Canadian Mortgages Inc. She acted as both auctioneer and bidder on behalf of "the mortgagee". Fitzgerald attested she opened the auction and bid \$273,750 on behalf of Canadian Mortgages Inc.

[112] Regular attested that Fitzgerald advised the minimum bid was \$273,750. He made that bid. Both Fitzgerald and Regular said that Fitzgerald accepted Regular's bid.

[113] Fitzgerald agreed to send a purchase and sale agreement to Regular, and he could return it the next day along with the deposit.

[114] Regular attested that the auction was declared closed by Fitzgerald. He left the auction understanding that he had successfully bid for the Property and was entitled to complete the purchase as agreed.

[115] After Regular and Kimberley Snook left the auction, Fitzgerald said she realized she had made a mistake as she had instructions to continue the bidding beyond the bid she accepted.

[116] Fitzgerald immediately advised Regular by email of her mistake. The email read, in part, as follows:

We have an issue. \$273,750.00 was the minimum bid not the mortgagee's maximum bid. I cannot accept your bid. If the lenders do not receive at least the maximum bid they will pursue the borrower for the deficiency. I am happy to continue the bidding process **with you** over the phone..."

[Emphasis added]

[117] Fitzgerald attested that the next morning, by telephone, Regular placed a further bid of \$275,000. Fitzgerald advised this bid was also too low and rejected it.

[118] Regular attested that he understood the bid he made at the auction was accepted. However, he was prepared to bid \$275,000. Regular said Fitzgerald responded that would not be satisfactory. He would have to bid in increments of an undetermined amount to find out what the Applicants would accept.

[119] Regular further attested that he informed Fitzgerald the reason he was at the auction was to acquire the Property for his clients to live in with plans to sell it back to them once they found financing. Regular attested that, "Since there was no

certainty that he would be able to acquire the Property within a reasonable level of the \$275,000 his efforts to compromise, which he had made mainly because Fitzgerald appeared new to the auction process and needed the accommodation, were not working.”

[120] Fitzgerald attested that Regular said he would call with a further bid that day. She did not hear from him so she wrote to him advising him he had until the end of the day to place a further bid before she “formally” concluded the auction. She received no further bid and concluded the auction.

[121] Fitzgerald then entered a bid of \$275,001 on behalf of Canadian Mortgages Inc.

[122] Regular attested that Fitzgerald did not inform him that another auction would be initiated so he decided to “wait to see what would happen.”

[123] A notice dated March 24, 2023, (“Sale Notice”) about the sale of the Property is signed by Fitzgerald and reads as follows:

**WHEN NOT SOLD AT AUCTION
BIDDING PAPERS**

Canadian Mortgages Inc., acting in pursuance of a certain indenture of Mortgage dated February 9, 2021 and registered on February 19, 2021 as document number 966838, made between William Snook and Kimberly Ann Snook also known as Kim Snook as Mortgagor and **Canadian Mortgages Inc. as Mortgagee**; and CMI High-Yield Opportunity Fund Corp., acting in pursuance of a certain indenture of Mortgage dated November 1, 2021 and registered on November 4, 2021 as document number 1000053, made between William Snook and Kimberley Ann Snook also known as Kim Snook as Mortgagor and CMI High-Yield Opportunity Fund Corp. as Mortgagee hereby offers for sale by public auction, the lands and premises situate at 16 Madison Place, Paradise, Newfoundland and Labrador.

The Mortgagee, Canadian Mortgages Inc./CMI High-Yield Opportunity Fund Corp. hereby bids for the Property, the sum of \$275,001.00 of lawful money of

Canada and **has been declared the highest bidder at auction** and is therefore declared the purchaser of the above noted property.

[Emphasis added]

[124] I find what happened in the power of sale process to be troubling. However, I cannot find that the Property was sold to Regular.

[125] Although I find that the initial offer made by Regular was accepted, when he was advised of Fitzgerald's mistake in accepting the bid, I find he chose to withdraw that bid and participated in the informal process initiated over the telephone by Fitzgerald. He made another bid in the amount of \$275,000 which Fitzgerald rejected.

[126] I accept Regular's evidence that he was told by Fitzgerald that much more than \$275,000 was required to satisfy the Applicants' expectations for purchase of the Property. Otherwise, it would make sense that he would have entered another bid.

[127] Having said this, Regular did not try to enforce the \$273,250.00 bid he made at the auction, nor did he take any other steps to perfect the deal such as forwarding the requisite deposit within the stipulated time. Instead, Regular elected to engage in the informal bidding process initiated by Fitzgerald after the auction. When his further bid of \$275,000 was rejected, he chose to take a wait and see approach to next steps.

[128] The Snooks relied on *Asphalte ABC Rive-Nord Inc. v. AG of Canada*, 2013 FC 1287 for the proposition that the failure to forward a deposit within the requisite time is not fatal. However, that case differs from the case before me in that the deposit in *Asphalte ABC Rive-Nord Inc.* was sent and received but not within the required time period. In this case, Regular never sent the deposit.

[129] I am satisfied that the sale of the Property to Regular was not perfected.

[130] I will next address whether there was a proper sale of the Property to Canadian Mortgages Inc. or the Second Applicant as purported in the Sale Notice.

[131] First, it is necessary to determine whether that purported sale happened during the auction process.

[132] The Sale Notice is dated the day after the auction took place. That document is internally inconsistent in that it is entitled “When Not Sold at Auction” and yet within the document Canadian Mortgages Inc./CMI High-Yield Opportunity Fund Corp. is declared the highest bidder *at auction*.

[133] Although Kumar attested in her affidavit that Canadian Mortgage Inc. had purchased the Property at the auction, she acknowledged in her testimony that was incorrect. She testified that the Property did not sell at the auction.

[134] Fitzgerald attested that she advised Regular he had until the end of the day to enter a further bid. She received no further bid and concluded the auction. She then entered the bid of \$275,001 on behalf of Canadian Mortgages Inc.

[135] Regular attested that the auction was closed before he left on the date of the auction. I accept Regular’s evidence that the auction was closed before he left. It was unlikely that Fitzgerald would not have closed the auction at that time as she believed a sale had occurred. It was only after the fact that she discovered her mistake which she tried to rectify by allowing Regular to continue bidding the next day by telephone.

[136] I find that Fitzgerald’s negotiations with Regular after the initial bid were not part of the public auction. Rather as Fitzgerald stated in her email communication to

Regular, she was prepared to continue the bidding process with him, the party whose bid she had mistakenly accepted during the auction. She engaged in this process to try and rectify her mistake. These discussions took place over the telephone. There is no evidence that the auction continued in a public fashion so as to entertain bids from other members of the public or private entities.

[137] Therefore, I find any purported sale of the Property after March 23, 2023, did not happen during the public auction.

[138] The Applicants adduced conflicting evidence as to who ultimately purchased the Property.

[139] The Sale Notice states that “the Mortgagee, Canadian Mortgages Inc./CMI High-Yield Opportunity Fund Corp.” was declared the highest bidder at the auction and therefore the purchaser.

[140] The Amended Application states that correspondence to the Snooks advised that Canadian Mortgages Inc. and the Second *Respondent*¹ had purchased the Property.

[141] The affidavit of Schpilow filed with the Amended Application states that that on March 27, 2023, a notice was sent to the Snooks advising that “the Applicant” had purchased the Property at the Mortgage Sale.” It is unclear which of the Applicants he is referencing. The March 27, 2023, notice is entitled “Notice to Vacate”. It does not state who bought the Property.

¹ Although this is repeated in the Application, presumably it is an error and is intended to mean, the Second *Applicant*.

[142] In the terms of the public auction, “the mortgagee” reserved the right to bid in the auction.

[143] Fitzgerald did not attest that at any time she entered a bid for the mortgagee, CMI High-Yield Opportunity Fund Corp. Therefore, there is no evidence that the Property was sold to the Second Applicant.

[144] The confusion as to the status of Canadian Mortgages Inc. continued into the power of sale process. Fitzgerald was of the understanding that Canadian Mortgages Inc. was the mortgagee. In her affidavit she attested that: (1) she acted as both auctioneer and bidder on behalf of “the mortgagee”; (2) she entered a bid for Canadian Mortgages Inc. in the amount of \$273,750; and later (3) she entered a bid of one dollar higher than Regular’s last bid of \$275,001 and did so on behalf of Canadian Mortgages Inc.

[145] I find that Fitzgerald believed she was continuing to bid within the auction process and did so on behalf of Canadian Mortgages Inc. erroneously believing it to be a mortgagee.

[146] Any purported sale to Canadian Mortgages Inc. outside of the public auction process would be a private sale and as such would need to comply with section 9(2) of the *Act*.

[147] Section 9(2) states as follows:

A mortgaged property shall not be sold at a sale by private contract by a mortgagee unless there are no offers to purchase the property at the time of the public auction or public tender or unless the offers are unreasonably low.

[148] There was an offer at the public auction by Regular for \$273,500 which was acknowledged to be the minimum bid required. This amount is \$1251 lower than

\$275,001, the amount offered and accepted by Fitzgerald on behalf of Canadian Mortgages Inc.

[149] Fitzgerald stated in her email to Regular following discovery of her mistake that unless the maximum bid was received the Applicants would pursue the Snooks for deficiency. Regular's bid was not rejected for being *unreasonably* low.

[150] It is apparent from subsequent correspondence to the Snooks that despite the purported sale of the Property for \$275,001, the Applicants intend to pursue the Snooks for the deficiency.

[151] In these circumstances, I cannot find that Regular's offer in the auction was unreasonably low so as to find that the Applicants complied with section 9(2) of the *Act* in purporting to sell the Property privately to Canadian Mortgages Inc.

[152] Therefore, I find that the purported sale to Canadian Mortgages Inc. was not in accordance with the terms of the auction or the *Act*.

[153] I must now consider the remedy.

[154] The Applicants submitted that any errors in the process did not nullify the power of sale process. Rather, they submitted that if they failed to comply with any of the requirements set out in sections 6 to 11 of the *Act*, the only remedy available to the Snooks is pursuant to section 12 of the *Act*. That is, the Snooks would not be liable for any deficiency resulting from the sale of the Property.

[155] I do not agree. I will explain.

[156] Section 12 of the *Act* states:

Mortgagor not liable for deficiency

A mortgagor or another registered encumbrancer or guarantor shall not be liable for a deficiency resulting from the sale of the mortgaged property where the mortgagee fails to comply with a requirement of sections 6 to 11.

[157] The Applicants submitted that their position on this point finds support in the trial decision of *Montreal Trust*. At paragraph 60, the Court referenced the “extreme consequences” of a failure to comply with any of the provisions in sections 6 to 11, as being section 12 of the *Act*.

[158] *Montreal Trust* was not, however, a case for vacant possession. It involved an application by the lender to recover the deficiency owed by a mortgagor after a power of sale. It is in that context that the Court referenced the consequences of section 12 of the *Act*.

[159] The *Act* utilizes the word “shall” in the provisions prescribing what is required to be done to effect a power of sale.

[160] I do not accept that the *only* consequence for failure to comply with the statutory provisions of the *Act* pertaining to a power of sale, is the mortgagor’s relief from liability for the deficiency on the sale (meaning any shortfall remaining after the mortgagee applies the sale proceeds against the amount the mortgagor owes under the mortgage).

[161] If this were so, there would be no consequence to the mortgagee for failing to comply with the provisions of the *Act* in circumstances where there is no deficiency on the sale. In such a market, there would be no incentive to comply with the mandatory provisions of the *Act*.

[162] Rather, in my view, section 12 applies to a situation where a power of sale has been completed and the mortgagee seeks to recover the deficiency on the sale from

the mortgagor or guarantor. It does not mean that in other proceedings such as a vacant possession application that the mortgagor would not be able to seek another remedy for the mortgagee's failure to comply with the *Act*.

[163] The Applicants also referenced section 14(2) of the *Act* to support its position that irregularity in the power of sale process cannot nullify the process itself.

[164] Sections 14(1) and 14(2) of the *Act* read as follows:

Conveyance receipt, etc., on sale

14. (1) A mortgagee exercising the power of sale conferred by this Act shall have power by deed to convey the property sold for the estate and interest in the estate that is the subject of the mortgage, freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights that have priority to the mortgage.

(2) Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that notice was not given, or that the power was otherwise or irregularly exercised; but a person adversely affected by an unauthorized or improper or irregular exercise of the power shall have his or her remedy in damages against the person exercising the power.

[165] Section 14(2) does not assist the Applicants in the circumstances of this case. This is because, in my view, section 14(2) is intended to protect an innocent arm's length purchaser in the event that subsequent to a sale irregularities in the power of sale process are uncovered. The title of that purchaser is unimpeachable because of such irregularities. Instead, the person adversely affected by the errors would have an action in damages against the person who exercised the power of sale.

[166] This case does not concern an arm's length purchaser. The purported purchaser of the Property was the administrator of the Mortgages and the party that exercised the power of sale proceedings on behalf of the mortgagees.

[167] Therefore, I find that the power of sale process did not result in a proper sale of the Property to any purchaser so as to divest the right of Corbo, Daniels and the Second Applicant to vacant possession of the Property.

[168] To be clear, although they are entitled to vacant possession as the mortgagees, they are not the purchasers of the Property as no proper sale of the Property occurred.

[169] This case is unusual in that more than one party applied in the same proceeding for vacant possession. If there is any dispute amongst them as to priority or right to vacant possession, Corbo and Daniels, being the mortgagees of the First Mortgage, shall have vacant possession in priority to the Second Applicant.

COSTS

[170] Although Corbo and Daniels and the Second Applicant have been successful on the Application, I am not prepared to award costs in their favour.

[171] This is because of the numerous mistakes made in the Application process including having to file an Amended Application and supplemental affidavits. This prolonged the matter and required the Snooks to take additional steps which may not have been necessary if the Applicants had been more thorough at the outset.

[172] In refusing to award costs to the Applicants I have also considered the circumstances surrounding the power of sale process. This included the acceptance and then refusal of Regular's offer which was intended to result in the Snooks staying in the Property. Had that happened, this litigation may have been avoided.

SUMMARY AND CONCLUSION

[173] I find:

- (1) The mortgagees, Corbo, Daniels and the Second Applicant, established their right to vacant possession of the Property.
- (2) There was no proper sale of the Property effecting their right to vacant possession of the Property.

[174] The Snooks shall provide vacant possession of the Property to Corbo, Daniels and the Second Applicant within 45 days of the filing of the Order.

[175] There is no order as to costs.

SANDRA R. CHAYTOR
Justice