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Getting Foreclosure Practice Right: Some Regulatory Suggestions

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Case commented on:

AGF Trust Company v Soos, 2012 ABQB 747

AGF Trust Company v Soos is a decision by Master Lorne Smart, reviewing a Bill of Costs in a standard residential foreclosure action — not the sort of decision that usually attracts our attention at ABlawg. But the Master does two things that make this decision worth commenting on. First, he makes an example of procedural irregularities in the action to reduce the legal fees claimed in the Bill of Costs. Second, he uses his review to comment on some troublesome economic aspects of foreclosure practice.

The procedural rules governing foreclosure actions, found in Division Five of Part 9 of the new *Alberta Rules of Court*, Alta Reg 124/2010, are detailed. Consider the rules applicable just to bills of costs in foreclosure actions. Under foreclosure Rule 9.35(1)(a)(iv) a bill of costs under Rule 10.35 is one of the documents a plaintiff (i.e., the lender) must file and serve on every defendant (i.e., the borrower) and subsequent encumbrancer before entering one of the types of orders that brings a foreclosure action to an end (i.e., an order declaring the balance owing to the plaintiff, an order for sale to the plaintiff, or an order confirming sale) or grants judgment against any party. Rule 10.35(2) requires (among other things) that the bill of costs itemize all the costs sought to be recovered, distinguishing between legal fees, disbursements and other charges. Foreclosure Rule 9.35(1)(b) states that an assessment officer — the court clerk for the judicial centre in which the action is located — must assess the reasonable and proper costs under Rule 10.41 and, after correcting or affirming the bill, issue a certified bill of costs under Rule 10.43. Under Rule 9.35(4) — the relevant rule in this decision — if the plaintiff is not satisfied with the assessment officer's assessment, the plaintiff may, before the order bringing the foreclosure action to an end is entered, re-attend before the Master who granted that order for the purpose of re-evaluating the costs.

The plaintiff lender in this case was AGF Trust Company. According to its web site, AGF Trust "offers real estate secured loans to Canadians who have sound credit, but whose circumstances may not meet the traditional requirements of Canada's large banks to qualify for their lowest rate . . . ." AGF Trust was represented throughout the foreclosure action by a Calgary lawyer who appears to practice as a sole practitioner.

On December 10, 2010, Master Smart granted an order for sale, accepting a third party's offer to purchase the foreclosed-upon property for $400,000. That made Master Smart the person before whom AGF's lawyer would re-attend if she or her client was dissatisfied with the assessment officer's evaluation of her Bill of Costs. The sale appears to have closed in February 2011, with AGF paid out that month. We are not told when the Bill of Costs was reviewed and assessed by

an assessment officer and we do not know when AGF's lawyer re-attended before Master Smart in private chambers to settle the Bill of Costs. It is not clear why the Bill of Costs was just being settled in December 2012, almost two years after the foreclosed-upon property was sold and AGF was paid out.

AGF's Bill of Costs was for $8,588.62, It was made up of legal fees of $6,500, disbursements of $941.50, other charges of $755.00, and applicable GST. The assessment officer reviewed that Bill and allowed a total amount of $5,073.75, which was $3,500 for legal fees and the balance for the same amount of disbursements, other charges and GST. In other words, the lawyer's legal fees were reduced by almost half, from $6,500 to $3,500, "[b]ased on the practice followed in Edmonton" (at para 8). This reduction is what led to her re-attendance before Master Smart.

Master Smart had requested AGF's lawyer's time records and she provided him with the Bill of Costs submitted to the assessment officer with the time spent in minutes beside each entry. The time spent totalled 1,857 minutes (30.95 hours). As the lawyer charged $350 per hour for her time, and 30.95 x $350 comes to $10,832.50, a large number of the hours had to be paralegal hours, although Master Smart noted there was no differentiation between lawyer and paralegal time in the Bill of Costs (at para 8).

In re-assessing the Bill of Costs, Master Smart focused on two aspects of the foreclosure action, its ordinariness and the differences between what the Rules of Court required and the steps taken by the lawyer and her paralegal, i.e., procedural irregularities. His focus on the former is illustrated by comments such as the following:

- "The Statement of Claim consists of 10 boiler plate paragraphs with the particulars of the mortgage and the indebtedness being the most material variables" (at para 2).
- "Standard residential foreclosure actions are not difficult. They are of a nature that I would describe as commodities work" (at para 9).
- "The vast majority of the work on the file (I would estimate 95%) is done by paralegals filling in blanks of precedents and following checklists which were by in large prepared years ago" (at para 9).

The second aspect, the procedural irregularities, including the use of outdated or inapplicable paragraphs in precedents, is illustrated by complaints such as the following:

- "A generic paragraph is added that refers broadly to a renewal and the mortgagor agreeing to its terms but no specific terms are mentioned" (at para 2).
- "One paragraph includes reference to reliance on the National Housing Act along with other statutes [but it] is apparent that the National Housing Act has no application to the case as the mortgage security does not support it" (at para 2).
- "No current title was filed as required by Rule 9.31(a) but counsel has a title stapled to the back folder of the file" (at para 3).
- "The filed Application [to accept an Offer to Purchase] refers to the Offer as being Schedule A [but there] was no Schedule attached to the document filed with the court" (at para 5).
- "There is no affidavit of service for the application filed . . . [but an] unfiled affidavit of service is on Counsel's file regarding service on Soos" (at para 5).
- "There is another offer on Counsel's file which ostensibly was the "all other offers", I rejected [but no] notice appears to have been given to the other offeror" (at para 5).

- "A hand written note on an accompanying ledger indicates $371,751.72 was due to AGF . . . [but by] simple calculation from December 16, 2010 to February 1, 2011 the accrued interest would be $2,600.97 (46 days x $56.5429) for a total balance due to AGF of $365,351.24. An explanation of the approximate $6,000 difference is warranted" (at para 7).
- "The Statement of Claim in this action although lacking any pleading of entitlement to solicitor client costs seeks in the relief recovery of "The party and party costs as well as the solicitor and client's costs of this action [in an] interesting use of what might be considered almost archaic language [referring to foreclosure actions of the early 1980s]" (at para 12).

Some of Master Smart's complaints about foreclosure practice are about foreclosure practice in general, and not in the matter before him:

- "Of course, the lawyer must attend in Court for the applications where, far too often, they demonstrate their limited involvement in the file by knowing little beyond what notes someone (the paralegal) has prepared for them and present Orders for signature that they clearly haven't reviewed" (at para 9).
- "Lenders consider recovery proceedings on delinquent mortgages an unfortunate inconvenience and expense. They have over the years consistently looked to ways to reduce costs. As part of that strategy lenders have downloaded more and more responsibility to lawyers including many of the administrative responsibilities that their staff used to perform… lawyers are unhappy with the increasing responsibilities imposed upon them and have recently sought both aggressive increases in the guidelines as well as attempting to identify and isolate specific items for additional compensation" (at para 13).
- [Referring to so-called "Cinderella payments" said to be "not applicable to this case"] "Despite the sophisticated computerization existing today it seems lenders don't wish to receive payments at their branches as communication of receipt with the law firms would be extra work [and so it] is almost invariably the practice now that payments on arrears must be made directly to the law firm. This, of course, is an administrative burden on the law firm but performing the services of a bank teller hardly warrants a lawyer processing fee of $150 per payment as proposed" (at para 13).
- Master Smart also contrasted the CBA Residential Real Estate Section's hope to increase conveyancing fees to $750-$850 for ordinary residential real estate sales, which he characterized as "minefield[s] of potential liability" (at para 13), with the $1,850 conveyancing fee proposed by some foreclosure practitioners, even though the latter have virtually no exposure to liability because the property sold in a foreclosure is sold "as is" with no representations and warranties of any kind whatsoever and even though less documentation is required (no RPRs or compliance certificates).

The Master did increase the legal fees in the Bill of Costs over what the assessment officer prescribed. He noted (at para 13) that assessment officers in Edmonton had no uniform practice for handling fees for completing the conveyance of a property to a third party under an Order for Sale but all of them should be adding $250 to $350 to each Bill for such conveyances. Because there was a conveyance to a third party in this case that required extra correspondence and the tendering of documents twice, Master Smart increased the Bill of Costs by $350, for a total in fees of $3,850.

However, Master Smart also decreased the legal fees allowed by the assessment officer. He was concerned that "many of the mandatory requirements prescribed by the Rules have not been performed" (at para 17). He summarized his gravest concerns (at para 15) as follows:

> There is first the failure to comply with the requirements of the foreclosure rules regarding titles, notice on offerors, failure to file a final affidavit of default and service of the "final" order. I also have serious concerns over what appears to be a significant over-payment to the mortgagee although I recognize that a final statement regarding dispersal of sale proceeds has not as yet been done. Also significant is the deficiency in the pleadings and evidence with respect to entitlement to solicitor/client costs.

As a result of these deficiencies, Master Smart reduced the $3,850 in legal fees by $1,000, to $2,850 (at para 17).

Then things got worse, based on what Master Smart saw as the apparent "significant over-payment to the mortgagee" (at para 15), i.e., "the approximate $6,000 difference" (at para 7). In the last paragraph of his decision, he indicated he wanted AGF's lawyer to give him "a full and detailed explanation of the mortgage balance calculation including supporting documentation from the Plaintiff" (at para 18). He would review that material and then decide "whether or not this is a proper case for costs to be assessed pursuant to Rule 10.49(1)" (at para 18). Rule 10.49 is about penalties for contravening rules. It provides:

> 10.49(1) The Court may order a party, lawyer or other person to pay to the court clerk a penalty in an amount determined by the Court if
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> (a) the party, lawyer or other person contravenes or fails to comply with these rules or a practice note or direction of the Court without adequate excuse, and
>
> (b) the contravention or failure to comply, in the Court's opinion, has interfered with or may interfere with the proper or efficient administration of justice.

The invocation of Rule 10.49 is a warning that the Master may well ask AGF's lawyer to pay a penalty personally.

Like Master Smart, one of us (JWH) also "cut my teeth as a junior lawyer on foreclosures over 30 years ago" (at para 10). The same could probably be said of AGF's lawyer in this case, as she too was admitted to the bar in 1978. The detailed procedural rules in Division Five of Part 9 of the *Alberta Rules of Court* are new, but the steps to be taken, the documents to be filed, the court applications to be filed and heard, and the calculations to be made are remarkably similar to what was required in the early and mid-1980s. There are a lot of i's to be dotted and t's to be crossed in a foreclosure action, even if the "the majority of files including those that might be considered somewhat complex can be adequately handled by a third year associate" (at para 10).

However, that similar legal practice now exists in an economic market for legal services that is, as Master Smart's judgment makes clear, different from the market that existed in the 1980s, and different in ways that creates real challenges for lawyers seeking to perform foreclosure work both competently and in a manner that is economically viable. Lawyers practicing alone or in small firms, like counsel in this case, face economic challenges created by the fact that the costs of dispute resolution now exceed the ability of many individual clients to pay, with the result that

there is both downward economic pressure on lawyers' fees and a dwindling client base for those lawyers to draw upon.

Lawyers who have institutional clients like AGF have the benefit of having clients who can afford to pay their fees. They are, however, in a weak position relative to their client. The economic relationship with AGF Trust is almost certainly far more important to their lawyer's financial viability than are her legal services to AGF. The lawyer appears to be in a position where AGF expects her to do more in the retainer than a lawyer working in a foreclosure would have done previously (as noted by Master Smart at para 13) and also expects that she will recover those costs from the debtor in cases, like this one, where the property is sold for more than the outstanding debt owed to the lender. Lenders are, in other words, putting pressure on lawyers to do work that would normally be done by the lender because — one presumes — the cost of that work is then born by the debtor rather than the lender.

Yet what happened in this case was that the court was unprepared to allow those costs to be passed on to the debtor. That means that lawyers are being expected to do work by their client but may or may not be able to recover for the costs of doing that work. While theoretically they can ask their actual client to pay, or decline to do the work, where are they to turn to for a better economic outcome? To the residential house transactions which are, as Master Smart notes (at para 13), less well paid and far more risky? To the individual clients who can no longer afford their services? This is not to suggest that Master Smart's decision was wrong — indeed, it seems to be well reasoned and more than justified — but simply to note that the economic reality for lawyers like the one in this case is quite difficult.

It is also a reality which raises other issues in the public interest, most especially with respect to competence. It is clear from Master Smart's judgment that there are significant problems of competence and perhaps with propriety in the work done by the lawyer and her paralegal. That lack of competence may have many causes, but one could be the economic pressures under which her practice is operating.

What does all this suggest from a lawyer regulatory perspective? One answer is that law societies ought to expend greater efforts on regulatory initiatives directed at standard setting and at creating lawyer competence (see on this point, Michael Trebilcok, "Regulating the Market for Legal Services" (2008) 45 University of Alberta Law Review 215). If foreclosures are as routine and full of boiler-plate provisions as Master Smart suggests, then it ought to be possible to create common standards, forms and checklists for all lawyers and their paralegals to follow in completing those foreclosures. The problem with that argument, though, is that common standards, forms and checklists do exist. For example, the Legal Education Society of Alberta (LESA) appears to have created them, offering the *Alberta Foreclosure Forms Practice Manual* containing commonly encountered foreclosure pleadings, updated periodically. In addition, the new Rules of Court themselves provide significant guidance as to how foreclosures are to be conducted.

What, then is the difficulty? It seems that the guidance which exists has not translated into a legal culture for foreclosure lawyers where routinely following those guidelines is the norm. To use an analogy discussed by Professor Trebilcock in his article, huge improvements to the safety of anaesthesiology were created by the adoption of checklists to be followed whenever administering an anaesthetic. Here the checklists exist, but they appear not to have been routinely adopted. As a consequence, the beneficial effects on legal practice are not being achieved, as they were for anaesthesiology.

Perhaps the answer is for the Law Society, which has the overarching regulatory authority for professional practice, to make it clear through a practice directive or otherwise that foreclosure practitioners must follow the LESA standard forms or risk being considered to have violated their professional obligations on competence. Doing so would have two significant benefits. First, it would allow a regulatory response that is not the piecemeal response likely to result where courts make an example out of one lawyer who, as likely as not, merely reflects broader practice norms (and who, for that "making an example out of" reason we have deliberately not named). This increases the likelihood of a cultural shift in foreclosure practitioners. Just as legally mandating seatbelts made people wear them, legally mandating compliance with the LESA materials will make people use them. Second, it would give the lawyer a tool that the lawyer can use to impose boundaries on clients who otherwise hold the upper hand; being able to point out the requirements imposed by the regulator, in addition to those imposed by the Rules of Court, would make it easier for the lawyer to resist instructions inconsistent with those requirements.

In addition, it should be noted that Alberta is one of the few jurisdictions that has not adopted compulsory continuing legal education for lawyers. While lawyers are required to have and maintain an education plan, there is no requirement that they take accredited courses and document the fact that they have done so with the law society. It is quite possible that the existence of a mandatory continuing legal education requirement would also help to shift the general practice environment and culture of foreclosure lawyers, and of others who face similar challenges in achieving competent and ethical practice. The problems faced by lawyers like the one acting for AGF in this case are complicated, but regulatory responses are possible, and ought to be considered.