

## Foreclosure and Power of Sale



**By Brian Madigan LL.B.**

There are two remedies provided to mortgagees who find their mortgages in default, assuming that simply waiting for payment is not appropriate:

- 1) power of sale,
- 2) foreclosure.

**Power of sale** is a relatively simple remedy. It involves taking possession of the property either by consent, acquiescence or Court Order, listing the property for sale and conveying it to the new purchaser.

There are some matters to bear in mind:

- The price needs to be reasonable
- The mortgagee may not be able to recover costs, if they are considered to be improvements
- The sale process needs to be expeditious
- The mortgagee needs to negotiate with prospective purchasers in good faith
- The owner is entitled to an accounting
- Any excess funds recovered are remitted to the owner (mortgagor)
- Any deficiency may be recovered from the owner

**Foreclosure** is somewhat different. It is a highly regulated event. There are strict procedural rules, and one error or mistake can set the mortgagee back months. Here, the intention is to eliminate the owner's equity of redemption in the property. That is the old common law test. But, in Land Titles, since there is no "legal mortgage" and only an "equitable mortgage", consequently, the owner's right to secure a discharge upon payment is eliminated.

The mortgagee still has the same problem with respect to recovery of possession. In order to convey the property, the mortgagee needs to be able to deliver possession.

At times, this will present something of a problem. A property may be contaminated and anyone who occupies it, or has possession of it, may become responsible for the cleanup. Some mortgagees, in these circumstances will prefer to sell under power of sale and never secure possession of the premises.

This is not possible with the foreclosure route. Upon registration of the Final Order for Foreclosure, the mortgagee will automatically be deemed to be in possession of the premises.

**Foreclosure** ends up transferring ownership to the mortgagee. The title to the property is registered in the name of the mortgagee who accepts the property in full satisfaction of the debt.

Like power of sale, there are some matters to bear in mind:

- The price (or value in the transaction) need not be reasonable
- The sale process does not need to be expeditious
- The mortgagee does not need to negotiate with prospective purchasers in good faith, or indeed negotiate with anyone at all
- Any excess funds recovered are for the account of the mortgagee
- The mortgagor has the right to have the property sold by judicial sale, converting the proceedings into a sale somewhat like a power of sale, with similar rights including an accounting and entitlement to excess funds
- No funds are remitted to the owner (mortgagor), in a foreclosure
- The owner is entitled to an accounting prior to the final order for foreclosure, but not afterwards
- If there is a deficiency it cannot be recovered from the owner

There is one little loose end here and that deals with the matter of mortgage arrears. If a Judgment for the arrears is obtained and executed before the foreclosure, then any monies secured by the Judgment may be obtained in addition to the property. That matter appears to vary slightly from jurisdiction to jurisdiction.

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