

## Putting the Brakes on a Power of Sale



**By Brian Madigan LL.B.**

Let's assume that a mortgagee has instituted power of sale proceedings, what, if anything, can the mortgagor do to delay or prevent the sale?

In the interim period, the owner could continue to market the sale of the property. Rarely, if ever, will a mortgagee achieve as high a price as the owner might achieve. So, it's quite worthwhile for the owner to try to sell it.

Just in case you're not too familiar with the terms, the mortgagor is the owner, and the mortgagee is the lender.

**Quick Action:** If the mortgagee issued a Notice of Sale too quickly, the proceedings may be a nullity. This could arise if a demand for full payment were made and the time limit in the demand had not expired. In such cases, the mortgagee would require a Court Order allowing the power of sale proceedings to take place.

**Pay up Arrears and Costs:** Most of the time, the mortgagee will require payment of the entire balance outstanding. Under the Act, the mortgagor can simply pay up the arrears and costs. If that takes place, then the mortgage is back in good standing. The enforcement proceedings are at an end.

**Pay Arrears and Costs into Court:** In some cases, the mortgagee will have instituted legal proceedings including an action for recovery of possession of the property. If that is the case, the mortgagor still has the right to pay up the arrears and costs as well as \$100 for security, and the proceedings will be stayed. The accelerated principal need not be paid. If judgment has not been recovered, the action will be dismissed. If judgment has been recovered, the proceedings in the action will be stayed provided that "no sale or recovery of possession of the land or final foreclosure of the equity of redemption has taken place."

**Request for Information:** A mortgagor is entitled to certain information from the mortgagee including the amount of the accelerated principal. Upon receipt of the request, the mortgagee is obligated to respond within 15 days, failing which no further proceedings may be taken. If the mortgagee fails to respond without a reasonable excuse or, if the response is incomplete or incorrect, any rights that the mortgagee may have to enforce the mortgage shall be suspended until the mortgagee has complied.

**Requisition an Assignment:** The mortgagor as well as all subsequent encumbrancers and execution creditors are entitled to an assignment of the mortgage upon payment in full of the principal, interest and expenses. The right in favour of each party is separate and independent of one another. The mortgagee is obligated to reply and comply with such requests.

**Technical Difficulties:** The Notice must comply with the contract and the Act. If there are any technical issues they should be raised at once and rectified by the mortgagee. Courts will usually respond to such issues and deal with the matter equitably. The mortgagor might be awarded costs and additional time to pay.

**Court Injunction:** On fair and equitable grounds the mortgagor will be awarded an Injunction. This stops the proceedings. One condition is the mortgage payments must be kept up to date until final disposition. This tactic will not work if the mortgagor has no hope of refinancing.

**Acceptance of Partial Payments:** In many cases, the mortgagor will have made a partial payment. This frequently occurs without the active participation of either party. The mortgagee issues the Notice, and the mortgagor's regular cheque is cashed. This means that the proceedings will have to start over again unless the mortgagee specifically indicates that it will accept the cheque as a "partial payment only", without staying its proceedings.

**Particulars of Costs:** The Act requires a mortgagee to set out its costs being claimed in the power of sale proceedings. Failure to do so can result in delay, or the Court failing to award costs.

These are some of the steps that might be taken by a mortgagor to put the brakes on.

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