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Foreclosure: An Overview

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FORECLOSURE: AN OVERVIEW

I. Introduction

Foreclosure proceedings are a summary judicial process through which a mortgagee may realize upon the assets given as security for a loan. This paper is intended to provide an overview of that process.

II. Demand and Notices

A. Demand

Interlender agreements and, in particular, priority agreements, will often contain terms governing matters post-default. For example, a common term stipulates that monies received by a subordinate mortgagee after receipt of notice of default under the prior mortgage will be subject to a trust in favour of the prior mortgagee. Interlender agreements also often contain standstill provisions and/or other terms applicable to any realization proceeding that may be taken against the borrower.

Accordingly, upon default and prior to issuing a demand, it is prudent to review any pertinent interlender agreements.

If a lender demands payment of the mortgage debt or takes steps to compel payment of it, then the lender will be precluded from claiming a prepayment penalty (*Chang v. Brown*, [1976] B.C.J. No. 1265 (S.C.) and *Citizens Trust Co. v. Vyas*, [1996] B.C.J. No. 843 (S.C.)). If the lender has the option and does not wish to accelerate the full balance of the loan (and thereby, for example, maintain the right to claim a prepayment penalty), then the lender may limit its demand to payment of arrears. These issues should be considered prior to the issuance of a demand.

A demand letter ought to be issued to the borrower(s) as well as any other parties liable for the mortgage indebtedness. A typical demand letter will identify the lender, the borrower(s) and the amount owed in addition to providing a deadline for payment and describing the consequences if payment is not received. The mortgage and/or collateral security will often contain terms addressing form and delivery requirements and, accordingly, ought to be reviewed in that regard.

At common law, if a demand is required before the lender has the right to enforce its security, then the borrower must be provided a reasonable period of time to remedy the default (*Lister v. Dunlop* (1982), 135 D.L.R. (3d) 1 (S.C.C.)). What constitutes reasonable time is a question of fact in every case. In *Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal* (1979), 25 O.R. (2d) 198 (H.C.), the court set out the relevant considerations as follows:

> ...(1) the amount of the loan; (2) the risk to the creditor of losing his money or the security; (3) the length of the relationship between the debtor and the creditor; (4) the character and reputation of the debtor; (5) the potential ability to raise the money required in a short period; (6) the circumstances surrounding the demand for payment; (7) any other relevant factors.

The court in *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1996] B.C.J. No. 621 (C.A.) at para 26 provided a useful discussion regarding the appropriate analysis as to what may constitute reasonable notice in a given case:

> In Whonnock, it was suggested that "a few days" will generally be regarded as adequate (supra at 327), a comment seemingly approved by the Ontario Court of Appeal in Kavcar Investments Ltd. v. Aetna Financial Services Ltd. (1989), 70 O.R. (2d) 225 at 235-6. The Ontario Court suggested that "any very short notice -- certainly one of less than a day -- is prima facie unreasonable and in such a case it would be up to the creditor to show why, in the particular circumstances, the period allowed was reasonable." But if reasonableness of notice is a question of fact, then what constitutes "very short notice" must also be a question of fact to be determined anew in each instance. With respect, it would seem to be circular reasoning for a court to decide where the onus lies -- the initial question -- without prejudging to some extent whether the notice given was reasonable -- the ultimate question. I would prefer not to lay down any legal rule or presumption as to whether any particular period may or may not constitute reasonable notice: whereas a few hours or days may be regarded as placing an evidentiary onus on the lender in a given case, in other circumstances the same length of time might appear to be reasonable, and the court will look to the borrower to show why it is otherwise.

Of course, if a borrower is in court contesting the reasonableness of the lender's notice, it is probably already too late. Mr. Justice Farley's words of caution in *Prudential Assurance Co. (Trustee of) v. Eglinton Ltd. Partnership*, [1994] O.J. No. 868 (G.D.) at para 23 are apt:

> Contingency plans are to be in place before disaster strikes; they are not to be designed after the ship has struck the iceberg.

B. Section 244 of the Bankruptcy and Insolvency Act

Pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ["***BIA***"], a secured creditor intending to enforce security on all or substantially all of the inventory, accounts receivable or other property of an insolvent person must give notice of its intention to the borrower in the prescribed form. The secured creditor may not enforce its security until after the expiry of 10 days from the provision of notice (unless the insolvent person consents to early enforcement after notice is provided), although it remains open to a secured creditor to seek the appointment of an interim receiver under s. 47 of the *BIA*. The purpose of the 10 day period is to provide the insolvent person with some breathing room to negotiate and reorganize their financial affairs. Rule 124 of the *BIA* requires that the notice of intention to enforce security be personally served, sent by registered mail or couriered (or by electronic transmission if agreed by the parties).

Section 244 will not apply, or will cease to apply, if:

- The debtor is bankrupt (see the definition of "insolvent person" under s. 2(1)).
- The insolvent person files a proposal that does not include the secured creditor (ss. 69.1(5) and 244(3)(a)).
- The secured creditors of the relevant class vote against the insolvent person's proposal (ss. 69.1(6) and 244(3)(a)).
- The stay is lifted in respect of the secured creditor (ss. 69.4 and 244(3)(b)).
- A receiver is appointed in respect of the insolvent person (s. 244(4)).

The 10 day period prescribed by s. 244 of the *BIA* is not an "add on" to the reasonable period of time required at common law (*Prudential Assurance Co. (Trustee of) v. Eglinton Ltd. Partnership*, [1994] O.J. No. 868 (G.D.)).

In *Beresford Building Supplies (1984) Ltd. v. Caisse Populaire* (1996), 38 C.B.R. (3d) 274 (Q.B.) the court held that where a s. 244(1) notice has been given, common law notice is no longer required and the 10 day notice period prescribed by the *BIA* is sufficient (i.e. the common law principle of reasonable notice does not apply).

C. Section 21 of the Farm Debt Mediation Act

If the borrower is a "farmer" then it will be necessary to provide notice of intent to realize on security under the *Farm Debt Mediation Act*, S.C. 1997, c. 21 ["***FDMA***"]. Section 21 of the *FDMA* provides as follows:

> 21 (1) Every secured creditor who intends to
>
> (a) enforce any remedy against the property of a farmer, or
>
> (b) commence any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of a farmer
>
> shall give the farmer written notice of the creditor's intention to do so, and in the notice shall advise the farmer of the right to make an application under section 5.
>
> (2) The notice referred to in subsection (1) must be given to the farmer in the prescribed manner at least fifteen business days before the doing of any act described in paragraph (1)(a) or (b).

Section 17 of the *FDMA* Regulations prescribes how notice may be given (e.g. personal service or sending the notice by priority post, courier or registered mail). Upon receipt of the prescribed

notice, pursuant to ss. 5 and 6 of the *FDMA*, an *insolvent* farmer (see the requisite criteria under s. 6) may apply for a stay of proceedings and mediation:

> 5 (1) Subject to section 6, a farmer may apply to an administrator for either
>
> (a) a stay of proceedings against the farmer by all the farmer's creditors, a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's creditors for the purpose of assisting them to reach a mutually acceptable arrangement; or
>
> (b) a review of the farmer's financial affairs, and mediation between the farmer and all the farmer's secured creditors for the purpose of assisting them to reach a mutually acceptable arrangement.

"Farmer" and "farming" are quite broadly defined under s. 2:

> *farmer* means any person, cooperative, partnership or other association of persons that is engaged in farming for commercial purposes and that meets any prescribed criteria.
>
> *farming* means
>
> (a) the production of field-grown crops, cultivated and uncultivated, and horticultural crops;
>
> (b) the raising of livestock, poultry and fur-bearing animals;
>
> (c) the production of eggs, milk, honey, maple syrup, tobacco, fibre, wood from woodlots and fodder crops; and
>
> (d) the production or raising of any other prescribed thing or animal.

Pursuant to s. 22 of the *FDMA*, proceedings taken without proper notice in contravention of s. 21 will be null and void. Accordingly, if there is any doubt, it is prudent to issue the *FDMA* notice.

III. Commencing Proceedings

A. Foreclosure Proceedings to be Commenced by Petition

Pursuant to Rule 21-7, a proceeding for foreclosure of the equitable right to redeem mortgaged property must be commenced by petition. The petition and supporting affidavit ought to be served on the parties to the proceedings as well as any person whose interest may be affected by the order sought.

B. Joinder of Claims

Rule 21-7(3) permits remedies that could usually only be claimed by way of notice of civil claim to be joined in the foreclosure petition provided that they arise out of the mortgage, the collateral security or an obligation given for the mortgage debt. This permits, for example, realization on personal property security pursuant to a general security agreement granted by the borrower. In *Royal Bank v. Lord*, [2011] B.C.J. No. 2277 (S.C.) claims pertaining to three agreements unrelated to the mortgage debt were permitted to be joined based on the proportionality considerations in Rule 1-3(2) and the court's finding that joinder had not unduly complicated or delayed the hearing and was to the borrower's benefit (avoiding a multiplicity of proceedings and the attendant costs).

C. Respondents to Petition

The mortgagor and any other parties liable for the mortgage debt ought to be made respondents to the petition. A foreclosing mortgagee "forecloses down" – so parties holding subsequent charges

(that are to be discharged from title upon sale or the taking of order absolute) must be added as respondents. Likewise, if the petitioner intends to foreclose on personal property pursuant to a general security agreement, then parties having subsequent interests in the personal property should also be added as respondents. Of course, any other parties against whom relief is sought ought to also be added as respondents (e.g. tenants who will be required to vacate the mortgaged property), including any co-mortgagees who refuse to be named as petitioners (*Graybriar Industries Ltd. v. South West Marine Estates Ltd.*, [1985] B.C.J. No. 1027 (S.C.)).

We understand some practitioners are adding Her Majesty the Queen in Right of Canada as a respondent in circumstances where there is a concern about a potential super-priority deemed trust. The logic is that, if Her Majesty does not advance a deemed trust claim in the foreclosure proceeding in priority to the mortgage, then Her Majesty will be estopped from advancing such a claim after pronouncement of the order nisi (as discussed below, an order nisi typically includes a declaration that the petitioner's mortgage charges the land in priority to the claims and interests of the respondents). Her Majesty is also made a respondent in circumstances where the secured assets include interests in crown assets (such as leases or licences) and where the consent of the Crown will be required as a condition precedent to a transfer of the interest.

Generally speaking, parties cannot be added to proceedings after judgment. A person who becomes a tenant at the mortgaged property after pronouncement of the order nisi need not be added as a respondent (*Canadian Imperial Bank of Commerce v. Garneau*, [1986] B.C.J. No. 2362 (S.C.) and *Vancouver City Savings Credit Union v. Serving for Success Consulting Ltd.*, [2011] B.C.J. No. 136 (S.C.) at para 5). The same is true for a person who acquires an interest in the mortgaged property after pronouncement of the order nisi (*National Trust Co. v. 486225 B.C. Ltd.*, [1997] B.C.J. No. 517 (S.C.)).

D. The Local Venue Rule

It is important to be cognizant of the "local venue rule". Under s. 21(2) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 ["*LEA*"]:

- If the land is in a municipality in which a Supreme Court registry is located, then the foreclosure proceeding must be commenced in that registry.
- If the land is not in a municipality, or if the land is in a municipality that does not have a Supreme Court registry, then the proceeding must be commenced at a registry within the judicial district in which the land is located.
- The Vancouver and New Westminster Registries are deemed to be the same registry (i.e. the foreclosing mortgagee may choose).
- Mortgages charging more than one parcel of land, each of which may be closer to different Supreme Court registries, permit the mortgagee to choose the registry in which it wishes to commence the foreclosure proceedings.

If the foreclosing mortgagee mistakenly commences proceedings in the incorrect registry, the court has jurisdiction to transfer the proceedings to the "correct registry" or to continue the proceedings in the "incorrect registry" (*Island Savings Credit Union v. Brunner*, [2014] B.C.J. No. 2838 (C.A.) at paras 19 and 20).

The local venue rule may be waived by the mortgagor after default. This option should be considered in order to reduce costs, file in a registry with more frequent chambers hearings or where there may be more persons interested in submitting competing bids.

I. Certificate of Pending Litigation / State of Title Certificates

A certificate of pending litigation ("CPL") should be claimed in the petition and registered against title to the mortgaged lands. State of title certificates should be ordered and reviewed after registration of the CPL in order to determine whether any intervening charges have been registered against title (i.e. registered after the drafting of the petition but prior to registration of the CPL). If that is the case, then any such chargeholder ought to be added as a respondent. This can be done by desk order under Rule 6-2. Pursuant to Rule 21-7(4) it is unnecessary to serve the petition on any person who registers or files an interest, right or claim in or to the mortgaged property in the land title office after registration of the CPL – and any such person will be bound by the orders made in the foreclosure proceedings and have the right to file a response.

IV. Order Nisi

A. Notice of Hearing / Statement of Relief Sought

Once the petition and supporting affidavits have been filed and served, and the time for the filing of response materials has elapsed, the petition may be set down for hearing by way of notice of hearing. Although not contemplated under the Rules, the court will expect the petitioner to file a statement of relief sought setting out the specific orders it intends to seek at the hearing of the petition. The state of title certificates must also be filed, typically by way of requisition.

B. Powers of the Court in Foreclosure Proceedings

Rule 21-7(5) sets out the powers of the court in a foreclosure proceeding. Rule 21-7(5) states:

> (5) The court may do one or more of the following in a proceeding under subrule (1):
>
> (a) make a final order of foreclosure;
>
> (b) order that a respondent must, within a redemption period that the court may fix, pay to the petitioner what is due under the mortgage and for costs, and that, in default of payment, the respondent is to be foreclosed of his or her equity of redemption;
>
> (c) determine summarily, or order that an account be taken of and that a registrar certify, the amount that is due to the petitioner or to any person on the date of the hearing of the petition or on the date of the accounting, as the case may be;
>
> (d) determine summarily, or order that an account be taken of and that the registrar certify, in relation to the amount determined under paragraph (c),
>
> (i) the daily amount of interest from the date of the hearing of the petition or from the date of the accounting, as the case may be, to the expiration of the period of redemption, or
>
> (ii) if the daily amount of interest referred to in subparagraph (i) may fluctuate over the period referred to in that subparagraph, the method for calculating such interest;

> (e) pronounce judgment for any amount determined to be due or for any amount that has been certified to be due on an accounting;
>
> (f) determine summarily, or order an inquiry to determine, any issues raised between respondents, including priorities;
>
> (g) determine summarily, or order an inquiry to determine, whether a person should be served with the petition;
>
> (h) order at what times, on what terms and in what order of priority respondents may redeem the mortgaged property and that in default they are to be foreclosed of any interest, right or claim in or to the mortgaged property;
>
> (i) order a sale of the mortgaged property;
>
> (j) grant further or corollary relief;
>
> (k) make an order under Rule 22-1 (7).

C. Conversion of a Foreclosure Proceeding into an Action

Pursuant to Rule 21-7(5)(k), the court may make an order under Rule 22-1(7). Rule 22-1(7)(d) provides that the court may:

> (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

The test for the conversion of a petition proceeding into an action is not the subject of much debate. The threshold is "very low" (*Canadian Western Bank v. 0777419 B.C. Ltd.*, 2009 BCSC 683 at para 30). The approach to be taken by a chambers judge in exercising her discretion whether to grant an order nisi is the same as that taken on a summary judgment application (*Bank of B.C. v. Pickering* (1983), 62 B.C.L.R. 136 (C.A.)).

The applicable test is whether a *bona fide* triable issue exists that cannot be determined by reference to the documents and that would affect the outcome of the proceeding (*Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 at para 48). A *bona fide* triable will arise where the evidence establishes a dispute on the facts or law that creates a reasonable doubt or suggests that the respondent has a defence which deserves to be tried (*Douglas Lake Cattle Co. v. Smith*, [1991] B.C.J. No. 484 (C.A.)). The petitioner bears the onus of establishing the absence of a triable issue (*Firstar Investment v. Ridgewood Development*, 2003 BCCA 660 at para 3).

In attempting to decide whether to remit a matter for trial, the court is not permitted to weigh the evidence or undertake a detailed consideration of the merits (*McCordic v. Hidden Rock Drilling Ltd. v. 409060 BC Ltd.*, 2006 BCSC 1428 at paras 19-21). Of course, in order to assess whether an alleged triable issue is *bona fide*, the court necessarily must have reference to the documentary evidence and engage in some consideration of the merits. As well, bald assertions, without more, will generally not be sufficient to give rise to a triable issue (*Southeast Toyota Distributors Inc. v. Bransh*, [1997] B.C.J. No. 1426 (S.C.) at para 62).

The existence of a *bona fide* triable issue will not, in and of itself, require that the matter be referred to the trial list. It will be necessary to assess whether the triable issue gives rise to a true defence or, alternatively, an independent claim (*Royal Bank of Canada v. Rizkalla* (1984), 59 B.C.L.R. 324

(S.C.)). A relevant *bona fide* triable issue must go to the root of the foreclosure – i.e. the validity of the mortgage, the ability of the petitioner to claim under the mortgage and commence the proceeding, or the amount properly due and owing – although the proceeding may nonetheless be referred to the trial list if the collateral claim is inextricably bound up with the foundational issues (*Griffin v. 0904713 B.C. Ltd.*, 2013 BCSC 273 at paras 41 and 42).

D. The Order Nisi

An order nisi is a final order of the court. Subsequent orders that may be obtained in the foreclosure proceedings, for example an order absolute or an order approving sale, are auxiliary or supplemental to the order nisi (*Bank of Montreal v. Singh* (1979), 18 B.C.L.R. 149 (C.A.) and *Gooch v. E.M.F. Holdings Ltd.*, [2013] B.C.J. No. 603 (C.A.)). The usual terms of an order nisi, with commentary as applicable, include:

- A declaration that the mortgage charges the mortgaged lands in priority to the interests or claims of the respondents and any person claiming by, through or under them.
- If applicable, similar declarations in relation to any general security agreements and the personal property charged by those agreements.
- A declaration that the borrower and guarantors/covenantors defaulted under the terms of the mortgage/security.
- A declaration determining the amount of money due and owing under the mortgage/security and that is required to be paid to redeem the lands/property. If an issue arises in relation to the proper amount due, the court has discretion to order a reference to the registrar under Rule 21-7(5)(c). As a subsequent mortgagee it is important to ensure that the redemption amount sought by a prior mortgagee does not include any amounts (e.g. an increased interest rate or additional fees) claimed under collateral agreements (e.g. a modification or forbearance agreement) entered into with the borrower after registration of the subsequent mortgage and to which the subsequent mortgagee did not agree. A subsequent mortgagee may disregard such agreements when calculating the amount it would be required to pay to redeem the prior mortgage and, in addition, any such payments received by the prior mortgagee ought to be credited to the outstanding balance calculated in accordance with the prior mortgage's original terms (*Romspen Investment Corporation v. 0895249*, 2016 BCSC 730, *London Life Insurance Company v. Lacheur*, [1983] B.C.J. No. 348 (S.C.) and *CIBC v. G-Plan Properties Ltd.*, [1984] B.C.J. No. 1881 (C.A.)).
- An order fixing the redemption period. The usual order is for a redemption period of six months. A longer redemption period will rarely be ordered and only in circumstances where there is no risk to the mortgagee's security (*Bank of Montreal v. Yukon Drafting Services Ltd.*, [1983] Y.J. No. 14 (C.A.)). This does not prevent a respondent from subsequently applying for an order extending the redemption period; however, before the court will so exercise its discretion, the applicant must establish that there is a reasonable prospect of payment and that the mortgaged lands have sufficient value by way of security for the amount outstanding (*MacDonald Development Corp. v. Canada House on Robson Ltd.*, [1999] B.C.J. No. 1138 (S.C.) at paras 26 and 27 and *Nord Real Estate Developments Ltd. v. Suncoast Projects Ltd.*, 2008 BCSC 879 at paras 27 and 28). A redemption period shorter than six

months may be ordered if it is shown that the mortgagee's security is at risk due to insufficient equity in the mortgaged lands, that the lands have been abandoned or that the lands or premises are wasting (*British Columbia (Attorney General) v. Malik*, 2009 BCCA 202 at para 54).

- An order granting judgment against the mortgagor and any other party liable for the mortgage debt. It ought to be kept in mind that a mortgagee's *in personam* claims may be pursued independent from the *in rem* claims – in certain circumstances that may be the preferred course of action (e.g. so as to not unduly complicate or delay the foreclosure proceedings). Where claims against the guarantors/covenantors are joined in the petition the court will expect the petitioner to seek the personal judgments at the order nisi stage. This is primarily because interest on the personal judgments will accrue in accordance with the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, not at the mortgage interest rate (*Courtenay Savings Credit Union v. Harle*, [1987] B.C.J. No. 1268 (C.A.)) – the delta being favourable to the guarantors/covenantors. It is not appropriate to delay an application for personal judgment in order to obtain the higher rate of interest nor is it appropriate to leave the mortgagor and/or guarantors/covenantors in a state of uncertainty as to whether a deficiency claim will be advanced (*Taylor v. Rudolph Holdings Ltd.*, [1985] B.C.J. No. 2558 (C.A.) at para 13). That said, in certain circumstances it may be appropriate to adjourn the application for personal judgments – in such circumstances, if appropriate, the master may impose a term to ameliorate any prejudice arising from the interest rate differential.
- Orders stipulating that if the redemption amount is paid into court or to the petitioner, then the petitioner will reconvey the land/property free and clear of its encumbrances or, if the redemption amount is not paid, then the petitioner will be at liberty to apply for order absolute. Orders absolute are discussed further below.
- An order granting the petitioner liberty to apply for a further summary accounting of any amounts which may become due to the petitioner (e.g. for interest, taxes, insurance, etc.). Because the order nisi is a final order, this clause may typically only be relied upon for costs and disbursements reasonably incurred after the date of the order nisi (*CIBC Mortgage Corp. v. Duguay*, [1991] B.C.J. No. 450 (S.C.)).
- An order adjourning the balance of the relief sought in the petition (e.g. for order absolute, an order for sale, a receivership order, etc.).
- An order granting the petitioner its costs of the proceedings to date (at Scale A if unopposed other than on the issue of costs pursuant to s. 5 of Appendix B to the Rules) and that the costs awarded (and those to be awarded on any subsequent application at a scale to be determined) be added to the redemption amount. Despite any mortgage term in relation to repayment of costs – e.g. requiring full indemnity – the court maintains its broad discretion in relation to costs pursuant to s. 20 of the *LEA*.

V. Redemption of the Mortgage

Redemption of a mortgage after pronouncement of the order nisi is often a straightforward process. The order nisi determines the redemption amount other than the quantum of the petitioner's costs and, if applicable, amounts subsequently incurred by the mortgagee which may be properly added to the redemption amount. Usually parties are able to agree on the quantum of these items. If

unable to reach an agreement on costs, pursuant to Rule 21-7(10), a respondent may pay to the petitioner the amount due under the mortgage and then serve a notice requiring the petitioner to assess its costs. If the petitioner does not file a bill of costs for assessment within 14 days of service, then it will lose its entitlement to costs. If a party wishes to take an assignment of the mortgagee's position, as opposed to redeem the mortgage, then the mortgagee will be entitled to rely on the terms of its mortgage/security including any entitlement to an indemnity for its costs.

The order nisi determines the sum required to be paid to redeem the mortgaged lands. Thus, a party may not pay a portion of the redemption amount in order to redeem a portion of the lands (*Upland Excavating (1971) Ltd. v. Block Bros. Realty Ltd.*, [1984] B.C.J. No. 2971 (S.C.)).

VI. Order Absolute

Order absolute is the order pursuant to which a mortgagee may take title to the mortgaged lands in fee simple and be entitled to immediate vacant possession. This order will most often be taken when the covenants are worthless and/or the petitioner believes holding or developing the property would be to its financial benefit. Petitioners contemplating taking order absolute should be cognizant of the requirement to pay property transfer tax upon the transfer.

The taking of order absolute will extinguish all rights of the mortgagee under the covenant (s. 32 of the *Property Law Act*, R.S.B.C. 1996, c. 377) as well as any collateral obligations, including the right to proceeds of fire insurance placed in accordance with the terms of the mortgage (*Braaten v. Yorkshire Trust Co.*, [1986] B.C.J. No. 1155 (C.A.)). When applying for order absolute it is a rule of practice that all interested parties ought to receive notice of the application even if no response has been filed (*Prospect Mortgage Investment Corp. v. Van-5 Developments Ltd.*, [1985] B.C.J. No. 2472 (C.A.) at para 23).

In exceptional circumstances, pursuant to Rule 21-7(5)(a), the petitioner may be granted an immediate order absolute at the hearing of the petition – i.e. in lieu of order nisi (*Devany v. Brackpool*, [1981] B.C.J. No. 84 (S.C.)). In order to obtain immediate order absolute, the evidence must establish that the value of the property is insufficient to pay the mortgage indebtedness or that wasting of the property will only result in a greater loss over time (*Anglican Synod v. Russell*, [1927] B.C.J. No. 86 (S.C.)).

More often, applications for order absolute follow expiration of the redemption period fixed by the order nisi. After expiry of the redemption period, it is the mortgagor who will bear the onus if opposed to the order – the mortgagor is required to satisfy the test for an extension of the redemption period as discussed above (*Imor Capital Corp. v. Bullet Enterprises Ltd.*, 2014 BCSC 2540).

A petitioner taking order absolute should be cognizant that the court has jurisdiction to re-open the order in special circumstances provided that the equities are in favour of the party so applying. As held in *3554984 BC Ltd. v. Namu Properties Ltd.*, [1998] B.C.J. No. 2599 (S.C.), in order to succeed on such an application, the applicant must establish that:

- The application was made with reasonable promptness having regard to all of the circumstances.
- There is a reasonable prospect of payment at once or within a short period of time.

- The applicant has been active in endeavouring to raise the redemption amount and was not able to redeem within the redemption period by reason of some unforeseen circumstances.
- The applicant has a substantial interest in the mortgaged premises or the property has some special intrinsic value.
- Special circumstances exist which justify the reopening of the foreclosure in that the equities in favour of reopening the order absolute strongly outweigh the equities against.

If re-opened, the mortgagor must pay the mortgage debt in addition to the petitioner's costs and expenses.

VII. Order for Conduct of Sale

An order for conduct of sale enables the party having conduct of the sale to, among other things, list the lands on the Multiple Listing Service and enter the property for showings during certain hours throughout the week. However, the court is not restricted to considering only offers obtained by the party holding conduct of sale. Any party to the proceeding may bring an offer before the court for approval (*Commerce Capital Trust Company v. Zimmerle* (1980), 23 B.C.L.R. 50 (C.A.)).

In general, a first mortgagee is entitled to an order for conduct of sale upon the expiration of the redemption period (Allan McEachern, C.J.B.C., *On Foreclosure Practice*, (1983) 41 The Advocate 583 [*"On Foreclosure Practice"*]). Accordingly, if a subsequent mortgagee wishes to have conduct of sale, it typically ought to bring the application at some reasonable point in time prior to the expiration of the redemption period.

The court granted the petitioner an order for conduct of sale, to take effect upon the expiration of the six month redemption period, concurrent with the pronouncement of the order nisi in *Reliable Mortgages Investment Corp. v. Longiye*, 2015 BCSC 903. The intention was to create efficiencies through the elimination of the need for a separate application after the redemption period expired. In *151 Cathedral Ventures Ltd. v. Titan Pacific Contracting Inc.*, [2015] B.C.J. No. 1973 (S.C.) the court agreed that the combined order was appropriate in the context of a residential foreclosure, but noted that the complexities of commercial foreclosure litigation militated against it – at least in the context of that case. In *HSBC Bank Canada v. A.S. Bains Developments Ltd.*, [2015] B.C.J. No. 2589 (S.C.) the court raised various questions regarding the combined order which, if inclined to seek, counsel should be prepared to address at the hearing.

Once order for conduct of sale has been obtained, the petitioner will begin to take the necessary steps to market and sell the mortgaged lands. A schedule limiting the petitioner's potential liability and containing terms appropriate to the foreclosure context ought to be incorporated into any listing agreement. There are a number of different forms of schedules; however, typically it will be made clear that:

- All offers presented are to be subject to the approval of the court in the foreclosure proceeding.
- The listing agreement will automatically terminate with no commission payable if any person redeems the mortgage, if the mortgage is assigned, if the court grants another party conduct of sale or if the petitioner otherwise ceases to have conduct of sale.

- The listing agreement and the payment of any commission are subject to orders of the court pronounced in the foreclosure proceeding.
- Commission will only be payable upon the completion of a sale pursuant to an offer procured under the listing agreement and approved by the court and upon the petitioner's receipt of the net sale proceeds in full.

Similarly, all offers considered by the petitioner ought to include an appropriate schedule protecting the petitioner from potential liability and containing terms appropriate to the foreclosure context. Unlike in private sales, a foreclosing mortgagee will usually have limited knowledge regarding the history and condition of the lands and premises and have a restricted ability to complete any accepted offer. Furthermore, the sale process differs – for example, a vesting order is used in place of a Form A transfer. Again, there are a number of different forms of the schedule; however, common terms include:

- An acknowledgement that the petitioner is selling the land pursuant to court order and that:
    - The contract is subject to court approval.
    - The petitioner has instructed its agent to maximize proceeds of sale within the court approval process.
    - The offer will become public information prior to the court approval date.
    - Competing purchasers will have the ability to appear in court with higher offers and will be encouraged to do so.
- The petitioner has recommended that the purchaser seek and obtain independent legal advice in relation to the contract and to advance its own (modified, if applicable) offer in court.
- The contract is subject to: the rights of any person to redeem, purchase or place the mortgage in good standing; the petitioner being restrained or enjoined or otherwise prevented from completing the sale; and the petitioner being able to complete the sale pursuant to court order.
- The petitioner will have the right to terminate the contract if any person becomes entitled to redeem the mortgage, takes an assignment of the mortgage or places the mortgage in good standing prior to completion.
- The petitioner will not furnish any keys, title documents, deeds, etc. other than those in its possession or control.
- The purchaser acknowledges and agrees that the petitioner is making no representations and/or warranties whatsoever with respect to the property and that the property is being sold on an "as is where is" basis.
- The purchaser acknowledges and agrees that it is relying entirely upon its own inspection and investigation into the property, etc.
- The purchaser is taking the fixtures and any chattels on the premises as at the completion date at its own risk and without any representation and/or warranty whatsoever, including as to ownership.

VIII. Order Approving Sale

Once an accepted offer has been obtained, and the offer is subject only to court approval, the petitioner should expeditiously apply for an order approving the sale. Even if a respondent has not filed a response, notice of the application ought to nonetheless be provided (*Farmers & Merchants Trust Co. v. Church*, [1997] B.C.J. No. 1039 (S.C.) and *On Foreclosure Practice*). It is good practice, if possible, to set the hearing date far enough in advance that the realtor is permitted sufficient time to advise all potential purchasers of the opportunity to submit competing bids (and for those individuals to make necessary arrangements). Sometimes, in order to maximize sale proceeds, it will be advantageous to hold the sale approval hearing in a registry other than the one in which the foreclosure was commenced. In such cases the petitioner may seek an order under Rule 23-1(13) to transfer the proceeding to another registry "for any or all purposes" (i.e. including solely for the hearing of the sale approval application).

The jurisdiction of the court to make an order for sale of a mortgaged property is derived from s. 15 of the *LEA* and Rule 21-7(5)(i). Approval of a sale by the court is discretionary (*Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, [2013] B.C.J. No. 1262 (C.A.) at para 41). There is no prohibition on the mortgagor making an offer, or the court considering that offer for approval, provided it is *bona fide* (*National Holdings Ltd. v. Vadas*, [2014] B.C.J. No. 1405 (S.C.)). The petitioner may submit an offer through a related entity and, if approved, the effective result will be the taking of the mortgaged lands while maintaining any deficiency on the judgment(s).

As a general rule, a sale at a reasonable price towards the end of the redemption period should be approved – particularly if the position of any mortgagee would likely be worsened by delay (*On Foreclosure Practice*). After the expiry of the redemption period, an application for court approval of a sale ought to be granted if the offer is provident in the circumstances (*Roynat Inc. v. Gallagher's Restaurants Ltd.*, [1983] B.C.J. No. 1894 (S.C.) and *On Foreclosure Practice*). The determination of whether a sale is provident constitutes a fact driven analysis (*Bank of Nova Scotia v. Marvin*, [2016] B.C.J. No. 1177 at para 19).

The mortgagee must go about finding a buyer for the mortgaged property in a businesslike manner (*Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, [2013] B.C.J. No. 1262 (C.A.) at para 40). The court will assess whether the marketing and sales process have been fair and reasonable. Accordingly, it is important to obtain a thorough marketing report from the listing realtor in support of the sale approval application. Parties often rely upon appraisal evidence in an effort to show that an offer represents (or does not represent, as the case may be) fair market value. However, where a property has received a proper and lengthy exposure to the market, there comes a point when the market speaks and appraisals become relegated to not much more than well-intended but inaccurate predictions (*Romspen Mortgage Corporation v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222 at para 20).

It is common for competing bids to be received at the hearing of the sale approval application. The specific protocol may vary from registry to registry – see for example *CIBC Mortgages Inc. v. Oddoux*, [2016] B.C.J. No. 296 (S.C.) where a master advised that, in her court at least, a "two-step process" would be utilized – but, in general terms, the common practice is for one round of competing bids to be simultaneously submitted to the court in sealed envelopes. It is preferable that the bids be written on template offers (including the requisite "Schedule A") so that they may be quickly and efficiently compared. The competing bidder will need to have included a certified cheque for the deposit in the sealed envelope or made other suitable arrangements (e.g. placing the monies in trust with the listing agency). Usually the offer with the highest sale price will be approved; however, other factors may come into consideration. For example, in *Bank of Montreal*

v. Skrenek, [2016] B.C.J. No. 2196 (S.C.) a slightly lower offer (approximately $7,000 less than the highest bid) was approved primarily due to it containing a closing date that accommodated the needs of the respondent who lived in the mortgaged property.

The court has discretion to accept a "backup offer" (*Golden View Development Corp. v. Power Tek Developments Inc.*, [2000] B.C.J. No. 412 (S.C.)). However, if a backup offer is approved, the backup offeror will be motivated to take adverse positions and this may result in unintended negative consequences (e.g. extended litigation, see the saga of *Addenda Capital Inc. v. 0781995 B.C. Ltd.*, [2015] B.C.J. No. 2368 (S.C.-M), [2016] B.C.J. No. 206 (S.C.-M) aff'd [2016] B.C.J. No. 1097 (S.C.))