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Q. What advice would you give to a client interested in purchasing

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properties at foreclosure sales?

i A. In responding to this question I am assuming that the client is I referring to a mortgage foreclosure as opposed to a sale of land under execution, although the procedures regarding the sales under both would be similar. I am also addressing only the issue of foreclosure in the Province of Nova Scotia. As

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most will know, the procedure is different in other provinces.

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Civil Procedure Rule 47 concerning sales by the Court should be reviewed by solicitors giving advice to persons interested in

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becoming involved in foreclosure sales. Standard precedents to be used in connection with foreclosure actions were approved

approximately six years ago by the judges of the Supreme Court,

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Trial Division for general use throughout the province and with a few modifications to fit the circumstances, there is a standard Order for Foreclosure and Sale. This Order, among other things, will settle the amount due, the items including costs and Sheriff's fees which will be deducted from the proceeds of sale, a brief description of the property, an order that the property be sold, the method of advertisement and the terms of the sale. The actual conduct of the sale may vary slightly from one Sheriff's office to another but essentially it is conducted on the basis of an auction with the property being knocked down and sold to the highest bidder.

Determine what is being foreclosed.

Is it a first or subsequent mortgage? The purchaser should be made aware that if a second or subsequent mortgage is being foreclosed, the property will be knocked down and sold subject to existing prior charges. If, for example, a \$100,000.00

property is being sold following foreclosure of a second mortgage,

I bidding may reach \$10,000.00 and the property will be knocked down and sold to that purchaser for \$10,000.00 and the purchaser would acquire the property for that sum subject to the existing first mortgage. Civil Procedure Rule 47 (12) requires the written consent of the

first or any prior mortgage where a subsequent mortgage is being foreclosed and normally as a condition of issuing the consent, any arrears on the existing prior charges would be brought up to date by the subsequent mortgage looking to foreclose. This is not, however, always the case and a prudent purchaser would enquire from the holder of prior encumbrances what the status is and whether or not the prior mortgage is seriously in arrears or may indeed have matured. When to search the title. This scenario begs the question whether or not a full title search should be conducted before or after a sale. Naturally, most prospective purchasers are not interested in retaining counsel to conduct a full search of title when they may not be the successful bidder at the sale. In the vast majority of situations in which I have been involved, a full title search is only conducted after the sale has been completed. Remember that the Sheriff from the standard form Order will only be selling the "estate, right, title, interest, claim, property and demand of the Mortgagor at the time of making the said mortgage foreclosed in this action, or at any time since, and of all persons claiming or entitled by, from or under the Mortgagor of, in and to the lands respectively purchased at such sale". It is a common misunderstanding that a foreclosure sale operates to clear the title to a property in much the same way as a tax sale used to be considered a method to clear title. If money was loaned and secured by a mortgage on property that had a defective title, the sale does not operate to clear any defects and the purchaser at the sale will acquire nothing more than what the Mortgagee acquired when the mortgage **was originally** made and it is not sufficient to raise an objection to title after the sale has been completed and expect that the deposit a

money's would be refunded. Encumbrances registered after the

date of the mortgage being foreclosed will, however, be cleared

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from the title except for certain statutory liens like Workers' Compensation which gain priority by virtue of statute. Accordingly, the best practise is to conduct the search of the title before

the bid is made but as I have stated, in practise, this is not often done. I suppose one theory is any foreclosure of a mortgage held by a conventional lender would have been supported by a Certificate of Title at the time funds were loaned and it is a safe assumption title is good. I hope too many do not make that assumption. Consider the type of property being sold. Recent amendments to the Residential Tenancies Act now mean that rental property, if foreclosed, will be sold subject to existing tenancies. This was not the case in prior years and the tenant **did not have** rights paramount to the mortgage company unless, of course, it was a lease registered prior to the date of the mortgage. If your client is interested in buying a property and making immediate alterations to it in the hope of a resale, he may experience delays if the property is occupied by tenants who would be entitled to notice as prescribed by the Residential Tenancies Act. Dealing again with the question of what is being sold, the Sheriff can only sell what was conveyed under the mortgage and normally this would not include any chattels unless chattels are specifically mentioned in the Order. Fixtures, of course, would be included in the sale. Properties sold at Sheriff's sales are not subject to any warranties. If pipes have frozen or the furnace is not in operating condition, there is no recourse against either the Sheriff or the Mortgagee. It is strictly a sale on an as is/where is basis and to that extent any prospective purchaser should make any investigations and examinations of the property that he might feel appropriate. **In connection** with foreclosures in which I have been involved, it is not unusual to receive calls from prospective purchasers with questions about room size, size of the lot, condition of the building, number of bathrooms and so on. As a matter of practise I do not release any information other than that information which could be obtained from a review of the records

at the Courthouse. No prudent solicitor **will be put in the** position of a real estate agent and make representations concerning the property to be sold for which he could be later held responsible if the representations are found to be in error. Conduct of the sale. The sales are generally held in the Sheriff's offices or at least in the courthouse in the County in which the land being foreclosed is located. As I mentioned, the practise **will vary** from Sheriff's office to Sheriff's office but **as a general rule**, the Sheriff will read a description of the property being sold. He will recite the terms of the sale which will include a 10\$ deposit in cash or certified cheque at the time of the sale, with the balance to be paid within 30 days and the Sheriff will also announce the status of any outstanding taxes. Outstanding real property taxes and other statutory liens, including Workers' Compensation, Sheriff's fees and costs will all be paid from the proceeds of the sale and should be included in your client's calculations of the amount that he may have to bid to successfully purchase the property. Most Sheriffs will ask if there are any questions before he proceeds to open for bids. He will then proceed to request bids on the property as read and it is usual for the solicitor for the Mortgagee to open the bidding with a figure that will equate with the Sheriff's fees and outstanding taxes. The bidding will then progress with the Sheriff announcing the last bid and calling for further bids three times and if he hears no higher bids, the property will be knocked down and sold to the highest bidder. The successful bidder will then sign a receipt acknowledging the purchase price and paying his deposit of 10%. At the falling of the Sheriff's hammer and the payment of the deposit, a contract is created between the Sheriff and the highest bidder. Although the solicitor for the Mortgagee is very much involved in the drafting of the Deed and Sheriff's Report, all dealings are done through the Sheriff's Office and indeed the conveyance documentation will be executed by the Sheriff as directed in the foreclosure Order. In the County of Halifax,

the Sheriff requires certified funds or cash. I expect this procedure is standard throughout the province. There are no **adjustments** for oil or taxes or betterments. The bid is the full sale price. What to bid. In determining the amount that a prospective purchaser may have to bid to successfully obtain the property, it may be appropriate to obtain an appraisal to determine the value and contact should be made with the solicitor for the Mortgagee or the Mortgagee directly to determine the outstanding balance. The amount fixed in the Order should be supplemented by a further 30 days interest to cover the time between the sale and the closing. Estimates can be made of the Sheriff's fees which are 5% of the amount claimed or bid to a maximum of \$1,000.00. As a rule, the cost of advertising in the Halifax area will run about \$500.00-\$600.00 and solicitor's fees, not including disbursements, range in the **area of** \$900.00, subject of course to taxation. Given that the appraised value of the property exceeds the amount outstanding on the mortgage being foreclosed together with any prior encumbrances, Sheriff's fees, and reasonable legal fees, a prospective bidder should be prepared to bid at least that amount and depending on the appraisal and attendance at the sale, bid higher to secure the property. As a rule, most conventional lenders are only interested in obtaining their outstanding mortgage **balances and** any costs and some mortgage companies will open **their bidding** at that amount. If a Mortgagee has a property on which the outstanding balance exceeds the appraised value, in order to protect the deficiency rights, it would be unusual if the Mortgagee would bid higher than the appraisal unless they had some assurance the property would sell for more than the appraised value. The successful bidder has up to 30 days to complete the sale. Extensions are not normally granted unless it is with the consent of the Sheriff and the Mortgagee. This consent usually involves

an additional payment to cover interest. In the event of a default of payment, the deposit monies would normally be forfeited and the property would be readvertised and sold. The solicitor for the Mortgagee is required to obtain a Sheriff's Report and apply to Court to have the sale confirmed. Confirmation of the sale proceedings in effect ratifies the proceedings and supplies the Court with proof that all matters as set out in the foreclosure order have been done as directed. It is **not unusual** to be asked by the solicitor for a successful purchaser to provide a Confirmatory Order before the balance of the purchase monies are paid. That is a procedural impossibility, since the Sheriff's Report will not be issued until such time as the full purchase price has been paid out, it is not unusual to solicit an undertaking that the Confirmatory order will be applied for as soon as possible after the sale. One final word, there is no right of redemption in the Province of Nova Scotia unless a gross irregularity in the sale or fraud can be shown. In other words, once a property has been foreclosed, the Mortgagor has no right to redeem the property following the sale. This procedure is different than in other provinces where a right of redemption may exist. It also differs from the tax sale situation where there is a right of redemption for one year after the sale and prior to the issuance of the tax deed.