DRAFTING MORTGAGE AGREEMENTS TO AVOID PROBLEMS AT FORECLOSURE

Introduction

A mortgage has been defined as, "a conveyance of land as a security for the payment of the debt or the discharge of some other obligation for which it is given, the security being redeemable on the payment or discharge of such debt or obligation". Falconbridge on Mortgages, (4th ed. 1977), page 8.

With only rare exceptions, it is a rite of passage that all would-be homeowners become indentured for what many perceive as eternity to a lender by way of a mortgage. In many cases at the closing the physical location of the keys to the property being purchased is of far more significance than the upwards of fifteen pages of twenty-five or thirty clauses and subclauses impacting on the relationship between borrower and lender in a mortgage document.

For lawyers who oversee the completion by deletion and insertion of a few variables in largely preprinted mortgage agreements in response to standard commitment letters, there may evolve a complacency and assumption that the contents are fair and correct for both parties.

For many of us who got discouraged trying to define a gale date, reading a mortgage was akin to totalling columns of phone numbers in the telephone directory. But, like marriage contracts, partnership agreements and insurance policies, the clauses

become relevant when there is trouble. In mortgages when there is trouble, it may be as a consequence of something being omitted from the contract.

The focus of this paper is to examine clauses in a mortgage instrument which are important for the protection of the borrower and the lender in the event of default on a mortgage obligation and which will facilitate a full recovery of the debt.

Others have passed this way before. For an examination of foreclosure practise and procedure in Nova Scotia, I know of no finer paper than that prepared by Arthur G. H. Fordham, Q.C. as part of the 1982 Practical Property Conference sponsored by C.L.E. Society of Nova Scotia entitled "Foreclosure and Sale in Nova Scotia". This paper, which is periodically updated and included in the Nova Scotia bar admission materials real estate volume, provides an historical review of foreclosure practise in this Province. The historical background to our foreclosure procedure, which is unique in Canada, is essential in coming to grips with mechanisms for dealing with many of the problems which arise in the foreclosure of mortgages.

In researching this topic, I have also made use of the Nova Scotia Real Property Practice Manual published recently by Butterworths, prepared by Charles W. MacIntosh, Q.C. and his associates. Reference has also been made to the Canadian Mortgage Practice Reporter published by Richard Dee Boo which contains a section on mortgage interest which I have to be particularly helpful.

What follows are a sampling of mortgage clauses which occur commonly in real property mortgages. They must be used in the context of the appropriate form and cannot be considered exhaustive. Schedule "A" to the Conveyancing Act R.S.N.S., 1967,

Chapter 56, provides some examples of forms of conveyance including mortgages and, in describing the examples the draftsman states in the preamble:

> "They are merely three of an indefinite number of possible forms and are provided as examples to suggest that conveyances need not be restricted in form and that the freedom of the conveyances is limited only by the need to be intelligible and the requirements as to execution."

John S. MacFarlane, Q.C. prepared a paper entitled "Collateral Security" for the Real Property Conference in April 1987 sponsored by C.L.E. which, in addition to excellent commentary, included several helpful examples of forms for collateral mortgage instruments. I have also attached a form of real property mortgage which may be considered with modifications to suit the particular mortgage situation.

Understanding the Mortgage Document

A mortgage of real property is a transfer of legal title from the mortgagor to the mortgagee as security for a debt or other obligation. The mortgagor retains the equity of redemption which is the right to get the property back if the debt has been paid or the other obligations have been fulfilled. This is referred to as "a legal mortgage". That which is not a legal mortgage is an equitable mortgage or not a mortgage at all. Since a first mortgage involves the conveyance of the legal estate to the mortgagee subject to the retention by the mortgagor of the equity of redemption, a second and subsequent mortgage on the same property is simply the mortgaging of the equity of redemption creating an equitable mortgage.

Second and subsequent mortgages are examples of equitable mortgages but there are other types. A mortgage may be equitable in nature if the instrument executed does not transfer the legal estate or if the interest being mortgaged is a future interest. An example of the former is where the mortgage is defective in form; i.e., contains the wrong legal description. See F.B.D.B. v. Elcon Petroleum Maintenance Ltd., (1983), 58 N.S.R. (2d) 246 (T.D.). An example of the latter is where the parties enter into an agreement in writing to execute a legal mortgage at some future date. The agreement operates as an equitable mortgage. See La Plante et al. v. Freed and Canadian Imperial Bank of Commerce, [1978] 6 W.W.R. 57 (Q.D.) (see also cases on equitable mortgages cited by C.W. MacIntosh, Q.C., Nova Scotia Real Property Practice Manual at p. 12-18).

An equitable mortgage is enforceable under the equitable jurisdiction of the court and, in the case of second and subsequent encumbrances in Nova Scotia, the consent of the prior mortgagee is required under Civil Procedure Rule 47.12.

The form of mortgage is most often stipulated by the lender and contained in a preprinted document. The clauses may be abbreviated pursuant to the Conveyancing Act but essentially the document contains a series of covenants to inter alia pay back the principal with or without interest, pay taxes, maintain the property in good repair and keep it insured.

The mortgage will also include clauses providing for remedies on default which would include the acceleration and right of entry clauses.

Understanding Foreclosure

The legal effect of the mortgage instrument is to transfer the mortgagor's interest in the security to secure a debt or other obligation which contains a series of promises, the fulfillment of which entitles the mortgagor to a reconveyance of title. A foreclosure action in Nova Scotia sets the wheels in motion to (a) extinguish the equity of redemption and (b) claim payment of the mortgage debt in full on the mortgage covenant to pay through a prescribed method of sale of the security. The action also claims a deficiency in the event the proceeds from the sale are insufficient to cover the debt or obligation and court approved expenses. Breach of a covenant in the mortgage acts as a triggering event for the remedy of foreclosure and sale or other action on the covenants, including taking possession of the mortgaged premises or suing for payments. Problems arise where clauses necessary to trigger the foreclosure are missing or restricted.

Problems in Foreclosure

The vast majority of problems in foreclosure do not have their root in the mortgage document. Indeed, the mortgage foreclosure procedure, which is largely prescribed in Civil Procedure Rules 47 and 12, court approved pleadings and practice which has evolved with some localized anomalies, gives rise to the bulk of the problems most of us will experience. Failure to give notice to a subsequent encumbrancer or include a necessary party on through to being late for a sale are reported procedural calamities which dot the landscape of the law reports like craters on a battlefield. Mr. Fordham's article, cited earlier, documents these moments in history in the life of practitioners doing foreclosures.

Apart from the problems created by not following procedure are the problems created by not having sufficient authority by contract to do some of the things necessary to realize the full balance of principal, interest and costs, protect the security and manage the security pending sale or other disposition.

Full Payback or Other Consequences

We have examined the nature of the real property mortgage instrument. We have looked at the mechanisms which are activated when something goes wrong. Now I want to turn to the clauses you may want to include in drafting to ensure the lender's expectations meet the borrower's expectations of full satisfaction for debt.

The attached precedent includes clauses which all have a purpose and others could be added depending on circumstances. I will touch on clauses which may cause problems in foreclosure, if not present.

i) Proper parties

Not infrequently instructions will be received from lenders directing that two or more individuals be included as mortgagors. The lender has qualified the applicants for the loan based on the pooled resources of the applicants.

On examination of the title to the property proposed to be given as security, the legal title can be given to the lender by way of a first

mortgage with only the signature of one of the applicants. The remaining parties should be included as guarantors if they are to become liable for the mortgage debt. Including non-owners as mortgagors puts them on the covenant for good title, which is simply not the case.

Spousal consent to the encumbering of a matrimonial home is essential pursuant to the Matrimonial Property Act, S.N.S., 1980, c.9, S.8. Under Section 8 (2) of the Act the transaction can be set aside in the absence of the consent. The absence of specific words denoting consent would not likely render the mortgage unenforceable if the non-owning spouse's signature appears in the document. The irony here is that the non-owning spouse may find themselves on the covenant to pay when all that was required was a consent to the encumbrance. Note also Section 9 of the Matrimonial Property Act which requires notice of any proceeding to realize on an encumbrance on a matrimonial home to be sent to the non-owning spouse by registered mail or served personally.

In foreclosure of mortgages which have been assumed, the equity of redemption is traced to the current owner who is joined in the proceeding. The continuing liability of the original mortgagor and intervening owners will depend on the wording in the original mortgage, assumption agreements and whether a release from the covenants has been issued by the lender. Most standard form mortgages provide for continuing liability on the part of original mortgagors notwithstanding the fact that they may have long since sold the mortgaged property (see paragraphs 11 and 18 in mortgage precedent).

Although not directly related to clauses in the mortgage, remember the requirement for registration of lenders under the Mortgage Brokers and Lenders Registration Act, R.S.N.S., 1967, c. 189 as amended which also includes the disclosure of the particulars of a mortgage or renewal agreement. I have not seen any problems in foreclosure yet as a consequence of disclosure statements. It should be noted that failure to comply with the Act does not affect the validity of the mortgage (Section 21 (c)).

ii) The security

The mortgaged property must be described with the same certainty as required for a deed. Generally, the property includes all buildings and appurtenances. Some mortgages attempt to include the chattels which, unless they can be characterized as fixtures, must be secured by a chattel mortgage as prescribed by the Bills of Sale Act, R.S.N.S., Chapter 23.

Parties can agree regarding removal of fixtures whether they be trade fixtures or otherwise but, generally, fixtures remain and are included in the security. Two incidents relating to this come to mind. The first was a situation where the mortgage was up-to-date but the mortgagor removed the buildings to another property. The second situation is one that happens not infrequently following foreclosure sale when the furnace was removed with all attendant pipes. Lien claimants will sometimes exercise this type of self-help remedy and obtain the return of materials which have been incorporated in the mortgage structure.

Note that the attached precedent has a clause dealing with demolition, alterations and the use of the property (paragraph 6) which when taken together with the covenant not to commit an act of waste (paragraph 5) give the lender several possible triggering mechanisms.

iii) Payment clause

Careful drafting will prevent problems in quantifying the balance due for principal and interest on a mortgage debt. Civil Procedure Rule 12.04 describes what materials must be before the Chambers Judge on the application for the Order for foreclosure and sale. Detail of all payments which have been made on account of principal and interest on the mortgage together with the dates of payment verified by affidavit so as to enable the court to check the computation of the amount alleged to be due must be provided.

Almost every lender produces a different format showing the history of the mortgage account. In an effort to standardize the reporting format, a summary statement of account is to be attached to the affidavit of the lender's mortgage officer in addition to the detailed history of the mortgage account when applying for an Order for foreclosure and sale. More than one application has been delayed pending clarification of entries on the histories which can include such things as administration fees, NSF cheque charges, legal fees, capitalized interest and even, alas, mistakes.

In dealing with interest, Section 6 of the Interest Act, R.S.C. 1970, c. I-18 provides as follows:

"6. Whenever any principal money or interest secured by a mortgage of real estate is by the mortgage made payable on the sinking fund plan, or any other plan under which payments of principal money and interest are blended, or on any plan that involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half yearly, not in advance."

Note the operative words, "blended payment" since Section 6 applies only to these types of payments.

The following is an excerpt from an older textbook entitled, Canadian Mortgages, by H. Woodward which is included in the Canadian Mortgage Practice Reporter at page 12-25. It will help you to understand the mathematics of mortgage interest.

"When interest is charged only on the principal sum, such interest is simple interest. When periodic rests are made for the charging of interest in such a manner that, at any subsequent interest rate, interest is charged not only on the principal sum but also on interest amounts charged in a preceding period, then the interest calculation is based on the compound interest principles. Provision for such compounding is customary in mortgage deeds by stating that all arrears of payments shall bear interest at the contract interest rate. The rate of interest is the ratio of the interest earned to the principal.

All rates of interest should bear a qualification as to whether they are 'in advance' or 'not in advance'. In any loan documentation there must be a clear statement showing whether the rate of interest is payable at the beginning of the loan or at its maturity. It is customary for mortgage interest rates to be qualified by the wording 'not in advance'. In determining how interest rates are to be expressed, the lender must decide how frequently compounding is to take place. Then the frequency of such, as so determined, is added as qualifying wording to the interest rate when stating it in the borrowing instrument. An example would be '6% per annum, calculated semi-annually, not in advance'. At this point, it should be noted that in interest law, the words 'compounded', 'calculated', 'computed', 'converted', or 'convertible' are considered to be synonymous terms. They are used interchangeably in the mortgage business but have the same meaning. None of

them has any necessary relationship to the time at which interest is payable. This principle must be understood at the outset. The qualifying wording is used solely to express, in explicit terms, the frequency of the compounding of the interest. The more frequent the 'calculation' or 'compounding', the higher the effective yield to the lender. Thus '6% calculated monthly' produces a higher effective rate than '6% calculated semi-annually'. In similar fashion, '6% calculated semi-annually' produces a higher effective annual yield than '6% calculated annually'.

Just as the frequency of compounding, as expressed by the word 'calculated' or its synonyms, has no bearing on when the interest is to be paid, neither has it any necessary bearing on how frequently the lender may charge the interest to the borrower's account. There is often some confusion on this point owing to the misunderstanding of the word 'calculated' in its mathematical sense. For example, an interest rate may be expressed as 'calculated semi-annually', yet the borrower may contract to pay the interest monthly. The lender, in turn, may be charging the borrower's account with interest each month. There is nothing incorrect in such procedures, provided (and it is an important proviso) that the effective annual yield to the lender is not higher than that derived from the contractual interest rate. When interest is payable by the borrower more frequently than once each period of compounding as expressed in the contractual interest rate, all interest mathematics are based on the theory that the lender re-invests the interest received from time to time at the same rate. Therefore, the amounts of interest received from the borrower, plus the theoretical re-investment earnings on them, produce, for the lender, the effective yield contemplated in the borrowing instrument, be it mortgage deed, promissory note, or otherwise.

Following along on this principle then, it will be apparent immediately that if, for example, the contractual rate is '6% calculated semi-annually not in advance', the lender cannot collect ½% each month for that would be a rate of '6% calculated monthly not in advance' and would be an over-charge. However, if the borrower is paying his interest monthly and the lender wishes to charge the interest to the account monthly, then some rate of charge must be determined which is the proper equivalent and which obviously must be less than ½% each month. To allow the monthly or other periodic charging and collection of interest without impairment of the contractual rate, mathematicians provide us with the applicable figures to be used when payments of interest are to be made and charged more often than the interest is to be compounded, calculated, or converted, according to the rate established in the contract. These figures are generally known, in the mortgage business, as interest factors. Thus, in the previous example, where interest is being collected and charged monthly, on a mortgage loan on which the interest rate is '6% calculated semi-annually not in advance', the lender would charge .493862% at the end of each month. The method of calculation of these factors is one of the aspects which must be accepted herein by the non-mathematician at face value."

Section 6 of the Interest Act is intended to protect a mortgagor from a mortgagee who attempts to conceal the true rate of interest. Since the Act provides for disclosure of the interest rate on blended payment mortgages calculated yearly or half yearly, not in advance, extra care must be taken to disclose the effective yield where interest payments are to be made more frequently than yearly or half yearly.

Confusion often arises when doing consumer loans which are often quoted as having a rate of interest of say 14% per annum payable monthly. Because of the frequency of payment and the theoretical re-investment earnings on the interest received monthly, the effective rate is actually slightly higher than 14% on an annual or semi-annual basis. It is not easy to explain to a borrower that he or she is actually paying a higher rate of interest annually because of payment frequency but, to comply with the Interest Act, it must be stated clearly in the mortgage.

Of course Section 6 of the Interest Act is avoided when payments are of interest only or made on other than an amortized basis. For example, a mortgage may provide for payment which will go exclusively to interest with any balance left over to be applied to principal. The irregularity of such a scheme may remove it from Section 6 but practitioners are advised to proceed with caution. See Kilgoran Hotels Ltd. v. Samek (1967), 65 D.L.R. (2d) 534 (S.C.C.).

Absence of a clause in the mortgage referencing the Interest Act is not fatal so long as the rate is clearly shown on an annual or semi-annual basis.

Care should also be taken to avoid problems with Section 8 of the Interest Act which provides as follows:

> "8 (1) No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage of real estate, that has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrears."

So for example, a clause which provided for additional interest at the rate of 2% per month to be payable by the mortgagee after the due date is not enforceable since these payments would have the effect of increasing the charge on arrears beyond the rate of interest payable on principal money not in arrears.

Section 8 does not preclude payment of an interest bonus for prepaying prior to maturity but it does preclude a bonus where a mortgagee commences a foreclosure action since the latter would have the effect of giving a higher rate of interest after default than before.

Where a mortgage is drawn so as to provide for payments of interest only after default, no interest can be recovered as the provision has the effect of increasing the rate of interest on arrears over the rate payable with

respect to principal not in arrears. See Pemberton Realty Corp. Ltd. v. C. Carter (1975), 58 D.L.R. (3d) 478 (B.C.S.C.).

Some lenders take a bonus up front often referred to as a "commitment fee" which is calculated as some percentage of the mortgage principal amount.

Typically, the mortgagor will sign a mortgage for $10,000 but only receive $8,000. The mortgagee obtains the return of $2,000 from the principal advance. Ultimately the mortgagee receives $10,000 (the face amount of the loan) in addition to the $2,000 received as a bonus. The bonus is not considered interest secured by the mortgage and is therefore not caught by the provisions of the Interest Act. See London Loan & Savings Co. v. Meagher [1930] 2 D.L.R. 849 (S.C.C.).

The Criminal Code R.S.C. 1970 c. C-34 s.305-(1) sets 60% per annum as the criminal rate of interest. Our courts have interfered with bonus payments where they result from an unfair or unconscionable transaction. See Longley v. Barbick (1963), 36 D.L.R. (2d) 672 (N.S.S.C.). Consider the definition of "interest" in the Criminal Code s.305(1) and it might temper the ambitions of some of your more entrepreneurial clients.

(iv) Right to prepay

Section 10 of the Interest Act also contains a provision that whenever any principal money or interest secured by a mortgage of real estate is not,

under the terms of the mortgage, payable until a time more than five years after the date of the mortgage, any person liable to pay or entitled to redeem may thereafter tender or pay to the person entitled to receive the money the amount due for principal or interest to the time of payment, together with three months' further interest in lieu of notice, and in that event no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage. This does not apply to corporations.

This section spawned some interesting clauses, particularly in Royal Trust documents when some creative mortgagors tried to suggest a mortgage renewal extended the term of the original mortgage. The lenders responded by including clauses which deemed renewals to start a new term and as long as the first and subsequent terms were less than 5 years each, section 10 did not apply. In other words, they couldn't accumulate.

The issue was finally settled by the Supreme Court of Canada in Royal Trust Co. v. Potash [1986] 2 S.C.R. 351. Each renewal starts a new term so avoidance clauses in mortgages are not required. (For commentary see article by C.W. MacIntosh in "Nova Scotia Law News", Vol. 13, No. 3, p. 33.)

Finally, on prepayment, remember that section 21A (1) of the Mortgage Brokers and Lenders Registration Act R.S.N.S. 1967 c.189 as amended, requires any mortgage or renewal after June 1985 to state whether the

mortgage can be prepaid and on what terms. Silence on this point means the mortgage can be prepaid at any time without penalty.

v) Mortgagor's covenants

Breach of the mortgagor's covenants trigger the remedies. The most common default is failure to pay on the due date but there are other triggering events to consider which are included in the precedent attached. These include the absence of good title (paragraph 2), failure to pay taxes (paragraph 3), provide insurance (paragraph 4) and failure to maintain the security (paragraphs 5 and 6). Some lenders want to tie a particular mortgage into other obligations and will make use of a cross default clause. Cross default clauses might be considered in second mortgages triggering a remedy if a first mortgagee goes in default. Property values can be volatile and arrears on a first mortgage can quickly "smoke out" a subsequent encumbrancer if a property has limited equity. An example of a cross default clause follows.

> "If the mortgagor defaults in the observance or performance of any of the covenants, terms, provisos or conditions in any mortgage to which this mortgage is subject, or to those mortgages specifically referred to in Schedule "B" hereto, the principal money hereby secured shall, at the option of the mortgagee be forthwith due and payable, and all the powers of the mortgagee under this mortgage in the event of default may be exercised."

Lenders want to be able to exercise their remedies should anything happen with respect to the security or the covenant to pay which would heighten the risk. Clauses which prevent transfer of the property without the

written consent of the mortgagee (paragraph 17) and compliance with laws (paragraph 7) and the financial impairment of the mortgagor (paragraph 10) are some examples which would trigger the right to foreclose in the event the lender perceives a deterioration in the security or covenant.

Notwithstanding these rights, lenders cannot act capriciously in resorting to their remedies. It is not correct, however, to argue a mortgage must be three months in arrears before a lender can commence action although, from a practical point of view, most lenders will grant time to remedy defaults and three months is not an unusual time period for arrears before foreclosure.

Under Section 38A of the Judicature Act, Stats. N.S., 1972, c.2 permits the court to discontinue foreclosure proceedings provided application is made by the mortgagor prior to the granting of an order for foreclosure and sale. The order will require that the default, which is the subject of the foreclosure proceedings, be cured on such terms as the court determines are reasonable and the application can only be made once with respect to the same mortgage. Some lenders would only accept arrears as a matter of privilege and this amendment made it a matter of right subject to court approval.

Finally, the cumulative effect of the breach of the covenants is brought into focus in the acceleration clause (paragraph 10) which by its name accelerates the payments which may have been due over a payment period

and enables the lender to call the full balance of principal and arrears and commence foreclosure action in default of payment.

vi) Management of the property before, during and after foreclosure

Perhaps the single greatest area of problems in foreclosure is the management of the security. In many situations properties are abandoned by mortgagors. The mortgagee wants to have authority to enter upon the property, change locks, drain pipes, collect rents and generally do such things as are appropriate to maintain, although not necessarily improve, the value of the security. Accordingly, we now see with increasing regularity an assignment of rents clause in a mortgage instrument (paragraph 16). The mortgagee should have authority to effect repairs, maintain the property and to inspect it (paragraph 5). In some cases it may be appropriate to appoint a receiver to manage the property and this is especially true in revenue producing properties where a substantial portion of the value is in the on-going aspect of the business. Loss of regular customers from a business such as a motel will motivate a lender to get involved in the operation of the business either directly or through the appointment of a receiver (paragraph 19).

In situations such as the foregoing a mortgagee may become what is known as a "mortgagee in possession". A mortgagee becomes a mortgagee in possession when he deprives the mortgagor of the control and management of the mortgaged property (see Falconbridge on Mortgages

4th ed. 1977, page 643). Mere collection of rents does not necessarily make a mortgagee a mortgagee in possession and some clauses will specifically state that the collection of rents does not establish that relationship.

Certain statutory liens which rank in priority to a mortgage such as the lien conferred for up to 90 days' power can become a mortgagee's obligation when the mortgagee is determined by the Power Corporation to be a mortgagee in possession. I have had some discussions with the Nova Scotia Power Corporation with respect to their definition of a mortgagee in possession which may differ from the definition of those who are more financially disinterested but, essentially, a lender becomes a mortgagee in possession when it takes steps to intercept the power of the mortgagor to manage the property. Apart from an obligation to pay the power bills, certain other responsibilities are assumed in consequence of taking possession of the property which includes management in a prudent manner, accountability for rents received and maintenance of the property in a reasonable state of repair (see First City Developments Ltd. v. C.M.H.C. (1985), 68 N.S.R. (2d) 195 (T.D.)).

As a summary to this section, I think when drafting the mortgage security one has to consider the type of asset being pledged and think ahead to a situation where there is a default and be sure to provide those clauses in the contract which would best enable the lender the right and opportunity to move with dispatch to protect the property and mitigate losses through prudent management to maximize revenue and minimize expenses.

I should touch briefly on the status of tenants in rental properties. The Residential Tenancies Act, Stats. N.S., 1970, Chapter 13 has been amended to protect and preserve residential tenancies notwithstanding foreclosure. The situation with respect to residential tenancies was the same as it currently is with respect to commercial tenancies. Unless the mortgage was given subject to pre-existing tenancy arrangements, the successful bidder at a foreclosure sale would purchase the property free of the tenants. This consequence of foreclosure has major implications on facilities such as shopping centers which depend on anchor tenants for financial vitality. Solicitors drafting mortgages for commercial ventures should refer to a recent decision of our Appeal Division in Metropolitan Stores of Canada Limited v. Devan Properties Limited. The decision was rendered in December 1988 under S.C.A. No. 02028 and I am sure will be reported.

vii) Recovery of costs and expenses

Generally speaking, the mortgagor can only be liable for those costs and expenses which he has contracted to pay. As a consequence, a mortgagee will want to ensure that there are covenants in the mortgage which would enable the mortgagee to recover any outlays legitimately incurred, including payment for taxes, insurance, repairs, management, processing of N.S.F. cheques and other administration charges.

The recovery of expenses during and after foreclosure is a major source of difficulty particularly in making application for deficiency judgments.

The authority for granting a deficiency judgment is found in Civil Procedure Rule 47.10. There are certain procedural requirements for obtaining a deficiency judgment not the least of which is that a deficiency has to be claimed in the original foreclosure action.

Paragraph 20 in the attached precedent follows from the decision of Mr. Justice Hallett in Nova Scotia Savings & Loan Co. v. Mackay (1980), 9 R.P.R. 332. In this decision Mr. Justice Hallett held that maintenance expenses, including repairs and taxes and real estate commission could not be included in a deficiency claim since the words in the Civil Procedure Rule restricted the amount for a deficiency to the difference between the amount found due by the court for principal, interest and costs and the purchase price at the Sheriff's sale. In other words, if there were costs over and above principal and interest which were to be recovered, they had to be included in the order for foreclosure and sale. This accounts for the heading, "Protective Disbursements" in the Schedule "A" summary statement of account which is used in the application for the order for foreclosure and sale. The problem was that there were often unforeseen or at least expenses which were not quantifiable at the time the application for the order for foreclosure and sale was made. Mr. Justice Hallett ruled that expenses after sale would be recoverable if the Civil Procedure Rules provided the mortgagee claimed and if the mortgage instrument contained a clause which provided for payment of such expenses.

One other matter which has caused difficulty in foreclosures is the recovery of legal expenses on a solicitor and client basis from the

mortgagor. I have been quite envious of some of my colleagues who alleged that they have been able to recover legal fees several times in excess of the amount that I have been able to tax in Halifax. I am attaching a copy of a decision which was provided to me by the Taxing Master at Halifax dealing with this issue. It seems that costs can be recovered on a solicitor/client basis prior to foreclosure but thereafter costs are in the discretion of the court quite apart from any contractual provisions. I understand under the new Costs and Fees Proposal the fee portion of the Bill of Costs will be approved by the Judge in Chambers with the disbursements to be approved by the Taxing Master, although at the date of writing this article I have not had any personal experience. It is to be noted that the new rules concerning costs and fees do not apply to actions which were commenced prior to January 1, 1989.

Conclusion

My grandfather once had a horse that had a peculiar habit of picking up its pace once it got closer to the barn. Your course leaders corralled me into putting flesh on a topic which they thought might be of interest. One hopes that there is more muscle than flab in the article because like my grandfather's horse, I have had to quicken my pace to meet publisher's deadlines. As a consequence, I may have touched on some problems superficially. The text of the article, however, contains references to publications which will help you to examine mortgage clauses in greater detail. You might even find the definition of a gale date.