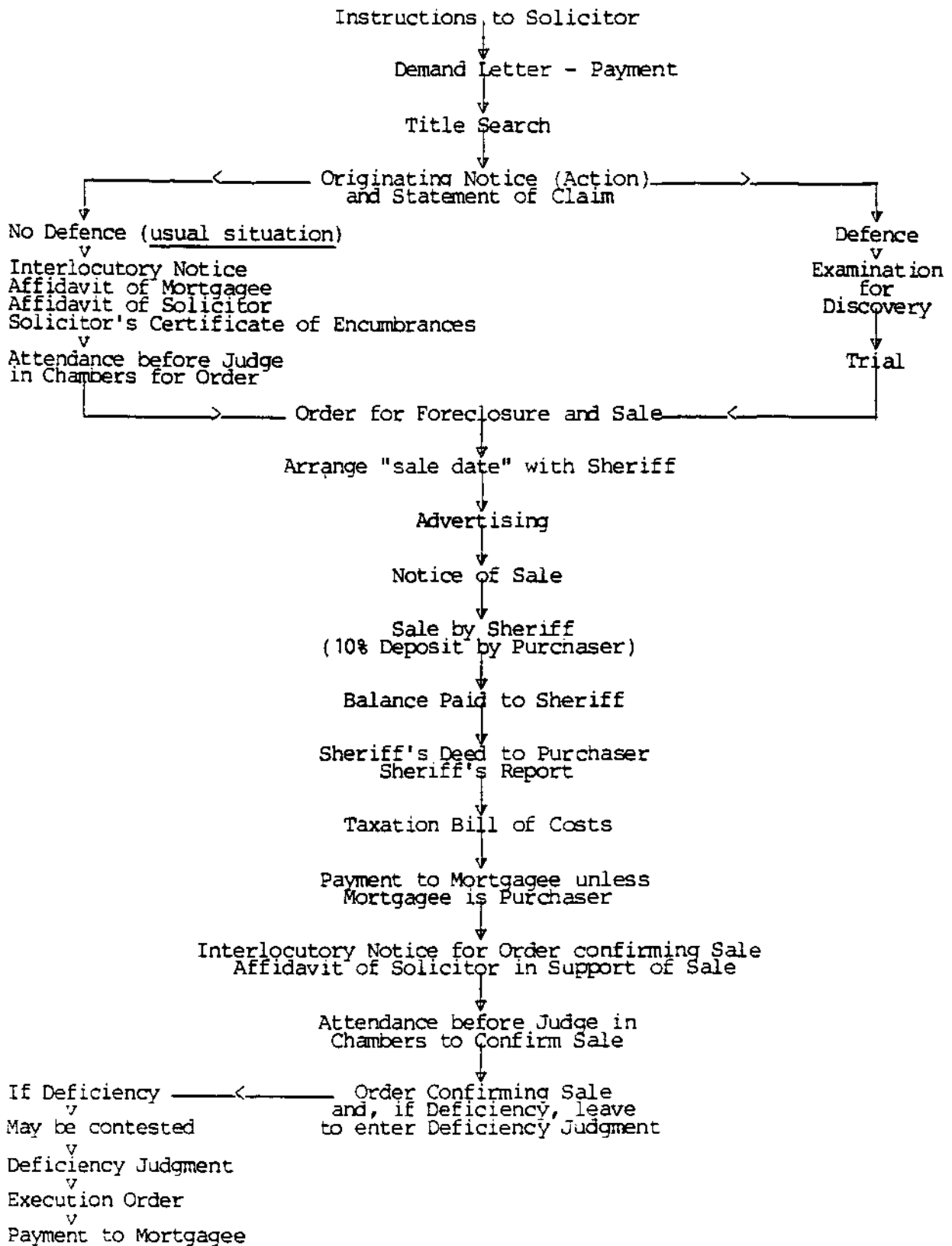


NOVA SCOTIA "FORCLOSURE & SALE"



FORECLOSURE AND SALE

The court has an inherent equitable right to relieve against forfeiture and for this reason most solicitors prefer to wait until an account is two payments in arrears before proceeding with the foreclosure action unless, of course, the mortgage has matured or the mortgagor has abandoned the property or filed for bankruptcy.

Upon receipt of instructions to foreclosure the solicitor writes to the person the mortgagee believes is the current owner demanding payment in full of the mortgage loan within a period of seven to ten days.

In some jurisdictions, a mortgagor has a statutory right to be relieved of his default by tendering the arrears plus costs or performing the breached covenant at any time prior to sale of the premises. However, such is not the case in Nova Scotia and once the acceleration clause has been involved making the whole of the loan due and payable, the only relief available to a defaulting mortgagor is to apply to the court, under Section 38A of the Judicature Act, for an order discontinuing the action. Any such application must be made prior to the granting of the Order for Foreclosure and, if the circumstances warrant, the court may grant a discontinuance conditional upon payment of the arrears and costs or performance of the breached covenant within the time frame defined by the court. It is only rarely that a mortgagor will apply for such relief and the court has no jurisdiction to grant more than one such discontinuance with respect to the same mortgage.

Failing payment of the mortgage debt, the solicitor

requests an up-to-date statement of the mortgage account showing a breakdown to interest, principal, insurance premiums, etc., as well as the per diem rate of interest. The solicitor then searches the title at the Registry of Deeds Office to ascertain the name or names of the registered owner of the property and subsequent encumbrancers. The prudent practice is to search the title back as far as the deed which conveyed the property to the mortgagor.

It is the recommended practice in all cases to claim a deficiency judgment on the personal covenant(s) in the event that the sale proceeds provide insufficient to satisfy the claim plus the costs of the action. However, all parties against whom a deficiency judgment may be sought must be joined as parties to the action.

The action is formally commenced by issuing an Originating Notice (Action) together with a Statement of Claim and these are served by the Sheriff on all of the named defendants.

If the action is well founded it is most unusual for a defendant to enter a Defence and, if no such Defences have been filed within 10 days from service of the Originating Notice and Statement of Claim an application is made to a Judge of the Supreme Court in Chambers for an Order of Foreclosure and Sale. This application consists of an Interlocutory Notice supported by (1) an Affidavit of the mortgagee, with a summary statement of the mortgage account and a true copy of the mortgage document attached, stating that the facts set out in the Statement of Claim are true and (2) an Affidavit of the solicitor stating that the

Originating Notice and Statement of Claim were issued and served and that no defence was filed. Attached to this latter Affidavit is the Certificate of the solicitor setting forth the encumbrances registered against the lands subsequent to the mortgage.

The Order for Foreclosure and Sale orders, directs, establishes, authorizes and provides as follows:

- (a) establishes the amount due to the mortgagee.
- (b) bars and extinguishes the equity of redemption in the property of the original mortgagor and all persons claiming through or under him, which would include all subsequent encumbrancers or any persons having an interest in the property which is junior in priority to the interest of the mortgagee.
- (c) prescribed the form of newspaper advertising.
- (d) authorizes the Sheriff for the County in which the lands are situate to sell the property at public auction and to give a deed to the purchaser.
- (e) provides that the purchaser pay a deposit of 10% of the amount of the purchase price to the Sheriff and the balance within 30 days of the date of the sale.
- (f) provides that if the mortgaged property is bid in by the mortgagee for an amount equal to or less than the amount of the mortgagee's claim plus costs that the Sheriff shall execute a deed to the mortgagee upon payment of the Sheriff's fee, outstanding real

property taxes and any amounts due on local improvement charges.

- (g) directs the Sheriff to pay out of the proceeds of the sale the amount due to the mortgagee plus taxed costs and the balance, if any, to the Accountant General of the Supreme Court.
- (h) provides for notice of the sale to subsequent encumbrancers and all named defendants.
- (i) provides for notice of the sale to the Sheriff together with a copy of the description of the lands as contained in the mortgage.
- (j) approves, if requested, a shortened form of description of the property for advertising purposes.
- (k) if a deficiency judgment has been claimed, the order also grants permission to the mortgagee to apply for leave to enter a deficiency judgment against the defendants for the difference, if any, between the amount realized on the sale and the amount due to the mortgagee plus taxed costs.

After the Order for Foreclosure and Sale has been granted the solicitor arranges the "sale date" with the Sheriff. The sale must be advertised in a local newspaper for a period of at least 30 days. There must be three insertions of the ad with not less than 5 days between the insertions, the first of which is to be at least 30 days before the appointed sale date and the last insertion must not be more than 10 days before the appointed date. The

advertisement sets out the time, place and date of the sale, a description of the property and the terms of the sale.

When the sale date has been set a Notice of Sale together with a copy of the advertisement must be sent by "registered mail" to all subsequent encumbrancers at least 30 days prior to the date of the sale. Similarly, a Notice of Sale together with a copy of the advertisement must be sent to each of the named defendants by "ordinary mail". At the same time the solicitor provides the Sheriff with a Notice of Sale, a copy of the advertisement and a copy of the description of the mortgaged lands as recited in the mortgage document for posting in the Court House.

The Mortgagee has the right to bid at the auction to protect his interest and a few days prior to the sale the solicitor contacts the mortgagee to determine the amount of the maximum bid which is arrived at by totalling the mortgage balance, interest, insurance premiums, outstanding taxes, local improvements charges, disbursements, taxed costs, Sheriff's fee plus an additional amount of interest for a period of 30 days after the sale date. It is customary for the mortgagee to authorize the solicitor to bid on his behalf and at the appointed time, place and date the solicitor attends at the Court House to carry the bidding, if so authorized, to a figure sufficient to reimburse the mortgagee in full. If the property has deteriorated or is not now worth the amount of the mortgagee's claim, the mortgagee may instruct the solicitor to stop bidding at a figure below the amount of the claim. Accepting a price less than the full amount of the claim may, under certain circumstances, be advantageous to the mortgagee as it would not only avoid having the property on

hand but also the accrual of interest, taxes and disbursements during the period that it would take the mortgagee to sell the property plus the real estate commission. The recommended practice is for the solicitor to start the bidding at a figure equal to the Sheriff's fee and outstanding taxes and progressively increase the amount up to but not beyond the predetermined maximum as authorized by the mortgagee.

If the property is purchased by someone other than the mortgagee, the purchaser must pay the Sheriff, at the time of the sale, 10% of the amount of the bid price and the balance of the price within 30 days. If the purchaser fails to pay the balance of the price within the prescribed thirty-day period the deposit is forfeited.

If the property is bid in by the mortgagee, the 10% deposit requirement does not apply and the mortgagee is entitled to a deed to the property upon payment of the Sheriff's fee, outstanding real property taxes and any amounts due for local improvement charges.

Following the sale the solicitor prepares the Sheriff's Deed in favour of the successful purchaser, as well as the Sheriff's Report and forwards these to the Sheriff for signature. At the same time, the solicitor prepares his Bill of Costs and submits it to the Sheriff, after taxing. If the property is purchased by other than the mortgagee, the Sheriff, upon receipt of the balance of the purchase price, gives the Deed to the purchaser, remits payment of the amount of the mortgagee's claim plus the taxed Bill of Costs and pays the surplus, if any, to the Accountant General of the Supreme Court for distribution

among the persons entitled thereto according to their priorities, as determined by the court.

Following the sale and delivery of the deed an application is made to the court for an Order Confirming the Sale. This application consists of an Interlocutory Notice supported by the Affidavit of the solicitor with the usual detailed recitals of the action and relevant exhibits together with a copy of the Sheriff's Report which confirms compliance with the terms of the Order for Foreclosure and Sale and shows the disposition of the funds received from the sale. If a deficiency judgment is claimed, the relevant details would be set out in the Affidavit of the solicitor.

The solicitor then attends before a Judge of the Supreme Court in Chambers to obtain the Order Confirming the Sale. This order simply ratifies and confirms the Sheriff's Report and the foreclosure and sale proceedings. However, the order does serve a useful purpose where a deficiency judgment is claimed.

DEFICIENCY JUDGMENT

The Judicature Act provides that "where the purchase money is insufficient to pay what is found to be due to a plaintiff for principal and interest and costs, the plaintiff shall be entitled ... to an order for payment of the deficiency" provided the person or persons against whom such deficiency is claimed were joined in the action as defendants and that a deficiency judgment was requested in the Statement of Claim.

If the property was purchased at the Sheriff's sale by someone other than the mortgagee for an amount less than the full amount of the mortgagee's claim, including taxed costs and fees, it is a relatively simple matter to determine the amount of the deficiency and the Order Confirming the Sale will give the mortgagee leave to enter a deficiency judgment for this amount.

There are two avenues available to the mortgagee who bids in the property at the Sheriff's sale and claims a deficiency judgment.

1. The mortgagee may obtain an independent appraisal of the fair market value of the property and apply for a deficiency judgment at the time of the Order Confirming the Sale. Based on the appraisal the court will determine the fair market value of the property. This amount will be subtracted from the amount owing to the mortgagee, taxes, Sheriff's fee and taxed costs and the court will grant a deficiency judgment for the difference.
2. In most cases the mortgagee would prefer to sell the property on the open market in order to establish the actual amount of his loss. The court recognizes the validity of this approach to establish the actual value of the property and when granting the Order Confirming the Sale the court will allow the mortgagee up to six months from the date of the sale to sell the property and to apply for a deficiency judgment. In addition, if circumstances warrant, the court will consider an application to extend this six-month period for a reasonable period of time.

When the property has been sold and the actual amount of the loss established, the solicitor can then apply to the court for the deficiency judgment.

When a deficiency judgment has been granted, the mortgagee can proceed to collect the amount by way of Execution.

FORECLOSURE OF SECOND MORTGAGE

Although a second or subsequent mortgagee is not entitled as of right to proceed with the foreclosure and sale remedy, nevertheless he may apply for this relief but "the court shall not direct a sale without the consent of the first or any prior mortgagee, ... except upon such terms as the court thinks fit and proper, which terms may include the deposit of money into court". Any such sale would, of course, be subject to all of the rights and interests of the first or prior mortgagee.

As a matter of practice, the first mortgagee will usually consent to the second or subsequent mortgagee's action provided the party initiating the action pays any arrears owing on the first mortgage and agrees to keep the payments on the first mortgage up-to-date during the course of the foreclosure and sale actions. However, the first mortgagee has the right to refuse to consent to such an action without explaining his reasons, if any, for the refusal. If this should happen it is almost impossible to speculate on the terms on which the court would authorize the action as there is almost a complete lack of precedent on this particular point. Assuming that the court might be

reluctant to alter the first mortgagee's original position without his consent and, as a change of ownership would be the natural consequence of a foreclosure sale, it is possible that the court might not approve the action unless the second or subsequent mortgagee were to pay the full amount of the first mortgagee's claim into court.

COSTS OF FORECLOSURE AND SALE ACTION

Advertising in the City of Halifax is very expensive and the taxed party-and-party costs, disbursements and advertising charges in connection with a foreclosure action would approximate about \$3,000 - \$3,500 plus the Sheriff's fee for selling the property which is 5% of the sale price to a maximum of \$1,050.

TIME FRAME OF ACTION

Allowing for normal delays, it usually takes from three to three-and-a-half months to complete a foreclosure and sale action from the date of the initial instructions to the final Order.

FORECLOSURE DATA SHEET

LAWYER: _____ DATE: _____
FILE NAME: _____ FILE NO.: _____
RE: _____

NO.(S) OF PRECEDENTS REQUIRED: _____

SPACING: single 1 1/2 double

PAPER TYPE: plain redline

INFORMATION REQUIRED:

Preliminary Information:

- 1. Action Commenced [year]: _____ 2. County _____
- 3. Docket Number: _____
- 4. Plaintiff: _____
- 5. Address: _____
- 6. If Plaintiff is a Company Registered Agent's name: _____
- 7. Address of Agent: _____
- 8. Position in Company: _____
- 9. Defendant: _____
- 10. Address: _____

Mortgage Particulars:

- 11. Property Mortgaged: _____
street _____ city _____
county _____ province _____
- 12. Date: _____
- 13. Recorded at the Registry of Deeds at: _____
- 14. In Book: _____ at Page: _____
- 15. Amount of Principal Secured: _____
- 16. Rate of Interest Chargeable: _____
- 17. Outstanding Principal: \$ _____
- 18. Outstanding Principal as of: _____
day _____ month _____ year _____
- 19. Outstanding Interest: \$ _____
- 20. Interest claimed from: _____
day _____ month _____ year _____
- 21. Outstanding Interest as of: _____
day _____ month _____ year _____
- 22. Total Amount Claimed: _____
- 23. Arrears outstanding: _____
- 24. Arrears as of: _____
day _____ month _____ year _____
- 25. Payments Paid as of: _____
day _____ month _____ year _____

[continued.../2]

FORECLOSURE DATA SHEET

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26. Solicitor's Certificate: _____ dated _____
27. O/N and Statement of Claim- Issued: _____ dated _____
28. Served: _____ dated _____
29. Advertisement of sale inserted in: _____
30. published by: _____ at _____
- and/or
31. Advertisement inserted in: _____
32. published by: _____ at _____
33. Three Dates of Insertion: _____
34. Solicitors Affidavit: _____ dated _____
35. Order for Foreclosure - Dated: _____
36. Granted: _____ dated _____
37. Notices of Sale sent: _____ dated _____
38. Certificate of Registration Issued: _____ dated _____
39. Name of High Sheriff: _____
40. Acting for the County of: _____
41. Auction: _____ date _____ Time _____
- circle one Standard/Daylight Saving
42. Auction to Take Place: _____ town/city _____ county _____
43. Name of Purchaser(s): _____
44. Address: _____
45. Purchase Price: _____
46. Number of months the Plaintiff has to file a Deficiency Order after the signing of the Confirming Order. _____
47. Date Notice and Ad sent to Defendant _____
48. Additional person Notice and Ad sent to _____
49. Address of additional person _____

***Attach short description to be inserted.**
***Attach list of names who hold encumbrances.**
