You Owe, You Owe, How Much I'd Like to Know

Francis N.J. Taman and Ksena J. Court

It's always interesting how basic assumptions are rarely challenged and when they are, it creates no end of difficulty. For many years, most mortgage lenders would honour a request by a subsequent encumbrancer for a letter outlining the balance owing on their mortgage. However, the decision of the Ontario Court of Appeal in *Citi Cards Canada Inc. v. Pleasance*[1] has had a chilling effect on this practice. Thankfully, a recent decision by Master Schlosser of the Alberta Court of Queen's Bench, holds that, at least in Alberta, mortgages in second or later position still have access to this information.

In *Citi Cards*, the Plaintiff, Citi Cards Canada Inc. obtained judgment against the Defendant and sought to sell the Defendant's house to satisfy that judgment. There was both a first and a second mortgage on the house. By law, before the house could be sold, the Sherriff required mortgage discharge statements from the two mortgagees showing the outstanding balances of the mortgages. The mortgagees refused to provide the discharge statements on the grounds that it might violate the Defendant's privacy rights under the *Personal Information Protection and Electronic Documents Act*.[2] The Plaintiff brought an application to compel the information.

The Justice originally hearing the application held that the disclosure of the mortgage statement was in fact prohibited by PIPEDA and dismissed the application. He also held that even if that had not been the case, he would not have ordered the production as the Plaintiff could have obtained that information by examining the Defendant or his wife in aid of execution. The Ontario Court of Appeal upheld the decision.

This decision, not surprisingly, has lead to a great deal of concern by mortgagees. Privacy issues are taken very seriously by lenders. At the same time, the outstanding balance of the prior mortgage can be a key piece of evidence in a foreclosure or other enforcement proceeding. The question was whether other Courts would follow the Ontario Court of Appeal's decision.

It was not surprising that the next court decision was not long coming. In November of 2011, the Toronto-Dominion Bank (the "TD Bank") made an application to compel a prior mortgagee to disclose the balance of its first mortgage as part of a foreclosure proceeding.[3] The TD Bank was in the process of making an application for a Redemption Order. As the TD Bank was in second place, in order to establish a reduced redemption period, the TD Bank needed to put into evidence the amount that was outstanding under the first mortgage.

The TD Bank applied, without notice to the first mortgagee, to have the Court compel the first mortgagee to provide a payout figure on its mortgage. Master Schlosser reviewed the *Citi Cards* case.

[1] 2011 ONCA 3 (CanLII) ("*Citi Cards*")
[2] S.C. 2000, c. 5 ("PIPEDA")

[3] *The Toronto-Dominion Bank v. Sawchuk*, 2011 ABQB 757 (Master) ("*Sawchuk*"). In the interests of full disclosure, it should be noted that the counsel for the TD Bank was our associate Kari Sehr, who practices out of our Edmonton office.

He found that the case was distinguishable in that *Citi Cards* dealt with a request from a writholder rather than from a subsequent mortgage holder. Even if it had not been, however, he would have declined to follow it.

He noted that in order for the Court to properly determine the redemption period to be granted in a foreclosure proceeding, the Court needs to know more than the face value of a mortgage as registered against title. It needed to know the actual amount owing to the prior mortgagee.

He noted, as well, that the "Foundational Rules" under the *Alberta Rules of Court* require the Court to facilitate actions as quickly as possible at the least expense. These Rules oblige the Court to provide effective, efficient and credible remedies. Since, in Alberta practice, prior encumbrancers are not made parties, some means must be created to allow the plaintiff mortgagee to obtain the information that is required for the Court to grant a proper redemption period. The alternative is to require prior encumbrancers to become parties and to provide disclosure pursuant to the Rules. This process would come at a very high cost to the defendant, the person whose rights are being protected.

Master Schlosser noted that it could not be the intention of privacy legislation to sterilize the Defendant's other rights. On that basis, he held that it was not inappropriate to require disclosure of the mortgage balance. He also noted that it was an appropriate circumstance to grant the Order without notice. If the prior mortgagee objected, they could return to Court to challenge the Order.

As such, he ordered the prior mortgagee to provide the payout figures as requested by The TD Bank.

This is a positive decision for both mortgagors and mortgagees. Mortgagors benefit from reducing the cost of the foreclosure process and by ensuring that accurate information is brought forward to the Court regarding prior mortgage balances. Usually, though not always, the mortgage balance is below the face value of the mortgage. This may mean an increased redemption period.

Mortgagees benefit by maintaining the more streamline process that has become the norm in Alberta. Prior mortgagees, who will be largely unaffected by the decision, do not have to be made parties to the foreclosure action and served. At the same time, there is an expedient and cost effective way to get the information that is required to move the foreclosure action forward.

Francis N.J. Taman and Ksena J. Court practice commercial and residential foreclosure and secured and unsecured debt collection at Bishop & McKenzie LLP in Calgary, Alberta.