

Insolvency & Corporate Restructuring

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Redeeming Mortgages in the Context of a Receivership

The rights of a mortgagor to redeem a mortgage when the mortgage falls into default and the mortgagee enforces are generally understood. A mortgagor has the right to redeem the mortgage at any time before the property is the subject of a binding purchase agreement. The right to redeem is different where the sale is conducted by a receiver appointed pursuant to the *Bankruptcy and Insolvency Act*¹ or the *Courts of Justice Act*.²

Subsection 22(1) of the *Mortgages Act* provides a mortgagor may put a mortgage in good standing at any time before a sale under the mortgage.³ The acceptance of an unconditional offer to purchase constitutes a “sale”.⁴ The mortgagor loses its right under this section once an unconditional offer to purchase is accepted.

Three relatively recent decisions deal with the rights of a mortgagor where the property is being sold by a court appointed receiver: *B&M Handelman Investments Limited et al. v. Mass Properties Inc. and Mass Banquet Halls Inc.*⁵ (“**B&M Handelman**”), *Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.*⁶ (“**Marlwood**”), and *Home Trust Company v. 2122775 Ontario Inc.*⁷ (“**Home Trust**”). In all three cases the court appointed receiver brought a motion to approve a sale it had facilitated and the mortgagor opposed the motion seeking to redeem the mortgage.

In *B&M Handelman*, the Court was faced with a motion to approve a sale and vest the property in the purchaser. The motion was opposed by an owner of the subject property who wished to redeem the mortgage. The receiver had conducted a sales process which included listing the property on the MLS, advertising in the Globe and Mail and contacting multiple prospects. The Honourable Justice Pepall refused the owner’s request to redeem the property for two reasons:

1. the order appointing the receiver stayed and suspended all rights and remedies affecting the subject property; and
2. allowing redemption would make a mockery of the sales process and act as a potential chill on securing the best offer.

In *B&M Handelman*, the order appointing the receiver was the customary Commercial List form of order. The order provides that “...all rights and remedies against the Debtor, the Receiver or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court...”. The right to redeem is a right affecting the subject property.

Pursuant to the order appointing the receiver that right was stayed and suspended. As a result, there was no automatic right to redeem the property.

The Court also points out that the receiver conducted a sales process which included engaging a real estate agent with significant experience selling commercial real estate, advertising the property and contacting prospects. From the purchaser’s perspective, it secured financing and had to pay lenders’ fees and legal fees. The Court stated that a mockery would be made of the practice and procedure relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is commonplace, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagor at the last minute. Since purchasers would be leery of deals being pulled out from under them, this could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

B&M Handelman was followed in *Marlwood*. In *Marlwood*, the Honourable Justice Newbould held that while the primary concern of a receiver is protecting of the interests of creditors, a secondary, but important, consideration is the integrity of the process by which the sale is effected. Moreover, the interests of a purchaser in a properly run sales process by a receiver are to be considered.⁸ For the reasons set out in *B&M Handelman*, Justice Newbould did not allow the mortgagor to redeem and instead approved the sale arranged by the receiver and vested the property in the purchaser.

Although it does not cite *B&M Handelman*, and it predates *Marlwood*, the Honourable Justice Brown came to the same conclusion in *Home Trust*. In *Home Trust*, Justice Brown also pointed out that the proposed purchaser had spent time and money participating in the bidding process and had participated in good faith believing that the superior offer would be approved by the

Court. Justice Brown also held that, while the mortgagor portrayed its request as one seeking a stay of the sale in order to redeem the mortgage, in essence the debtor sought an extension of the bid deadline in order to make a late bid. If granted, the stay would seriously impugn the integrity of the court-sanctioned sales and marketing process. To permit this request would risk seriously eroding the confidence of the market in the integrity of the receivership sales process sanctioned by the Court.

In all these cases, where the sale is conducted by a court appointed receiver, the Court is concerned about the integrity of the process and the costs incurred by the participants. Under the circumstances, the Court is not prepared to allow the debtor to redeem the mortgage.

Considering the above decisions, what right does a mortgagor have to redeem a mortgage if the sale is being conducted by a court appointed receiver? Based on a strict reading of the language of the standard form receivership order, the right to redeem is stayed by the receivership order which provides that all rights and remedies affecting the Property are stayed and suspended. This would mean that there is no right to redeem once the receiver is appointed. However we believe that the mortgagor could redeem

the mortgage before the deadline for submitting offers in the sales process conducted by the receiver. As Justice Brown points out in *Home Trust*, the mortgagor was in essence seeking to extend the bid process by attempting to redeem at the stage of the approval motion. If, however, the redemption was to occur prior to the deadline for submitting bids then it is our view that this would have a similar effect to an offer to purchase the property for the full amount owing to the mortgagee.

Understanding the differences in the redemption rights in a power of sale process compared to a court appointed receivership can assist mortgagees in dealing with difficult borrowers where there is a concern that the borrower may use its redemption rights to delay the process and hinder enforcement.

¹ R.S.C. 1985, c. B-3

² R.S.O. 1990, c. C.43

³ R.S.O. 1990, c. M.40; *Re Mission Construction Ltd. and Seel Investments Ltd.*, 1973 CanLII 396 (ON SC) ("Mission Construction")

⁴ *Mission Construction; Theodore Daniels Ltd. v. Income Trust Co.*, 1982 CanLII 1757 (ON CA); *Toronto-Dominion Bank v. Pallett Developments Ltd.*, 1984 CanLII 2062 (ON SC)

⁵ 2009 CanLII 37930 (ON SC)

⁶ 2015 ONSC 3909

⁷ 2014 ONSC 1039

⁸ *Marlwood* at paragraph 26



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Pallett Valo LLP Insolvency & Corporate Restructuring Practice

We provide legal advice to debtors, secured and unsecured creditors, trustees and receivers in the context of proceedings under the "Bankruptcy & Insolvency Act" (BIA) and the "Companies' Creditors Arrangement Act" (CCAA). Over the course of the last several years, we have guided debtors, lenders, suppliers and landlords through numerous significant CCAA proceedings.

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