

# POWER OF SALE PROPERTIES

- Mortgagee's Remedies on Default
- Power of Sale versus Judicial Sale
- Power of Sale - Procedure
- Power of Sale - Sellers
- Power of Sale - Buyers
- Special Considerations with POS Transactions
- Protecting Your Buyers

- Action for arrears
  - Suing the mortgagor (borrower) for the amount owing plus costs of enforcement
- Possession
  - Need possession to show property to prospective buyers
  - If rental property, taking possession allows the re-direction of rent payments to the mortgage holder
- Foreclosure
  - Usually leads to a Judicial Sale (see next slide)
- Power of Sale
  - Most common remedy—allows mortgagee to sell property without many legal hurdles and with fewer delays

- A Judicial Sale (e.g. under Foreclosure) is a sale that occurs under the supervision of a court.
- The only available remedy to lenders in some provinces.
- Compared with POS, the waiting times are longer and costs are generally higher ... however, because the Court approves each step, the selling lender is better protected against allegations of an improvident sale by the mortgagor.
- Under a Judicial Sale, the lender takes title to the property (which may involve the payment of LTT among other considerations) – unlike POS.

- Power of Sale is the remedy used in 90+% of cases of mortgage default in Ontario
- Procedure:
  - 15 days following default, mortgagee delivers a written “Notice of Sale” to all parties having an interest in the land
  - Mortgagor then has 35 days to pay all defaulted amounts (known as redemption) and stop the process – mortgagee cannot do anything for 35 days
  - If he or she fails to do so, the mortgagee can then exercise Power of Sale rights

- Statement of Claim - mortgagee sues mortgagor for non-payment - 20 days to file a Statement of defence
- Notice of Sale - sent to all interested parties' - mortgagee cannot take any action for 35 days
- Obtain Judgement
- Apply for Writ of Seizure and Sale
- Apply for Order for Possession and Writ of Possession – notify mortgagor
- Sherriff evicts mortgagor – property can be listed

*“ ... a mortgagee in exercising his power of sale does owe a duty to take reasonable precaution to obtain the **true market value** of the mortgaged property at the date upon which he decides to sell it.”*

-- Lord Salmon, English Court of Appeal (1971)

Canadian courts have interpreted this duty to include:

- Bringing the property to the attention of a wide segment of the market
- Advertising the property for sale--including displaying a “For Sale” sign on the property & placing it with a multiple listing service
- Ensuring that sales efforts are conducted for at least 60 days
- Obtaining proper appraisals

- The majority of Power of Sale properties in Ontario are listed and sold by licensed real estate agents.
- There are several unique issues associated with marketing and buying a POS property.
- Often taking instructions directly from the lender or from the lender's lawyer.



- Lender will attach a long Schedule to the Agreement of Purchase and Sale, restricting obligations to Buyer (usually non-negotiable)
- “As-Is, Where-Is”
- No Representations or Warranties on Chattels
- No UFFI Warranty
- GST Issues
- Mortgagor’s Right of Redemption

“As-Is, Where-Is”

*Generally, a sale of property “as is” means that the property is sold in its existing condition, and use of the phrase as is relieves the seller from liability for defects in that condition.*

-- Black’s Law Dictionary

## No Representations or Warranties on Chattels

Because the selling lender in a Power of Sale doesn't take title to the property, they are not in a position to make any representations about and to warrant the condition— *or even ownership* — of any chattels that may be on the premises.

This might not be a deal breaker if the property in question is a single-family "fixer-upper" ... but if it's a multi-unit rental complex, the buyer can't be sure they'll receive clear title to a dozen sets of kitchen appliances

- Generally, HST is not payable on used residential complexes.
- Normally the Seller provides a declaration or certificate that HST is not payable. A Lender will not provide this to a Buyer or represent that HST is not payable.
- Buyer should do some due diligence to determine how the property was used by prior owner (i.e. as a residence). Particularly for a brand new condo!

- This is a risk unique to the marketing of Power of Sale properties.
- Until closing the mortgagor has the right to redeem (pay off) the mortgage and take back the property... in which case the listing or sale is abandoned and the property is removed from the market.
- It doesn't happen often, but it's essential to inform prospective purchasers of POS listings of this possibility, so as to avoid an unpleasant situation in the event the mortgagor does redeem.



## 1. Subject to Inspection

Always a good idea, but especially critical here. In addition to the usual structural and mechanical inspections, don't forget about termites!

## 1. Subject to Inspection



## 2. Subject to Solicitor's Review

The Agreement of Purchase and Sale will almost certainly contain terms unique to POS transactions. Strongly encourage your clients to review these with an experienced solicitor, as their plain language and legal meanings can differ significantly.



## 1. Subject to Inspection



## 2. Subject to Solicitor's Review



## 3. Subject to Financing

Another item that's always a good idea, but could be especially critical in a Power of Sale transaction.





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