

## **SALE OF LAND**

### **Sale of Partial Interests in Land under Part 7 of the Civil Enforcement Act**

The ability of judgment creditors to recover money judgments on the sale of land has been hampered by the practical uncertainty of how to sell the interests of co-owners (joint tenants or tenants in common) where one owner is a non-judgment debtor. In most cases there is a close relationship with the judgment debtor.

Nothing in the Act restricts the sale of a partial interest. Section 67 of the Civil Enforcement Act makes it clear that all legal interests in land may be sold using a method of sale that is, in accordance with Section 69, commercially reasonable. The challenge with joint interests has been to find or develop commercially reasonable methods to sell joint interests.

#### **Background:**

Part 7 of the Civil Enforcement Act provides for the sale of land of an enforcement debtor to enforce a writ of enforcement. This process allows for the sale of the interests of a land owner, and includes the sale of joint tenant or tenant-in-common interests.

Constraints on such a sale are:

1. the procedures outlined in Part 7 of the Act and the regulations require service of a Notice of Intention to Sell Land and a Notice of Method of Sale respecting the land. The procedure also requires service of the Notices to non-enforcement debtors who are registered owners of the property;
2. the general principles require that the civil enforcement agency act in a commercially reasonable manner, as set forth in paragraph 69 of the CEA.

The process outlined in Part 7 of the Civil Enforcement Act allows for the sale of co-ownership interests (joint or common) without the involvement of the courts although the court's involvement is desirable in certain circumstances. Those circumstances include cases where there are subsequent encumbrances, and an order of the court is required to allow the title to be cleared of the subsequent encumbrances for the sale of the property to be completed.

Section 76 of The Civil Enforcement Act also provides for the severing of joint interests when the Civil Enforcement Agency "has entered into an agreement to sell the debtors' interests." Severance is registered on title when a transfer is presented to Land Titles, so that joint tenants become tenants in common.

#### **Practical Problems**

The problem with the sale of joint interests under Part 7 of the Civil Enforcement Act arises where only one of the joint owners or co-owners is the enforcement debtor. The market place for joint or co-ownership interests is very limited, and perhaps impractical. This is particularly the case with respect to joint tenants of a home or residence who are spouses of enforcement debtors. Who wants to purchase this kind of interest?

In legal terms, these interests are fully saleable. , However the practical question arises as to the market place for these types of sales.

Legally speaking, the process is as follows:

1. The joint interest is sold to a third party.
2. The joint interest becomes a co-ownership interest.
3. The purchaser of the co-ownership interest either voluntarily sells to the other co-owner, or makes an application to the Court of Queens Bench under Part 3 of the Law of Property Act, and requests partition or (more likely) sale of the entire interest. Note that under the Law of Property Act only a co-owner has the right to make an application under Part 3.

A couple of observations can be made about this process.

First, a purchaser of this type of interest in land is purely an investor. He is not interested in the land itself, except to the extent that he can make a profit. It is also clear that there is some risk to the investor. The investor may be dealing with a hostile co-owner, and may be forced to make an application for sale under the Law of Property Act to obtain a writ of possession. Note, however, that the case law for sale of co-ownership interests under the Law of Property Act suggests that the granting of an Order for Sale is not discretionary. It must be granted. In addition, the investor will have sale costs such as real estate commissions, carrying costs, insurance, etc. and will discount his price to recover those costs.

In essence there is a double discount applied to the purchase of co-ownership interests. The first level of discount that is typical with any forced sale arises from the fact that the purchaser generally does not have access to the interior of buildings on the property. Secondly, there is the concern that before possession is obtained, the property may have been damaged. These discounts for forced sale can be up to 10% of the property value.

The second level of discount applies directly to the purchase of a joint interest. It relates to the costs and risks associated with making a court application for partition and sale, obtaining possession, and real estate and carrying costs. In addition to these costs, the purchaser of a partial interest is purchasing with a view to making a profit. We have seen discounts on joint interests in the range of \$50,000.

There are investors who are interested in these kinds of investments. They include real estate investors and higher risk lenders, renovators, builders or entrepreneurs.

### **Notice of Method of Sale for Joint Interests**

There are specific requirements in the Civil Enforcement Act and Regulations regarding the contents of the Notice of Method of Sale. It has been our experience that MLS listings are generally not appropriate for the sale of joint interests. Generally, Sale by Tender is a more appropriate process. The appropriate method of sale must meet the terms of commercial reasonableness. The sale process must reach the purchasers who are interested in this kind of investment, and must also recognize market values.

Sale by Tender requires the following:

1. Determination of Value – an appraisal is required to generate the bid values required in a tender process. We instruct the appraiser to assess the market value of the property. In our experience appraisers do not have the data to assess forced sale of a joint interest. We make that assessment ourselves.
2. Establishing a minimum price is determined in reference to the appraisal, and must also recognize the discounting that will be used to address the higher risks associated with the sale of the joint interest.

### **Bid Package**

The actual sale of the joint interest is effected by preparing a bid package that is issued to interested purchasers. The bid package contains a copy of the appraisal and copies of the Notice of Intention to Sell Land and Notice of Method of Sale. Included is an explanation of the processes involved in Sale of Land under the Civil Enforcement Act, a brief explanation of the potential requirement of Partition and Sale applications or Writ of Possession Applications, a copy of title, and a form of offer that addresses all of the issues.

### **Sale Method**

The best method of sale is sale by tender. We have used 2 methods: one involves the direct solicitation of tenders, and the second involves newspaper advertisements.

### **Conclusion**

The sale of co-ownership interests can be an effective way of enforcing a judgment.

The usual method of sale will be by private tender, directed to real estate investors and second mortgage lenders.

Anticipated proceeds should be the judgment debtor's equity value less anticipated discounting for risk.

The anticipated time frame is between 9 months to 1 year.

Most sales of joint interests are settled prior to completion of sale, and generally result in the payment of all civil enforcement costs and judgment interest.

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