

Mortgage Discharges and Final Reports to Lenders

Prepared For: Legal Education Society of Alberta

Real Estate Boot Camp

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For Presentation In:

Edmonton – November 25, 2009

Calgary – December 10, 2009

POST-CLOSING ISSUES

1. Introduction

The transaction has closed, but before you can close your file there are always “loose ends” that need to be tied up. Have you complied with trust conditions? Have you lived up to your undertakings? Is something or someone preventing you from doing what you need to do? There are things you can do to help yourself out. This paper is intended to highlight common problems and practical solutions, and is confined to residential purchase/sale/mortgage transactions.

The most important advice that can be offered is relax and take it easy. Most, if not all, of us have had post-closing problems arise from time to time. As conveyancers, we need to adopt a cooperative approach to solving these problems. That said, lawyers need to be hands on in solving these problems and cannot delegate these matters (entirely) to staff. Remember, you are accountable to live up to trust conditions and undertakings, not your assistant.

2. The Retainer - Getting Paid for Post Closing Matters

The typical engagement involves getting a fax from a realtor’s office that says some people you may or may not know have said you will be their lawyer. I am not sure how many lawyers use boilerplate retainer letters for residential real estate transactions. My practice is to use a standard form “engagement letter” that is presented to the clients at the first opportunity, usually when seeing them to execute documents (see sample letter at Appendix A). By the time I have seen them, we have already discussed fees. Often I have shared my firm’s residential real estate fee “menu” with the clients prior to being engaged, but in any event the anticipated fees are repeated in our engagement letter.

Post closing fees, I suggest, can be covered in the engagement letter with the wording “at this point I have no reason to believe that there will be any unusual complications, but fees to deal with any such problems will be billed at [the lawyer’s hourly rate]”. I have not had the opportunity to test this with the Taxing Officer, but I have been willing to try. Fortunately, I have always been paid before taking out the appointment.

3. Mortgage Discharges

Section 75 of the Law of Property Act¹ of Alberta reads as follows:

¹ R.S.A. 2000, C. L-7

Discharge of mortgage

75(1) When a mortgage is fully paid the mortgagee shall furnish to the mortgagor, within 30 days after the mortgage being fully paid,

(a) a discharge of mortgage, and

(b) any other document, if any, required to enable the mortgage to be discharged,

that is in a form and contains the information satisfactory to the Registrar.

(2) No fee or expense shall be charged and no amount shall be accepted by a mortgagee for a discharge of mortgage and other document, if any, furnished under subsection (1).

(3) A mortgagee who

(a) fails to comply with subsection (1), or

(b) charges or attempts to charge any fee or expense or accepts any amount for furnishing a discharge of mortgage or other document under subsection (1),

is guilty of an offence and liable to a fine of not more than \$500.

Essentially, a mortgage lender is required to furnish the mortgagor with discharge documents within 30 days of the mortgage being paid out. No matter where their mortgage processing centre is based, any mortgage lender doing business in Alberta should be aware of this legislation. Unfortunately, for one reason or another, you will not always get your discharge within 30 days.

When you pay out the mortgage lender, you should send funds with a covering letter that states that the payout funds are sent in trust on the express condition that the mortgage lender provide a registrable discharge and attach a copy of the payout statement provided by the mortgage lender. You diarize your file for 30 days and, if you have not received the discharge, you send a written reminder and diarize your file for another 15-30 days.

Suggestions:

1. Always attach a copy of the covering letter sent with the payout funds and section 75 of the Law of Property Act in its entirety and reference them in the first reminder letter.
2. Please call/write/email other counsel and advise them that you have sent the reminder.

If you have still not received your discharge at the end of this second diary period, send a second written reminder and diarize for a further 15-30 days. My second reminder is a "Final Notice" that gives the mortgage lender 3 weeks from the date of the letter to provide the discharge, failing which I will apply under section 75 of the Law of Property Act for an order directing the Registrar of the Land Titles Office to discharge the mortgage with all costs incurred payable by the mortgage lender on a solicitor and client full indemnity basis (see sample letter at Appendix B).