

Commercial Land Mortgage Lending

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Land Mortgage Financing and Enforcement Fundamentals

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COMMERCIAL LAND MORTGAGE LENDING

It is my opinion that one cannot discuss commercial land mortgage lending without some reference to commercial lending in general.

Accordingly, I wish to briefly discuss how commercial land mortgages fit into the context of overall commercial lending by reference to Term Sheets and Loan Agreements and the issues contained in them and then a brief discussion on legal due diligence requirements in order to fulfill many of the terms and conditions contained in such Term Sheets and Loan Agreements.

I will then discuss many of the terms and conditions contained in a typical collateral land mortgage including the application of Section 104 of the Alberta *Land Titles Act*

I will then discuss the utilization of General Assignment of Rents and Leases as well as Non-Disturbance Agreements with sample copies attached.

Finally, I will then have a brief overview of debentures with reference to a typical Debenture.

LOAN AGREEMENTS

Any document whereby a borrower in return for funds agrees to repay those funds on certain terms and conditions is a form of loan agreement and can range from a simple demand promissory note to multi-lender, multi-borrower loan syndication.

However, there are some very key preliminary considerations that counsel, if involved, ought to keep in mind at all times at the beginning of a loan transaction or financial transaction:

1. What is the time frame?

Both borrowers and financial institutions often have extremely narrow time frames in which they contemplate a transaction or loan relationship concluding particularly where they first present the deal to outside counsel after what they consider to be an agreement as to all terms and conditions. Very rarely are matters of due diligence (other than environmental) or registration delays put into their formulations as to when the transaction ought to “fund”. Additionally, closing may have a tax driven reason to close by a certain date or there may be a regulatory approval that may expire or a “subject to” on financing for an acquisition that must be fulfilled or waived.

2. Legal Fees Expected?

Borrowers do not like paying financial institution's counsel's legal fees. This problem must be discussed forthwith as almost all financial institutions require that legal fees be paid from the borrower's accounts whether from advances in the transaction or by a direct debit. It is extremely common for lenders these days to "fee shop" in order to get what they perceive to be the best price for their customer and almost without exception financial institution counsel's legal fees are "excessive" in everyone's minds. The general rule of thumb is that the financial institution's regular counsel will often be the most economic counsel for two main reasons notwithstanding that their initial fee quote may be higher than someone else's: familiarity with the documentation and protocols of the lending institution; and the "break" that may be given to high volume clients by such lawyers.

3. Jurisdictions Involved?

Multi-jurisdictional matters cause multi-problems in timing. Some provinces are more notorious than others for the delays for confirmation of registrations as well as peculiarities in local laws that must be drawn to the attention of the lending institution and/or the borrower.

It is good practice to think about all these issues at the very outset of any transaction to immediately draw them to the attention of the financial institution and borrower and their respective counsel as the case may be. The number one rule is "do not make promises that cannot be kept".

AGREEMENTS

Generally speaking, the following is a rough outline of basics to most complex loan agreements:

- (a) Term Sheet
- (b) Commitment Letter/Offer of Finance/Letter of Offer
- (c) Loan/Credit Agreement

I would immediately advise that in many, many commercial loan situations an accepted commitment letter is often the actual and only loan agreement upon which the transaction is based, proceeds and is administered depending upon the financial institution or institutions involved. Formal Loan Agreements after an accepted commitment agreement depend upon the lender, or in some cases the number of lenders involved in a transaction. The Term Sheet is basically the "nuts and bolts" of the business issues between the lender and the borrower and usually surfaces in the negotiation process between a lender and a borrower. It will contain the types and amounts of credits, the terms