



ACCEPTABLE FORECLOSURE SALES PRICES

What sale efforts are enough?

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ISSUE

You are a lender whose borrower has breached the mortgage. You have through foreclosure proceedings obtained the right to conduct the sale of the security property. Are you obligated to take all possible steps, follow all leads and respond to all inquiries to ensure you obtain the best possible price? Do you risk having the court reduce the amount of debt owing to you under the mortgage if you do not obtain the best possible price?

The Supreme Court of Nova Scotia in *Canadian Imperial Bank of Commerce v Conrad*, 2019 NSSC 37 provides some guidance. Although provinces differ as to the method by which lenders get to realize their security, all provide for a stage where the lender can sell the property and for a court review of the lender's conduct of that sale. The principles in *Conrad* are helpful across the country to assess such sales conduct.

WHAT HAPPENED?

For 15 months the borrowers tried to sell the mortgage security property; they did not receive a single offer. During this time, they defaulted on the mortgage and the lender demanded full repayment. Not receiving payment, the lender began foreclosure proceedings.

Just over a week before the foreclosure proceedings were filed, the borrower's Realtor

learned of a potential buyer considering making an offer of \$295,000; the next day the Realtor advised the lender of the potential offer. Six days later the lender responded that it would potentially permit a sale for less than the amount owing under the mortgage. Eight days later, the potential buyer communicated through her Realtor that she wanted to make an offer for \$295,000; the next day, she communicated she was willing to offer \$310,000 but would need an answer by the end of the day. The borrowers' Realtor made several attempts to reach the lender. About a month later the lender advised it would approve the sale for \$310,000, if the borrowers would consent to judgment for the balance. It was too late; the potential buyer had moved on.

About eight months later, having obtained an appraisal of \$240,000, the lender purchased the property at public auction (as permitted in Nova Scotia) for \$221,000, there had been competing bids. About three months later, the lender sold the property for \$260,000, having countered that buyer's initial offer of \$255,000.

The sale left a balance owing under the mortgage and the lender sued the borrowers for the balance. The borrowers took issue with the claim because the lender had failed to promptly reply to the earlier sale inquiry that may have generated a greater sale price; completion of that sale would have left a smaller deficiency balance owing to the lender.

LEGAL REQUIREMENTS

At least in Nova Scotia, the obligation of the lender is to obtain a reasonable price, a commercially responsible price in the circumstances. This price may be lower than one that might have been obtained by a prudent owner.

Independent appraisals assist the Court in determining whether the sale price offered or obtained is reasonable, though appraisals are not determinative. It is the market, not appraisals, that best determines the fair market price of a property when it has been sold (or presumably, when there is a legitimate offer obtained after reasonable marketing in the circumstances).

OUTCOME

The lender in this case, as evidenced by the marketing and offers, obtained a commercially reasonable price for the property. As the lender had met the standard of conduct required, the lender was entitled to the complete amount owing under the mortgage less the amount realized from the sale.

TAKEAWAYS

A lender selling property in a foreclosure need obtain a commercially reasonable price, not necessarily the price that a prudent owner could obtain. **MB**