II. SECOND OR SUBSEQUENT MORTGAGES [§7.2]

If the borrower has already mortgaged the property, then the lender may only obtain mortgage security by taking a subsequent mortgage. There are certain risks to a lender under a second or subsequent mortgage, and certain matters flow from the nature of a subsequent mortgage (as opposed to a first mortgage).

A. RISKS [§7.3]

The risks are the liability of the second mortgagee to be ousted by tacking, the liability of foreclosure by a prior mortgagee, and problems arising from the doctrine of consolidation. When the first mortgage secures a running account or re-advanceable loan, there are additional concerns for the subsequent mortgagee. The subsequent mortgagee's lawyer should consider the matters raised in the Law Reform Commission of British Columbia's *Report on Mortgages of Land: The Priority of Further Advances* (LRC 85, January 1986) (available at www.bcli.org/publication/85-report-mortgages-land-priority-further-advances) under the heading "3. DIFFICULTIES WHERE THE SECOND MORTGAGE SECURES A RUNNING ACCOUNT". However, such risks can be mitigated if the subsequent mortgagee's lawyers avail themselves of certain best practices discussed in this section.

The mortgagee and mortgagor's lawyers, respectively, should ensure that they do not fall afoul of their professional obligations, including the *Code of Professional Conduct for British Columbia* Rule 3.4-10, Acting against former clients. A proper search of file records should be conducted to see if the mortgagee's lawyer has acted for the mortgagor previously or if the mortgagor's lawyer has acted for the mortgagee previously. If so, the lawyer must satisfy themselves that they are acting in accordance with Rule 3.4-10 and/or ensure that all conflicts are considered and the proper consents are obtained.

1. TACKING [§7.4]

Under certain circumstances, a prior lender may make further advances of money after the registration of a second mortgage and still have priority for repayment of that money. For example, the lender with a first mortgage for $10,000 providing for advances and re-advances may have advanced only $5,000. A second lender advances another $3,000 on the security of a second mortgage. If the second

lender has not given notice of the registration of the second mortgage, then the first lender might advance another $5,000 and still have the priority of the first mortgage for repayment of that money, in and above the priority of the mortgage securing the $3,000.

This is an example of "tacking". The rules respecting tacking are set out in s. 28(2) of the *Property Law Act*, R.S.B.C. 1996, c. 377:

> (2) Despite the *Land Title Act*, after October 30, 1979, further advances made by a registered owner of a mortgage contemplated by and in accordance with the mortgage rank in priority to mortgages and judgments registered after the mortgage that contemplates the further advances was registered if
>
> (a) the subsequent registered mortgagees or judgment holders agree in writing to the priority of the further advances,
>
> (b) at the time the further advances are made, the registered owner of the mortgage has not received notice in writing of the registration of the subsequent mortgage or judgment, from its owner or holder,
>
> (c) at the time the further advances are made, the subsequent mortgage or judgment has not been registered, or
>
> (d) the mortgage requires the registered owner of the mortgage to make the further advances.

It follows that in order to assert a priority over further advances made by the first mortgagee after the second mortgagee has registered and advanced their funds, the subsequent mortgagee should:

(1) give express and direct notice in writing to the prior mortgagee of the registration of the subsequent mortgage;

(2) check the state of account and confirm the balances owed thereunder between the prior mortgagee and the borrower at the time of the registration of the subsequent mortgage; and

(3) confirm whether the prior mortgage has been fully advanced or whether further advances are required to be made under the first mortgage.

To protect further advances, a mortgagee must fall within the s. 28(2) categories or obtain a priority agreement. A prior mortgagee should be aware that ticking the "current or running account" box in the mortgage does not, in and of itself, give priority to advances made

after registration of a subsequent mortgage. Accordingly, both the first mortgagee and the subsequent mortgagee must always be aware of providing or receiving s. 28 notices in such transactions. The prudent solicitor doesn't want to put their client in an unwanted priority dispute, and would be well advised to canvass s. 28 issues with their clients.

In British Columbia, pursuant to s. 28(2)(b) of the *Property Law Act*, a subsequent mortgage holder who wishes to assert a priority over further advances made by the first mortgagee must give the prior mortgagee actual express written notice of registration. In *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2020 BCCA 70, leave to appeal refused 2020 CanLII 71311 (SCC), the court found that the Legislature chose to address priority issues associated with tacking by imposing an obligation on the subsequent mortgage holder to provide actual express written notice of registration. The court held (at para. 40) that "it is a simple step … intended to clearly import to the earlier mortgagee that a line has been drawn, and that future advances under the prior mortgage will no longer rank in priority". In addition, the obligation of "direct and express notice alerts the prior mortgagee so that it can, if it wishes, take steps to protect itself—steps that may include the cessation of further advances or the insistence on a priority agreement before further advances are made". As the Supreme Court of Canada refused leave to appeal, written notice should be provided to ensure the prior mortgagee cannot tack additional amounts that would enjoy the same priority.

See also *Paradigm Quest Inc. v. Chung*, 2012 BCSC 1646 (Master), where the court held that the notice contemplated under s. 28(2)(b) of the *Property Law Act* must be provided by the subsequent chargeholder to the previous chargeholder and may not be effective if provided by the subsequent chargeholder's solicitor. *Obiter* in *Forjay* supports, in clear language, the opposite view; see para. 36 of 2020 BCCA 70. The take-away, from *Forjay* at least, is that the requisite s. 28 notice could be provided by the subsequent mortgagee's solicitor to the prior mortgagee.

Also, the *Forjay* case makes it clear that actual notice is required and not mere knowledge by the first mortgagee of the subsequent advance; see paras. 37 to 40.