

*This publication contains information of a general nature intended to assist the public at large. It is not legal advice about your situation. You should consult a lawyer for advice on your particular situation. This publication is not a substitute for you or your lawyer's on research, analysis and judgment.*

## Mortgages: Frequently Asked Questions

- 1. I agree that I owe the money and that I have defaulted on my payments, but I need more time to bring my mortgage payments up to date. Is this possible?**

*Your ability to obtain more time to pay will depend on a number of factors. First, if the default is recent and your track record is good, the company or bank holding your mortgage (called the mortgagee) may be willing to negotiate an extension in time for payment or new terms of payment. You will not know whether the mortgagee is willing to do that unless you ask. The willingness of the mortgagee to consider that will depend on whether it is better off financially trying to work something out with you or enforcing the mortgage. While a house may be your family home and pose emotional issues for you, for the mortgage company the main issues will be is your fresh promise to pay on new terms reasonable and will the mortgagee be better off by going that route rather than taking or selling your home.*

*Even if the mortgagee has already started legal proceedings against you, you can try to negotiate some agreement to hold off while you try to pay but again whether the mortgagee agrees to stop or put proceedings on hold depends on whether a business or cost/benefit case can be made for the mortgagee to do so.*

- 2. What do they mean when they say that the bank or company holding my mortgage can "enforce it in one or more ways"? Walk me through what they can do to enforce my mortgage.**

*A mortgage is a legal contract which contains your promise to pay the mortgage loan amount and to pay any accrued interest on that amount. The mortgage document will record the amount of the debt you promised to pay and will state the rate of interest which you are required to pay. The mortgage may also include promises by you to pay the legal and other costs which the mortgage lender spends trying to collect payment of the debt. These expenses can be high and your responsibility to pay these costs, as well as the usual rule in court proceedings that the loser of the court case pays the winning side's costs is a reason for you not to fight a mortgage proceeding*

*unless you have a valid defense and a good chance of success. Another important term of a mortgage is the right which the mortgagee has to take ownership of your property or the right to take the mortgaged property and sell it to another party in order to recover full or partial payment of the mortgage debt.*

*When a mortgage lender seeks repayment by taking title to the property itself, this is called "foreclosure." When the mortgage lender just seeks an order to sell the property to another party, it is called a "sale" remedy. Foreclosure is much less common. The sale remedy can be a private sale by the lender after serving what is called a Notice of Sale on the borrower and other parties with a legal claim to or interest in the mortgaged property (an example of such a party would be a lender under a second mortgage) or a court ordered sale which is done after the mortgage lender goes to the court and gets an order to sell the mortgaged property. To make taking title to the property or the sale of the mortgaged property easier, the mortgage will also give the mortgagee the right to get an order telling certain parties who occupy the property to leave the property so that the mortgagee has possession of the property free of any interference from others, including the mortgage borrowers or their family. This right to make sure the property is vacant or only has people on it that the mortgagee wants to have on it (or is required to have on it) is called the right to seek an order for possession.*

*There are special rules which would apply where there are tenants on the mortgaged property. If the tenants are commercial tenants (a business) their right to remain on the property will depend on the terms of their lease and on whether the lease arrangements were with the consent of the mortgagee or in place when the mortgage was put in place. If the tenants are residential tenants, living on the property, they can only be removed if the removal is permitted under the Residential Tenancies Act or under Part V of the Mortgages Act.*

*The right of the mortgagee to look to the mortgaged property as a source of repayment is the most distinctive feature of a mortgage. An ordinary loan agreement involves a party promising to repay the loan amount and if there is no repayment the lender can sue for the debt. Under a mortgage, the lender can sue for the debt and seek to recover payment of the debt by selling the mortgaged property which was promised as security for the debt.*

- 3. The mortgage company has served me with a Statement of Claim. It asks me to pay \$400,000.00 as well as asking for an order for possession of my home so that they can sell it to pay the mortgage debt. If the mortgagee wins the case, does it take my home as well as getting an order whereby I still owe \$400,000.00 to the bank?**

*A mortgage is a promise to repay borrowed money as well as a promise that if you do not pay that debt when it is owed, the mortgage company can take your house and sell it and use the proceeds to pay the mortgage debt. If the debt with all interest and valid costs and charges is \$400,000 and the mortgage company were to sell your house for \$400,000, including the costs of selling it, that would pay off the mortgage debt and no further amount would be owed. If the mortgage company sold it for \$500,000 the \$100,000 extra would come back to you (provided that there are no other*

creditors who have a claim against the mortgaged property). If the property sold for \$300,000 inclusive of sale costs, you would owe \$100,000.

Remember that mortgage interest continues to build up on the debt until you pay it. Remember too that the costs of the sale and the costs of any court proceedings taken by the mortgage company to get the sale are added to your mortgage debt. The mortgage company may still want to have a judgment saying you owe the \$400,000 plus interest but they cannot enforce that judgment for the full \$400,000 plus interest if they also sold the house and got proceeds which reduced the mortgage debt to zero. They cannot get double recovery but they can seek judgment for the debt while they try to sell your house.

#### **4. Is there a way to avoid my Credit Rating being affected? Or is it too late?**

Your credit is your credit. You cannot rewrite history and have credit or other agencies pretend that you paid a debt when you did not or that you never defaulted when you did. That said, it is important that your credit information be up to date and accurate if you have repaid the debt and you are no longer a debtor under the mortgage. It is not uncommon for debtors entering into settlement agreements with banks or companies who sued them to have that company or bank agree to notify the credit agency that you have resolved the claim or paid it. Which credit agency is involved or was reported to by the bank or company depends on the facts of your case.

#### **5. I want to defend the claim, because I feel I have a valid defence, what are some ways to defend a mortgage default claim?**

If a mortgage company commences a court action to enforce its mortgage claim against you, you will be served with a statement of claim and you will have the right to respond to the statement of claim in a document called a statement of defence. Valid defences include: I did not agree to the mortgage on the terms the claim states and, if corrected, I would not owe what they say I owe or I did not default and paid what I owed. These are basic defences and must have evidence to back them up if you want the Court to agree with your version of events. Also, some of these defences may only reduce the amount you owe. So long as there is any amount owed, judgment and other enforcement remedies are available to the bank or mortgage company to enforce against you.

Remember to check that the amount being claimed from you is accurate and that the costs of enforcing the mortgage being claimed are not excessive or unreasonable. Also, a breach of your promise to pay your regular mortgage payments may trigger an obligation to pay the whole of the mortgage loan. If that is the case and a court action to enforce the mortgage has been started, you may be able to cure that breach and stop that trigger (called acceleration) by payment of the arrears in payments. The borrower also has the right to ask the lender for a statement of the mortgage debt required to put the mortgage back into good standing. Until that statement is provided, the lender is not to take further enforcement action.

**6. I want to defend the claim by telling the Plaintiff that I've lost my job. I want the Judge to see that I've been paying my mortgage up until now. Will the Judge help me?**

*The judge has to be impartial between the two parties so he or she cannot "help" you. It is up to you and/or your lawyer to put forward any defence you have to the claim. Losing your job is not a defence to the promise of payment you made when you signed the mortgage although it is a factor which, as with your prior good track record, you might point out so that the Court and the mortgage company know that you are honest and would pay if you could. If you think your prospects of getting another job are good, you might try negotiating a new payment plan with the mortgage company. The mortgage company might be better off trying to work with you than trying to sell your house. They will decide based on the evidence of a particular situation and the value of the house.*

**7. I have a buyer for my property, but there is a judgment and a writ of possession granted to my mortgage company about my home, can I still sell the property?**

*If there is a judgment giving title to your property to the mortgage company (a "final order for foreclosure"), you no longer own the property and, therefore, cannot sell it to your buyer. Another judgment obtained by the mortgagee might be a judgment that the mortgage company is entitled to sell the property, called an "order for judicial sale." If this is the judgment obtained, you would be trying to sell property that the court has already said that the mortgage company - not you - is entitled to sell.*

*If the mortgage company has obtained an "order for possession", then the mortgage company can get a document called a writ of possession which it can then serve on you or anyone else not entitled to be on the property ordering those persons to leave the property. The order for possession and the writ of possession tells you and anyone who might want to buy from you that it is the mortgage company who is entitled to possess or occupy the property not you. A buyer will not buy unless it is sure to get vacant possession and if there is an order for possession (and writ of possession) it is the mortgage company who can say who can go on the property not you or any person you try to sell to.*

*The rules of procedure for mortgage actions are very detailed and until a final order or judgment is granted by a court, various steps may be taken by a mortgage debtor. See the handout called "Overview of Mortgage Enforcement."*

*However, as a practical matter, if at any stage you have found a buyer with a good price and the mortgage company has not sold the property yet, you may want to let the mortgage company know about your buyer (provided that the buyer consents to that disclosure). If your buyer is willing to pay a better price than any buyer the mortgage company may be considering, you might be able to persuade the mortgage company to look into the other buyer so that the sale proceeds to be deducted from your debt are increased. If the mortgage company ignores or does not pursue reasonable buyer offers, you may be able to argue that the higher prices available from the ignored other offers should be the amount deducted from your mortgage debt not the lower price the*

*mortgage company got from its buyer. Other uses may also be made of this alternate buyer information depending on the detailed procedures and steps described in that handout.*

*Note too that a mortgage debtor does have the right to redeem the property (stop the sale process and get the property back) by payment of the amount of the debt plus interest and costs to the redemption date but this right to redeem the property must be exercised within certain time limits as described in that handout.*

**8. The legal fees that have been added to what I owe the bank seem to be excessive. What can I do to challenge these fees?**

*The usual terms of a mortgage provide that in addition to payment of the mortgage loan amount plus interest, the mortgage debtor must pay all legal costs and disbursements incurred by the mortgage company in enforcing the mortgage because of a default in payment. Sometimes those fees are regarded as too high by the mortgage debtor even if those fees seem fine to the mortgage company. A debtor can complain about the amount even if the mortgage company does not have a problem with them under the Solicitors Act of Ontario.*

*Under that Act, any party who has paid or is liable to pay another party for payment of legal fees incurred by that other party may, assuming that certain time limits are met, have the solicitor's bill for fees or disbursements reviewed for reasonableness and fairness by Court officers called Assessment Officers. In addition to meeting the deadlines for seeking such review, a debtor wanting to reduce such a bill by Assessment must provide or point to evidence to support any argument that the fees and costs are too high or are unreasonable.*

*This assessment process is also only available to you if you are trying to assess fees which have not already been determined by a court to be the fees payable by you. For example, if you defend a mortgage action and lose and the court orders certain fee to be paid by you, the Court has already decided those fees are the proper amount. The assessment procedure is to determine fee amounts not determined by the Court.*

*Examples of reasonable grounds for complaint are: the time charged is excessive for the work involved, the rate is too high for the work involved or that there are errors or duplicate charges in the account.*

*Be aware, however, that there is no such thing as a free ride. If you allege that the fees are too high but the Assessment Officer does not agree with you, you can end up paying the lawyer's costs of responding to the assessment in addition to the legal fees and costs that went to the Assessment Officer.*

**9. I have two mortgages not just one. I defaulted on my second mortgage, and now the second mortgage company wants to take possession of my property, can they do this even if my first mortgage is up-to-date?**

*The short answer is “yes”. The longer answer is that keeping one mortgage up to date but letting the other go into default does not mean that the other mortgage company cannot act to enforce its mortgage. If in your case, the second mortgage company moved to enforce its mortgage by selling the house, the holder of the first mortgage would have first claim to the sale proceeds and only if there was money from the sale after the first mortgage company had been paid off could the second mortgage company apply the proceeds to its debt.*

*Be aware however that most mortgages will provide that a default under another mortgage or the registration of a claim against title to the mortgaged property by another creditor (a lien for condominium fees for example) will also constitute a default under the mortgage.*

**10. What consequences may I face by filing a Defence?**

*The general rule is that if a party takes a position in a lawsuit and fails to prove it, the Court can order that losing party to pay the winning party’s reasonable legal costs and disbursements. If you defend the mortgage action but do not win your case, the Court could order you to pay the costs incurred by the mortgage company in hiring lawyers to deal with your defence. Another “consequence” is that time is money in any mortgage claim. The debt will continue to accrue interest and interest on interest until paid so putting forward a defence just to delay matters may result in more interest charges being incurred and your debt being bigger than it started out.*

**11. I’ve filed my Defence to defend the mortgage default, what may happen now or what should I do next?**

*See the steps in a court action to enforce a mortgage in the handout called “Overview of Mortgage Enforcement.”*

**12. I can afford my mortgage payments, but I can’t afford my credit card and car payments. Should I keep paying my mortgage payments, default on my other payments?**

*Where you owe different debts on different terms and most importantly have agreed to different interest rates on those debts, you need to think about the financial and not just legal issues. Many debt counsellors will tell you to pay the debt which charges the higher rate of interest but you have to assess what all of your options are. You have to consider what the value of the house and car are relative to what you owe. You might also want to get advice about consolidating your debts to see if*

*you can reduce the interest on your overall debt. These financial or cost/benefit issues have to be considered by you in deciding what debt to pay first and what to do. Credit counselling from a professional credit counsellor or advisor may be required.*

**13. I am up to date with my mortgage payments, but can't afford my common expenses; what may happen?**

*If you live in a condominium in Ontario, the Condominium Act states that the condominium corporation, the company which runs your condominium, can register a common expense lien claim on title to your condo unit. The lien can include not just the common expenses claimed but not paid but also interest charges on those expenses and legal costs of collecting those expenses. The Act says that provided that the lien is for a proper amount, is registered on time and that the appropriate notice to the unit owner has been given, the lien can be enforced just as a mortgage is enforced. In other words, if you do not pay your common expenses, the condominium corporation can sue you for the debt and could sell your unit to collect payment of the arrears from the sale proceeds.*

*The "lien" claim is like a mortgage that is created by the Act rather than, as is the case of a mortgage, by agreement between the parties. As noted above, the registration of such a condo lien may constitute a breach of your mortgage.*

*If excessive or unreasonable legal fees or disbursements are claimed by the condominium corporation and included in the lien claim for common expenses, those fees and disbursements may be subject to review in any action brought to enforce the lien or on an assessment just as certain fees and disbursements charged by mortgage holders may be subject to review. See Question 8 above.*

**14. I have tenants, what may happen to them if the bank takes the house?**

*Whether the mortgage lender can get an order telling your tenants to leave the property depends on a number of factors. If the tenants are commercial tenants and the lender agreed to the tenants going into the property in the first place, then the tenants will likely be entitled to stay in place at least until the lease the mortgage company agreed to expires. If the mortgage company was not aware of and did not agree to the commercial tenancy arrangement and it was not in place when the mortgage was entered into, the mortgage company can get an order getting the tenants out of the property and those tenants may complain to you as their landlord about that and seek damages for your failure to honour the lease agreement. Detailed rules apply depending on the facts of your case. If the tenants are living on the property and are therefore residential tenants, they are protected under the Residential Tenancies Act and may only be removed in accordance with the requirements of that Act and Part V of the Mortgages Act.*

**15. Will I know if the bank is issuing a Writ of Possession? Will I just be told from the Sherriff's office that I have to move by a certain date?**

*A "writ of possession" is the court document which a party who obtains an order for possession is supposed to serve on the people it wants to get possession back from. Unless there is some unusual urgency, the order giving the party the right to get the writ is obtained in an action or application where you as the defendant or respondent would be served with notice of the action (statement of claim) or application (notice of application). If the mortgage company knows how to reach you and there is no urgency, there would be no reason for you not to get notice.*

Pro Bono Law Ontario's funding is provided by the Law Foundation of Ontario.

PBLO gratefully acknowledges Anne McNeely's contributions to this guidebook.

PRO BONO LAW  
ONTARIO



The Law Foundation of Ontario  
*Building a better foundation for justice in Ontario*