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DEBT LITIGATION

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Debt Litigation is a comprehensive work dealing with default and summary judgments relating to debtor-creditor law and practice. It includes annotations and commentary on topics such as the fiduciary duties of solicitors, including negligence and conflict of interest, spoliation of evidence and e-discovery and conventional mortgages and guarantees.

What's New in this Update

The author has updated the commentary and case law regarding mortgages, guarantees, default judgment procedure and evidence. Notable cases are summarized overleaf.

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Highlights

- Neither a mortgagor nor a guarantor may move to set aside a notice of sale on default on the basis that through inadvertence the mortgagor only missed one payment and the consequences of power of sale were too severe: *Mikhail v. Hill* (2018), 291 A.C.W.S. (3d) 176 (Ont. C.A.) [*Mortgages* 2:30].
- A misleading discharge statement does not comply with the statutory requirement and the mortgagee's right to seek power of sale remains suspended on account of the original demand: *1173928 Ontario Inc. v. 1463096 Ontario Inc.* (2018), 295 A.C.W.S. (3d) 180 (Ont. C.A.) [*Mortgages* 2:80].
- The mortgagee need not supply a discharge statement conforming to the mortgagor's alleged oral variation of the mortgage loan: *Solar Income Fund Inc. v. Jackson* (2018), 290 A.C.W.S. (3d) 276 (Ont. S.C.J.) and *Barrie Leasing Services Inc. v. Wainman* (2018), 290 A.C.W.S. (3d) 293 (Ont. S.C.J.) [*Mortgages* 2:80].
- An assignment at approximately 5% of the mortgage's value may incite suspicion but it does not deprive the mortgage of its rightful priority: *Canada (National Revenue) v Edgar*, 2018 D.T.C. 5033 (Alta. Q.B.) [*Mortgages* 2:140].
- A mortgagee does not have an insurable interest in the equity of redemption, which is the property of the mortgagors: *Hanson v. Totten Insurance Group Inc.* (2018), 293 A.C.W.S. (3d) 147 (Ont. C.A.) [*Mortgages* 2:180.10].
- Absent specific contractual provisions, a party paying off another's mortgage debt is not thereby entitled to a transfer of title to the real property which is security for the redeemed mortgage: *Dagenais v Farm Credit Canada* (2018), 293 A.C.W.S. (3d) 159 (Sask. C.A.) [*Mortgages* 2:200.60].
- As the creditor enjoys a discretion in the crediting of various accounts in the absence of a clear direction from the debtor, the creditor may so re-arrange and reallocate the various attributions of payments in the context of multiple debts so as to toll any limitation period which threatens the coverage of the guarantee; this does not offend the principle of honest performance, even if it is not in strict accordance with standard accounting principles: *Continental Steel Ltd. v. CTL Steel Ltd.* (2018), 420 D.L.R. (4th) 621 (B.C. C.A.) [*Guarantees* 3:140].

- Where the default judgment arises because of the failure of a solicitor to act and the solicitor has knowingly misled the defendant in this respect, the default judgment will be set aside: *8697469 Canada Inc. cob as Rev Install 360 v. Kimberly Medica cob as BBK Enterprises* (2018), 292 A.C.W.S. (3d) 632 (Ont. S.C.J.) [*Procedure* 4:10.20].

