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FALCONBRIDGE ON MORTGAGES, FIFTH EDITION

**by Walter M. Traub
Release No. 1, May 2022**

This work, initially formed from Dean Falconbridge's lectures at Osgoode Hall, quickly became the authoritative text on mortgages in Canada. Now in its fifth edition, under the editorial leadership of distinguished practitioner Walter M. Traub, *Falconbridge on Mortgages* is the standard reference source for those who teach and those who practise in the field, and has often been cited by the judiciary.

What's New in this Update:

This release features updates to the commentary and case law in Chapters 3 (Mortgage in Equity), 7 (Priorities in Equity), 19 (Discharge of Charge), 29 (Action for Redemption), 31 (Accounting in a Mortgage Action), 33 (Regulation of Mortgage), 35 (Sale under Power of Sale), 38 (Insurance), and 39 (Condominiums).

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Highlights

- **Mortgage at Common Law and in Equity: Priorities—Priorities in Equity—Good Faith**—A plaintiff successfully sued for some of the losses it had incurred on four second mortgages it had purchased from a broker. The mortgages were managed by an administrator, who misrepresented that one of the second mortgages was foreclosed (whereas in reality it was the first mortgage that had been subject to foreclosure). The administrator did nothing to correct the plaintiff’s misapprehension when the truth about the foreclosure came to light and made additional misrepresentations. In awarding the plaintiff damages for its losses, the court pointed out that the administrator had breached its contractual duty of care toward the plaintiff by not correcting the misleading statement. This was tantamount to an active misrepresentation, one that deprived the plaintiff of the right to make its own decisions around whether to take action to protect its investment. Citing the Supreme Court of Canada in *Bhasin v. Hrynew*, the court noted that the duty of faith in contractual performance does not depend on the “good faith” clause described in the mortgage-related documentation. Nor is it an implied term of the contract; rather it arises out of a general organizing principle of good faith that operates irrespective of the intentions of the parties. It exists in every contract, whether or not an express term to that effect is included in the contract. Similarly, as later confirmed by the Supreme Court of Canada in *C.M. Callow Inc. v. Zollinger*, there is also a duty of that applies to all contracts as a matter of contractual doctrine and means “simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.” *Canlanka Ventures Ltd. v. Capital Direct Lending Corp.*, 2021 CarswellAlta 747, 2021 ABCA 115.
- **Sale under Power of Sale: Conduct of the Sale—Responsibility of Mortgagee**— A mortgagee’s failure to provide a discharge statement, without a reasonable excuse, may suspend and even invalidate the mortgagee’s exercise of a power of sale, as was the outcome in this case. The facts involved a mortgagor who defaulted under a mortgage. The mortgagee made a demand, then provided the requisite notice of sale. After the expiry of the 35-day redemption period, the mortgagee entered into an agreement of purchase and sale with a third party, to sell the property. The mortgagor, however, entered into its own agreement of purchase and sale with another party, also to sell. In other words, the mortgagee and mortgagor had competing agreements to sell. The mortgagor requested a discharge statement from the mortgagee, setting out the amount owing. The mortgagee refused, on the basis that the mortgagor’s equity of redemption had already been foreclosed and based on its suspicion that the mortgagor’s sale to the third party was specious. The mortgagee then proceeded to close on its own agreement to sell to a *bona fide* purchaser. The mortgagor successfully brought a motion to set aside the sale, pointing to the mortgagee’s failure to deliver a mortgage discharge statement. The court noted that a mortgagor has the right to redeem the mortgage right up to the point at which the mortgagee sells the property. However, once that sale occurs, the mortgagor’s right to redeem is extinguished. The court then considered the provisions of s. 22(2) and (3) of the *Mortgages Act* which obliges the

mortgagee, upon the request of the mortgagor, to provide a written statement that furnishes the amount of the principal or interest in respect to which the mortgagor is in default. The mortgagee must provide the discharge statement within 15 days; if the mortgagee fails to do so without reasonable excuse, the mortgagee's rights to enforce the mortgage are subject to suspension. Based on the wording of s. 22, the term "reasonable excuse" must be interpreted broadly and involves an objective test for reasonableness. In this case, the mortgagee failed to establish that it had a reasonable excuse – in fact, it had no valid legal excuse whatsoever. The court ordered that the mortgagee's rights to enforce the terms of the mortgage were suspended: *2544176 Ontario Inc. v. 2394762 Ontario Inc.*, 2021 CarswellOnt 5836, 2021 ONSC 3067.

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