

## **PARTICULAR PROCEEDINGS**

### **RULE 64**

#### **MORTGAGE ACTIONS**

##### **DEFINITION**

**64.01** In Rules 64.03 to 64.06, "subsequent encumbrancer" means a person who has a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question in the action.

##### **Default Judgment with Reference**

**64.02** Where a default judgment in a mortgage action directs a reference, the reference shall be directed to the Prothonotary.

##### **FORECLOSURE ACTIONS**

##### **Persons to be Joined**

- 64.03** (1) In an action for foreclosure, all persons interested in the equity of redemption shall be named as defendants in the statement of claim, subject to subrule (2).
- (2) The plaintiff may commence a foreclosure action without naming subsequent encumbrancers as defendants where it appears expedient to do so by reason of their number or otherwise, but the plaintiff may make a motion without notice on a reference after judgment to add as defendants all subsequent encumbrancers who were not originally made parties.
- (3) On a reference, where the referee considers that subsequent encumbrancers should have been named as defendants in the statement of claim, the referee may refuse to allow the additional costs of adding them on the reference.

##### **Statement of Claim**

- (4) The statement of claim in a foreclosure action shall be in Form 14B.

##### **Claims that May be Joined**

- (5) In a foreclosure action a mortgagee may also claim,
- (a) payment of the mortgage debt by any party personally liable for it; and
  - (b) possession of the mortgaged property.

### **Request to Redeem**

- (6) A defendant in a foreclosure action who wishes to redeem the mortgaged property shall serve on the plaintiff and file with proof of service a request to redeem (Form 64A) within the time prescribed by Rule 18.01 for delivery of a statement of defence, or at any time before being noted in default, whether he or she delivers a statement of defence or not.
- (7) A request to redeem filed by a defendant who is a subsequent encumbrancer shall contain particulars, verified by affidavit, of his or her claim and the amount owing.

### **Effect of Filing Request to Redeem**

- (8) A defendant who has filed a request to redeem is entitled to,
  - (a) seven days notice of the taking of the account of the amount to the plaintiff; and
  - (b) sixty days after the taking of the account of the amount due to the plaintiff, to redeem the mortgaged property,but if the defendant is a subsequent encumbrancer, he or she is entitled to redeem only if his or her claim is proved or is not disputed.

### **Default Judgment where no Request to Redeem**

- (9) Where a defendant in a foreclosure action has been noted in default and has not filed a request to redeem, the plaintiff,
  - (a) if he or she wishes a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for foreclosure with a reference (Form 64B); or
  - (b) if he or she does not wish a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for immediate foreclosure (Form 64C).

### **Default Judgment where Request to Redeem Filed**

- (10) Where a defendant in a foreclosure action has been noted in default but has filed a request to redeem, the plaintiff,
  - (a) if he or she wishes a reference concerning subsequent encumbrancers, may require the registrar to sign judgment for foreclosure with a reference (Form 64B); or
  - (b) if he or she does not wish a reference concerning subsequent encumbrancers, may require the registrar,

- (i) to take an account of the amount due to the plaintiff,
  - (ii) where more than one party is entitled to redeem, to determine the priority in which each is so entitled, and
  - (iii) to sign judgment for foreclosure (Form 64D).
- (11) Where, on the taking of the account or in determining priorities, any dispute arises between the parties, or the registrar is in doubt, the registrar may sign judgment for foreclosure with reference (Form 64B).

**Redemption by Named Defendant**

- (12) In a foreclosure action, a defendant named in the statement of claim,
  - (a) who has filed a request to redeem; and
  - (b) whose claim is proved on a reference or is not disputed, if he or she is a subsequent encumbrancer,may redeem the mortgaged property on paying, within the time fixed by the judgment or report on a reference, the amount, including costs, found due to the plaintiff.

**Redemption by Encumbrancer Added on Reference**

- (13) A subsequent encumbrancer added on a reference who attends on the reference and whose claim is proved or is not disputed is entitled to redeem the mortgaged property within the time fixed by the report on the reference.

**Foreclosure of Subsequent Encumbrancer**

- (14) Where a subsequent encumbrancer has been served with a notice of reference under subrule 64.06(4), (7) or (8) and fails to attend and prove a claim on the reference, the referee shall so report and, on confirmation of the report, the claim of that party is foreclosed and the plaintiff may obtain a final order of foreclosure (Form 64E) against that party on motion to the court without notice.

**Final Order of Foreclosure**

- (15) Where no defendant other than a subsequent encumbrancer has filed a request to redeem, and where no subsequent encumbrancer has attended and proved a claim on the reference, the referee shall so report and, on confirmation of the report, a

final order of foreclosure may be obtained against all defendants on motion to the court without notice.

- (16) On default of payment according to the judgment or report on a reference in a foreclosure action, a final order of foreclosure may be obtained against the party in default on motion to the court without notice.

#### **Conversion from Foreclosure to Sale**

- (17) A defendant in a foreclosure action who is not a subsequent encumbrancer, and who wishes a sale but does not wish to defend the action, shall serve on the plaintiff and file with proof of service a request for sale (Form 64F) within the time prescribed by Rule 18.01 for delivery of a statement of defence, or at any time before being noted in default, and the plaintiff may require the registrar to sign judgment for sale (Form 64G or 64H).

- (18) A subsequent encumbrancer named as a defendant in the statement of claim in a foreclosure action who wishes a sale, but does not wish to defend the action or redeem the mortgaged property, shall within the time prescribed by Rule 18.01 for delivery of a statement of defence, or at any time before being noted in default,

- (a) pay into court the sum of \$250 as security for the costs of the plaintiff and of any other party having carriage of the sale; and
- (b) serve on the plaintiff and file with proof of service a request for sale (Form 64F), together with particulars, verified by affidavit, of his or her claim and the amount owing,

and the plaintiff may require the registrar to sign judgment for sale (form 64I) conditional on proof of the subsequent encumbrancer's claim.

- (19) A subsequent encumbrancer added on a reference in a foreclosure action who wishes a sale shall within ten days after service on him or her of notice of the reference, or where the encumbrancer is served outside Prince Edward Island within such further time as the referee directs,

- (a) pay into court the sum of \$250 as security for the costs of the plaintiff and of any other party having carriage of the sale; and

- (b) serve on the plaintiff, and file with proof of service, a request for sale (Form 64F), together with particulars, verified by affidavit, of his or her claim and the amount owing,

and where the subsequent encumbrancer attends and proves a claim on the reference, the referee shall make an order amending the judgment from a judgment for foreclosure to a judgment for sale.

- (20) On the reference, the referee may require the subsequent encumbrancer to pay an additional sum of money into court as security for costs.
- (21) The referee shall deal with the security given under subrule (18), (19) or (20) in the report on the reference.

**Power of Referee to Convert from Foreclosure to Sale**

- (22) The referee may on the motion of any party, either before or after judgment, direct a sale instead of foreclosure and may direct an immediate sale without previously determining the priorities of encumbrancers or giving the usual or any time to redeem.

**Power of Referee to Reconvert to Foreclosure**

- (23) Where a foreclosure action has been converted into a sale action, the referee may, on the motion of any party, either before or after judgment, direct foreclosure instead of a sale where it appears that the value of the property is unlikely to be sufficient to satisfy the claim of the plaintiff.

**Where Judgment for Sale Obtained in Foreclosure Action**

- (24) Where a judgment for sale has been obtained in a foreclosure action, a subsequent encumbrancer is entitled to notice of the hearing for directions on the reference for sale, whether he or she has filed a request to redeem the mortgaged property or not.
- (25) Where the plaintiff wishes to transfer carriage of the sale to the defendant requesting the sale, he or she may do so by serving on the defendant a notice of election to transfer carriage of the sale and filing it with proof of service, and the defendant then has carriage of the sale and is entitled to the return of his or her deposit paid into court under subrule (18), (19) or (20).

**Procedure on Reference where Foreclosure Action Converted to Sale**

- (26) Where a foreclosure action is converted to a sale action under subrule (17), (18), (19), or (22), the reference shall proceed in the same manner as in a sale action.

## **SALE ACTIONS**

### **Persons to be Joined**

- 64.04** (1) In an action for sale of a mortgaged property, all persons interested in the equity of redemption, other than subsequent encumbrancers, shall be named as defendants in the statement of claim.
- (2) In a sale action, subsequent encumbrancers shall be added as parties on a reference after judgment.

### **Statement of Claim**

- (3) The statement of claim in a sale action shall be in Form 14B.

### **Claims that may be Joined**

- (4) In a sale action, a mortgagee may also claim,
- (a) payment of the mortgage debt by any party personally liable for it; and
  - (b) possession of the mortgaged property.

### **Request to Redeem**

- (5) A defendant in a sale action who wishes to redeem the mortgaged property shall serve on the plaintiff and file with proof of service a request to redeem (Form 64A) within the time prescribed by Rule 18.01 for delivery of a statement of defence, or at any time before being noted in default, whether the defendant delivers a statement of defence or not.
- (6) In a sale action, a subsequent encumbrancer is not entitled to file a request to redeem, and where a foreclosure action is converted to a sale action, a subsequent encumbrancer is not entitled to redeem even though he or she has filed a request to redeem.

### **Effect of Filing Request to Redeem**

- (7) A defendant who has filed a request to redeem is entitled to,
- (a) seven days notice of the taking of the account of the amount due to the plaintiff; and
  - (b) sixty days after the taking of the account of the amount due to the plaintiff, to redeem the mortgaged property.

### **Default Judgment**

- (8) Where a defendant in a sale action has been noted in default and,
  - (a) has not filed a request to redeem, the plaintiff may require the registrar to sign judgment for immediate sale with a reference (Form 64J); or
  - (b) has filed a request to redeem, the plaintiff may require the registrar to sign judgment for sale with a reference (Form 64K).

### **Redemption by Named Defendant**

- (9) In a sale action a defendant named in the statement of claim who has filed a request to redeem may redeem the mortgaged property on paying, within the time fixed by the report on the reference, the amount, including costs, found due to the plaintiff.

### **Final Order for Sale**

- (10) Where no defendant has filed a request to redeem and where no subsequent encumbrancer has attended and proved a claim on the reference, the referee shall so report and, on confirmation of the report, a final order for sale (Form 64L) may be obtained on motion to the court without notice.
- (11) On default of payment according to the judgment or a report on a reference in a sale action, a final order for sale may be obtained on motion to the court without notice.

### **Purchase Money**

- (12) Where an order for sale has been obtained, the property shall be sold under the referee's direction, and the purchaser shall pay the purchase money into court unless the referee directs otherwise.
- (13) The purchase money shall be applied in payment of what has been found due to the plaintiff and the other encumbrancers, if any, according to their priorities, together with subsequent interest and subsequent costs.

### **Order for Payment of Deficiency on Sale**

- (14) Where the purchase money is not sufficient to pay what has been found due to the plaintiff, the plaintiff is entitled, on motion to the court without notice, to an order for payment of the deficiency by any defendant liable for the mortgage debt.

## **REDEMPTION ACTIONS**

### **Persons to be Joined**

- 64.05** (1) In an action for redemption of a mortgaged property, all persons interested in the equity of redemption, other than subsequent encumbrancers, shall be named as plaintiffs or defendants in the statement of claim.
- (2) In a redemption action, subsequent encumbrancers shall be added as defendants only where the plaintiff is declared foreclosed.

### **Claims that May be Joined**

- (3) In a redemption action, a person interested in the equity of redemption may also claim possession of the mortgaged property.

### **Judgment**

- (4) In a redemption action, where the defendant has been noted in default, the plaintiff may require the registrar to sign judgment for redemption (Form 64M).
- (5) Every judgment for redemption shall direct a reference, whether or not there are any subsequent encumbrancers.

### **Where Plaintiff Fails to Redeem**

- (6) On default of payment according to the report in a redemption action, the defendant is entitled, on motion to the court without notice, to a final order of foreclosure against the plaintiff or to an order dismissing the action with costs.
- (7) Where the plaintiff is declared foreclosed, directions may be given, in the final order foreclosing the plaintiff or by a subsequent order, that the reference be continued for redemption or foreclosure, or for redemption or sale, against any subsequent encumbrancers, or for the adjustment of the respective rights and liabilities of the original defendants.
- (8) Where the reference is continued under subrule (7),
- (a) for redemption or foreclosure, the reference shall proceed in the same manner as in a foreclosure action;
  - (b) for redemption or sale, the reference shall proceed in the same manner as in a sale action,

and for that purpose the last encumbrancer shall be treated as the owner of the equity of redemption.

- (9) Where the plaintiff is declared foreclosed, a subsequent encumbrancer who attends and proves a claim on the reference is entitled to thirty days to redeem the mortgaged property.

**Where Nothing Due to Defendant**

- (10) Where, on a reference in a redemption action, nothing is found due to the defendant, the defendant is liable for the costs of the action and the defendant shall pay any balance due to the plaintiff forthwith after confirmation of the report on the reference.

**PROCEDURE ON MORTGAGE REFERENCES GENERALLY**

**Rule 55 Applies**

- 64.06** (1) Rule 55 (procedure on a reference) applies to a reference in an action for foreclosure, sale or redemption, except as provided in this rule.

**Plaintiff to File Material Concerning Subsequent Encumbrancers**

- (2) On a reference in an action for foreclosure, sale or redemption, the plaintiff shall file sufficient evidence to enable the referee to determine who appears to have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question.

**Duties and Powers of Referee**

- (3) On the reference the referee shall,
- (a) add subsequent encumbrancers as defendants in accordance with subrule (4);
  - (b) fix a time and place for determining the validity of the claims of subsequent encumbrancers;
  - (c) determine who has a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question;
  - (d) take an account of what is due on the mortgage and what is due to subsequent encumbrancers who prove a claim;
  - (e) fix or assess the costs of the parties;
  - (f) fix a time and place for payment, where applicable;

- (g) where the reference is for immediate sale, give directions for the sale and defer taking accounts until after the sale is held or proves abortive;
- (h) where a sale is being conducted on the request of a subsequent encumbrancer, determine that the encumbrancer has a valid claim before giving directions for the sale;
- (i) take all necessary steps for redemption by or foreclosure of the parties entitled to redeem the mortgaged property and, where applicable, for sale of the mortgaged property; and
- (j) take subsequent accounts and fix or assess subsequent costs as required.

#### **Adding Subsequent Encumbrancers**

- (4) Subject to subrule 64.05(2) (subsequent encumbrancers in redemption action), the referee shall direct all persons who appear to have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question and who were not named as defendants in the statement of claim to be added as defendants and to be served with a notice of reference to subsequent encumbrancer added on reference (Form 64N).
- (5) A subsequent encumbrancer added under subrule (4) may be served with documents on the reference,
  - (a) in the case of an execution creditor, by mail at the address shown on the writ of execution or the most recent request to renew it or, if the creditor's address is not shown, by serving the creditor's lawyer in a manner authorized by subrule 16.05(1);
  - (b) in the case of a person who has registered a claim for lien under the *Mechanics' Lien Act*, by mail at the address for service shown on the claim for lien; or
  - (c) in any other case, personally or by an alternative to personal service under Rule 16.03.
- (6) A person served with a notice under subrule (4) may move within ten days after service, or where the person is served outside Prince Edward Island, within such further time as the referee directs, to set aside or vary the judgment in the action or the order adding him or her as a defendant.

- (7) Where it appears to the referee that a person who was named as a defendant in the statement of claim may have a lien, charge or encumbrance on the mortgaged property subsequent to the mortgage in question, although the person was not alleged to be a subsequent encumbrancer in the statement of claim, the referee shall direct that defendant to be served with a notice of reference to subsequent encumbrancer named as original party (Form 64O).

#### **Notice of Reference to Original Defendants**

- (8) Subject to subrule (10), all persons who were named as defendants in the statement of claim shall be served with a notice of reference to original defendants (Form 64P), stating the names and nature of the claims of all those appearing to have a lien, charge or encumbrance on the mortgaged property.
- (9) Any person named as a defendant in the statement of claim who is not a subsequent encumbrancer and who has not filed a request to redeem or a request for sale may be served with the notice of reference by mail at his or her last known address.
- (10) A subsequent encumbrancer who was named as a defendant in the statement of claim and who has not filed a request to redeem or a request for sale is not entitled to notice of a reference for foreclosure.

#### **Adding Parties Other than Encumbrancers**

- (11) Where on a reference it appears that there are persons interested in the equity of redemption, other than subsequent encumbrancers, who are not already defendants to the action, the referee may order that they be added as defendants on the reference on such terms as are just, and the order shall be served on them, together with the judgment in the action and a notice to added party (Form 64Q) personally or by an alternative to personal service under Rule 16.03.
- (12) A defendant added under subrule (11) may move within ten days after service of the material referred to in subrule (11), or where the defendant is served outside Prince Edward Island, within such further time as the referee directs, to set aside or vary the judgment in the action or the order adding him or her as a defendant.

#### **Where more than one Party Entitled to Redeem**

- (13) One day shall be fixed for payment by all the parties entitled to redeem and, where more than one party is entitled to redeem, the referee shall determine the priority in which they are so entitled.
- (14) Where more than one defendant entitled to redeem makes payment, any such defendant may make a motion on the reference for further directions.

**Proof of Account where Mortgage Assigned**

- (15) In an action for foreclosure or sale by, or for redemption against, an assignee of a mortgagee, a statement of the mortgage account, verified by affidavit of the assignee, may be taken as proof of the state of the account and an affidavit is not required from the mortgagee or any intermediate assignee denying any payment to the mortgagee or intermediate assignee, unless the mortgagor or the mortgagor's assignee, or any party entitled to redeem, denies by affidavit the correctness of the statement of account.

**Referee's Report**

- (16) The referee shall set out in the report on the reference,
  - (a) the names of,
    - (i) all persons who were parties on the reference,
    - (ii) all subsequent encumbrancers who were served with notice of the reference, and
    - (iii) all subsequent encumbrancers who failed to attend on the reference and prove their claims;
  - (b) the amount and priority of the claims of the parties who attended and proved their claims on the reference, and the report shall show those parties as the only encumbrancers of the property; and
  - (c) the date on which the report was settled.
- (17) The report shall be served on all parties who attended on the reference and on any defendant who filed a request to redeem or a request for sale and shall be filed with proof of service.
- (18) Where any period fixed for payment expires within fifteen days after confirmation of the report, a new account shall be taken.

**Mortgagee to Transfer Property where Redeemed**

- (19) Where a party pays the amount found due on the mortgage, the mortgagee shall, unless the judgment directs otherwise, transfer

the mortgaged property to the party making the payment or his or her nominee, free and clear of all encumbrances incurred by the mortgagee, and the mortgagee shall deliver up all instruments in his or her possession, control or power that relate to the mortgaged property.

### **Change of Account**

- (20) Where the state of account as ascertained by an order or report has changed before the day fixed for payment, the mortgagee may, at least fifteen days before that day, serve notice of the change of account on the person required to pay, giving particulars of the change of account and of the sum to be paid.
- (21) Where notice of a change of account has been served and the sums mentioned in it are proper, the court may make a final order without further notice or, on the motion for a final order, may fix a new day for payment and may require notice to be served.
- (22) A party served with notice of change of account who is dissatisfied may make a motion to the court to determine the amount to be paid and to fix a new day for payment.
- (23) Where the state of account has changed before the day fixed for payment and notice of change has not been served,
  - (a) where the amount payable for redemption is reduced, a new day shall be fixed for payment, on notice to the persons entitled to redeem; or
  - (b) where the amount payable for redemption has increased, the mortgagee may move for a final order after the day fixed for payment, without the fixing of a new day.
- (24) Where the state of the new account has changed after the day fixed for payment, it is not necessary to fix a new day, unless the court so directs on the motion for a final order.
- (25) Where it becomes necessary to fix a new day for payment after the expiration of the original period, the further time allowed shall be thirty days, unless the court orders otherwise.
- (26) Notwithstanding subrule (25), the court may, on motion of any party, extend or abridge the time for redemption for such time and on such terms as are just.