



OPTION TO PURCHASE:

Terminated or Alive?

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A right of first refusal (or option to purchase) clause contained in a mortgage (or lease) will not be held to extend past the maturity date of the mortgage (or lease) unless there is unambiguous language that states the clause can survive past said maturity date. In other words, the courts will not enforce a right of first refusal clause simply on the renewal of a mortgage (or lease). Rather, the clause must be accompanied by clear language that explicitly states the right of first refusal has been extended past the maturity or termination date and that it has been carried forward into the term of the mortgage or lease renewal.

A recent Ontario Court of Appeal decision highlights the importance of ensuring that there is no ambiguity in relation to a right of first refusal in a mortgage or lease. If the clause is automatically assumed to have been extended due to a term renewal of a mortgage or a lease, the party trying to enforce the clause runs the substantial risk of losing the right of first refusal.

In *Three Seasons Homes Ltd. v. Faris*, 2005 CanLII 41803 (ON. C.A.), Three Seasons Homes Limited (the "Mortgagee") and Robert Faris (the "Mortgagor") had a dispute over the enforcement of a clause pertaining to a piece of land (the "Property"). The Clause stated that "...during the term of the charge, on an ongoing basis..." the Mortgagee had the option to purchase the Property on the terms that were given to the Mortgagor by another prospective purchaser's written offer. The term of the mortgage was from October 23, 2001 to October 23, 2002.

On February 26, 2003, the Mortgagor received an offer to purchase the Property for \$2,000,000. The Mortgagee initially waived its right of the first refusal, however, upon learning that the purchase price was really \$1.7 million, the Mortgagee decided to reclaim the right of first refusal.

The issue the court was faced with was not whether the Mortgagee was authorized to reclaim its right of first refusal after they had initially discharged its right; rather the issue of the court was whether the right of first refusal clause was still valid since the term of the mortgage expired on October 23, 2002.

The trial court interpreted the clause to extend beyond the maturity date of the mortgage as it interpreted the wording of the clause to contain no proof of limitation, and thus allowed the enforcement of the clause to extend past the term of the mortgage. The trial judge interpreted the word "term" to not limit the life of the clause to the maturity date of the mortgage. The trial judge further stated that upon all the extrinsic evidence of the case, there was proof that the conduct of the parties made it clear that the clause was to survive the maturity date.



Option to Purchase

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The case was appealed and the subsequent decision by the appellate court submitted that the trial judge made a reversible error in interpreting the clause. The appellate court had deemed that the word “term” did refer to the time frame between the start date and the maturity date of the mortgage, which meant that the clause would expire at the maturity date if the mortgage was not renewed by an agreement in writing.

This Ontario Court of Appeal decision stands for the fact that a first right of refusal clause must be explicitly extended in order for it to be enforced past the initial term of a mortgage. In this particular case, there were alleged discussions of the clause being extended however; there was no conclusive proof that would enable the court to enforce the extension of the clause past the maturity date. As such, when trying to enforce a right of first refusal (or option to buy) clause in the context of a mortgage or lease there must be language which clearly states that the clause will extend past the date of maturity or balance due date and into the renewal term.

This article was prepared with the assistance of Rick Forno, law student, University of Ottawa, Faculty of Law.