



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
GENERAL DIVISION**

**Citation:** *Home Trust Company v. Ballam*, 2024 NLSC 67

**Date:** April 16, 2024

**Docket:** 202301G1375

**BETWEEN:**

**HOME TRUST COMPANY**

**APPLICANT**

**AND:**

**TERRANCE BALLAM, ALSO KNOWN  
AS TERENCE BALLAM**

**RESPONDENT**

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**Before:** Justice Alexander MacDonald

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**Place of Hearing:**

St. John's, Newfoundland and Labrador

**Date of Hearing:**

December 11, 2023

**Appearances:**

Joshua J. Santimaw and  
Doug W. Schipilow  
Terrance Ballam

Appearing on behalf of the Applicant  
Appearing on his own behalf

**Authorities Cited:**

**CASES CONSIDERED:** *Four-maids Ltd. v. Dudley Marshall (Properties) Ltd.*, [1957] Ch. 317

**STATUTES CONSIDERED:** *Conveyancing Act*, R.S.N.L. 1990, c. C-34

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

**REASONS FOR JUDGMENT****MACDONALD, J.:****INTRODUCTION**

[1] Terrence Ballam mortgaged his property to Home Trust Company. He was unable to pay his mortgage. Under the terms of the *Conveyancing Act*, R.S.N.L. 1990, c. C-34 (*Act*), Home Trust demanded that Ballam:

- (a) pay the total amount due under his mortgage; or
- (b) leave the property, and thereby provide Home Trust with what lenders call vacant possession.

[2] Ballam did neither. Home Trust then took this Originating Application for vacant possession.

[3] At the hearing, Ballam and Home Trust agreed to a Consent Order. Ballam agreed to leave the property by the end of February 2024. Home Trust agreed not to ask for court costs of the Application.

[4] That would normally be the end of the matter. However, this case raises issues about lenders' applications during powers of sale. Home Trust asked that I resolve

these issues for the benefit of people who borrow money secured by mortgages on their properties (mortgagors), lenders who lend money secured by mortgages, and the legal community.

[5] I will discuss:

- (a) the steps a lender must take to complete a power of sale;
- (b) the facts a lender must prove to complete a power of sale; and
- (c) who a lender must notify during a power of sale and how it does so.

[6] I give this guidance for mortgages on residential, not commercial, properties.

### ***Conveyancing Act Governs Powers of Sale***

[7] Sections 6 through 15, and 40 of the *Act* govern how a lender enforces its mortgage through a power of sale.

### ***How Lenders Start a Power of Sale - the Default***

[8] Section 6 provides that a lender shall not exercise a power of sale unless:

- (a) a mortgagor has defaulted on their mortgage. Usually this is because a mortgagor has not made monthly payments; and
- (b) a lender gives the mortgagor, and any encumbrancer or guarantor, written default notice.

[9] In the default notice, a lender can require the mortgagor to:

- (a) pay the lender the money secured by the mortgage, and the mortgagor is in default of payment for at least 30 days after giving the default notice;
- (b) pay the lender the interest arrears due under the mortgage, and the mortgagor is in default of payment of the arrears for at least 30 days after giving the default notice; or
- (c) rectify a breach of another term of the mortgage, and the mortgagor has not rectified the breach for at least 30 days after giving [having been given?] the default notice.

[10] *If the mortgage allows it*, a lender can also demand that a mortgagor:

- (a) repay the total amount of the mortgage, including outstanding interest and principal, not just the arrears; and
- (b) pay the lender's actual legal fees and other enforcement costs.

### ***Service of the Default Notice***

[11] Under ss. 40(3) and (4) of the *Act*, a lender can serve the mortgagor and any encumbrancer or guarantor with the default notice in one of two ways:

- (a) First, it can serve the *mortgagor* by leaving a copy at, or attaching it to, the mortgaged property. It shall serve any *encumbrancer or guarantor*, not by leaving a copy at the mortgaged property, but by leaving it at their last known residence or place of business; or

- (b) Second, it can serve a *mortgagor and encumbrancer or guarantor* by sending it by registered mail to their last known address, so long as Canada Post does not return the letter to the lender marked undelivered.

[12] A lender *does not need to personally serve a mortgagor and any encumbrancer or guarantor* with the default notice unless it cannot serve it as I described in paragraph [11]. I will call this non-personal service.

### ***Mortgagor Can Remedy the Default Notice***

[13] The mortgagor can satisfy a default notice by rectifying the term they breached. For example, if the default is for failure to pay and the lender demanded payment of all of the money secured under the mortgage, they may pay that amount.

[14] A lender may agree with a mortgagor about how they can satisfy the default notice. For example, a lender may be prepared to compromise and allow a mortgagor to pay only the arrears on the mortgage. This is a matter between the lender and the mortgagor. A lender need not agree to any compromise.

[15] If the mortgagor does not satisfy the default notice, a lender can take further action.

### ***Lender's Option to Seek Vacant Possession***

[16] A lender has the right to take possession of the mortgaged property at any time (*Four-maids Ltd. v. Dudley Marshall (Properties) Ltd.*, [1957] Ch. 317). However, most mortgages allow a mortgagor to stay in the property until default. A lender can demand vacant possession once it serves a mortgagor with a default notice. It can include this demand for vacant possession in the default notice. The lender may also give the mortgagor a separate notice to vacate the property.

[17] A lender, except in unusual cases that I describe in paragraph [21], will take an originating application (*inter partes*) under Rule 5.02 seeking an order for vacant possession.

### ***Service of an Application for Vacant Possession***

[18] A lender must *personally serve the mortgagor with an originating application* under Rule 6.02. “Personally serve” means the lender must arrange in-person delivery of the originating application on a mortgagor.

[19] Under Rule 29.05(2)(a), if a mortgagor is in the province, a lender must serve them with the originating application at least 10 clear days before the hearing date. Clear days do not include the day a lender serves the originating application, or the day of the hearing.

[20] Under Rule 29.05(2)(b), if a mortgagor is out of the province, a lender must serve them with the originating application at least 30 clear days before the hearing date.

[21] In the rare case where a lender has already started an action on the mortgage (perhaps for recovery of money due under the mortgage), it can take an interlocutory application under Rule 29.02(b). A lender must serve this application under Rule 29.05(c) at least two clear days before the hearing. I will call both the originating and the interlocutory applications for vacant possession an application.

### ***Contents of Application for Vacant Possession***

[22] A lender must include an affidavit with its application. The affidavit must:

- (a) be from a lender, or if it is a corporation, from an employee with personal knowledge of the facts, *and not by its counsel* or anyone without personal knowledge. The employee should give current details of the default. If the

- employee does not personally know a fact, they must tell the court who told them about it;
- (b) include a copy of the mortgage, the default notice and any notice to vacate the property; and
  - (c) explain how the lender served the default notice and notice to vacate.

[23] Lender's counsel should include a suggested order with the application. It would also be prudent for lender's counsel to take reasonable steps to inform themselves about:

- (a) who lives in the property and whether children or other people under disability live there;
- (b) whether any of those children are going to school;
- (c) whether there is a family law dispute between married or common law mortgagors;
- (d) whether there is any imminent risk to the property or to persons living in the property; and
- (e) any other matters a lender considers relevant to the proceeding.

### ***Scheduling the Hearing of an Application for Vacant Possession***

[24] After lender's counsel files the application for vacant possession at the court, the court will schedule it for a preliminary hearing. The purpose of this hearing is not to deal with the merits of the application but to set a date to do so.

[25] Lender's counsel should file proof of service of the application before or at the hearing. If served, the court *may* deal with the merits of the application at the preliminary hearing if the mortgagor consents to the order for vacant possession or if a mortgagor does not attend.

[26] If a lender has not served the application, the court will generally reschedule it to another preliminary hearing date. The court will follow the procedure I just described at each rescheduled preliminary hearing.

***If a Lender Cannot Personally Serve the Mortgagor***

[27] If a lender tried but cannot personally serve a mortgagor with an application for vacant possession, it may take an *ex parte* interlocutory application for substituted service under Rule 6.04. A lender *does not need to serve a mortgagor* with a substituted service application.

[28] A lender may support this application with an affidavit from properly informed counsel. Lender's counsel must describe the efforts their office made to personally serve the mortgagor. Often a lender will file an affidavit from a professional process server or other person who tried to serve the application for vacant possession.

[29] Counsel must provide the court with the suggested order.

[30] A judge will usually grant a substituted service order without a hearing. Sometimes the judge will change the suggested order, ask counsel for a revised suggested order, or ask them to appear at a preliminary hearing.



### ***Hearing on the Merits***

[31] If a lender has properly served a mortgagor with the application for vacant possession, the court at a preliminary hearing will set the date for the hearing of the merits of the application. Usually, the court will schedule the hearing for the next available date.

[32] The judge may also provide direction to lender's counsel on how to serve the mortgagor with notice of the hearing date if they did not appear at a preliminary hearing.

[33] Lender's counsel should be prepared to tell the judge about any material changed circumstances since the lender's original affidavit. The judge may request an updated affidavit. Counsel should know at each hearing date if the mortgagor or another person is still living in the property.

### ***Factors that Can Affect Length of Time the Mortgagor Has to Leave the Property***

[34] At the hearing on the merits, the judge will decide when the mortgagor must leave the property. The judge will consider whether a lender followed the statutory requirements for the default notice. The judge will also consider any relevant term of the mortgage.

[35] A judge may also consider the non-exhaustive list of factors I described in paragraph [23].

[36] The court has no standard time when a mortgagor must leave the property. The time varies with the circumstances of the case. However, a lender should expect that the court will give the mortgagor at least 30 days to do so. It is unlikely that the judge, except in extraordinary circumstances, will order a mortgagor to leave a property around publicly celebrated holidays.

[37] The judge may also consider other factors like the impact of moving during the winter or whether persons under a disability are in the property. Depending on these circumstances, a lender can expect that the court might allow a mortgagor more time to leave the property.

[38] A mortgagor should not expect that the shortage of alternate housing in their community will affect the amount of time they have to leave the property. The court will usually hear the application months after a lender served the default notice. The court will usually expect that a mortgagor would have used this time to find alternate accommodations.

[39] The court will issue a vacant possession order promptly after the hearing. Counsel should give the judge a copy of the suggested order at the hearing. The form should allow the judge to insert the date for the mortgagor to leave the property. The judge may ask counsel for a revised suggested order.

[40] The judge will usually only consider awarding the lender its costs of the application on a party and party basis as provided for under the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. If the mortgage allows it to do so, a lender may account for its actual enforcement costs in the sale of the property, or in a later action for a deficiency.

[41] A judge will not initially order that the High Sheriff of Newfoundland and Labrador enforce a vacant possession order. A lender must serve the mortgagee with the order first. I will discuss why later in this decision.

### ***Serving the Order for Vacant Possession***

[42] A lender will provide the mortgagor with a copy of the vacant possession order by non-personal service. *It does not need to personally serve a mortgagor with the order.*

### ***If the Mortgagor Refuses to Follow the Vacant Possession Order***

[43] Rule 27.13(1) says that when a lender seeks “to enforce a final order for the recovery of possession of property, the Court may, on an *ex parte* application supported by affidavit, grant an order ... for the sheriff to deliver possession of the property as provided in the order.”

[44] This means that a lender cannot seek enforcement by the Sheriff until a mortgagor does not follow the already issued vacant possession order.

[45] If this happens, a lender may take an *ex parte* application under Rule 27.13(1) asking that the Sheriff assist it in enforcing the order. A lender may support this application with an affidavit from properly informed counsel. The affidavit will describe a lender’s failed efforts to enforce the order.

[46] A lender *does not need to serve a mortgagor* with the application. A judge will usually grant the order without the need for a hearing.

### ***Procedure Where a Lender Sells the Property***

[47] If the mortgagor does not satisfy the default notice, a lender may sell the property. Most mortgages give a lender the power to sell the property only if a mortgagor defaults. Section 5 of the *Act* also gives it this power.

[48] Under s. 7(1) of the *Act*, a lender cannot sell a property unless it prepares a notice of sale. It must serve the notice of sale on the mortgagor and any encumbrancer and guarantor by non-personal service. *It does not need to personally serve this notice.*

[49] Under s. 7(2) of the *Act*, a lender shall publish the notice of sale in a newspaper in general circulation where the property is found at least once a week for two

consecutive weeks before the date of the sale. However, a lender must not serve or publish the notice of sale until expiry of the 30-day period in the default notice.

[50] Section 8(1) of the *Act* provides that before any sale, a lender must obtain a written appraisal of the mortgaged property by a qualified appraiser. If there is no appraiser in the area, a lender can obtain a statement of the fair market value of the property from a licensed real estate agent familiar with property values in that area.

[51] Sections 9(1) and 9(3) of the *Act* provide that a lender cannot sell the property privately, at public auction, or by public tender for less than 75% of its appraised value unless the lender first obtains court approval for the sale.

[52] Section 9(2) of the *Act* provides that a lender can only sell the property by private contract if:

- (a) no one buys the property at a public auction or tender; or
- (b) the offers at a public auction or tender are unreasonably low.

### ***Application to Sell the Property at Less than 75% of its Value***

[53] Sometimes the application to approve a sale is the first court filing about the mortgage. If so, a lender can take an originating application (*inter partes*) under Rule 5.02. A lender *must personally serve this application* on a mortgagor and any encumbrancer or guarantor as I describe in paragraphs [18] through [20].

[54] Again, if a lender has already started an action on the mortgage as I described in paragraph [21], it can take an interlocutory application. A lender *must personally*

*serve this application* on a mortgagor and any encumbrancer or guarantor as I describe in that paragraph.

[55] A lender must file an affidavit supporting its application. The affidavit shall meet the requirements I described in paragraph [22]. It should also describe the sale process. If lender's counsel conducted the sale process, a judge may accept their affidavit on that process. The affidavit must also include:

- (a) a copy of the default notice and an explanation of how the lender served it on the mortgagor;
- (b) a copy of the notice of sale;
- (c) proof of publication of the notice of sale;
- (d) a copy of the appraisal;
- (e) confirmation as to whether there are other guarantors or registered encumbrancers and who they are;
- (f) details of the results of the sale process, including a copy of any sales agreement; and
- (g) any other relevant facts.

[56] Lender's counsel should include a suggested order with the application. The court will schedule this approval application in the same way as it does for an application for vacant possession.

[57] Lender's counsel should file proof of service of the application for approval of a sale before or at the hearing. If counsel cannot personally serve the mortgagor or any encumbrancer or guarantor, it may take an *ex parte* interlocutory application for substituted service as I described earlier.

[58] Lender's counsel should be prepared to tell the court about any material change in circumstances since the lender's original affidavit. The judge may request an updated affidavit at any time. The judge may ask counsel for a revised suggested order or ask them to appear at another preliminary hearing.

### ***Accounting of Sale Proceeds***

[59] Under s. 10 of the *Act*, a lender must prepare an accounting of the proceeds of the sale after it sells the property. It must include a copy of the appraisal of the property with the accounting.

[60] A lender must serve the mortgagor and any encumbrancer or guarantor with these documents within 30 days after completion of the sale. The lender may serve this accounting by non-personal service. *It does not need to personally serve them.*

[61] Under s. 11 of the *Act*, a mortgagor, encumbrancer or guarantor who is not satisfied with the accounting may apply to a judge and ask for relief.

[62] Under s. 12 of the *Act*, if a lender does not comply with the procedures described in the *Act*, a mortgagor, encumbrancer or guarantor need not pay any deficiency resulting from the sale of the property.

[63] A deficiency is any shortfall remaining after the lender applies the sale proceeds against the amount the mortgagor owes under the mortgage, including the costs the lender spent enforcing the mortgage.

## **CONCLUSION**

[64] Judges understand the circumstances that cause a lender to demand payment of a mortgage can be difficult. Often mortgagors find themselves unable to pay their

mortgage for circumstances beyond their control. Lenders often do not want to start the power of sale process unless they have no other choice.

[65] Because of this, the Court insists on strict compliance with the power of sale process. I intend for this decision to give certainty to lenders, mortgagors, encumbrancers and guarantors on how the Court will usually approach these cases.

## **DISPOSITION**

[66] I hereby order that:

- (a) Ballam will leave the property by the end of February 2024; and
- (b) There is no order to costs.

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**ALEXANDER MACDONALD**  
Justice