ONTARIO

A Practical Review of Secured Financings

A Practical Primer on Real Property Security Documentation Part II

Jeffrey Shore
Goodman Phillips & Vineberg

Saturday, December 4, 1999

Canadian Bar Association - Ontario
Continuing Legal Education

A PRACTICAL PRIMER ON REAL PROPERTY SECURITY DOCUMENTATION

by Jeffrey H. Shore[1]

TABLE OF CONTENTS

1. INTRODUCTION

This paper seeks to provide the reader with a basic understanding of what security is typically taken by lenders against real property, why lenders want the security and the types of registrations that need to be undertaken to give effect to the security. The general terms of these agreements are also discussed. This paper also examines the specific issues related to taking security in what are commonly known as space tenant leases.

---

[1] Jeffrey Shore, B.A., LL.B., associate with Goodman Phillips & Vineberg. Special thanks to Mark Spiro, student-at-law, for his assistance with the bibliography.

Given that the subject of taking security in real property has formed the subject matter of entire texts, a number of important areas are not discussed in this paper. For instance, the typical starting point for all of the matters discussed herein is the commitment letter. However, as another presenter has prepared a paper on the negotiation of the commitment letter, this paper will not reiterate what has already been covered.

2. TYPICAL SECURITY DOCUMENTATION

(a) Primary Security

Primary Security is the principal collateral that lenders look to when they agree to loan money to their clients. Where real property is the collateral, such security will take the form of either a mortgage or a debenture. In practice, there is little difference between these two documents and they generally contain the same provisions. While this paper treats mortgages as primary security, one should note that they may also stand as collateral security for promissory notes, guarantees and the like.

(i) Mortgages

At common law, a mortgage is a conveyance of land as security for the payment of a debt or the performance of an obligation, the security being redeemable on the repayment or discharge of the debt or the performance of the obligation.[2] If a mortgagor defaulted on its obligation to repay the debt or otherwise failed to fulfil its obligations under the mortgage, the mortgagor lost its common law right to repurchase the mortgaged property. Because equity found this result unacceptable, it developed the concept of the equity of redemption, an equitable interest in the mortgaged property retained by the mortgagor after it had conveyed its legal

---

2 W.B. Rayner and R.H. McLaren, *Falconbridge on Mortgage*, 4th ed. (Agincourt: Canada Law Book, 1977) [hereinafter, "*Falconbridge*" at 7].

interest in the land to the mortgagee under the mortgage. Until the mortgagee foreclosed upon the mortgagor's equity of redemption, the mortgagee did not become the absolute owner of the mortgaged land.

In Ontario, the common law is modified by Section 6(1) of the *Land Registration Reform Act*[3] which provides that a mortgage does not operate as a transfer of the mortgagor's legal estate in the land to the mortgagee; it merely creates a security interest in the mortgaged property (hence, the use of the term "charge" in the Ontario legislation) which, pursuant to Section 6(2) of the *LRRA*, is discharged on the payment of the principal and interest owing on the loan in accordance with the provisions of the mortgage. Section 6(1) of the *LRRA* has little practical effect on mortgage law as Section 6(3) of the *LRRA* goes on to provide that a mortgagor and mortgagee are entitled to all the legal and equitable rights and remedies that would be available to them if the mortgagor had transferred the land to the mortgagee by way of mortgage, subject to a proviso for redemption.

Because of the proviso for the equity of redemption, the mortgagee's counsel must ensure that the mortgage is not made irredeemable. This concept is known as the doctrine against clogging the equity of redemption. It arises whenever a lender includes in a mortgage or security collateral thereto any stipulation for the benefit of the lender other than the payment of principal, interest and normal costs.[4] One type of benefit that is occasionally granted to mortgagees is an option to purchase the property. In such a situation, the courts have struggled to determine whether it is fair to permit the mortgagee to exercise its option to acquire the mortgaged property

---

3 R.S.O., 1990, c. L.4 [hereinafter, the "*LRRA*"].

4 While this principal appears most frequently in the context of mortgages of real property, it also applies to charges of personal property.

after the mortgage itself has been redeemed by the borrower. The Ontario Court of Appeal's decision in *Dical Investments Ltd. v. Morrison*[5] on this point, while *obiter*, is instructive as the court determined that while an option may be a collateral advantage which, in one line of cases is permissible, it should still be held void as being repugnant to the mortgagor's right to redeem the mortgage. In a strong dissent, Madame Justice McKinlay held that the option in question was not a clog on the equity of redemption and was enforceable as the transaction was carefully negotiated between parties of equal sophistication and bargaining power, the option was at a fair market price and the mortgage loan was made in consideration of receiving the option.[6]

So long as a mortgage is prepared in the prescribed form,[7] Section 7(1) of the *LRRA* will deem the mortgage to include a short list of covenants by the mortgagor. These include such things as a covenant that the mortgagor and its successors will pay, in the manner provided by the mortgage, the money and interest it secures and a covenant to pay the taxes assessed against the land.[8] These implied covenants are of the most basic variety and, in almost every case, the lender will elaborate on the same covenants in the mortgage itself or, if used, the loan agreement.

---

5 (1989), 68 O.R. (2d) 549 (H.C.J.), aff'd 75 O.R. (2d), leave to appeal to S.C.C. refused 83 D.L.R. (4th) vii [hereinafter *Dical*]. For an excellent study of this issue, see E.W. Belyea, "Unclogging the Equity of Redemption in Commercial Transactions" (1994), 24:2 Can. Bus. L.J. 151.

6 To avoid having an option found void, Ernest Belyea (*ibid* at 187) suggests that lenders: (i) place the mortgage and option in separate documents; (ii) have the option agreement executed at a different time than the mortgage; (iii) have the mortgagor grant the option to a different entity than the mortgagee; and (iv) while self-serving, have the parties add a clause to the option agreement stating the option is intended to be a separate agreement from the mortgage and the optionor forever waives the right to claim that the option constitutes a clog on the equity of redemption.

7 Form 2 of R.R.O. 1990, Reg. 688.

8 *LRRA*, s. 7(1)1(i)

In addition to a provision whereby the mortgagor charges the property to the mortgagee as security for the loan and an elaboration on some or all of the implied covenants (which are present in all mortgages), where a loan agreement is not used, the mortgage will contain:

- comprehensive representations and warranties by the borrower as to, *inter alia*, the borrower's legal capacity, the state of the property and the buildings thereon, including environmental matters, and the status of the tenancies, if any;

- covenants by the borrower to pay all amounts due under the mortgage, not to further encumber the property without the lender's consent,[9] manage the property in a prudent manner, observe all laws, such as building codes and zoning by-laws, not to dispose of the property without the lender's consent (this may include any change of control in the borrower), report on the financial condition of the borrower and the project at regular intervals, [10] insure the property and pay all taxes[11] and utilities assessed against the property;

---

9 Depending upon what the borrower intends to do with the property, such a covenant can be extremely restrictive. Where the property is to be developed, it is necessary to obtain a covenant from the lender expressly permitting the borrower to enter into various municipal agreements, transfer parts of the property to the municipality and grant easements to the municipality. As municipalities will require that they have priority over any mortgages, it will also be necessary for the mortgagee to agree to postpone the mortgage to such agreements and easements and, in the case of a transfer to a municipality, grant partial discharges.

10 Borrowers should ensure that these correspond to their accounting practices. For instance, many lenders require audited statements while many borrowers do not have audited statements prepared. Additionally, lenders may ask the borrower to report on a frequent basis (i.e. quarterly) while the borrower is not inclined to do so as their records are prepared on a less frequent basis (i.e. annually or semi-annually).

11 Many lenders require that realty taxes be paid directly to the lender in equal monthly instalments which the lender will remit to the taxing authority when due. As realty taxes are typically billed in small instalments for the first half of the year with one or two final instalments due towards the end of the year, such payments to the lender do not usually correspond to when realty taxes actually become due. Often, borrowers wish to avoid pre-paying their realty taxes and attempt to amend this covenant accordingly. Conversely, to the extent realty taxes are collected from tenants in equal monthly instalments as part of additional rent, this should not present a cash flow problem.

- events of default which are often no different than any other commercial agreement (for example, a breach of any representation, warranty or covenant by the borrower)[12]; and

- remedies upon a default, such as accelerating all principal and interest due under the mortgage, permitting the mortgagee to re-enter and take possession, appoint a receiver,[13] foreclose or otherwise sell the property by power of sale or judicial sale.

These provisions will either be scheduled to the Form 2 Charge/Mortgage of Land[14], or, as is often the case with smaller financings, incorporated by reference to the mortgagee's standard charge terms filed in the land registry office.[15] Subsection 9(4) of the *LRRA* codifies the common law by stipulating that where there is a conflict between an express term in a charge and the standard charge terms incorporated by reference, the express term prevails. In the event that the parties are using one of the lender's standard charge terms, counsel will have to review them carefully to ensure that they do not conflict with the deal negotiated between the lender and borrower. If a clause in the standard charge terms contradicts the commitment letter or loan

---

12 Whenever possible, borrower's counsel should ensure that before enforcing its security, the lender must give the borrower adequate notice of the default (specifying the nature of the breach) and a period of time to remedy the default. Cure periods are usually divided into monetary and non-monetary defaults, with monetary breaches receiving shorter cure periods.

13 The addition of a clause permitting the mortgagee to appoint a private receiver and manager for the property with broad powers is extremely important. In the event of default, the mortgagee will need to be able to run the property until it is sold. Without such a clause, the mortgagee will have to obtain a court appointed receiver under Section 101 of the *Courts of Justice Act, R.S.O.* 1990, c.C.43, which can add undue delay and expense to realizing on one's security.

14 Section 4(1) of the *LRRA* provides that a document attached as a schedule to a document whose form is prescribed shall be deemed to be part of the document whose form is prescribed.

15 Section 9(1) of the *LRRA* provides that a mortgage shall be deemed to include a set of standard charge terms filed under subsection 8(1) of the *LRRA* if the set is referred to in the charge by its filing number. Note that section 11 of the *LRRA* makes it an offence for a mortgagee to take a charge containing standard charge terms before providing the mortgagor with a copy of those terms. Accordingly, it has become standard practice to have the mortgagor acknowledge receiving a copy of the standard charge terms prior to giving the mortgage.

agreement, it will be necessary to prepare a schedule to the mortgage which deletes the inapplicable provision and, if necessary, substitutes an appropriate clause. Occasionally, to avoid amendments to their form of mortgage, lenders stipulate in the commitment letter that the mortgage will incorporate a specific set of standard charge terms without amendment.

Where the lender will not agree to amend its standard mortgage security package, lenders and borrowers occasionally enter into unregistered side letters to address issues or modifications that the lender does not want to appear on title. Because these agreements are unregistered and most lenders retain the right to assign the security to another institution at any time without the borrower's consent, borrowers should beware. They must ensure that the side letter includes a clause that it will be binding upon the lender's successors and assigns and a covenant by the lender to obtain from any assignee of or successor to the lender's interest in the security an acknowledgement that it agrees to be bound by the terms of the side letter. If such an acknowledgement is not obtained and the successor or assignee fails to honour the terms of the side letter, the borrower may then have recourse against the predecessor or assignor.

Where a loan agreement is used by the parties, it really is not necessary to repeat all the representations and warranties, covenants and events of default in the mortgage. Rather, the mortgage need only contain the charging provision, the borrower's covenant to pay, the principal terms of the loan (such as the principal amount, the interest rate payable and the maturity date), the mortgagee's remedies and a basic default clause providing that an event of default under the unregistered loan agreement constitutes a default under the mortgage. However, one should note that Section 22(6) of the *Registry Act*[16] provides that one may not register any document, interest

---

16 R.S.O. 1990, c. R.20 [hereinafter, the "*Registry Act*"].

or claim that is dependent upon or arising out of an unregistered instrument. Due to this provision, the Land Registrar should not accept such documents. However, the definition of "instrument" in subsection 1(1) of the *Registry Act* only extends to agreements which "affect" land and, accordingly, it can be argued that unregistered commitment letters and loan agreements can be mentioned in mortgages as they do not "affect" the land on their own.

Similarly, the *Land Titles Act*[17] is based upon the proposition that the parcel register for a property within the Land Titles system is to be a complete depository for all documents related to that property. As such, Section 72(1) of the *Land Titles Act* provides that no person, *other than the parties thereto*, shall be deemed to have any notice of the contents of any document, except for those recorded on the parcel register for the property.

(ii) Debentures

Debentures are employed in situations where there is a revolving line of credit that may, at times, be paid down completely. This creates a problem because section 6(2) of the *LRRA* provides that once the indebtedness owing under the mortgage is paid, the mortgage is no longer effective. *In re George Routledge & Sons, Limited. Hummel v. George Routledge & Sons Limited*, [1904] 2 Ch.D. 474 held that the parties cannot contract out of this result. However, due to the operation of subsection 44(2) of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 (hereinafter, the "OBCA"), and the definition of "debt obligation" in subsection 1(1) of the OBCA, debentures, unlike mortgages, are not redeemed when the indebtedness is reduced to zero.[18]

---

17 R.S.O. 1990, c. L.5 [hereinafter, the "*Land Titles Act*"].

18 Section 39(12) of the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44, contains a similar provision.

Prior to the enactment of subsection 44(2) of the OBCA, a pledge of debenture was used to avoid this rule. While unnecessary, such pledges are still used today. As described in the frequently cited text of Warren Grover and Donald Ross,[19] the pledge, *inter alia*, allows lenders to "... separate the loan obligation from the debenture obligation so that the latter is clearly identified as a collateral independent obligation governed by its own terms and conditions; in short, the debenture no longer represents the loan itself." One commentator notes that a debenture pledge may not be enforceable by virtue of some of the jurisprudence in this area and suggests that lenders only use one where the lender wants to be able to sell the debenture rather than the property subject thereto.[20]

Debentures can be registered in either of two ways. First, the provisions of a debenture may be annexed as a schedule to the Form 2 Charge/Mortgage of Land. The borrower executes the Form 2 just as if it were a mortgage; the scheduled debenture does not contain a separate signing block for the borrower. Standard Charge terms are usually not incorporated into such a debenture. While the use of Form 2 imports the implied covenants of Section 7 of the *LRRA*, the provisions of Part III of the *Mortgages Act* (which provides for how a power of sale is to be conducted) do not apply to debentures and, accordingly, the lender's solicitor needs to ensure that the debenture contains detailed sale powers in addition to the mortgagee's other remedies. [21]

---

19 *Materials on Corporate Finance* (Toronto: Richard De Boo, 1975) at 227.

20 See S.P. Jeffery, "Taking Security in Real Property" at page 15 in From Commitment to Closing: A Practical Review of the Typical Secured Financing (Canadian Bar Association Continuing Legal Education, C.B.A.O. Education and Meeting Centre, Toronto, 4 April 1992).

21 Section 41 of the *Mortgages Act*, R.S.O. 1990 c.M.40. This matter is not free from doubt, however, as some cases have held that this provision really only applies to corporate debentures or bonds secured by trust deeds and not to simple debentures (see *Ramardo Mines Ltd. v. Canadian Imperial Bank of Commerce* (1980), 2 A.C.W.S. (2d) 302 (Ont. H.C.J.)) while others have gone the other way (see *Diegel and Feick Inc. v. Donia Consulting Corporation* (1980), 35 C.B.R. (2d) 134 (Ont. S.C.).

A debenture may also be registered by attaching the originally executed debenture to a Form 4 Document General. When proceeding in this manner, mortgagees need to ensure that the debenture contains all necessary charging language, covenants by the borrower and all of the mortgagee's rights and remedies (including a power of sale) as the implied covenants of Section 7 of the *LRRA* do not apply when Form 2 is not used. It will also be necessary to include a legal description of the mortgaged property in the debenture itself.

(b) Additional Security

In addition to the primary security, lenders will obtain collateral security from the borrower to help meet their underwriting criteria, to provide flexibility to the lender in the exercise of remedies and to provide comfort with respect to the cash flows from the mortgaged property. While guarantees are often obtained for these purposes, they are not unique to real property financings and have been omitted from this discussion.

(i) General Assignment of Rents

Next to the value of the land mortgaged to the lender, the space tenant leases are often the most important assets of the borrower. Depending upon the identity of the tenants and the terms of the leases, they may constitute the bulk of the lender's security. Accordingly, lenders are preoccupied with ensuring that they can take the benefit of the rental stream from these leases. However, lenders wish to ensure that they can realize on the rental stream without undertaking any liability for the management of the property. This can occur if, after the borrower defaults, the lender is found to have taken possession of the mortgaged premises.[22] By taking a general assignment of rents, the lender can get at the rental stream without going into possession; upon

---

22 When enforcing their security, mortgagees wish to avoid taking any steps which would lead them to be deemed a "mortgagee in possession". Such a mortgagee is found at common law to have assumed certain obligations related to the property. See *Falconbridge*, *supra* note 2, at 651 for elaboration on this point.

default by the borrower, the mortgagee need only serve the tenants with notice that it has taken an assignment of the rents and a direction to pay all future rents to the lender.

Recently, the Ontario Court of Appeal[23] had occasion to comment on the effect of this form of security and held that an assignment of rents, whether general or specific, does not operate to create privity of contract or estate between the lender and the tenants under the leases that are the subject of the assignment; only the lender and the borrower/landlord have such privity. Rather than an absolute assignment of the borrower's rights in and to the leases and rents, an assignment of rents or leases merely acts as an assignment by way of security which permits the lender to collect rents without going into possession.[24] As a result, absent some other agreement between the mortgagee and a tenant (such as a non-disturbance and attornment agreement, as described later in this paper), the lender will not be able to enforce the underlying lease against a tenant. To change the effect of the assignment or rents and try to bind the tenant, the mortgagee would have to take an absolute assignment of the rents and leases from the borrower, thereby assuming all the obligations and liabilities of the landlord under the leases. Given mortgagees are extremely reluctant to take any steps which would result in them being deemed a mortgagee in possession, it is doubtful that they will be instructing their counsel to amend their precedents.

As with the principal security, the mortgagor must review the general assignment of rents to confirm that it does not conflict with the terms of the commitment letter or the loan agreement

---

23 *Goodyear Canada Inc. v. Burnhamthorpe Square Inc.* (1999), 21 R.P.R. (3d) 1 (Ont. C.A.) [hereinafter, *Goodyear*]. Leave to appeal to S.C.C. dismissed [1998] S.C.C.A. No. 629.

24 As most general assignments of rents do not provide that the lender will be assuming any of the landlord's obligations under the leases and state that the lender may demand rents without being deemed to have gone into possession of the mortgaged property, the Court of Appeal's reasoning would appear to be quite sound.

or create additional covenants that the borrower did not agree to give. Additionally, borrower's counsel needs to ensure that it does not conflict with the provisions of the mortgage or debenture, which typically provides for an assignment of all leases and rents. Often one will include a "conflicts" clause which provides that in the event that the general assignment of rents (or other security document) conflicts with the provisions of the loan agreement, the loan agreement will prevail.[25]

Where there is merely a commitment letter and no formal loan agreement, the lender will want to include provisions in the general assignment of rents which curtails the borrower's ability to deal with the leases. In particular, lenders expect borrowers to covenant not to accept more than one month's rent in advance, do any act or thing or omit to do any act or thing which would have the effect of terminating, cancelling or accepting the surrender of any of the leases, modifying, amending or varying any of the leases or waiving, releasing or reducing any of the tenant's obligations under the leases. Usually, the lender's consent is required in respect of such actions. Obviously, such covenants are important to protect the lender's security. However, borrowers usually consider them too restrictive. Accordingly, a compromise may be struck; the foregoing covenant may be qualified by a clause stating that the prior written consent of the lender shall not be required for any of the aforesaid acts or omissions in respect of any lease pursuant to which the annual basic rent throughout its term is less than a threshold amount (or the rentable area is below a threshold amount), if such act or omission is in accordance with prudent or commercially reasonable real estate management practice. Such a provision is often

---

[25] Where such a clause is used and an opinion is given that the security document is enforceable in accordance with its terms, one must add the qualification that certain provisions of the security document may be subject to the loan agreement and that no opinion is expressed as to the enforceability of any provision in the security document which is inconsistent with or contrary to the provisions of the loan agreement.

acceptable to lenders as they only are concerned with the major tenancies. However, some lenders are equally likely to resist such an indulgence as the common law provides that, so long as the security does not confer upon the mortgagor, either expressly or impliedly, a right to enter into new leases, the mortgagee has the right to disaffirm and terminate all leases subordinate to the mortgage upon the mortgagee foreclosing or otherwise taking possession of the property.[26]

A general assignment of rents will be registered on title to the mortgaged property immediately after the mortgage, either pursuant to Section 22(7) of the *Registry Act* or by means of a notice under Section 71 of the *Land Titles Act*. As all general assignments of rents also assign the benefit of the leases to the lender, lenders often entitle these documents "General Assignment of Rents and Leases". However, for registration purposes, one may wish to delete any reference to leases in the title of the document because: (a) in Land Titles, assignments of rents and assignments of leases are registered under two different sections of the *Land Titles Act*, and (b) when the mortgage is ultimately paid out and discharged, the Registry Office may insist upon the registration of a separate re-assignment of leases before ruling-off (in the case of Registry lands) or deleting (in the case of Land Titles lands) the general assignment.

As a general assignment of rents is essentially an assignment of receivables, it is practice to also register a financing statement under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (hereinafter, the "*PPSA*"), under "accounts" and "other" for the term of the loan.

---

26 See *Falconbridge*, *supra* note 2, at 326, Lem J. W., "Subordination and Attornment" in Haber, H. M. *Tenant's Rights and Remedies in a Commercial Lease* (Aurora: Canada Law Book, 1998) at 361, and, by way of example, the following cases: *Canadian Tire Corporation Limited v. Dirty Dan Discount Stores Ltd.* (1981), 11 A.C.W.S. (2d) 274 and *Guscon Enterprises Ltd. v. Andsam Masonry Co.* (1995), 48 R.P.R. (2d) 255 (Ont. Ct. (Gen. Div.)) [hereinafter, "*Guscon*"].

(ii) Specific Assignment of Lease

Lenders will often require that their borrowers specifically assign to them the benefit of each significant lease at a property to ensure that the cash flow from the property's key tenants is not interrupted in the event the borrower/landlord defaults under the mortgage. If there is a default, the lender may opt to send notices of default to the key tenants only, thereby securing the bulk of the property's rents while maintaining the argument that it is not in possession of the mortgaged property.

The determination of which leases merit a specific assignment is usually based on one or more of the following considerations:

- the proportionate amount of space occupied under the lease;
- the proportionate amount of rent payable throughout the term of the lease;
- the length of the term (inclusive of renewals); and
- the number of tenants (if the mortgaged property is a one-tenant facility the general assignment of rents may be replaced by a specific assignment alone).

These thresholds or, in some cases, the specific leases which the lender wants assigned, are typically specified in the commitment letter or loan agreement. Less frequently, when the commitment letter doesn't specifically list all the parameters for the security to be received, counsel will receive instructions from the lender on this point. Once the lender's counsel is aware of the threshold, it must review the rent roll to determine which leases will be specifically assigned and advise borrower's counsel.

Additionally, the lender will review each of the leases to be specifically assigned to:

- ensure that the borrower/landlord is entitled to assign the tenant's lease as security without the tenant's consent;

- determine whether the tenant's lease is automatically subordinated to the lender's security; and

- determine whether the borrower/landlord is obligated to provide the tenant with a non-disturbance agreement (see below).

Generally, a specific assignment of lease should contain the same terms as the general assignment of rents. Accordingly, the comments under the heading, "General Assignment of Rents", above, also apply here.

Unlike a general assignment of rents, specific assignments are not always registered on title to the property.[27] Unless a notice of lease has been registered against title to the property in respect of a particular lease, a specific assignment of that lease cannot be registered on title. The reason for this relates to the regulations under the *Registry Act*[28] and section 111 of the *Land Titles Act* which effectively provide that one cannot register an instrument on title (the specific assignment) that refers to an unregistered instrument (the unregistered lease to which it relates). In rare circumstances, lenders will insist that the borrower arrange for the registration of a notice of lease so that their specific assignment of lease can be registered thereafter. This is generally not a problem if the property is within the Land Registry system as any party to the lease can unilaterally register a notice in respect of that document. However, it can become quite

---

27 When registering a specific assignment of leases, a Land Transfer Tax Affidavit will be required. So long as the unexpired term of the lease, including all renewals and extensions thereof, is less than fifty years, no land transfer tax will be payable (see subsection 1(3) of the *Land Transfer Tax Act*, R.S.O. 1990, c. L.6).

28 R.R.O. 1990, Reg. 995, s.20.

problematic for borrower's counsel if the property is within the Land Titles system as subsection 111(4) of the *Land Titles Act* and the regulations thereunder,[29] are understood by the Land Registrar to provide that the Notice of Lease has to be signed by both the landlord and the tenant. Counsel should remember that tenants, who are generally not sympathetic to their landlord's problems, are in no hurry to sign such notices and will usually want to consult with their legal counsel which adds a further element of delay.

In addition to real property registrations, lenders needs to register any specific assignments under the *PPSA* for the same reason one does such a registration in respect of a general assignment of rents. Because the lender is probably already filing a *PPSA* registration for the general assignment of rents and/or the general security agreement, the lender will not do a separate *PPSA* registration for the specific assignment of lease; rather, it will "shelter" all the security documents under one *PPSA* registration.

It is worth noting here that when it comes time to discharge the primary security to which a registered specific assignment of lease is given, it is not sufficient to just list the specific assignment on the discharge; it is also necessary to have the lender execute and register a specific re-assignment of lease. Otherwise, the specific assignment of lease will not be, in the case of Registry lands, ruled-off the abstract page by the Registry Office and, in the case of Land Titles lands, deleted by the Registrar.

---

29 Form 31 of R.R.O. 1990, Reg. 690. Note that as a result of the *Red Tape Reduction Act, 1998*, S.O. 1998, c.18, Sch. E, s. 142(1) a short form of lease need not be used in Land Titles to register a lease any longer; a notice may be registered now just as is the case in Land Registry.

(iii) Assignments of Contracts, Warranties and Insurance Policies

Given that lenders wish to ensure that they can sell the property as a going concern if the borrower defaults, lenders often consider taking security in the contracts, the proceeds of any insurance policies and any warranties which are material to the operation of the mortgaged property. Like the property's leases, these contracts, policies and warranties may be assigned by the borrower to the lender, either by way of a general assignment of all contracts or by way of specific assignments. And like the leases, the lender will have to review the agreements to determine whether the borrower can assign the agreements; some agreements may require the prior written consent of the other party prior to their assignment. Some may merely require that the third party receive notice of the assignment. Additionally, lenders and their counsel will need to ensure that they understand the borrower's business well enough to confirm that they are taking an assignment of all the documents required to run its operations.

Typically, lenders look to take assignments of the following:

- Property Management Agreements: Often, the borrower only wants the property's cash flow and not the headache of managing the property on a day-to-day basis. Therefore, the borrower may hire a third party to look after the property for it.

- Insurance Policies: Prior to advancing any funds to the borrower, the lender will want to receive evidence that the borrower has taken out sufficient insurance on the property. For the most part, the issue of insurance is complex and beyond the scope of this paper. Moreover, most lenders engage a risk management consultant to evaluate the borrower's policies (lawyers may be asked to conduct such a review but may not be adequately trained to do so). However, lender's counsel is often asked to ensure that the proceeds of

all policies are assigned to the lenders and notice of such assignment is given to the insurer.

- Title Documents: This comprises major agreements registered on title. Any assignments of title documents should be registered on title.

- Construction Documents: Where the property is in the process of being developed, the lender may require the assignment of all development and construction contracts so that it can take over the project if the borrower goes into default before it is completed.[30]

- Licenses: Where the property is licensed to carry on a particular business, the lender may consider whether it can take security in the borrower's license (i.e. a license issued by the Ministry of Health to operate a nursing home is a valuable commodity and necessary to the continued operation of the borrower's business). Before assigning a license, counsel will have to review the governing legislation to determine whether such a license can be assigned as security, what the procedure is for doing so and, if required, notifying and obtaining consent from the appropriate governmental authorities. For obvious reasons, many types of licenses are personal to the borrower and may not be assigned even as security.

(iv) General Security Agreement

Most commitment letters call for the borrower to execute a general security agreement in favour of the lender. Essentially, lenders require such a document to ensure that they are taking security in any personal property located on the property. Such personal property usually

---

30 Construction financing is a very specialized area and it is suggested that readers unfamiliar with this area refer to the secondary materials on this subject.