

Lending Against a Partial Beneficial Interest?

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A beneficial interest is an individual's right to benefit from assets held by someone else. With respect to real property, it is imperative for a lender to ensure that the consent of the beneficial owner of the subject property as well as a charge of such beneficial interest is obtained. We have previously discussed the difference between registered and beneficial ownership interests in real property.

Where a borrower owns or is purchasing a partial beneficial interest in a property, for example through a co-ownership, and taking a loan only for such interest or purchase, the lender has two options.

A borrower can create its own nominee, to be registered on title, to hold its interest in the real property along the other co-owner's nominee. This would allow the lender to then take a mortgage against the borrower's interest in the property only (from the borrower's nominee) and its beneficial interest.

Where, this is not available, the alternative is for the lender to take a charge on the borrower's beneficial interest in the property (which is not registered on title) with a PPSA registration and, if possible, a pledge of the borrower's share in the nominee on title.

In either situation, the lender would enter into an agreement with the other co-owner setting out rights on default by the borrower. In the event of a default, the lender would typically want the ability to sell the borrower's interests and the co-owner would want the ability to cure default and/or approve whether any new buyer or owner are acting reasonably. To ensure the agreement is enforceable, one would need to confirm that the lender received notice of the borrower defaulting under the co-owners agreement, ensuring there are no penalties/rights of the co-owner to purchase the borrower's interest on default without the lender having the first right to enforce.

For more information please contact: **Zev Zlotnick** at **416.865.6601** or zzlotnick@grllp.com

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Author



Zev Zlotnick

Partner

416.865.6601

zzlotnick@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com