

Mortgagees' Remedies in a Shaky Market

This is the last in this year's series of Falcon Chambers seminars, and obviously the market has moved on a little since we came up with the title of this talk. But it remains the case that, whilst the property market is currently booming, its future is far from certain, and there are legacy problems from the recent recession which still affect – or should – mortgagees' decisions in realising their security. This paper looks at the pros and cons of a) taking possession and effecting a sale; b) taking possession but retaining the property; and c) appointing a receiver with an eye on the issues that need particular consideration at the moment.

(A) POSSESSION AND SALE

Our focus for present purposes is on sales by the mortgagee out of court and not with the less used option of applying to the court for an order for sale. The latter, whilst providing a degree of certainty to the mortgagee, nonetheless is very unattractive as it is not usually necessary and would incur additional expense and delay. However, if the mortgagee only enjoys the benefit of an equitable charge, for example over only the interest of one of the freehold proprietors, it will be necessary to seek an order for possession and/or sale of the property from the Court, under section 14 of the Trustees of Land and Appointment of Trustees Act 1996.¹

Power of Sale

The Power

Pursuant to section 101 of the Law of Property Act 1925, where the mortgage is made by deed and the mortgage monies have become due (ie the ordinary case), the mortgagee enjoys a statutory power of sale.

The power is wide-ranging: the sale may be made by private sale or auction, be of the whole of the property or only part. Further supplementing powers, such as the right to insure and the right to sell the mines and minerals of the property are also included in section 101.

¹ Which is beyond the scope of this paper.

It is therefore not necessary for the mortgage deed to make reference to an express power of sale. However, it remains open to the mortgagee to seek to amend or extend the power of sale by express provision in the mortgage deed in any event.² Indeed it is common practice to do so, though mortgagees usually need only rely on the statutory provision. In any event, the effect of the exercise of the power is the same in either case.

In order for the power of sale to arise the following three preconditions must be satisfied:

- (i) the mortgage must be made by deed;
- (ii) the mortgage money must have become due;
- (iii) there must be no contrary intention expressed in the mortgage deed.

When the Power of Sale may be exercised

Pursuant to section 103 of the Law of Property Act 1925, one of three conditions must be satisfied before the power of sale, having arisen, becomes exercisable:

- (a) a notice requiring repayment of the mortgage money must have been served on the mortgagor and the mortgagor must have failed to pay the mortgage monies for three months after the expiry of the notice; or
- (b) the mortgage must be in arrears for at least two months; or
- (c) there must have been a breach of some other provision in the mortgage deed or in the 1925 Act.

It is not uncommon for the mortgage deed to exclude these restrictions or to provide for its own. This can cut both ways, however. For example, in *West Bromich Building Society v Wilkinson [2005] 1 WLR 2303* the House of Lords held that as the mortgage deed identified specific events after which the power of sale would be exercisable, it was implied that unless and until one of those events had occurred the parties had agreed that the power would not be exercisable.

The notice to be served under section 103 of the 1925 Act must be in writing³ and must be served on the mortgagor, or at least one of two or more mortgagors,⁴ in accordance with section 196 of the 1925 Act, though section 196 is only applicable subject to any contrary expressed intention in the mortgage deed.

² *The Maule [1997] 1 WLR 528* at 532-533.

³ Section 196(1) of the Law of Property Act 1925.

⁴ Section 103(i) of the Law of Property Act 1925. The term 'Mortgagor' here also includes any person deriving title under the mortgage: Section 205(1)(xvi) of the Law of Property Act 1925.

The importance of a mortgagee ensuring that the power of sale has become exercisable and not merely arisen cannot be overstated. If the power has not become exercisable then the mortgagee does not enjoy any power of sale at all. Any purported sale by the mortgagee in this context will not transfer any interest in the mortgaged property to a purchaser, but the effect would be to transfer the mortgage to the purchaser. It is therefore in both the mortgagee and the purchaser's interests to ensure that the power of sale has arisen and become exercisable.

Exercise of the Power of Sale

The power of sale is for the benefit of the mortgagee, to enable it to realise its security more efficiently and effectively than if it had first to seek an order from the court. Provided it acts in good faith, and behaves fairly towards the mortgagor, it can therefore put its own interests before those of the mortgagor.

However, the mortgagee must take reasonable care to obtain what has variously been described as “the best price reasonably obtainable at the time of sale”, “the proper price”, or “the true market value” of the property. See e.g. Silven (above); Palk v Mortgage Services Funding Plc [1993] Ch 330; Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349. Such duties as it owes are, though, in the words of Hoffmann J in Re Potters Oils Ltd [1986] 1 WLR 201 (at 206) “qualified by being subordinated to the protection of his own interests”.

Therefore, the mortgagee must ensure that the property is properly advertised so that if, for example, planning permission to construct 100 flats on the property had been obtained by the mortgagor, the mortgagee must ensure that this is included in the particulars.⁵ But the mortgagee's duty does not extend to taking any active steps to improve the value of the property.⁶

Thus the mortgagee is generally free to decide if and when to exercise the power of sale; but when it does decide to exercise the power, it must take reasonable steps to obtain the best price on the sale. In deciding how to sell, a mortgagee which exercises its judgment reasonably is unlikely to be in breach of its duty to the mortgagor.

Further the mortgagee does owe a duty to the mortgagor, and any others with an interest in the equity of redemption⁷ (such as subsequent mortgagees) to both act in good faith and to

⁵ *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949.

⁶ *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409.

⁷ *Freeguard v Royal Bank of Scotland plc* [2002] *The Times*, 25 April 2002.

use his powers for proper purposes.⁸ In practice it may be difficult for a mortgagor to prove that a mortgagee has acted in bad faith.⁹ However, an easy example of this duty of good faith is that the sale must be a real sale and not a sham and, therefore, the mortgagee must not sell to itself or a connected person,¹⁰ unless the sale is by the court and he has leave to bid. A sale to an employee may be permissible but only where the mortgagee can show that it has acted in good faith and has obtained the best price reasonably obtainable and the burden will be on the mortgagee to show that it has done so.¹¹

Duties and Liabilities of the Mortgagee when selling the Property

The mortgagee enjoys the benefit of a wide discretion as to the sale of the property:

- (i) The power of sale is given to the mortgagee for his own benefit and, therefore, he may exercise that power for his own benefit above that of the mortgagor;¹²
- (ii) Therefore, the mortgagee is free to decide whether to sell at all,¹³ irrespective of the wishes of the mortgagor,¹⁴ and even if contrary to professional advice to sell he may decide not to sell at that time;¹⁵
- (iii) The mortgagee is entitled to decide the time for the sale¹⁶, subject to the duty set out below to obtain the best price reasonably obtainable;
- (iv) The mortgagee is not under any obligation to carry out further works to the property or to take further steps in order to achieve a higher sale price;¹⁷
- (v) The mortgagee is free to determine what property ought to be included in the sale;
- (vi) The mortgagee is free, subject to any restrictions in the mortgage deed, to determine how the sale ought to be conducted: e.g. whether by private sale through agents or at auction. However, whatever the means of sale, the property must be properly advertised.

⁸ *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949.

⁹ See *Caricom Cinemas Ltd v Republic bank Ltd* [2003] UKPC 2.

¹⁰ *Farrar v Farrars Ltd* (1888) 40 ChD 395, *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349.

¹¹ *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349.

¹² *Palk v Mortgage Services Funding plc* [1993] Ch 330.

¹³ *Raja v Austin Gray* [2003] 1 EGLR 91.

¹⁴ *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536 and *Silvern Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409.

¹⁵ *Lloyds Bank plc v Bryant* [1996] NPC 31.

¹⁶ *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, *Den Norske Bank ASA v Acemex Co Lintied* [2005] BCLC 274.

¹⁷ E.g. see *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949.

Advantages and Disadvantages of Sale

The following are the advantages when a mortgagee decides to sell the property as opposed to going into possession:

- (i) the mortgagee enjoys an almost free reign in the sale of the property and, subject to there being sufficient equity, may recover the costs of the sale;
- (ii) it usually provides a relatively quick resolution and realises within a reasonable time a significant lump of equity for the mortgagee;
- (iii) it avoids the potential delays and costs involved in either taking on possession of the property;
- (iv) it further avoids the costs of appointing a receiver;
- (v) the duties owed by the mortgagee are far less onerous when selling the property than when going into possession.

However, the following are the disadvantages when a mortgagee elects to sell the property straight away rather than go into possession or to appoint a receiver:

- (i) In the present economic climate mortgaged properties are often in negative equity or at least would provide a poor return for the costs involved in organizing the sale and obtaining vacant possession. Whilst the mortgagee would still have the benefit of the personal liability of the mortgagor, this is often not worth the paper it is written on.
- (ii) By contrast, the rental market is currently booming and property prices, particularly in London, are predicted by most market analysts (see eg Savills' current predictions) to continue going up for at least the next few years, so selling a property where there is negative equity is a rather short-termist solution at present which is unlikely to give the best value to the mortgagee.
- (iii) Further, especially in the context of residential property, it is more likely than not that the mortgagee will want to sell with vacant possession (in order to maximize its own return on the sale) and, therefore, despite the above, it will in reality be necessary to obtain vacant possession by court proceedings in any event, which rather erodes the main benefits of speed and cost savings on a sale.

(B) POSSESSION WITHOUT SALE

Right to Possession

As has already been discussed, the general rule is that a mortgagee is entitled to seek possession of the mortgaged premises at any time after the mortgage deed is executed. This has been summarised by the old maxim that the mortgagee, “may go into possession before the ink is dry on the mortgage”.¹⁸

This immediate right to possession is a result of the estate vested in the mortgagee. It is not related to any default on the part of the mortgagor nor is it dependent upon notice or demand. The only restrictions are either those in the mortgage deed itself¹⁹ or the statutory restrictions.

How to exercise the right

There is, as a matter of law, generally no need for a mortgagee to undertake litigation in order to exercise its right to possession²⁰. However, in practice, a mortgagee will rarely take possession without a Court order unless there is already a tenant in situ and the mortgagee accepts that it is bound by that tenancy. In such circumstances, in order to obtain possession, it is only necessary for the mortgagee to serve a notice upon the tenant to pay rent to the mortgagee.²¹

Note that the court has wide discretion to grant relief to mortgagors faced with proceedings for possession, however. There is an inherent jurisdiction at common law for the High Court (and, it appears, the County Court), to grant a short adjournment of proceedings to a mortgagor in order to give him a chance of paying off the mortgage: *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883 at 891.

This discretion has been supplemented by various subsequent statutory provisions:

¹⁸ *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 at 320 per Harman J.

¹⁹ For example, it is usual where the mortgage is repayable by instalments for the terms of the mortgage to provide that the mortgagee will only be entitled to exercise their right to possession upon default.

²⁰ *Ropaigalach v Barclays Bank* [2000] WB 263

²¹ *Fisher & Lightwood* 29.49

- a) The Consumer Credit Act 1974: Where the mortgage is regulated by this statute, the Court has a jurisdiction to suspend an order for possession and/or make a ‘time order’ (providing for payment of sums owed by instalments at such times as it considers reasonable, having regard to the mortgagor’s means), or to amend the terms of the mortgage itself: ss. 129, 135-6.
- b) The Administration of Justice Act 1970: Where a mortgagee brings proceedings for possession and the mortgaged property consists of or includes a dwelling-house, the Court can adjourn the proceedings, suspend the execution of any order it makes for possession, or postpone the date for possession. This discretion can only be exercised where it appears that the mortgagee is likely to be able within a reasonable period to pay any sums due under the mortgage: *First National Bank Plc v Syed* [1991] 2 All ER 250.

In determining what amounts to a ‘reasonable period’, the starting-point is the remaining term of the mortgage: *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 WLR 343.

This discretion is inapplicable where the mortgage is regulated by the 1974 Act.

Rights of the mortgagee in possession

A mortgagee in possession is entitled to the rents²² and profits of the mortgaged property.²³ A mortgagee in possession also has the right to enforce leasehold covenants.²⁴

(1) Receipt of rents from existing tenancies

The mortgagee must first consider whether the tenancy is binding on him. The mortgagee is bound by a tenancy if:

- 1) It predated the mortgage; or
- 2) The terms of the mortgage permitted the borrower to grant tenancies; or
- 3) The mortgagee consented to the tenancy.

(a) Where there is tenancy in situ binding on the mortgagee

²² *Trent v Hunt (1853) 9 Exch. 14.*

²³ *See Fisher & Lightwood 29.49.*

²⁴ For pre-1996 leases see Law of Property Act 1925, s.78. For post-1996 leases see Landlord & Tenant (Covenants) Act 1995, s.15 and *First Penthouse Ltd v Channel Hotels & Properties (UK)* [2004] L & TR 16.

Where the mortgagee is bound by a prior tenancy of the property, the mortgagee will take possession by serving a notice on the tenant to pay the rent to the mortgagee. Upon taking possession by serving the notice the mortgagee is entitled to:

- (i) any arrears of rent at the date the mortgagee takes possession (even where the tenant has paid the rent prematurely to the mortgagor before it fell due²⁵);
- (ii) the future rents of the property.²⁶

The tenant is not entitled to set off against the rent any personal claim he may have against the mortgagor²⁷

(b) Where there is a tenancy which is not binding on the mortgagee

In this situation, the mortgagee must decide whether it wants to accept the tenant as its tenant (in which case it can sue for the rent falling due), or not – in which case the mortgagee is not entitled to demand the future rent or any arrears²⁸ – though it is entitled to mesne profits for the tenant's use and occupation of the mortgaged property. This is likely to be a sum equivalent to the rent under the non-binding tenancy²⁹ and upon such a demand being served on the tenant, provided it is stipulated to be mesne profits and not the grant of a new tenancy) the mortgagee will be entitled to demand the sum from the tenant in occupation without creating a tenancy binding upon himself.

Upon a mortgagee taking possession, his right to possession dates back until the grant of the mortgage (assuming that the mortgage deed does not provide otherwise) and, therefore, the mortgagee is entitled to mesne profits for the entirety of that period, subject to the six year statutory limitation and giving credit for sums already paid by the tenant to the mortgagor before the mortgagee took possession.³⁰

The mortgagee must consider whether to accept the tenant as its tenant immediately, for it may, by its conduct estop itself from denying that the tenancy is binding upon it.

²⁵ *Reeves v Pope [1914] 2 KB 284, CA.*

²⁶ This includes any increase by variation of the rents, which has occurred after the mortgage was entered into. See. *Fisher & Lightwood 29.49.*

²⁷ *Fisher & Lightwood 29.49.*

²⁸ See *Kitchen's Trustees v Madders [1950] Ch 134, CA at 146*

²⁹ *Ocean Accident and Guarantee Corporation v Ilford Gas Company [1905] 2 KB 493, CA at 498-499.*

³⁰ *Fisher & Lightwood 29.49.*

(2) Granting new leases

Absent any term in the mortgage deed to the contrary, a mortgagee in possession enjoys the right to grant new leases of the mortgaged property, pursuant to section 99(2) of the Law of Property Act 1925,³¹ and a power to accept a surrender of leases if necessary in order to enable it to grant a lease itself: section 100(2) of the Law of Property Act 1925.³²

Importantly, by section 99(6), the lease must be at the best rent reasonably obtainable, having regard to the circumstances, but without any fine being taken. Furthermore, a mortgagee may not grant a lease on terms which will have an adverse effect on the level of the debt of the mortgagor, without incurring a liability to the mortgagor. For example, in *White v City of London Brewery Co. (1889) L.R. 42 Ch. D. 237*, the court held that the mortgagee was obliged to account to the mortgagor for the difference in rent when the mortgaged property, being a public house, was let on a tied basis (the mortgagee being a brewer). This was especially true where the level of rent for a tied tenancy was insufficient to meet the ongoing mortgage payments, resulting in an ongoing increase in the arrears.

A mortgagor can, of course, apply to the court for an order for the sale of the property pursuant to section 91 of the Law of Property Act 1925, in circumstances where the proposed or ongoing tenancy is on terms which will have an adverse effect on the mortgage arrears.

Application of Receipts

The mortgagee in possession ought to apply receipts from either old or new tenancies (or any other profit from the mortgaged property) in the following order (see *Fisher & Lightwood, Law of Mortgages 29.54*):

- (i) discharging outgoings relating to the property including expenses of the mortgagee in possession for managing the property (such a receipt of rent commission);
- (ii) paying the interest on any prior mortgages or incumbrances;
- (iii) paying the interest due under the mortgagee's mortgage;
- (iv) any surplus may then either be (a) paid off the principal or (b) handed over to the mortgagor.

³¹ This power may be delegated to a receiver pursuant to section 99(19) of the Law of Property Act 1925, as to which see below.

³² As to which please see below.

The mortgagee is free to decide whether to utilise any surplus to pay down the principal due under the mortgage. The mortgagee is not obliged to do so. He does not have to accept “dribbles” off the principal sum owing under the mortgage.³³ He may simply pay it to the mortgagor, unless he has received notice from a later incumbrancer to pay any surplus to him instead.

Liabilities of the Mortgagee in Possession

Upon taking possession of the mortgaged property, the mortgagee automatically assumes a number of additional liabilities to the mortgagor, the holders of prior incumbrances and some tenants in occupation.

In particular the mortgagee in possession will have the following liabilities:

- (i) a liability to account for wilful default;
- (ii) a liability for deliberate and negligent damage to the property;
- (iii) a liability to repair and maintain the property;
- (iv) a liability under some freehold and leasehold covenants.

(i) *liability to account for wilful default*

By taking possession of the mortgaged property, the mortgagee in possession becomes the manager of that property and accordingly owes duties to the mortgagor. In particular, the mortgagee is bound to be diligent in the collection of the rents and profits from the mortgaged property. Therefore, credit must be given off the mortgagor’s account for both all rents and profits collected and any rents and profits which are not actually received by the mortgagee, by virtue of the mortgagee’s own incompetence, negligence or wilful default.³⁴

A mortgagee will, therefore, in order to discharge this duty, be required to employ all the usual means of recovering any arrears of rent, including the taking of proceedings.³⁵

If the mortgagee decides that it will not sell the property it may well be obliged to seek to rent out the mortgaged property, exercising reasonable care both in the decision as to whether to let and, if so, how to let. The duty to account is owed not only to the mortgagor but to all

³³ *Wrigley v Gill [1905] 1 Ch 241 at 254 per Warrington J.*

³⁴ *Medforth v Blake [2000] Ch. 86.*

³⁵ *See Duke of Buckingham v Gayer (1684) 1 Vern. 258.*

those with an interest in the equity of redemption. Therefore, the duty is also owed to both the holders of prior and later charges.

However, the duty to account only covers receipts of income arising from the mortgaged property itself. Therefore, in *White v City of London Brewery Co [supra]* although the mortgagee was required to account for the difference in the rent for the mortgaged public house where it was let on a tied basis, the brewer mortgagee was not obliged to account for the additional profit made from the sale of the beer. This profit was made by the mortgagee *qua* brewer and not *qua* mortgagee.

(ii) *a liability for deliberate and negligent damage to the property;*

The mortgagee in possession is under an equitable duty to give the property back to the mortgagor in the same state in which he took possession of it, upon redemption of the mortgage. In effect, therefore, the mortgagee is under a duty to take reasonable care of the mortgaged property. The mortgagee in possession will be held liable in damages for any damage resulting from his negligence or that of his agents. For example, the mortgagee in possession has been held liable in damages for allowing water pipes to freeze³⁶ and for any reduction in value by alteration works undertaken by the mortgagee.

(iii) *a liability to repair and maintain the property;*

The duty of a mortgagee in possession to take reasonable care of the property extends to a duty to carry out all necessary and reasonable repairs to the property,^{37 38} though the costs of repair may be charged to the mortgagor's account.

Further is a long established principle that the mortgagee in possession is only required to undertake repairs to the extent that the surplus rents or profits received from the mortgaged property allow, after deducting the sums due towards the interest to which the mortgagee is entitled, without expending his own monies.³⁹

A mortgagee in possession cannot be served with a section 146 notice or with a notice under section 1 Leasehold Property (Repairs) Act 1938.⁴⁰ However, a mortgagee in possession may

³⁶ *Sterne v Victorai & Grey Trust Co (1984) 14 DLR (4th) 193 a Canadian case.*

³⁷ See the discussion in *Downsview Nominees Ltd v First City Corporation Ltd [supra]* at 315.

³⁸ See *Fisher & Lightwood at 29.64.*

³⁹ *Richards v Morgan (1753) 4 Y & C. Ex. 570.*

⁴⁰ *Smith v Spaul [2003] QB 983.*

well be liable for the loss caused by forfeiture where they fail to use the rents and profits to carry our necessary repairs.

(iv) *a liability under some freehold and leasehold covenants.*

Positive freehold covenants will not bind the mortgagee in possession as they are personal to the mortgagor (unless one of the recognized exceptions applies). However, the mortgagee in possession will often be bound by any restrictive freehold covenants, as a successor in title to the covenantor.

Under mortgages of pre-1996 leasehold interests, a covenant is enforceable against the mortgagee in possession where the obligation concerns the subject matter of the lease.⁴¹

Under mortgages of post-1996 leasehold interests, (or the reversionary interest of such a lease) covenants are enforceable against the mortgagee in possession, unless they are expressed to be personal or are unenforceable for want of registration.⁴²

(v) *Liabilities as ‘owner’ or ‘occupier’*

Once a mortgagee has taken possession of the mortgaged property it may also expose itself to third party liabilities, especially where the liability is imposed simply on an ‘owner’. Some examples are:

- Liability in negligence and/or under the Occupiers’ Liability Act 1957 to third parties on the property;
- Liability in nuisance to neighbours;⁴³
- Liability to trespassers under the Occupier’s Liability Act 1984;
- Liability under planning regulations where a development has been started prior to the mortgagee taking possession;
- Liability to the local council under environmental regulation, such as the Contaminated Land Regime;
- Liability for rates.⁴⁴

⁴¹ Law of Property Act 1925, s.142.

⁴² Landlord & Tenant (Covenants) Act 1995, s.15.

⁴³ See the brief discussion in *Fisher & Lightwood at 29.60*. At common law it is not necessary for the present owner or occupier to have caused the nuisance in order to be held liable. This is also true under the rule in *Rylands v Fletcher* and for statutory nuisances: see section 81 of the Environmental Protection Act 1990.

For most of these cases the mortgagee in possession satisfies the definition of ‘owner’ by their degree of control upon taking possession. There have been occasions,⁴⁵ however, where the courts have held that the mortgagee in receipt of rent is not in sufficient control to justify imposing liability. However, more often than not the statutory definitions are broad enough to capture mortgagees in possession.

One example is the statutory regime for contaminated land contained in the Environmental Protection Act 1990.⁴⁶ The regime actually imposes liabilities upon local councils for the remediation of contaminated land in their area. However, a power (which in practice has been rarely exercised) is provided whereby a contribution towards the remediation may be required from a variety of persons.⁴⁷ Section 78A(9), in defining an ‘owner’ for the purposes of establishing upon whom the council may impose liability, provides:

“in relation to any land in England and Wales, means a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land, or, where the land is not let at a rack rent, would be so entitled if it were so let”.

It is clear from this definition that a mortgagee, once he has entered into possession, is perfectly capable of being caught by the legislation. Whilst remediation bills are relatively rare they are, nonetheless, relatively large and it may be of no comfort to the mortgagee that he may be able, under the terms of the mortgage deed, to pass this on to the mortgagor.

This position is to be contrasted to that of the appointment of a receiver by the mortgagee. As discussed below, the receiver is the agent of the mortgagor and, saving where the court has held that the mortgagee has exercised an excessive practical control,⁴⁸ this will protect the mortgagee from liability as ‘owners’, such as under the Environmental Protection Act 1990.

Ultimately, there is little authority in this area as a result of a prevalence of confidential settlements. However, it must remain a real danger which the mortgagee ought to take into

⁴⁴ For example, in *Westminster City Council v. Haymarket Publishing Ltd* [1981] 1 W.L.R. 677 the mortgagee in possession was held liable for the rating surcharge as it was the mortgagee who had control of the letting (at 680 per Denning LJ).

⁴⁵ See *Midland Bank v Conway* [1965] 1 WLR 1165 in connection with the then Public Health Act 1936.

⁴⁶ See sections 78A and 78 E of the 1990 Act.

⁴⁷ See section 78E and 78F of the 1990 Act.

⁴⁸ *Standard Chartered Bank v Walker* [1982] 1 WLR 1411.

account before entering into possession. This is especially true of development projects funded by the mortgagee.

Advantages and Disadvantages of Retaining Possession

Where a mortgagee elects to take possession of the mortgaged property and to receive the income from it absent a sale, he enjoys the following benefits:

- (i) provided the ongoing interest payments are met, it provides an opportunity to ride out a poor property market without prejudice to the mortgagee's investment;
- (ii) the possibility of reducing the capital sums owing, if income exceeds the costs plus interest;
- (iii) a significant degree of control over both the income received and the occupier of the mortgaged property;
- (iv) an opportunity in certain cases to increase his own profits aside from the mortgaged property itself (such as in *White v City of London Brewery Co*);
- (v) the mortgagee may be able to realise all of these benefits without incurring the inevitable costs of obtaining a court order, if there is an authorized tenant in occupation.
- (vi) It gives the borrower a final opportunity to redeem before the security is sold.

At present, in a rising market and with a very strong rental market, it may be that a mortgagee, particularly in the context of a property in negative equity, will do better financially by letting a property whilst waiting for its value to increase. Certain areas of the market, notably residential property in the south east, and small warehouses on the outskirts of towns are a particularly good investment for rental returns at present, whereas sale values, particularly in the context of auctions where most mortgagee sales take place, are unlikely to realise full values.

However, the mortgagee taking possession of the mortgaged property also entails the following disadvantages:

- (i) the mortgagee takes on significant liabilities and duties not only to the mortgagor but also to third parties interested in the equity of redemption, and even potentially to strangers;
- (ii) the mortgagee must undertake the use of its resources to manage the property, for example the time involved in dealing with third party tenants or other incumbrancers;

- (iii) the mortgagee in possession will be liable for the actions of any agents it employs to carry out its functions as mortgagee in possession.

A mortgagee taking possession of a leasehold estate must also be alert to the possibility that by taking possession he may make the lease vulnerable to forfeiture by the landlord. Whilst able to apply for relief, nonetheless this invites both an uncertain and costly element into the equation. Mortgagees of leasehold interests are strongly advised to check the terms of the lease before entering into possession.

Ultimately, a mortgagee taking possession is a remedy which enjoys a great deal of control over the mortgaged property, in return for which the mortgagee takes on not insignificant additional liabilities and duties owed to both the mortgagor and third parties, so whilst this can be a financially appealing option it is not without its hazards.

(C) APPOINTMENT OF A RECEIVER

One of the other main options available to a mortgagee is to appoint a receiver. As *Fisher & Lightwood* concludes, “*the appointment of a receiver is a means by which the mortgagee can ensure that the mortgaged property is efficiently managed and that the net rents and profits are paid first towards the interest due under the mortgage*” (at 28.1). These benefits can be obtained without the mortgagee having to undertake the liabilities arising from being a mortgagee in possession.

Moreover, a mortgagee in possession is not precluded from appointing a receiver if it wishes to absolve itself of the responsibilities of being in possession – for once appointed, the receiver will take over the possession: *Refuge Assurance Co v Pearlberg* [1938] Ch 687.

The right to appoint a receiver may arise both by statute and by an express power in the mortgage deed.

Appointment

A receiver may be appointed by a mortgagee both in and out of court. In practice, mortgagees prefer to appoint receivers out of court. Firstly, it avoids the inevitable costs and delay associated with the court process. Secondly, the mortgagee thereby retains a greater degree of control over the identity of the person appointed as receiver. Given these advantages, an appointment by the court will usually be resorted to only where for some reason (if the mortgage not being by deed or a legal charge) the express or statutory power to appoint a

receiver is not exercisable. Accordingly, this paper will focus primarily on appointment out of Court⁴⁹.

Statutory Power of appointment

Section 101(1)(iii) of the Law of Property Act 1925 provides that the mortgagee enjoys:

“(iii) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part thereof; or, if the mortgaged property consists of an interest in income, or of a rentcharge or an annual or other periodical sum, a receiver of that property or any part thereof”.

This statutory power of appointment arises if the mortgage money has become due or there has been another breach of the mortgage deed or at such other time as is stipulated in the mortgage deed.

The power is exercisable at the same time as the statutory power of sale is exercisable⁵⁰ – again, unless the mortgage deed makes some other provision.

The appointment must be made in writing.

Express power of appointment

A receiver may also be appointed out of court by a mortgagee pursuant to an express power of appointment contained in the mortgage deed. This power will be exercisable in accordance with the strict terms of the mortgage deed, though this can have the effect of making the power exercisable in circumstances where the statutory power has not yet become exercisable. On the other hand, it could also impose more onerous requirements – for example, a demand might be required.

As discussed below, the other benefit of an express power of appointment is that the receiver may be given wider or extended powers over and above those enjoyed by a receiver appointed pursuant to section 101 of the Law of Property Act 1925. However, if the receiver is appointed pursuant to an express provision in the mortgage, he will only be the agent of the mortgagee and not the mortgagor (as with a statutory appointment) if it is provided so in the

⁴⁹ Further, the powers of the receiver are those set out in each individual court order and the duties owed are very similar to those owed by a receiver appointed out of court. It should, however, be noted that a court-appointed receiver is not the agent of the mortgagor. He is an officer of the court.

⁵⁰ See Law of Property Act 1925, s.109(1).

mortgage deed. It is, therefore, vital (in order to achieve many of the benefits of a receiver) that the mortgagee ensures that the mortgage deed includes a provision to the effect that the receiver appointed by the mortgagor acts as the agent of the mortgagor and not the mortgagee. In the remainder of this paper, we assume this to be the case where an express power of appointment is in issue.

In addition, it is important to note that the receiver will only be the agent of the mortgagor if the strict terms of the statute/the deed are complied with. If, for example, there is no default, or a formal demand is required but not served, the receiver's appointment will be invalid and the mortgagee will remain liable for his acts. This will also be the case if the mortgage deed was not validly executed in the first place.

Leave to appoint a receiver is only required where the trigger event is committing an act of bankruptcy, or being adjudicated bankrupt or entering into liquidation. If another trigger event can be relied on (e.g. default) the fact that insolvency subsequently occurs does not result in leave being required.

Selection of a receiver

A mortgagee's power to appoint a receiver is provided, whether expressly or by statute, in order that he may protect his own interests and, as such, it is a power which the mortgagee is entitled to exercise entirely for his own benefit. Therefore, whilst the mortgagee may be under a duty to take reasonable care not to appoint someone who is incompetent or known to be an incompetent as a receiver,⁵¹ save for a few limited restrictions on the appointment of a receiver, the mortgagee is under no duty as to whom is appointed.

However, it should be noted that once a receiver is appointed the mortgagee must not interfere or divert his activities if it wishes to avoid liability for the acts of the receiver.

The position of a receiver

Sections 109(2) and (3) of the Law of Property Act 1925 provide:

“(2) A receiver appointed under the powers conferred by this Act, or any enactment replaced by this Act, shall be deemed to be the agent of the mortgagor; and the mortgagor shall be

⁵¹ See *Shamji v Johnson Matthey Bankers Ltd [1991] BCLC 36 at 42*.

solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Act”.

Therefore, it is the *mortgagor*, and not the mortgagee, who is responsible for the receiver’s acts and defaults.⁵²

In *Silvern Properties Ltd v Royal Bank of Scotland plc [2003] EWCA Civ 1409*, a case concerning the sale of a property by a receiver, the Court of Appeal made the following comments as to the relationship of a receiver with the mortgagor and mortgagee:⁵³

- (i) the agency is one where the principal (the mortgagor) has no say in the timing of the appointment or the identity of the appointed receiver;⁵⁴
- (ii) there is neither a contractual nor a tortious duty owed by the receiver, as agent, to the mortgagor, as principal.
- (iii) Only an equitable duty is owed.⁵⁵ However, this duty is owed to both the mortgagor and the mortgagee;
- (iv) Assuming he does not exceed his powers, the duty owed to the mortgagor is limited to that of an account for any sums not actually received due to the negligence or wilful default of the receiver;
- (v) The receiver’s primary duty is to the mortgagee, to manage the mortgaged property in order to pay off the secured debt;⁵⁶
- (vi) General agency principles are of limited use given the particular and unique relationship of the receiver with his principal.⁵⁷

⁵² See *George Baker (Transport) Limited v Enyon [1974] 1 WLR 462*. This is so unless the mortgage deed provides otherwise.

⁵³ Also listed and discussed in *Fisher & Lightwood, Law of Mortgages at 28.8*.

⁵⁴ Rigby LJ in *Gaskell v Gosling [1896] 1 QB 669 at 692* held that, “for valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with”.

⁵⁵ See *Medforth v Blake [supra]* and *Raja v Austin Gray (a firm) [2002] EGLR 61*.

⁵⁶ *Medforth v Blake [supra]* at 95-96. *Downsview Nominees Ltd v First City Corporation Ltd [supra]* at 331.

⁵⁷ *Gomba Holdings UK Ltd v Homan [1986] 1 WLR 1301 at 1305 per Hoffman J*.

The mortgagee, therefore, would appear to have the best of both worlds upon the appointment of a receiver. On the one hand, the mortgagee has the benefit of a professional receiver maximising the income of the mortgaged property and ensuring that the profits are paying off the interest (and if he desires the principal debt too) owed to him. On the other hand, the mortgagee is not responsible for the actions of the receiver, who exercises his powers as agent of the mortgagor.

A further example can be seen in the recent case of *National Westminster v Hunter [2011] EWHC 3170*. Receivers had sold the security at an auction. The borrower complained of this (for he had made a higher, though it was held less attractive, offer), and sought an order for sale under section 91 of the Law of Property Act 1925. The Court held that the auction contract was one to which the borrower was, albeit involuntarily, a party – and this meant that if the Court acceded to his application, this would place him in breach of the auction contract. As a result, the Court refused his application and the contracts resulting from the auction could proceed.

Powers of a Receiver

Once appointed a receiver enjoys the following powers:

- (i) the power to demand and recover all the income of the mortgaged property⁵⁸, which he may do either in the name of the mortgagee or the mortgagor; and
- (ii) the power to issue receipts for such income.

If there are tenants:

The receiver should give the tenants formal notice of his appointment as soon as possible, for until this has occurred that the tenants cannot obtain a valid discharge by paying the mortgagor.

In addition he has any powers of the mortgagee delegated to him by the mortgagee.⁵⁹ The usual practice is for the mortgagee to delegate to the receiver extensive powers, including often the power to lease, accept surrenders, sell the property and to borrow money on any part of the mortgaged property. Such extensions usually take effect as an express power and not as an extension of the statutory power.

⁵⁸ Law of Property Act 1925, s.109(3).

⁵⁹ See Law of Property Act 1925, ss. 99(19), 100(13) and 109(3).

Some mortgages also expressly delegate to the receiver the power to take possession of the mortgaged property. First, we must consider the receivers' ability to obtain possession from third parties. The receiver can, by virtue of the mortgage terms, commence proceedings against third parties (eg former tenants or trespassers) in the name of the mortgagor: *M Wheeler & Co v Warren [1928] Ch 840*.

Secondly, there is the question of obtaining possession from the mortgagor himself. Since the receiver acts as agent of the mortgagor, there is an obvious advantage to the mortgagee if a receiver can be appointed and can take possession without the mortgagee having to accept all the liabilities which flow from being in possession. For this reason, no doubt, borrowers have, in some cases, questioned whether this provision really means what it says. The following particular questions can arise:

- (1) Are the receivers entitled to take possession without any Court proceedings at all? and
- (2) If Court proceedings are taken:
 - Can the receivers sue in their own name, or must they join the lender?
 - Can (and should) the Court order possession to be delivered to the receiver, as opposed to the mortgagee?

The authorities are limited, but one member of chambers has successfully persuaded a County Court judge to make a possession order in favour of a receiver, relying on *Pratchett v Drew [1924] 1 Ch 280*. Another was involved in an unreported High Court case in 2001, where it was apparently decided that the mortgagee must be joined to the possession claim (though he could not recall whether the terms of the mortgage in that case specifically entitled the receivers to possession). Finally, in the recent case of *Bower Terrace Student Accommodation Ltd v Space Student Living Ltd [2012] EWHC 2206 (Ch)* an interim order requiring possession, brought in the name of the receivers, was successfully obtained before Foskett J.

Note that if there are no express extensions of the statutory powers, the receiver has no powers beyond those identified in (i) and (ii) above. So, he cannot insure the property, carry out repairs, carry on the mortgagor's business or collect book debts, nor can he recover possession from tenants, terminate the tenancy or increase the rent – so care needs to be taken when drafting the mortgage deed, to add such express powers if they are likely to be needed. If the receiver acts beyond his powers, he will be liable to the mortgagee for any sums spent from the income. He may also be liable to the mortgagor – so an authorisation from the mortgagee to exceed his powers may not be a 'carte blanche'.

The Receivers' Duties

(1) Application of income

The receiver is bound, in the absence of any agreement between mortgagor and mortgagee to the contrary, to apply the income received as follows:

“(109) (8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:

(i) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right where of he is receiver; and

(iii) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv) In payment of the interest⁶⁰ accruing due in respect of any principal money due under the mortgage; and

(v) In or towards discharge of the principal money if so directed in writing by the mortgagee;

and shall pay the residue, if any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property”.

As to his remuneration: if no rate is specified in the mortgage, the receiver will generally be entitled to 5% of the monies received – though an application to court for an increased rate is possible.

(2) Other duties

The receiver's primary duty is to the mortgagee to realise the income of the property for the protection of the mortgagee's security⁶¹ both as to payment of interest and the principal debt

⁶⁰ Although arrears of interest are included, only interest which is not statute-barred can properly be paid.

itself. The receiver therefore owes a duty of good faith and a duty, to the mortgagee, to exercise his powers for the purpose of obtaining repayment of the debt secured by the mortgage.

Whilst there is no common law duty of care, the receiver owes an equitable duty to both the mortgagee and the mortgagor (and anyone else interested in the equity of redemption) to deal fairly and equitably with the mortgaged property. The equitable duty includes a duty of good faith, and a duty to manage the property with due diligence.

The receiver has an obligation to be proactive and to take steps to receive the income from the property and to apply it to the mortgage interest and debt. These duties extend beyond merely the collection of rents where the mortgaged property is let. The receiver is under a duty to act in order to safeguard the investment and this may require him to take additional steps. In *Knight v Lawrence [1993] BCLC 215* the court held that the duty (which was owed to both mortgagor and mortgagee) extended to requiring the receiver to trigger an upwards only rent review clause.⁶²

The duty does not extend to maximising the value of the mortgaged property by undertaking works of improvement or development, nor is the receiver generally obliged to accept any proposals, however reasonable, from the mortgagor.⁶³

If the receiver has a power of sale delegated to him by the terms of the mortgage, he owes the same duty to the mortgagor as the mortgagee would: namely a duty to obtain the best price reasonably obtainable. In *Glatt v Sinclair [2011] EWCA Civ 1317* the Court of Appeal gave some valuable guidance as to how a breach of such a duty should be avoided. In that case, the receiver (there a Court appointed receiver, though the principles are the same) had obtained a valuation of £330,000 from an independent valuer, and nominated local estate agents to market the property. In a short space of time, the agents reported that there had been 3 offers, the highest of which was £330,000, and the receivers accepted that offer and completed the sale at that price. On the same day, the property was re-marketed, and shortly afterwards a price of £455,000 was obtained. That, of course, led to a complaint by the borrower that the receivers had sold at an undervalue. The Court of Appeal indicated that it was not enough for a receiver to obtain a valuation and then sell at the stated value. In order to be able to defend themselves against such a complaint, the receivers should have concerned themselves with whether there had been a proper testing of the market – ie by the

⁶¹ *Downsview Nominees Ltd v First City Corporation Ltd [supra]* at 313-315.

⁶² Approved in *Medforth v Blake [supra]* at 99-100.

⁶³ *Lloyds Bank plc v Cassidy [2002] EWCA Civ 1767*.

marketing process. In the particular case, it was suggested that exposing the property to the market for longer than a few days would have been sensible given the level of interest that had been obtained, and that the receivers ought to have known whether sales particulars had been produced, and how and where the property had been advertised before deciding whether to accept the offer.

However, more positively, so far as receivers are concerned, the Court of Appeal also indicated that, absent anything to put the receivers on notice, they were entitled to assume that reputable estate agents were not acting fraudulently.

Likewise, if a receiver is able and decides to carry on the business, he must (like the mortgagee) do so with reasonable competence: *Medforth v Blake* (supra).

If the mortgagee is concerned about a proposed action (or inaction) on the part of a receiver, he can, if the circumstances warrant it, seek to restrain the receiver from his proposed course, by injunction.

In summary, the receiver generally owes the following duties:

- (i) to the mortgagee, a primary duty to take steps to protect the security of the mortgagee and to receive income from the mortgaged property and to apply it to the mortgage debt and interest;
- (ii) a duty to act in good faith;
- (iii) a duty to account for any wilful default and/or negligence;

Termination

The mortgagee retains the power to terminate in writing the receivership or to replace the receiver with another of his choosing at any time.⁶⁴ The mortgagor does not have the direct power to terminate a receivership, despite being his principal.

Ultimately, this provides the mortgagee with a powerful incentive for the receiver to act in the mortgagee's own interests efficiently. Further, the larger mortgage lenders ordinarily have a bank of friendly receivers ready to be appointed to the various defaulting mortgaged properties, thereby ensuring that a friendly relationship pre-exists the actual appointment. The mortgagor is effectively cut out of this practical relationship whilst being liable for the actions of these receivers.

⁶⁴ Law of Property Act 1925, s.109(5).

However, a receiver's appointment may also be terminated by:

- (i) the appointment of a receiver by a prior mortgagee;
- (ii) an administration order;
- (iii) the receiver's death.
- (iv) The mortgagor obtaining an order for sale under section 91 of the Law of Property Act 1925.

Advantages and Disadvantages of appointing a receiver

The advantages of appointing a receiver are that:

- (i) Unless it interferes, the mortgagee bears no liabilities or duties towards the mortgagor or third parties;
- (ii) whilst acting under the 'protection' of his agency with the mortgagor, the receiver works to secure and realise the security for the mortgagee;
- (iii) once the mortgagee has appointed the receiver, he may sit back and receive the income (via the receiver) as opposed to having to manage the mortgaged property himself;

By contrast, there are relatively few disadvantages, save possibly:

- (i) The receiver is remunerated out of the income received from the mortgaged property, and if margins are tight, the mortgagee may prefer to maximise his receipt from the mortgaged property;
- (ii) The mortgagee, whilst having control over the appointment of the receiver, has less control than when in possession;
- (iii) In practice, the mortgagee may have to agree to indemnify a receiver against some or all of his potential liability to the mortgagor.

Whilst less common, it is not infrequent that a modern lease also contains a forfeiture clause in the event of the appointment of a receiver. Therefore, although less likely, a mortgagee is always advised to consult the terms of the leasehold interest, over which it has the mortgage, before appointing a receiver.

A Brief Further Note on Limitation and Mortgagees' Claims

Money claims

Section 20 of the Limitation Act 1980 provides that no action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property after the expiration of 12 years from the date on which the right to receive the money accrued.

Section s. 20(5) of the Act of 1980 provides that no claim to recover interest payable in respect of any sum secured by a mortgage or other charge can in any event be brought after the expiration of six years from the date on which the relevant interest became due.

If the cause of action, when it arose, was a claim to a debt secured on a mortgage, s. 20 does not cease to apply if the security is subsequently realised by the mortgagee: West Bromwich BS v Wilkinson [2005] 1 WLR 2303; Bristol & West v Bartlett [2003] 1 WLR 284.

Possession claims

Section 15(1) of the Limitation Act 1980 provides that no claim shall be brought by any person to recover land after the expiration of 12 years from the date on which the cause of action accrued to him. Section 38(7) of the Act of 1980 provides that a right of action to recover land includes “a right to enter into possession” of the land.

A mortgagee’s right to enter into possession of the mortgaged property arises upon the execution of the mortgage (unless the terms of the mortgage restrict the right). That applies equally (as against the mortgagor) to a second or subsequent mortgagee. See e.g. Ashe v National Westminster Bank [2008] 1 WLR 710 (CA) at paras. 26-27. Thus if the mortgagor was in possession of the property when the mortgage was granted, the mortgagee’s cause of action to recover possession will accrue on the grant of the mortgage: Limitation Act 1980, Sched. 1, para. 3; Ashe v National Westminster Bank (above) at para. 40.

Section 17 of the Act of 1980 provides that after the expiration of the time limit for recovering possession, the title of that person is extinguished; and see Ashe v National Westminster Bank (above).

Payments and acknowledgments: starting time running again

Section 29(2) of the Act of 1980 provides that if the person in possession of the mortgaged land makes any payment in respect of the mortgage debt (whether principal or interest), the mortgagee’s right to possession is to be treated as having accrued on and not before the date of the payment.

Section 29(3) of the Act of 1980 provides that if the person in possession of the land “acknowledges the title” of the person to whom the right of action to recover possession of the land has accrued, the right is treated as having accrued on and not before the date of the acknowledgment.

Section 29(5) of the Act of 1980 provides that where any right of action has accrued to recover any debt, and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it, the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.

Whether or not a particular letter or document amounts to an acknowledgment depends on the true construction of the document in all the surrounding circumstances: Allen v Matthews [2007] EWCA Civ 216.

For the purposes of acknowledgments, without prejudice privilege does not apply to apparently open communications designed only to discuss the repayment of an admitted liability, rather than to negotiate and compromise a disputed liability: Bradford & Bingley v Rashid [2006] 1 WLR 2066.

For the purposes of s. 29(5), the debtor must acknowledge his indebtedness and legal liability to pay the claim in question: Surrendra Overseas v Sri Lanka [1977] 1 WLR 565.

Acknowledgments for the purposes of the Act of 1980 are not confined to admissions of debts that are indisputable as to quantum as well as liability. However, if a debtor admits liability only for a specified sum (as opposed to the whole of the sum claimed, or for an unspecified sum) that will constitute an acknowledgment only to the extent of the specified sum. See Bradford & Bingley v Rashid [2006] 1 WLR 2066.

To amount to a sufficient acknowledgment of title for the purposes of s. 29(2), the statement must, viewed as a whole, be a sufficiently clear admission of the relevant title upon which the person whose title is said to have been acknowledged seeks to rely. Thus, the fact that someone has acknowledged that he owes a debt to the person in question is not the same as acknowledging that that person also has title under a mortgage over the person's property. See Ashe v National Westminster Bank [2007] 2 P&CR 27 (Mr Richard Arnold, Q.C, sitting as a judge of the Chancery Division; that aspect of the decision was not appealed from), paras. 75 & 84.

To be effective, the acknowledgment must be in writing and signed by the person making it or their agent: s. 30, Act of 1980.

A right of action, once barred by the Act, will not be revived by any subsequent acknowledgment or payment: s. 29(7), Act of 1980.

Conclusion

In conclusion, it will often be preferential for a mortgagee to sell the property in order to realise any equity within it before it is too late. However, in today's economic climate, there are at present rather more occasions where a mortgagee may wish to consider the other options available to it. In such cases, more often than not, a mortgagee is likely to prefer to appoint a receiver in the first instance, as a means of receiving the income from the mortgaged property and applying it off the mortgage interest and debt, without incurring any additional liabilities. In practice, the relationship between the receiver and the mortgagee will be sufficiently close for the mortgagee to be satisfied that it retains a sufficient degree of control over the realisation of the income of the mortgaged property. Further, it is always open to a mortgagee to take possession and end the receivership at any time.