

Mortgagee's duties on sale

A very brief summary of the law

In general, the mortgagee will have the power (under the terms of the mortgage, and/or under the statutory power granted by s. 101 of the Law of Property Act 1925) to sell the mortgaged property without the need to obtain an order from the court.

A mortgagee's conduct in relation to the exercise of its power of sale is governed exclusively by equitable principles. It does not owe a duty of care in tort to the mortgagor or others. The mortgagee is under a duty, owed to the mortgagor and others interested in the equity of redemption, to act in good faith and use its powers only for proper purposes; but it is not a trustee for the mortgagor of its powers of sale. See Silven Properties v RBS [2004] 1 WLR 997.

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".

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.

Madoff Loan Co v. Indigent

Madoff Loan Co had a mortgage over a commercial property owned by Mrs Indigent (consisting of a lock up shop on the ground floor, let on a 10 year FRI lease, and a flat above let on an AST). Mrs Indigent stopped meeting her interest payments, and Madoff Loan Co decided to exercise its power of sale. Mrs Indigent had originally purchased the property for £429,000. The amount due under the mortgage at the time of sale was £350,000, but the property was sold by Madoff Loan Co for only £290,000. Madoff Loan Co maintains Mrs Indigent is liable for the shortfall of £60,000.

Mrs Indigent insists that, for various reasons, Madoff Loan Co could have achieved a far higher price for her house. In which of the following scenarios might Mrs Indigent have a cause of action against Madoff Loan Co?

- (1) Mrs Indigent is insistent that, if only Madoff Loan Co had waited six months before selling, the property market would have picked up, and the property would have recovered its former value.
- (2) Mrs Indigent also says that, if Madoff Loan Co was not going to wait for the market to recover, it should have sold the property more quickly, before the market had dropped as far as it did.
- (3) The property was sold by auction. Mrs Indigent claims it would have achieved a better price if it had been offered for sale by private treaty.
- (4) Madoff Loan Co had initially consulted Mrs Indigent about the options for sale, and even allowed her to pursue some potential purchasers but after a short time decided it would make all its own decisions.
- (5) The property was in Carlisle, yet Madoff Loan Co sold it at an auction in London with Gavel & Sons, because it was more convenient for Madoff Loan Co to sell all its defaulted securities with a single auctioneer. Mrs Indigent claims that if it was to be sold by auction, it should at least have been auctioned in Carlisle.

- (6) Madoff Loan Co always used Gavel & Sons, because their reputation was preeminent in the field. On this occasion, however, Gavel & Sons slipped up, and illustrated the particulars of the property with a photograph of a derelict shop in Whitehaven (which they were also selling), and the particulars of the derelict shop in Whitehaven with a photograph of the property.
- (7) The auction particulars also failed to mention that the property had the benefit of planning permission for the construction of another flat on the roof.
- (8) Gavel & Sons had suggested to Madoff Loan Co that they might wish to consider taking out advertisements for the sale of the property in the Estates Gazette and the Carlisle Bugle. Madoff Loan Co declined, on the basis that the former was too expensive, and the circulation of the latter was surely too small to make it worthwhile.
- (9) Mrs Indigent claimed that, since it would only have cost of few hundred pounds to paint the front facade of the property, and that that would have made the property far more attractive, Madoff Loan Co should have got a decorator to do that before they put the property on the market.
- (10) Gavel & Sons had advised Madoff Loan Co that if they applied for planning permission to convert the upper flat to office use, it would probably be granted (if not by the council, then on appeal by the inspector), and that that would probably increase the value of the property by 20%. Madoff Loan Co saw a planning consultant, and got as far as getting him to complete an application; but then decided not to pursue the matter further, as it decided the process would be too costly and time consuming.
- (11) The tenant of the flat was a somewhat eccentric character, who had, in breach of his lease, adopted 35 stray cats and had demonstrated a marked reluctance to clean himself or the flat. Mrs Indigent insists that the property would have achieved a higher price if Madoff Loan Co had obtained vacant possession of the upper flat before the pre-sale viewings; and an even better price if they had first re-let it to a more normal tenant.
- (12) There was a pending rent review on the shop lease, but Madoff Loan Co did not ensure a rent review notice was served prior to the sale.

- (13) The property was sold by private treaty. A local property investor, Mr Slope, had offered £300,000, but Madoff Loan Co was advised by its agents, Badgertons, that Mr Slope had a reputation for making high initial bids, but then prevaricating and seeking to negotiate the price down on the basis that a property was subject to various spurious defects. Madoff Loan Co decided to accept the next highest offer of £290,000 from Mr Harding. After Madoff Loan Co had entered into a contract with Mr Harding, another purchaser offered £340,000; but Madoff Loan Co declined to break its contract with Mr Harding.
- (14) The property was sold by private treaty to the tenant of the shop, with whom Mrs Indigent had already been in lengthy negotiations for a sale of the freehold. Would it make any difference if Mrs Indigent had continued to encourage Madoff Loan Co to sell to the tenant?
- (15) The property was sold by private treaty to the Madoff Charitable Foundation for Succouring the Indigent.

What is the time limit for Mrs Indigent to bring her claim? Would Mrs Indigent be entitled to set her claim off against Madoff Loan Co's claim for the shortfall? Does that make any difference to the time limit?

Madoff Loan Co was the second of three mortgagees. Might the first or third mortgagees have any claim against Madoff Loan Co?

Mortgagee's Right to Possession

A very brief summary of the law

A mortgage operates by way of legal demise (Law of Property Act 1925 ss 85-87) and thus, in the absence of any agreement to the contrary,

“...*The mortgagee may go into possession before the ink is dry on the mortgage...*” (*Fourmaids Ltd v Dudley Marshall (Properties) Ltd* [1957] 2 All ER 35 at 36)

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:

- 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.

Grabbit & Runn Mortgage Co Ltd v Brown

Grabbit & Runn Mortgage Company Limited has a mortgage over Mr. and Mrs. Brown's residential property at 32 Windsor Gardens, Ladbroke Grove. Mr. Brown is the registered owner, and he and his wife occupy the property along with their two children, Jonathan and Judy. The property is worth around £300,000, and the current amount owed under the mortgage is £200,000. Mr. and Mrs. Brown have missed the last four monthly payments due under the mortgage, and Grabbit & Runn now want to take possession of the property so that they can sell it.

Consider the following:

- 1) The Browns leave the property empty temporarily while they visit darkest Peru. They are having the roof replaced and accordingly put their furniture in storage. Grabbit & Runn send letters to the property stating that they intend to realise their security by taking possession of the property. In the Browns' absence, they do so by peaceable re-entry. The Browns write stating that they are instructing solicitors to gain relief and stating that the repossession has breached their human rights to respect for their private and family life and home.
- 2) Expecting to be long absent in darkest Peru, the Browns let the property to their friend, Mr. Gruber pursuant to an assured shorthold tenancy for a term of 6 months, which will expire shortly:
 - a. Mr. Gruber's tenancy began before Grabbit & Runn provided the mortgage (the aim of which was to pay for the Peruvian jaunt); or
 - b. Mr. Gruber's tenancy was entered into several years after the mortgage began.
- 3) Grabbit & Runn bring proceedings for possession in the West London County Court. The Browns defend the proceedings on the basis that Grabbit & Runn owe them £450,000 for wellingtons and marmalade which they have sold to the mortgagees from the cottage industry at home as a partnership.

- 4) Grabbit & Runn bring proceedings for possession in the West London County Court. On the day before the hearing, the Browns send a cheque to the mortgagee's office for an amount which would pay off all the arrears, and accrued interest.
- 5) Grabbit & Runn bring proceedings for possession in the West London County Court. The mortgage is regulated by the Consumer Credit Act 1974. There are arrears of some £12,000 and the remaining term of the mortgage is 25 years. The Browns can afford to pay an additional £250 per month over the usual mortgage payments and seek assistance from the Court.
- 6) The position is as in (5), but the mortgage is not regulated. The Browns are disorganised, and miss the first hearing. Bailiffs are instructed and they are removed, having to live with their neighbour. They can afford to pay off the arrears in a reasonable time. Grabbit & Runn have a potential purchaser and want to know whether they can safely proceed to sell.
- 7) Grabbit & Runn bring proceedings for possession in the West London County Court. Mr. Brown has recently been made redundant by the Royal Bank of Snowdonia and Mrs. Brown has never worked:
 - a. Mr. Brown has applied for a place on a teacher training course, hoping to become a qualified teacher; or
 - b. Mrs. Brown has been shortlisted for a job serving tea and buns at a nearby café; or
 - c. Judy is awesomely good at tennis and about to turn pro.
- 8) Grabbit & Runn bring proceedings for possession in the West London County Court. Mr. and Mrs. Brown have seen the writing on the wall, but want to be allowed to sell the property themselves. They have found a potential purchaser who has made an offer of £180,000 to purchase the property and seek a three-month adjournment to finalise that sale.
- 9) Grabbit & Runn gained an order for possession in 1990 and took possession in May of that year. Since then they have let the property to Mr. Gruber pursuant to an AST. The Browns moved in with their neighbour, Mr. Curry, at that time, and have not been in contact with the mortgagee, but are friends with Mr. Gruber and know that the house has not been sold on.

Mrs. Brown wins the lottery, and sends a cheque to Grabbit and Runn for payment of the full amount owed pursuant to the mortgage, including accrued interest.

Limitation and mortgagees' claims

A very brief summary of the law

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.

Wessex Lending v. Alfred

In 1990, Alfred entered into a guarantee to pay, on demand, all the liabilities which his bakery company, Delicious Cakes Ltd, might at any time owe to its funders, Wessex Lending. The following year, 1991, Alfred granted Wessex Lending an all monies mortgage over his house. In 1993 Delicious Cakes Ltd, following certain quality control issues and a fire in the premises, fell victim to the (last) recession and went into liquidation. In 1993 Wessex Lending demanded payment of Alfred of £200,000 under the guarantee, but he failed to pay.

Are there any limitation defences available to Alfred in any of these alternative scenarios?

- (1) In October 1997 Wessex Lending brought possession proceedings against Alfred, under the mortgage. Alfred's Defence admitted his liability under the mortgage to pay the debt, but sought time to pay. The court nevertheless made a possession order in Wessex Lending's favour, and Wessex Lending sold his house. It realised only £100,000. Alfred has heard nothing from Wessex until this year, but has just been served with a claim, issued this month, by Wessex Lending for (a) the £100,000 shortfall in the guaranteed debt, and (b) another £80,000 of interest (calculated over the period from 1993 to date).
- (2) Alfred had a breakdown in 1993 as a result of the stress caused by the collapse of his business, and in 1996 his solicitors successfully persuaded Wessex Lending to be merciful and hold off bringing any proceedings whilst he was ill. Alfred was well again by 1997, and has, since then, kept a low profile, hoping Wessex Lending would have forgotten about him. However, Wessex Lending have, this month, issued a claim for possession and a money judgment.
- (3) As per (2), but Wessex Lending wrote to Alfred in 2003, reminding him that he remained liable under the guarantee for £200,000 plus interest, and received from him, by return, a letter by way of reply containing one of the following sentences:
 - (i) I am shocked to receive your letter. I have been very ill, and have no recollection whatsoever of entering into the guarantee to which you refer.

- (ii) As per (i), but there is also an attendance note in Wessex Lending's file, recording that Alfred had telephoned the following week, to say that, having looked through his files, he now did recall entering into the guarantee and the mortgage, but that he was still not fully well, and might they not continue to show him some mercy?
- (iii) I am shocked to receive your letter. However, I acknowledge that I do owe money under the guarantee (though not, I think, as much as you claim – more like £15,000 or £20,000 I would have thought). I will try and raise the money as soon as possible.
- (iv) I am shocked to receive your letter. I acknowledge that I owe £15,000 under the guarantee, which is all that Delicious Cakes owed you when it went into liquidation, but I am certainly not liable for the other outrageous sums you are claiming. I will try and raise the £15,000 as soon as possible.
- (v) I am shocked to receive your letter. However, I acknowledge that I do owe you the money. I should be able to raise the money by June. Please will you hold off taking any proceedings in relation to my house in the meantime – it is home to my three young children.
- (vi) 'Without prejudice'. I am shocked to receive your letter. However, I acknowledge that I do owe money under the guarantee. Can we reach an agreement that I can pay it by instalments of, say, £100 a month?
- (vii) 'Without prejudice'. I am shocked to receive your letter. I acknowledge that I do owe some money under the guarantee (though not, I think, as much as you claim – more like £15,000 or £20,000 I would have thought). Is there any possibility that I can pay whatever I do owe by instalments of, say, £100 a month?
- (viii) 'Without prejudice'. I am shocked to receive your letter. I acknowledge that I owe £15,000 under the guarantee, but I am certainly not liable for the other outrageous sums you are claiming. However, I am willing to compromise and admit liability for £25,000 if you will allow me to pay the £25,000 by instalments of, say £100 a month.
- (ix) I am shocked to receive your letter. However, I enclose a cheque for £5,000 towards my debts to you. I will try and raise the rest as soon as I can.

- (4) In 1993, 1995, 1997, 2002 and 2008 Alfred made payments totalling £100,000 towards the debt, on each occasion acknowledging the existence of the mortgage. Alfred has lost his job, and has no assets other than his house. That is worth about £200,000. This month Wessex Lending have issued and served him with proceedings claiming possession, and a money judgment for (a) the outstanding £100,000, and (b) interest (calculated over the period from 1993 to date) of £98,000. Alfred accepts that, realistically, he has little prospect of resisting the possession proceedings. Does Alfred have any prospect of salvaging much money from the wreckage?
- (5) Wessex Lending brought a claim against Alfred in 1993 for a money judgment under the guarantee. Alfred disputed the debt, and also made it plain to Wessex that he was ill; that he had no assets other than his house; and that his house was worth very little because of the crash in house values. Wessex Lending abandoned the claim in 1994, and it was struck out by an efficient district judge when the CPR came into force. Every few years since then, Wessex have written to Alfred asking if he is now in a position to pay his debts “under the mortgage”, and Alfred has on each occasion sent Wessex a cheque for a few thousand pounds “towards your claim” on the grounds that that is all he is able to afford. Wessex have now issued a claim for possession and a money judgment under the mortgage. Alfred claims that he has a limitation defence; but that in any event the new proceedings amount to an abuse of the process of the court, given that Wessex Lending abandoned the first claim, and applies to have the new claim struck out. What are his prospects of succeeding?
- (6) Alfred had, at the time he entered the mortgage, taken out a personal loan from Wessex lending of £40,000. Wessex Lending wrote to Alfred in 2003, reminding him that he remained liable under the guarantee for £200,000 plus interest, and received from him, by return, a letter stating that he accepted he was liable for “all his debts to Wessex”.

Rights of Holder of a Charging Order

A very brief summary of the law

The Court's jurisdiction in relation to charging orders is found at part 73 of the CPR and the Charging Orders Act 1979, and they provide relatively powerful means of enforcing judgment debts. A charging order takes effect and is enforceable as an equitable charge:

"...a charging order shall have the like effect and be enforceable in the same courts and in the same manner as a general equitable charge created by the debtor by writing under his hand." Charging Orders Act 1979, section 3(4).

A charge can be imposed either on the whole of a property, or on a beneficial interest therein.

Once the charging order is made, the beneficiary of that order can have a notice inserted at HM Land Registry to protect his security in the event of a sale of the relevant property: see section 29 of the Land Registration Act 2002.

Enforcement of a charging order is by way of a sale of the property. The Court has a general equitable jurisdiction to decide whether or not to enforce a charging order in this way: CPR r.73.10. The practice direction to that rule requires details of all other creditors interested in the property, and others residing or having lodged notices claiming a right to reside at the property to be provided to the Court.

If the property is held on trust, the Court will have regard to the principles set out in sections 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996 in deciding whether or not to allow the charging order to be enforced by an order for sale.

Worplesdon v Fink-Nottle

Lord Worplesdon has obtained judgement in a claim against Mr. Fink-Nottle in the Evesham County Court for damages caused by a newt population, which Mr. Fink-Nottle is said to have allowed to escape from his own land and cause alarm to Lady Worplesdon, among other matters. Judgment is entered for the sum of £35,000, which Mr. Fink-Nottle is unable to pay within the usual 14 days. Mr. Fink-Nottle and his wife Madeline jointly own the freehold title to their country pad, Totley Towers, however, which is worth about £500,000. Lord Worplesdon wishes to recover the judgment debt by means of a charging order.

Consider the following:

- 1) Lord Worplesdon wishes to have a charging order over the entire property.
- 2) Mr. Fink-Nottle has recently been made bankrupt for failing to settle his account at the Drones' Club.

Lord Worplesdon obtains a final charging order. He now wishes to enforce it by a sale of the property.

Consider the following:

- 3) There is a legal mortgage over Totley Towers, and five prior charging orders. They vary in value from £10,000 to £100,000.
- 4) Madeline Fink-Nottle objects to the property being sold. She has filed a notice of home rights pursuant to section 31 of the Family Law Act 1996 at HM Land Registry, since Totleigh Towers was the home she shared with Mr. Fink-Nottle when they were first married, and thus she claims to be entitled to occupy it. Mrs. Fink-Nottle has, however, been living for the last five months in rented accommodation because of an argument with Mr. Fink-Nottle arising out of his refusal to become a vegetarian. Her father is extremely wealthy.
- 5) Madeline has decided to divorce Mr. Fink-Nottle and wishes to have a property adjustment order made transferring his interest to her.

