



## Law of Property Act 1925 – the first 100 years

### Focus on sections 90 and 91: equitable charges and orders for sale

#### Summary

- Where a creditor seeks to enforce a charging order, or other equitable charge made without a deed, by sale of the property, they must apply to the court for an order for sale. Sections 90 and 91 of the Law of Property Act 1925 provide a means for that to take place through the legal mechanism of vesting a term of years in the mortgagee/charge.
- Complicated jurisdictional limits apply in this context, and care should be taken when choosing whether to issue in the county court or the High Court.

#### Overview

In the case of a legal mortgage, or an equitable mortgage made by deed, the mortgagee has a statutory power under s.101(1)(i) of the Law of Property Act 1925 ('LPA 1925') to sell the mortgaged property once the mortgage money has fallen due.

However, no such statutory power exists in respect of an equitable mortgage or charge created otherwise than by deed. Notably, that includes a charging order, which has the same effect and is enforceable in the same manner as an equitable charge created by writing: s.3(4), Charging Orders Act 1979.

In those circumstances, an equitable chargee seeking to sell the property must obtain a court order for sale. Where the debtor is the sole legal and beneficial owner of the charged property, the power to make that order arises out of the court's inherent equitable jurisdiction and s.91 LPA 1925, and the mechanism by which the chargee is enabled to effect a sale is provided by s.90 LPA 1925.

#### Section 91 LPA 1925

S.91 LPA 1925 is the source of the Court's power to direct a sale of mortgaged property in circumstances where it would otherwise be impossible, or excessively difficult, to effect such a sale. As s.91(2) provides:

*"In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of any mortgage money, the court, on the request of the mortgagee, or of any person interested in either the mortgage money or in the right of redemption, and notwithstanding that -*

- (a) Any other person dissents; or*
- (b) The mortgagee or any other person interest does not appear in the action;*

*And without allowing time for redemption or for payment of any mortgage money, may direct a sale of the mortgaged property, on such terms as it thinks fit, including by the deposit of a reasonable sum fixed by the court to meet the expenses of the sale and to secure performance of the terms."*

In the case of legal mortgages or equitable mortgages made by deed, it will rarely be necessary to resort to this power (although, for an example of such a case, see, e.g. Arab Bank Plc v Mercantile Holdings Ltd [1994] Ch 71). This is because a legal mortgagee will be entitled to exercise its common law right of possession (see Four Maids Ltd v Dudley Marshall Properties Ltd [1957] Ch 317) and then exercise its statutory power of sale under s.101(1)(i) LPA 1925. In the case of an equitable mortgage made by deed, the position is materially similar, save that the mortgagee may require a court order before taking possession as it has no legal right thereto.



However, in the case of equitable charges or mortgages which are not created by deed, including charging orders, there is no freestanding statutory power of sale. S.91(2) therefore provides a direct solution to this problem - as an extension of the Court's general equitable jurisdiction to enforce equitable charges - by conferring on the Court a power to direct a sale of the mortgaged property on such terms as it thinks fit.

It is notable that s.91(2) only confers a discretion on the Court to direct a sale of the “*mortgaged property*”. In cases where an equitable mortgage or charge has been created otherwise than by deed, the mortgagee will have no legal interest in the property to sell or other statutory power to sell that interest.

By section 90 LPA 1925, however, additional powers are conferred on the Court in order to solve this practical problem. These are considered directly below.

### Section 90 LPA 1925

Section 90 provides that where the court makes an order for sale in relation to an ‘equitable mortgage’ (which expression includes an equitable charge: s.205(1)(xvi)), the court may facilitate that sale through various technical methods, the most frequently encountered of which is to “*vest in the mortgagee a legal term of years absolute to enable him to carry out the sale... in the like manner as if the mortgage had been created by deed by way of legal mortgage pursuant to this Act, but without prejudice to any incumbrance having priority to the equitable mortgage unless the incumbrancer consents to the sale.*”

The effect of this vesting is that the equitable chargee is able to carry out a sale as if they were a legal mortgagee, using the statutory power under s.101(1) LPA 1925, because it confers on them the same rights as a mortgagee under the now old-fashioned technique of creating a mortgage by a demise with a cesser on redemption. By s.88 LPA 1925, the exercise of the statutory power of sale will have the result of vesting the legal title to the property in the name of the purchaser.

Additionally, where the relevant property is tenanted and the creditor is bound by that tenancy, the vesting of a term of years also causes the creditor to stand in the position of the tenant's landlord, with power to take steps to terminate the tenancy and achieve vacant possession.

In the case of a charge over freehold property, the practice is to grant a legal term of 3000 years, and in the case of leasehold property it is to grant a legal term of one day less than the remaining period of the defendant's lease term. Thus, the sample order for enforcement of a charging order by sale at PD 73, Appendix A includes the following provision:

*“To enable the claimant to carry out the sale, there be created and vested in the claimant pursuant to section 90 of the Law of Property Act 1925 a legal term in the property of [3000 years] [one day less than the remaining period of the term created by the lease under which the defendant holds the property]”.*

Importantly, section 90 can only operate to enable a sale of the legal interest in the property where the relevant charge in fact attaches to that interest. Where the charge only attaches to the debtor's beneficial interest in the property rather than the legal estate, as will be the case for a charging order made against a debtor who is not the sole legal and beneficial owner, any order made under s.90 will only enable a sale of the beneficial interest charged and not the legal estate: Sainsbury's Supermarkets Ltd v Olympia Homes Ltd [2005] All ER D.

Although frequently encountered in the charging orders context, s.90 also applies more broadly. By way of example, the High Court confirmed in Menelaou v Bank v Cyprus UK Ltd [2016] EWHC 2656 (Ch) that s.90 LPA 1925 is also the appropriate mechanism by which the court can authorise the sale of a property to enforce an unpaid vendor's lien. Such a lien arises where parties exchange contracts for sale



and operates as an equitable charge securing payment of the purchase price. It therefore falls within the scope of s.90.

### **A potential jurisdictional pitfall**

Practitioners should beware the complicated limits on the county court's jurisdiction in this context. Under s.23(c) of the County Courts Act 1984, the county court has equitable jurisdiction to enforce a charge where the amount owing is up to £350,000, that limit having been increased from £30,000 in 2014. However, the county court's jurisdiction under ss.90 and 91 was not extended and remains limited to cases where the amount owing at the commencement of the proceedings does not exceed £30,000: ss.90(3) and 91(8).

The effect would seem to be that where an order under s.90(1) is a necessary step to ensure successful enforcement of the charging order, proceedings should only be commenced in the county court if the sum owing at the date of commencement is £30,000 or less. Otherwise, the creditor may find that they are unable to obtain the relief they need. In practice, that highly inconvenient position is often overlooked, but if the point is taken it is difficult to see how the Court would be able to circumvent the express wording of ss.90(3) and 91(8). A cautious creditor may prefer, therefore, to seek the debtor's agreement by way of signed memorandum to extend the jurisdiction (s.24, County Courts Act 1984) or to issue in the High Court together with an application to transfer down (which would itself confer jurisdiction on the county court: National Westminster Bank plc v King [2008] EWCA Civ 280 (Ch)). Separate limits apply in relation to an order for sale sought under s.14 of the Trusts of Land and Appointment of Trustees Act 1996.

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