LECTURE: RECEIVERSHIP AND OTHER MORTGAGEE REMEDY ISSUES

PART 1 – A MORTGAGEE'S REMEDIES

1. During this part of the talk, we will be looking at some issues that can arise whenever a mortgagee wants to exercise a remedy, and the more common of the various remedies open to a mortgagee in the event of default – namely possession, sale and the appointment of a receiver.

Preconditions

2. The mortgagee's powers to sell and appoint a receiver arise (unless the mortgage conditions provide differently) "when the mortgage money has become due" (section 101 of the Law of Property Act 1925)[1].

3. If there are no relevant contractual terms in the mortgage conditions, the mortgagee is entitled to take possession "before the ink was dry on the mortgage" (*Four Maids v Dudley Marshall [1957] Ch 317*), - ie regardless of whether the mortgage money is due or there has been any default - provided that the lender is acting to enforce or preserve his security: *Quennell v Maltby [1979] 1 WLR 318; Meretz Investments NV v ACP [2006] 3 All ER 1029.*

4. However, some modern mortgages provide, as a matter of contract, that the mortgagee is not able to exercise any remedy until certain things have happened. Standard clauses provide, for example, for all of the lenders remedies (including for possession) to become exercisable only once the mortgage money has become due.

5. It is therefore usually necessary to ascertain when the mortgage money has become due before considering what remedies are open to the mortgagee. That is purely and simply a matter of construing the contractual terms (generally the standard mortgage conditions). Sometimes a demand for the full amount outstanding is required in order to render the mortgage money due.

Demands

6. The need for a demand can lead to problems.

7. Firstly, it may not be clear, from reading the mortgage conditions, whether a demand is necessary or not. The safe course is obviously to demand if there is any doubt as to whether it is necessary!

8. Secondly, the demand must comply with any requirements in the charge, and it must be for the full amount owing – not for the arrears. Although not completely free from doubt, the law appears to be that an error in the amount stated as owing will not invalidate the demand: *Arab Banking Corpn v Saad Trading and Financial Services [2010] EWHC 509*; and

[1] Note that (unless amended by the contractual terms) the powers are not exercisable until further preconditions have been met. These are set out in section 103 of the Law of Property Act 1925 (and see s 109(1)).

even that there is no need to attempt to state the amount owing at all[2]. The demand must also make it clear that it is an immediate demand for payment, rather than, say, a letter before action, or a notification of the balance then due.

9. Thirdly, the lender must also be able to prove that he has served the demand (in accordance with any requirements in the charge) before he can take any steps to seek possession, or sell the property, or appoint a receiver if the mortgage terms so provide. If actual service can be proved (by a receipted copy being returned by the mortgagor), so much the better.

10. But what if that cannot be done? In some cases the mortgage conditions will provide that properly addressed demands sent by post to the security (or some other stated address) will be deemed served within a certain period of time. Well drafted conditions will also provide for deemed service in the event of death of the borrower (or its dissolution if a corporate borrower).

11. If, however, the charge in issue does not have such a helpful provision, is there any other way to get round difficulties of this nature?

12. In order to answer that question, it is important to appreciate exactly what those difficulties are. Firstly, if the borrower is an individual and has died, the mortgagee may not be aware. If the lender is aware that the borrower has died, he can, of course, check the register of personal representatives at the Principal Registry of the Family Division. If a grant of representation is taken out, the lender will be able to discover the identity of the personal representative (ie the person in whom the legal estate vests, and who has liability to pay the debts) and can serve the demand. But, if there is no personal representative appointed, on whom can the mortgagee serve the demand?

13. And, if the borrower is a company, it is easy to ascertain whether it has been dissolved. However, if it has been dissolved, its property will have gone bona vacantia to the Crown. But, can a demand for payment be made of the Crown? If not, how can the demand be made?

14. There are a number of potentially helpful statutory provisions which apply to the service of a "notice". But, is a demand a "notice"? On the one hand, the functions of a demand and a notice are rather different – a notice gives information; a demand requires some action to be taken. But, it seems to me that there is a reasonably good argument that to distinguish between the 2 is unduly pedantic, for these reasons:
    - There are examples within the statutes of documents called "notices" which clearly require the recipient to take some action (eg under section 146 of the Law of Property Act 1925)
    - Furthermore section 103(i) of the Law of Property Act 1925 refers to a "notice requiring payment" of the mortgage money being served on the mortgagor
    - A demand for payment can be categorised as providing notice that early payment is required : see *Brighty v Norton 32 LJQB 38*
    - It is difficult to see what reason of principle there can have been for Parliament to have taken steps to facilitate the service of notices, but taken no steps with respect to demands.

[2] This is discussed in *The Modern Contract of Guarantee by Phillips and O'Donovan at 10-129 – 10-130 and Bank of Baroda v Panessar [1987] Ch 335*

15. If it is right that a demand for payment is a "notice" within the various statutory definitions, the following statutory provisions will assist:

    (a) As regards an individual borrower, if the mortgagee had no reason to believe that he had died, the notice will be valid if it would have been if the recipient were still alive: Law of Property (Miscellaneous Provisions) Act 1994 s17.

    (b) And (unless this provision is excluded by the terms of the charge) if the lender is aware of the death but there is no personal representative appointed, the lender can address the notice to "the Personal Representative of [ ]" and send it to the last known residence or place of business of the deceased, with a copy to the Public Trustee: section 18 of the Law of Property (Miscellaneous Provisions) Act 1994.

    (c) The position is less straight-forward on a company dissolution. There is no authority on the point and regrettably the Bona Vacantia Division guidance on sales by mortgagees does not deal with the point, so what follows is my best guess. It cannot be regarded as anything more. Looking at the matter from first principles, although the Crown takes the property subject to the charge, the Crown could not be sued for the debt. The purpose of the demand is to warn the debtor that if he does not discharge the debt, the security will be enforced. A demand ought, therefore, to be addressed to the person with the obligation to pay, not the person who holds the title to the security. However, where there is no one liable to pay the debt, because it (the debt) has died with the company, the only purpose of making the demand is as a prelude to exercising a remedy over the security. In that situation, it seems to me that there is a reasonable argument that the demand would be validly served if served on the person holding the security (ie the Crown).

    (d) However, as an alternative (and I would suggest doing both, on a belt and braces approach), it might also be possible to rely on s 196 of the Law of Property Act 1925. This applies to any notices required to be served by any instrument affecting property after the 1925 Act was brought into force unless a contrary intention appears. It provides that
        (i) a notice can be addressed to "the Mortgagor" and left at the security, and
        (ii) a notice addressed to the mortgagor by name and sent to the last known place of business (or abode) by registered post (or recorded delivery[3]) is deemed served unless returned through the dead letter service

    Subsection (2) specifically says that it applies "notwithstanding that any person to be affected by the notice is absent, under disability, unborn or unascertained". It does not say notwithstanding that the recipient is a company which has been dissolved. Furthermore, it might be argued that the existence of section 18 of the 1994 Act (see (b) above) suggests that s 196 was not intended to have a wide interpretation – but it must be remembered that s 196 only applies to notices required to be served by an instrument: it probably does not apply to a common law notice to quit, and, in 1994, it was uncertain whether it applied to notices which a party had a choice whether to serve[4]. So, that argument could be met. Overall, I think it likely that

[3] The Recorded Delivery Services Act 1962 s1(1)

[4] There is still no binding authority, but the comments in *Enflied LBC v Devonish (1996) 74 P & CR 288 at 294* suggest that s 196 can be relied on in relation to any notice expressly referred to in the instrument, even if the server had a choice whether to serve it or not.

some County Court judges at least would be persuaded to give a wide interpretation to the provision, so as to prevent a mortgagee in this situation being left powerless to serve a demand and exercise any remedies – unless it jumps through the hoops to get the company restored to the register.

The mortgagee's options

16. Once any preconditions are satisfied, the mortgagee has a number of options. Some of them are rather obscure. For today's purposes, I want to look at:
    - Possession
    - Sale
    - Appointing a receiver.

Possession

17. Possession is usually achieved by obtaining a Court order for possession. But, if the property is empty, so there is no risk of the lender committing a criminal offence under the Criminal Law Act 1977, and the lender is certain that it is entitled to possession, physical re-entry can be effected: *Ropiagealach v Barclays Bank [2000] 1 QB 263.*

18. Often possession is a prelude to a sale. But it need not be. The mortgagee might take possession in order to obtain the rents and profits from the security in discharge of ongoing instalments. Those rents can either come from an existing tenancy (in which case the mortgagee can take possession by serving notice on the tenant to pay the rent to the mortgagee: *Fisher & Lightwood at paragraph 29.49*) or from the grant of a new tenancy (unless there is something in the mortgage terms to oust section 99(2) of the Law of Property Act 1925).

Sale

19. This is the standard remedy that many mortgagees exercise in the event of default. The mortgagee has the power to sell by virtue of sections 101 and 103 of the Law of Property Act 1925, unless a contrary intention is expressed in the mortgage deed (or the charge is only equitable/not by deed). I have never come across a mortgage where the statutory power of sale has been excluded unless replaced by wider contractual powers of sale.

20. The effect of a sale by a mortgagee is to confer good title to the mortgaged estate on the purchaser, free from all registered interests to which the mortgage has priority: s104 LPA Purchasers from a mortgagee need only be satisfied of the mortgagee's title and that the power of sale has arisen. The purchaser will obtain good title even if the power of sale was improperly exercised in some way[5] - unless the purchaser was aware of the irregularity.

21. No Court sanction is required for the sale itself, though generally it is preceded by the mortgagee obtaining a Court order for possession of the premises – but this need not be so. In *Horsham Properties v Clark and Beech [2008] EWHC 2327*, Briggs J accepted that someone

[5] Although in this case, the borrower would have a claim in damages against the mortgagee

who had bought a property from a lender[6] who was not in possession could evict the borrowers, whose rights (for example to redeem, or seek time to pay under the Administration of Justice Act 1970) had been overreached by the sale and discharge of the mortgage.

22. However, there have not been a flood of cases of this nature since then. Why not? Firstly, the course there adopted is not likely to be attractive to the mortgagee in the majority of cases: the mortgagee is going to want to maximise the potential sale price, and selling subject to the occupation of persons who are not paying rent is unlikely to do so. Generally the mortgagee will either sell with vacant possession, or, where there is a good tenant in the building paying rent, the mortgagee will sell with the benefit of the tenant covenants and the purchaser would want to retain them as tenants.

23. The second reason why there have not been a flood of like claims is that the regulators moved quickly to indicate that they would take a dim view of a lender seeking to sidestep the protections available to a residential borrower in this way. The FSA (which was then the relevant regulator – now the FCA) indicated to its members that it would have "serious concerns" as to whether a firm was treating its customer fairly if it sold in circumstances where they would not have succeeded in getting a court order for possession. The CML went further and indicated that its members (who include the majority of lenders) would not sell an owner occupied residential property without first obtaining an order for possession - absent fraud, abandonment or voluntary possession. The government subsequently entered into a formal consultation as to whether lenders' powers to sell residential owner-occupied properties without a court order should be removed. The consultation closed in March 2010 – but nothing appears to have happened since. It seems that the government is satisfied that the regulatory safeguards are sufficient, and legislation is not required.

Receivers

24. Receivers can be appointed out of Court (unless the mortgage is not by deed / a legal charge), under a statutory power in s 101(1)(iii) and/or an express power in the mortgage deed. A receiver appointed under the statutory powers has the power (and duty) to demand and recover all income of the mortgaged property (for the benefit of the mortgagee). In exercising that power, he acts as the agent of the mortgagor. The statute does not confer any right to insure the property, to carry out repairs, to carry on the borrower's business or to terminate any tenancies/increase the rent. The receiver also has no right to possession, or to sell the property.

25. He may also have specific powers of the mortgagee delegated to him – but these powers can only be exercised in the name of the mortgagee, and fall outside the agency of the mortgagor.

26. If there is an express power to appoint a receiver in the mortgage deed, the receiver can be given wider powers in his own right (ie as agent of the mortgagor), if the mortgage deed so provides. Sometimes the mortgage deed entitles the mortgagee to possession. If possession needs to be obtained from a third party (former tenant/ trespasser), the receiver

[6] Strictly, from receivers exercising the lender's power of sale

will sue in the name of the borrower – but where it is the borrower who is in possession and who will be the defendant to the proceedings, who is the Claimant? Is it the receivers in their own name, or must the lender be joined? I have persuaded a County Court judge, relying on *Pratchett v Drew [1924] 1 Ch 280,* that it was appropriate to make an order that possession be delivered up to the receivers (which tends to suggest that the mortgagee was not a necessary party), but a colleague has been involved in a case where it was decided that the mortgagee would have to be joined.

The pros and cons of each option, from the mortgagee's point of view

	Possession without sale	**Sale**	**Receivers**
Width of powers	No limit on right to possession, other than per mortgage terms	Once triggered, wide powers, including power to sell free of subsequently created minor interests (s104 LPA), and borrower's right to redeem	Powers may be limited – much depends on the contractual terms
Mortgagee's duties to mortgagor	Not to take possession other than to enforce or protect security To take all reasonable care to maximise the return from the property "wilful default" To take reasonable care of the Property, including a duty to carry out all reasonable repairs (to the extent that they can be afforded from the surplus income after mortgage interest paid)	Not to sell until power of sale exercisable To use powers for proper purposes To obtain best price reasonably obtainable (but otherwise mortgagee is free to act in its own interests as to whether, when, what and how to sell)	Not to appoint until power to do so has arisen Not to appoint a receiver who is known to be incompetent To remove receiver if he knows he is acting improperly
Other Potential liabilities	Liability for rates Environmental obligations (eg contaminated land under the	Replies to PCEs – careful not to make any misrepresentations to purchaser	Limited, provided mortgagee does not interfere with what receivers are doing – receivers act as agent of the mortgagor; if

	Environmental Protection Ac t1990) To trespassers / occupiers To those with the benefit of restrictive covenants To planning enforcement action, even if the development started before the mortgagee took possession		they exceed their powers, receivers are liable not mortgagee (unless an indemnity was given on appointment) Risk of order to indemnify receivers against liabilities arising from invalid appointment
Economic considerations	No need for expense of Court proceedings if tenant in occupation Resource implications if managing rather than appointing receivers to do so	If in negative equity, is it better to wait? Likely to achieve lower price than sale by owner-occupier Court proceedings will be required if want to sell with VP	No Court order required to appoint, but receivers fees come out of income as first slice

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