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The Rights of Mortgagees

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1. Enforcement of Mortgages *19 June 2003*
2. Indefeasibility of Mortgage Title *17 Nov 2003*
3. Mortgage Drafting in NSW *17 Mar 2004*
4. Mortgage Priorities *15 June 2004*
5. The Rights of Mortgagors *10 Oct 2005*
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9. Contracts Review Act Defences to Mortgages *29 May 2007*
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15. Proportionate Liability in claims against Valuers *29 Oct 2008**
16. Examinations under the Corporations Act and ASIC Act *5 March 2012*[†]

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A. The rights of mortgagees

Mortgages are ancient legal instruments and as such have accumulated a vast body of both common law & equitable principles on their voyage through time, many of which favour the mortgagee. Various statutes, particularly *The Real Property Act 1900* & *The Conveyancing Act 1919* heavily influence the rights of both parties to a mortgage. In addition to the terms thus implied there are also multiple rights a mortgagee can self-endow itself with in the deed itself. Mortgagees thus have an impressive armoury of rights which derive from multiple sources.

B. The right to possession under a registered mortgage

1. Section 60 of the Real Property Act

A registered mortgagee of Real Property Act land has a right of possession of the security, but only if the mortgagor is in default and the mortgage does not expressly provide to the contrary.

The basis of the right is RPA s 60, which confers the same power to take possession on default of the mortgagor as an Old System first mortgagee enjoyed. Such a mortgagee possessed the common law right to take possession at any time so long as the mortgage did not provide to the contrary: see for example *Four-Maids Ltd v Dudley Marshall (Properties) Ltd*[1].

S 60 of the Real Property Act provides:

> The mortgagee, chargee or covenant chargee on default in payment of the principal sum or any part thereof, or of any interest, annuity, or rent-charge secured by any mortgage, charge or covenant charge may:
>
> (a) enter into possession of the mortgaged or charged land by receiving the rents and profits thereof, or
>
> (b) [Repealed]
>
> (c) bring proceedings in the Supreme Court or the District Court for possession of the said land, either before or after entering into the receipt of the rents and profits thereof, and either before or after any sale of such land effected under the power of sale given or implied in the mortgage, charge or covenant charge, in the same manner in which the mortgagee, chargee or covenant chargee might have made such entry or brought such proceedings if the principal sum, interest, annuity, or rent-charge were secured to the mortgagee, chargee or covenant chargee by a conveyance of the legal estate in the land so mortgaged or charged.

[1] [1957] 1 Ch 317

2. Covenants for possession

In view of RPA s 60, there is no need to include the power to take possession as an express clause in the mortgage. It is, however, prudent to do so. This is because if the mortgage does not become registered the mortgagee may need to rely on an express contractual term to obtain possession (see section on unregistered mortgages below).

3. Proceedings for possession

Although a registered mortgagee could seek specific performance of a contractual power to take possession if the mortgagee so desired, there is no need to resort to an equitable remedy as RPA s60 provides the same rights to a Real Property Act mortgagee as possessed by an Old System Title first mortgagee. Such a mortgagee had available to it the common law action in ejectment, which is now known by the more modern term "proceedings for possession of land". The Supreme Court Act section 8(1)(h) notes the change in name of the action.

4. Conditions precedent to the exercise of the right to possession

i) s60 of the RPA requires a default

The right to possession under s60 of the Real Property Act confines the right to possession to instances where the mortgagor is in default.

ii) Contractual conditions precedent

Many mortgages contain requirements for the mortgagee to give notice before entering into possession. Also many ancillary documents, such as loan documents, which require written notice of a default before a lender can take any action. Usually these clauses impose a requirement of a written demand being sent to the mortgagor which must be unfulfilled for some period prior to possession being available. These must be met or else the mortgagor is entitled to an injunction.

iii) Consumer Credit code regulated loans

For loans under the Consumer Credit code, there is the additional precondition of a demand being issued under s80 of the Code and being unfulfilled for 1 month.

iv) s57(2)(b) of the RPA

Except in the case of a Consumer Credit Code loan or if the mortgage documents impose a notice requirement on the mortgagee, there is no requirement for the mortgagee to provide prior notice to the mortgagor (or any other person) before taking possession of the property or commencing proceedings for possession. The common belief that a s57(2)(b) notice needs to be issued and one month pass without satisfaction before possession proceedings can be commenced is a misconception: see *Long Leys Co Pty Ltd v Silkdale Pty Ltd*[2].

5. Taking possession without a court order

After a period in which the self-help taking of possession had fallen into disfavour *Hemmings v Stoke Poges Golf Club*[3] established that (notwithstanding the right to approach a court to obtain a writ of possession and thus cause the sheriff to effect the

[2] (1991) 5 BPR 11,512
[3] [1920] 1 KB 720

removal of an occupier of the land) the rightful possessor of land could itself take possession without the intervention of the court, provided that no more than reasonable force was used in the process.

In that case an employee of the owner of the land had left that employ and was thus no longer entitled to occupy his dwelling, which he had been permitted to occupy only for the duration of his employment. The owner sent 4 or 5 men to take possession. The occupiers resisted, but only in a passive manner: the ex-employee "was either led or gently pushed out of the house", whilst his wife and infant child were carried out on a chair on which they were sitting. The furniture was also carried out and placed in the garage. The English Court of Appeal did not consider this to be a case of forcible entry. As, however, the owner had admitted forcible entry in the court below, the Court of Appeal had to consider the remedies that might be granted in respect of forcible entry by an owner. They found that although there was possible criminal consequences for such conduct, no civil liability existed provided no more than reasonable force used. The Court of Appeal found that no more than reasonable force was used and dismissed the employee's claim.

Hemmings v Stoke Poges Golf Club was followed by the New South Wales Court of Appeal in *MacIntosh v Lobel*[4]. A first instance decision of the Supreme Court had found that the occupier was a trespasser. The occupier was subsequently ejected from the premises, not by the sheriff in exercise of a writ, but by way of self-help. An appeal then occurred, reversing the first-instance decision. The former occupier then complained that forcible entry had been effected. The Court of Appeal then needed to construe s 18 of the Imperial Acts Application Act 1969 (NSW), which reads as follows:

> No person shall make any entry into any land except where such entry is given by law and, in such case, with no more force than is reasonably necessary. *8 Henry VI c 9—The Forcible Entry Act 1429* ; *31 Elizabeth c 11—The Forcible Entry Act 1588* .

It was contended by the former occupier that the phrase "where such entry is given by law" applied only to instances of the sheriff entering in the execution of a writ of possession. The Court, however, rejected that argument, referring to the well-recognised and long-standing right of an owner to use self-help, and citing (inter alia) *Hemmings v Stoke Poges Golf Club* as authority for that proposition.

A person entitled to possession may temporarily lose the right to use self-help by commencing legal proceedings for possession; this is interpreted as an election against self-help in favour of the curial process: *Argyle Art Centre Pty Ltd v Argyle Bond & Free Stores Co Pty Ltd*[5]. After a favourable judgement is received from such proceedings, however, the plaintiff is then once again entitled to use self-help to take possession, although there is normally little reason to do so given that it is then generally easier and less risky to rely on the sheriff to take possession: *Aglionby v Cohen*[6]; *MacIntosh v Lobel*[7].

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[4] (1993) 30 NSWLR 441
[5] [1976] 1 NSWLR 377
[6] [1955] 1 QB 558
[7] (1993) 30 NSWLR 441

C. The right to possession under an equitable mortgage

1. There is no legal right, only specific performance

An equitable mortgagee has no legal right to take possession of the security, only the right to approach Equity for specific performance of an express or implied term in the mortgage providing for possession by the mortgagee in the event of default.

In *Barclay's Bank v Bird*[8], Harman J states:

> The bank had… an equitable mortgage which gave it all the rights of equitable mortgagees. It was entitled, therefore, as any other equitable mortgagee is entitled, to come to the court and take out a summons asking for possession. It does not matter from that point of view that the mortgage is equitable. The only limitation on an equitable mortgagee in that respect is that he has no right to possession until the court gives it to him.

2. No action for ejectment

In *Mills v Lewis*[9], the NSW Court of Appeal determined that to bring a common law action for possession of land, in the sense of an action in ejectment, there must be "a right of entry" and:

> A right of entry meant a legal right to enter and take actual possession of land as incident to some estate or interest therein. Furthermore, "the right must be a legal right; a mere equitable right is not sufficient". (p 9431)

The Court of Appeal then found that an equitable mortgagee had no legal right to possession, only an equitable right, hence that an equitable mortgagee has no right to possession (in the sense of a right to bring an action in ejectment). In the mortgage, however, there was an express power for the equitable mortgagee to take possession in the event of default, and that the mortgagee hence had a contractual right to possession which could be specifically enforced through the court granting a judgement for possession and issuing a writ of possession.

3. The covenant to give possession

It is strongly arguable that the right to take possession is implied in an equitable mortgage unless the mortgage expressly provides to the contrary. The passage from *Barclay's Bank v Bird*[10] previously cited gives support to the general implication of a term into an equitable mortgage that the equitable mortgagee can take possession on default. As previously noted, in *Mills v Lewis*[11] the Court of Appeal found an express contractual power to take possession within the mortgage so there was no need for the Court to raise the question of whether such a power would in any event have been implied. Priestley JA, however, appeared in that case to be supportive of the proposition that equitable mortgagees, as such, had a right to obtain possession, but that they could not obtain that possession by way of an action in ejectment; by inference the right was thus to be exercised by way of specific performance, with a

[8] [1954] 1 Ch 274 at 280
[9] (1985) 3 BPR 9421
[10] [1954] 1 Ch 274 at 280
[11] (1985) 3 BPR 9421

term being implied into the mortgage providing for possession on default if an express them to that effect were lacking.

The above argument was accepted by Master McLaughlin in making orders for specific performance in *Rebfin Pty Ltd v Panovski*[12] in the absence of any express contractual provision enabling possession to be taken. As, however, those orders were made in the context of an ex parte application for default judgement with no contest raised by the defendant, and as the Master gave no judgement in the matter beyond a statement to the effect that the remedy of specific performance appeared to be available in such circumstances.

Master Macready, in *Rebfin Pty Ltd v Stowers*[13], found that, in any event, a court could give possession to an equitable mortgagee to facilitate orders for judicial sale even if specific performance was not available.

Given the lack of conclusive authority on the matter, prudent drafting practice would dictate that an express contractual power for a mortgagee to take possession on default be included in any mortgage, and especially in a mortgage that the mortgagee anticipates will remain unregistered. A covenant expressly conferring the power to take possession can be concisely drafted as follows:

> In the event the mortgagor defaults under this mortgage the mortgagee shall have the right to take possession of the security.

4. Conditions precedent

i) The Consumer Credit Code

If an equitable mortgage is found to be regulated by the Consumer Credit Code, a s80 notice needs to be served and not complied with before possession is taken or proceedings for possession are commenced.

ii) The Real Property Act & Conveyancing Act

The Real Property Act is not directly applicable (given that it only relevantly applies to registered interests), but as many mortgages (probably inadvertently) provide by their express contractual terms that the provisions of that Act are to be complied with, a mortgagee may be contractually bound to serve a s 57(2(b) notice in the same circumstances as must a registered mortgagee. The effectively identical 111(2)(b) of the Conveyancing Act would apply in any event.

These two sections, however, are only relevant to obtaining a power of sale and accelerating principal repayment, not obtaining possession of land, and are thus only of importance if the mortgagee is combining a suit for specific performance of an equitable mortgage with a suit for judicial sale orders to enable the equitable mortgagee to sell the security after possession is obtained, in which case the service of and non-compliance with a s 111(2)(b)/57(2)(b) notice may be required to obtain the judicial sale orders sought (but not the orders for specific performance).

[12] NSWSC on 13 May 2005
[13] NSWSC on 3 June 2005

5. Proceedings for specific performance

Specific performance of a covenant for possession can be sought when the right to possession has accrued. Most mortgages give the mortgagee the power to take possession immediately following any default by the mortgagor.

As specific performance is an equitable remedy, a court has a degree of discretion when deciding whether or not to grant that relief, and may decline to order specific performance in special circumstances, such as when the mortgagee approached the court with unclean hands. Thus the "right" to possession in this case is subject to the court being willing to grant relief in the individual case in question. This is more a theoretical distinction than a practical one, however, as in the great majority of cases where a court would refuse specific performance it would also have been prepared to restrain a registered mortgagee exercising its common law right to possession (usually by reason of the Contracts Review Act or the doctrine of unconscionability).

6. Taking possession without a court order

As discussed previously, an equitable mortgagee has no legal right to take possession of land, but does possess an equitable right provided the mortgage contains a covenant for possession on default. Given that such a covenant represents the written consent of the occupier to enter the land following default, an equitable mortgagee with the advantage of such a covenant also has a good defence to a trespass or possession claim brought by the former occupier.

Generally speaking, an owner of land may revoke his consent (or licence) for another person to enter onto land, even if the owner has promised not to revoke that consent in a contract. That is what happened in *Cowell v Rosehill Racehorse Co Ltd*[14], where the High Court found that equity would not preclude the owner from revoking consent even if the revocation was contrary to contract (the contract in question being for the entry onto the racecourse for a small admission fee). The Court made an exception to this general doctrine, however, in the case of a licence that is allied to a proprietary right in land. Latham CJ stated[15]:

> If a man creates a proprietary right in another and gives him a licence to go on certain land in order that he may use or enjoy that right, the grantor cannot divest the grantee of his proprietary right and revest it in the grantor, or simply determine it, by breaking the agreement under which the licence was given. The grantee owns the property to which the licence is incident, and this ownership, with its incidental licence, is unaffected by what purports to be a revocation of the licence. The revocation of the licence is ineffectual.

In the case of a contractual term in a mortgage, the licence to enter the land and take possession would be a licence granted as an incident to the mortgagee's interest, for the better enjoyment of the mortgage given that it facilitates the realisation of the security. It follows, then, that the contractual licence in such a case could not be revoked, and so any entry on the security and taking of possession of the security by the mortgagee would be deemed to be with the consent of the mortgagor, even if the mortgagor later seeks to revoke that consent and deny entry to the mortgagee.

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[14] (1936) 56 CLR 605
[15] at 615

Notwithstanding the mortgagor's consent, the mortgagee also needs to be cautious in using no more force than is reasonably necessary so as to avoid effecting a forcible entry, lest the entry into possession is thereby rendered wrongful.

There are various authorities that give support to the proposition that the holder of an equitable interest, including an equitable mortgagee, who takes possession with the consent of the owner of land may maintain that possession, notwithstanding the original absence of a legal proprietary right to take possession of the land, and notwithstanding a subsequent change of heart by the owner or his successors in title.

In *Re Postle: Ex Parte Bignold*[16], the English Court of Review (as it then was) had to consider whether the equitable mortgagee (with a mortgage effected by deposit of title deeds) who had gone into possession had the right to receive profits from his possession of the land. The court determined that profits could only be received if the mortgagee had taken possession rightfully. One judge found that the deposit of deeds gave implied authority to the mortgagee to take and retain possession. Another judge found there was no such implied authority, but that possession was rightfully taken as the mortgagor abandoned the premises and his successors in title had previously not objected to the mortgagee's taking possession. The third judge found that there was either implied authority or consent by the mortgagor.

In *Spencer v Mason*[17], an equitable mortgagee of Old System land had been paid out by the mortgagor's mother, who in exchange took an assignment of the equitable mortgage. The mother then took possession of the property with the mortgagor's consent, although another occupier of the premises did not consent and sought to contest the mother's possession. The judge decided in favour of the mother, stating:

> It has never been held inequitable for an equitable mortgagee to take possession as against a person whose title is subsequent to his security.

His Honour noted that the mortgagor was a person whose title was subsequent to that of the mortgagee, and that the other occupier took through the mortgagor, so that the mortgagee's title had priority.

In *Mason v Clarke*[18], a holder of an equitable profit a prendre (being, in that case, an oral grant of a right to hunt rabbits on land) who had been permitted by the proprietor of the land in the past to enter onto the land for the purpose of hunting rabbits, was found to be entitled to bring an action in trespass against the proprietor after the proprietor had initially let the rabbit-hunter onto the land for that purpose and then later attempted to obstruct the rabbit-catching activities. The fact that possession of the profit by the hunter had occurred was found to have empowered the hunter to sue in trespass to defend that possession, notwithstanding the fact that the unwritten profit was merely an equitable interest.

[16] (1834) 4 Deac & Ch 259
[17] (1931) 75 Sol Jo 295
[18] [1955] AC 778

D. The right to possession as against the occupier

1. Action for ejectment

In an action for possession (ejectment), the mortgagee normally proceeds against the mortgagor. This is effective against third party occupiers because they necessarily claim their right of occupation through the mortgagor. If the mortgagor cannot be served, or for other tactical reasons, the mortgagee can choose to proceed against the actual occupiers. In each case the nature of the action is the same, the judgment made is for possession, and the judgement is enforced through a Writ of Possession.

2. Proceedings against unknown occupiers

A difficulty can present itself for mortgagees wishing to commence possession proceedings against the actual occupiers of premises (when the occupiers are persons other than the mortgagors), if the mortgagees are not able to ascertain the names of the occupiers to name as defendants in the Statement of Claim for possession.

This was a difficulty encountered by the plaintiff in *Re Wykeham Terrace*[19], in which the owner of land wished to clear the land of squatters prior to putting it up for auction. The plaintiff then commenced proceedings for possession, but failed to name any persons as defendants in those proceedings, claiming that it but was unable to ascertain their names. The court dismissed the claim for possession on the basis that its was the court's practice to require a named defendant in a possession suit and not to make possession orders in *ex parte* proceedings by way of summons. In that matter Stamp J suggested one way of dealing with this difficulty might be to identify one of the occupiers and then to sue him as a defendant in a representative capacity.

In *McPhail v Persons Unknown*[20], *Re Wykeham Terrace* was not followed and orders for possession were made with respect to premises containing squatters without any named defendants to the proceedings. This was because it was said that new rules of court had been made since *Re Wykeham Terrace* that validated an *ex parte* application for possession by way of summons.

In New South Wales, Part 4 Rule 2(e) provides that a statement of claim is required in proceedings for possession of land. Part 4 Rule 2A requires commencement of proceedings in which there is no defendant by summons (although the Rule says further that if such proceedings are commenced by statement of claim they are not thereby invalidated but the plaintiff can then simply proceed to file a summons). Arguably the two Rules, taken together, prohibit proceedings for possession of land being commenced without a named defendant, as a different forms of originating process is required for possession suits than is required for suits lacking a defendant. In any event, the practice of the Supreme Court of New South Wales has always been to have one or more named defendants in a possession suit.

The Western Australian Full Court in *Harding v Her Worship Lane SM*[21] the Court endorsed the comments of Stamp J in *Re Wykeham Terrace* that:

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[19] [1971] Ch 204
[20] [1973] Ch 447
[21] (2000) BC200008411

> ..it is axiomatic that a person claiming an order of this court against another, except where a statute provides otherwise… cannot obtain that relief except in proceedings to which that other person is a party and after that other person- the person against whom the relief is sought- has had the opportunity of appearing before this court and putting forward his answer to the claim.

Although *Harding* involved an *ex parte* monetary judgement rather than possession, the citation in that decision of a number of other authorities (including *Delta Properties Pty Ltd v Brisbane City Council*[22]) on the general essentiality of joining necessary defendants, it is clear that the Court did not view this principle as being narrowly confined.

It follows that it is most unlikely that the *ex parte* approach taken in *McPhail v Persons Unknown* would be regarded as appropriate in New South Wales, with the approach taken in *Re Wykeham Terrace* instead likely to find favour. Thus mortgagees seeking possession wishing to proceed against the occupiers rather than the mortgagors should ascertain the identities of at least one of the occupiers to name as a defendant, who can then be treated as representative of all defendants pursuant to Part 8 Rule 13. Given the service of Notices to Occupiers inviting any other occupiers to apply to be joined to proceedings if the so desire, it is difficult to see why the Court would oppose this course if there were some evidence concerning the difficulty in discovering the identity of the other occupiers.

E. Exercising the right to possession

1. What constitutes taking possession?

Lord O'Hagan said in the oft-cited passage in *The Lord Advocate v Lord Lovat*[23]:

> As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts implying possession in one case, may be wholly inadequate to prove it in another. The character and the value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests- all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.

Thus, in essence, to take possession of an in land a person must do the sort of things an owner of that land would normally do, the precise nature of those acts varying according to the land in question. One important aspect of this is the exclusion of the former possessor of the land from exercising similar rights, as one cannot be said to take possession until the former possessor has been ousted from possession: see *Williams Brothers Direct Supply Ltd v Raftery*[24].

In most cases, it is clear that a mortgagee has taken possession, as entry into premises and physically evicting the existing occupiers and/or changing the locks involve

[22] (1955) 95 CLR 11
[23] (1880) 5 App Cas 273 at 288
[24] [1958] 1 QB 159

ouster of the previous possessor and a clear exercise of dominion over the property by the mortgagee. In some cases, however, the question is more difficult, such as when the land is vacant of occupiers or lockable structures or the when the mortgagee wishes to assert its rights over the land but with the existing occupiers remaining in occupation.

2. Leaving the tenant in place

In *Noyes v Pollock*[25], a mortgagee did not disturb the occupation of existing tenants of land or interact with them in any way, but took the rents from the mortgagor's agent with the tenants apparently still believing that they were paying rent to the mortgagor. The court found that there was no taking of possession in this case, but that more was required than the mere receipt of rents. As Cotton LJ stated[26]:

> in my opinion it ought to be shewn not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken on himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate.

The court contrasted the facts of the case before it with the situation where the mortgagee sends a notice to the tenant requiring the rent to be paid to the mortgagee rather than the mortgagor, or the situation where the mortgagee takes over the rent collection process by taking the rents directly from the tenants rather than permitting the mortgagor or his agent from doing so- in either of these cases, possession would have been found to have been taken.

Thus, provided that the mortgagee informs the tenants that it is taking possession and directs all further rents to be paid to the mortgagee and not the mortgagor, the mortgagee can, if it so desires, leave tenants (or licensees) in occupation of property but still be considered to have taken possession. That does not, however, exclude the possibility that the tenants or licensees might later refuse to vacate the premises if the mortgagee requests them to do so, with the mortgagee then needing either to initiate possession proceedings or to risk taking possession by way of self-help so as to clear the premises of unwanted occupiers.

The mortgagee might also take possession without ousting a mortgagor in possession by making an agreement with the mortgagor that henceforth the mortgagor is to remain in occupation only as a tenant of the mortgagee and is to pay rent to the mortgagee in exchange for that right.

3. Vacant land

In *The Lord Advocate v Lord Lovat*, the interest in land in question was the fishing rights to a river. Lord Lovat was held to have taken possession by occasionally fishing in the river, by employing persons to supervise the spawning of the salmon in the river, and by requiring his tenants in their leases to prevent others from fishing in the river.

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[25] (1886) 32 Ch D 53
[26] at p 61

In *Kirby v Cowderoy*[27], a person was found by the Privy Council to have taken possession of a tract of wild land in British Columbia by paying all taxes referable to the land after the owner had ceased to do so, in the circumstances that the land was uninhabitable and payment of taxes by the new possessor was "the only act of possession of which it appeared to be capable".

In relation to the more usual situation in which the vacant land is an unimproved block of suburban land, it is suggested that possession could be taken by physical entry onto the land by the mortgagee or its agent and affixing some notice to the land indicating the taking of such possession- the placing of "For Sale" signs on the land would probably be adequate for this purpose.

4. Rights & liabilities on taking possession

After taking possession, the mortgagee is entitled to the rents and profits of the land, but must use these to reduce the mortgage debt and is liable to account to the mortgagor and/or any subsequent mortgagees. The mortgagee is also entitled to receive its expenses properly incurred in preserving the security and, if the mortgage grants the power or it is necessary to properly realise the value of the land at sale (such as in the case of partially completed buildings), the cost of making improvements to the land: see *Matzner v Clyde Securities Ltd*[28].

The mortgagee is also liable to the mortgagor and/or subsequent mortgagees for any unnecessary injury to the value of the security property whilst the mortgagee is in possession, either by deliberate act of the mortgagee or its agents or by gross and willful negligence of the mortgagee: see *Midland Credit Ltd v Hallad Pty Ltd*[29] Reasonable exercise of a statutory or other power to exploit the security for the purpose of realising a profit, such as working mines and/or cutting and selling timber, does not, however, attract liability to the mortgagee even if it devalues the security, although the profits from such activity must be accounted for (as with any profits).

In *Midland Credit Ltd v Hallad Pty Ltd*, Hutley JA dealt with a case involving a mortgage over a multi-story residential building site. After default, the mortgagee entered into possession, completed the building, and sold the units. The officer of the mortgagee, Baird, who was put in charge of the construction process employed as the builder a man classed by his Honour as his "crony" named Roberts, even though Roberts, when employed, was unlicensed. Baird and Roberts then conspired to have the building work performed in a way that was to their own financial advantage, without keeping proper accounts, making no attempt to keep building costs down, and employing shoddy materials and workmanship. The mortgagee had failed to properly supervise the activities of Baird or Roberts, even though Baird had no special skills that fitted him for the task assigned to him. His Honour determined that in the circumstances, the mortgagee had not made a "genuine effort to complete the building in a proper and economical way". The mortgagee was then only permitted to recover such building expenses that were found to be reasonably incurred, and further had to deduct from the mortgage debt the amount of money lost on sale of the units as a result of the "willful default and neglect" of the mortgagee, with the matter being referred to the Master to determine the quantum of these amounts.

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[27] [1912] AC 599
[28] [1975] 2 NSWLR 293
[29] (1977) 1 BPR 9570.

5. What if the mortgagor re-enters possession?

If "forcibly or by stratagem" a mortgagor re-enters the security premises after the mortgagee has taken possession pursuant to the exercise by the Sheriff of a writ of possession, the mortgagee need not commence new proceedings for a fresh writ of possession, but can instead return to court in the original proceedings and seek that a writ of restitution be issued to put the mortgagee back into possession and/or that the mortgagor be committed for contempt of court: *Alliance Building Society v Austen*[30]. Although a writ of restitution is not mentioned by name in the Supreme Court Rules, it comes under the description "writ in aid of a writ" in Part 44 Rule 1, being in aid of the original writ of possession. As such a writ can be sought immediately and, if necessary, on an ex parte basis, the writ of restitution avenue would be the easiest and quickest means of regaining possession in such a case.

Writs of restitution and contempt actions are available only in the case of re-entry by or at the behest of a defendant to the original proceedings. In the case of the dispossession of the mortgagee by a third party, it is necessary to commence new proceedings for a fresh writ of possession against that third party and/or the new occupiers.

If re-entry into the premises is made by breaking and entering, it is possible that the police may act to remove the perpetrator of this illegal act from the premises and restore the mortgagee to possession. As the police have wide discretion in the exercise of their powers and often do not wish to be involved in matters that may be adjudicated in civil courts, a mortgagee should not count on their assistance in these circumstances.

6. As between the first and second mortgagee

A registered second mortgagee is entitled to bring possession proceedings, however not at the expense of the rights of the first mortgagee. Handley J's judgement in *Zanzoul v Westpac Banking Corp*[31], the decision of the NSW Court of Appeal which established the registered mortgagee's rights to possession, notes in this regard[32]:

> It is true… that a second mortgagee is not entitled to possession of the security as against the first mortgagee. If the first mortgagee had also sought possession, the Court would be bound to make an order in its favour and to refuse an order in favour of the second mortgagee.

His Honour went on to state that the first mortgagee in the case before him "had not attempted to recover possession" and thus considered that the second mortgagee was entitled to possession notwithstanding the existence of a first mortgage on the title.

In relation to equitable mortgagees seeking possession by way of specific performance and orders for judicial sale, the Masters in Equity have initiated the practice of requiring notification of first mortgagees that such orders are sought, and have then only granted the orders in question if either the first mortgagee chooses to take no action or if an additional order is added requiring the second mortgagee to yield up possession to the first mortgagee immediately on demand.

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[30] [1951] 2 All ER 1068
[31] (1995) 6 BPR 14,142
[32] at 14,145

In any event, if a second mortgagee gains possession of the security, the first mortgagee is free to assert its superior right to possession at any time by bringing its own possession suit against the second mortgagee.

If, by virtue of the lodgement of a defence by a mortgagor in proceedings brought by a first mortgagee for possession, orders for possession of the security by the first mortgagee appear unlikely to be made for some considerable time, that would be good reason for possession to be given to the second mortgagee on an application by the second mortgagee that was undefended, in the circumstances that no conflicting judgement in favour of the first mortgagee was imminent. The first mortgagee's rights would not be prejudiced in this case as after the second mortgagee took possession, the first mortgagee could then discontinue its proceedings against the mortgagor and instead call on the second mortgagee to deliver up possession, which the second mortgagee would be obliged to do given the first mortgagee's prior claim.

F. Power to appoint a receiver

1. All mortgages deemed to contain the power to appoint a receiver

S 109(1) (c) of the Conveyancing Act has the effect of deeming any mortgage to contain (except to the extent that the mortgage may express the contrary intention):

> A power to appoint a receiver of the income of the mortgaged property or any part thereof.

The section is applicable whether or not the land in question is under the provisions of the Real Property Act, and in relation to both registered and unregistered mortgages.

2. Default required before the appointment

S 115A of the Conveyancing Act clarifies several matters in relation to the appointment of receivers under the Conveyancing Act.

Firstly, the section defines in broad compass the concept of "default" under the mortgage that may give rise to the appointment of a receiver. Such a default can be in the payment of principal, interest or any other money secured by the mortgage. Default also occurs if any "covenant, agreement or condition" in the mortgage is breached. In other words, "default" is given its natural meaning of breach of any obligation under the mortgage.

Secondly, the section forbids a mortgagee from appointing a receiver, whether under the Conveyancing Act or otherwise, unless a default under the mortgage has occurred.

Thirdly, the section forbids a receiver from exercising any powers unless both a default has been made and the instrument appointing the receiver has been registered. This has been found to only apply where there is no express covenant in the mortgage allowing for the appointment of a receiver.

Fourthly, the section forbids the receiver from exercising any power to sell the security property until the mortgagee itself acquires a power of sale. For a mortgagee

to acquire power of sale there must be service and non-compliance with a s 57(2)(b) and/or s 111(2)(b) notice.

In *Isherwood v Butler Pollnow Pty Ltd*[33], the NSW Court of Appeal considered s115A, the key judgement being that of McHugh JA (with whom Glass JA agreed). His Honour found no provision in either s155A or s111 of the Conveyancing Act requiring the s111 notice provisions to be observed prior to the appointment of a receiver. The mortgage in question, however, provided by its express terms that the mortgagee could only appoint a receiver if the moneys secured under the mortgage became payable, which was interpreted as meaning that the principal must fall due before a receiver could be appointed. As the time for repayment of principal had not yet arrived, however, the mortgagee was obliged in that case to accelerate the principal, which would normally require non-compliance with a s57 or s111 notice. However, as a non-monetary default had occurred and the mortgage contained a provision dispensing with notice, principal was found able to be accelerated, and thus the receiver appointed, notwithstanding the lack of a prior notice.

Isherwood further decided, notwithstanding the express words of the section, that s115A should be construed as only requiring registration of the instrument appointing a receiver in cases where the appointment was not pursuant to a power in a mortgage deed.

3. Receiver agent of the mortgagor

Section 115(2) of the Conveyancing Act provides, with respect to a receiver appointed pursuant to s 109(1)(c) of the Act:

> (2) The receiver shall be deemed to be the agent of the mortgagor or person whose land is subject to the charge, and the mortgagor or person shall be solely responsible for the receiver's acts or defaults, unless the instrument creating the mortgage or the covenant under which the charge arose otherwise provides.

Thus, unless the mortgage otherwise provides, the receiver will be the mortgagor's agent notwithstanding the fact that the receiver has been appointed by the mortgagee. Thus if the receiver commits any wrongful act or default this will be the responsibility of the mortgagor and not the mortgagee.

It should be noted that this rule only applies in relation to receivers appointed pursuant to the implied power in the mortgage, and only if the mortgage does not otherwise provide. The rule has thus no applicability to a court-appointed receiver.

Notwithstanding the general rule, a mortgagee can become liable for a receiver's actions if the mortgagee seeks to restrict a receiver's discretion by directing the receiver or interfering in the receivership. In *Standard Chartered Bank Ltd v Walker*[34], Lord Denning considered an appeal from an application for summary

[33] (1986) 6 NSWLR 363
[34] [1982] 3 All ER 938

judgement, and noted[35] that the allegation that the debenture-holding bank had directed the receiver to sell assets as quickly as possible created a triable issue as such interference may result in liability for the bank, the rule being:

> The debenture holder, the bank, is not responsible for what the receiver does except in so far as it gives him directions or interferes with his conduct of the realisation. If it does so, then it too is under a duty to use reasonable care…

See also *ANZ Banking Group Pty Ltd v Walker*[36], which followed *Standard Chartered*.

4. Challenges to the appointment of a receiver

As is the case with any other step taken by a mortgagee, the appointment of a receiver is liable to be challenged. This is a particular danger in relation to receivers as if a receiver's appointment is invalid then so are all the receiver's subsequent acts.

The most likely means of attacking the appointment of a receiver is by claiming that the appointment of the receiver was not in accordance with the terms of the mortgage. An example of such a challenge is found in *Isherwood v Butler Pollnow Pty Ltd*[37], referred to previously. Another example is found in *Bunbury Foods Pty Ltd v National Bank*[38] in which a mortgage which stated that the debt was repayable "on demand" was construed as meaning "within a reasonable time" from the service of the demand, and hence if a receiver was appointed before that "reasonable time" had elapsed the appointment would be invalid. It was found in that case, however, that 3 days after the receipt of the demand the mortgagor admitted to the mortgagee that it could not pay the debt, and that the mortgagee was not required to allow any additional time to pay after that admission.

5. Responsibility for the receiver's fees

The receiver will first look for his or her fees from the income and/or proceeds of sale of the assets of the receivership. If those assets are insufficient to pay the receiver's fees, the receiver usually will look to the mortgagee for the balance if there is an agreement to this effect between the receiver and the mortgagee (which the receiver will usually insist on as a condition of appointment).

6. The powers of the receiver

S 115(3) of the Conveyancing Act sets out the following powers possessed by a receiver appointed pursuant to a power under that Act:

> The receiver shall have power to demand and recover all the income of the property of which he or she is appointed receiver, by action or otherwise, in the name either of the mortgagor or person whose land is subject to the charge or of the mortgagee or chargee, to the full extent of the estate or interest which the mortgagor or person could dispose of, and to give effectual receipts accordingly, for the same, and to

[35] at p 943
[36] (1983) 1 ACLC 1081
[37] (1986) 6 NSWLR 363
[38] (1984) 153 CLR 491

> exercise any powers which may have been delegated to him or her by the mortgagee or chargee pursuant to this Act.

Section 115A(3) of the Conveyancing Act provides, however, that receiver cannot exercise power of sale over property until such time as the mortgagee appointing the receiver is itself able to exercise power of sale.

If the mortgagor is a corporation, the receiver arguably has additional powers conferred by s 420 of the Corporations Act.

7. Liability of the receiver

A receiver is liable for any wrong committed by him or her, but in the usual case of the receiver being the agent of the mortgagor, the receiver will usually be able to claim an indemnity from the mortgagor with respect to any personal liability, but not if the receiver's acts which attracted the liability in question exceeded the receiver's authority. If a receiver's appointment is invalid, however, no indemnity will be available from the mortgagor, and receivers normally insist on an express indemnity from the mortgagee to cover such liability as a condition of the receiver accepting appointment. Although a mortgagor has the standing to sue a receiver, there is no utility in bringing such a suit in those cases in which the receiver enjoys an indemnity from the mortgagor.

G. The right to cut and sell timber

1. An implied right under the Conveyancing Act

Section 109(1) of the Conveyancing Act, which applies also to mortgages and charges under the Real Property Act, has the effect of implying into a mortgage a variety of terms conferring powers on the mortgagee. This subsection thus removes the need for a mortgage to expressly set out the powers referred to in the sub-section, but is of no assistance to a mortgagee who has already included the powers in question in the express terms of the mortgage. The powers may also be expressly negatived. Subsection (3) stating:

> Subsection (1) applies only if and as far as a contrary intention is not expressed in the instrument, and shall have effect subject to the terms of the instrument and to the provisions therein contained.

2. The power to cut timber

Section 109(1)(d) confers on the mortgagee the following:

> A power, while the mortgagee or chargee is in possession, to cut and sell timber except trees planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

As can be seen, the power to cut and sell timber is restricted in several ways:

(a) The mortgagee can only cut and sell, or enter into a contract for the cutting and selling, of timber whilst the mortgagee is in possession;

(b) Ornamental and/or shade trees cannot be cut; and

(c) Any contract for cutting and sale entered into must restrict the right of the other party to cut the trees within 12 months of the contract date

3. Applies to legal & equitable mortgages
Section 109 applies equally to legal and equitable mortgages, so the right to cut timber is implied into both types of mortgage.

4. Disbursement of the proceeds from the sale of timber
As with any income earned by the mortgagee from the security property, the proceeds of cutting and selling timber must be applied towards payment of the debt secured under the mortgage (assuming no prior interest-holders with first claim over the monies), and the mortgagee is liable to account for such proceeds to the mortgagor and any subsequent mortgagees.

5. Precautions regarding the exercising this right
A mortgagee selling any security property has a duty to attempt to realise the best available price. If a mortgagee wishes to cut and sell timber in advance of the sale of the property as a whole, the mortgagee should only do so if the combined sale price of the timber and the sale price of the property denuded of the timber is likely to be no less than the expected sale price of the security with the timber still standing on it.

H. The right to sell easements

1. Statutory basis for the power
Section 109(1)(f) of the Conveyancing Act confers on a mortgagee:

> A power to sell any easement, profits a prendre, right or privilege of any kind over or in relation to the mortgaged or charged property.

This power is a power to create and sell incorporeal hereditaments, being rights to utilise land in various ways short of exclusive possession. The most common rights of this nature are easements, which include rights of way, rights to lay and maintain cables or drains across property, and easements of support whereby retaining walls or the like can be maintained on a property for the support of neighbouring land. A profit a prendre is a right to take something from the land, such as wood or stone. A similar right that would also be covered by this power is the profit a rendre, where the right is to deposit something on land, such as to dump rubbish.

The existence of this power means that the mortgagee is empowered to sell rights of the above types over the security property prior to (or, if sufficient monies are thereby raised, in lieu of) selling the security itself.

2. Applies to both equitable and legal mortgages
The powers set out in section 109 are implied into a mortgage by the Conveyancing Act rather than by the Real Property Act, so are implied into all mortgages, legal or equitable.

3. Precautions when exercising this power
A mortgagee selling any security property has a duty to attempt to realise the best available price. If a mortgagee wishes to sell incorporeal hereditaments over the security in advance of the sale of the property as a whole, the mortgagee should only

do so if the combined sale price of the hereditaments and the final sale is likely to be no less than the expected sale price of the security unencumbered by further incorporeal hereditaments. One can, for example, greatly reduce the sale price of land by selling, a drainage easement through the centre of the block, which may then prevent any building from being erected on the land.

I. The right to collect rents

1. Under the Real Property Act

A registered mortgagee has a statutory power to collect rents pursuant to section 60 of the Real Property Act, the text of which has been set out in full previously in this paper under the heading "The Right to Possession under a Registered Mortgage".

Section 63 of the Real Property Act facilitates the collection of rents by a mortgagee as follows:

> (1) Whenever a mortgagee, chargee or covenant chargee gives notice of demanding to enter into receipt of the rents and profits of the mortgaged or charged land to the tenant or occupier or other person liable to pay or account for the rents and profits thereof, all the powers and remedies of the mortgagor, charger or covenant charger in regard to receipt and recovery of, and giving discharges for, such rents and profits, shall be suspended and transferred to the said mortgagee, chargee or covenant chargee until such notice is withdrawn, or the mortgage, charge or covenant charge is satisfied, and a discharge thereof duly registered.
>
> (2) In every such case, the receipt in writing of the mortgagee, chargee or covenant chargee shall be a sufficient discharge for any rents and profits therein expressed to be received, and no person paying the same shall be bound to inquire concerning any default or other circumstance affecting the right of the person giving such notice beyond the fact of the person's being duly registered as mortgagee, chargee or covenant chargee of the land.
>
> (3) Nothing herein contained shall interfere with the effect of any judgment or order of the Supreme Court in regard to the payment of rent under the special circumstances of any case, nor shall prejudice any remedy of the mortgagor, charger or covenant charger against the mortgagee, chargee or covenant chargee for wrongful entry or for an account.

As can be seen, section 63 enables the mortgagee, merely by serving notice on a tenant or occupier, to suspend the mortgagor's rights as landlord and to enable the mortgagee to give a good receipt to the tenants or occupier for any rent.

As previously discussed, an equitable mortgagee who obtains possession lawfully is entitled to receive rents and profits: *Re Postle: Ex Parte Bignold*[39].

[39] (1834) 4 Deac & Ch 259

2. Unpaid rental arrears

In *Amev Finance Ltd v Auscott Ltd*[40], Needham J decided a case in which the mortgagee had given notice of entering into receipt of rents after several rental payments had fallen due but remained unpaid by the tenant. His Honour found that the mortgagee then entering into receipt of rents was not confined to receiving future rents, but was also entitled to receive the unpaid rental arrears.

3. Rent paid in advance to the mortgagor

If the tenant pays rent in advance to the mortgagor he is not obliged to pay it again to the mortgagee unless it was paid after receiving a notice under section 63. Even then the tenant is not obliged to repay rent for any period pre-dating the mortgage. See *De Nicholls v Saunders*[41].

J. The right to restrict the mortgagor from further incumbering the property

A clause can be put in a mortgage stating that the mortgagor cannot further encumber the land or cannot do so without the consent of the mortgagee. This is, however, merely a promise by the mortgagor to refrain from encumbering the land, and does not render the mortgagor legally incapable of encumbering the land in breach of the promise. However if the mortgagee discovers an attempt to encumber the land before that attempt is perfected, the mortgagee may be granted an injunction to restrain the completion of the transaction.

Young J stated as follows in *Nia v Phuong*[42]:

> A registered proprietor of land who grants a mortgage to a mortgagee, even after the mortgage is registered, remains the proprietor of a congerie of legal rights over which prima facie he or she has the power of mortgage or other disposition as with any other proprietary right. It is, of course, competent for the mortgagor to covenant that he or she will not exercise this right, but if such a covenant is made, it by no means follows that the mortgagor is deprived of the capacity to mortgage the land, it may well be that the only remedy the mortgagee has is in damages.

The above statement that the mortgagee has no remedy other than damages, however, can only describe the situation in which the subsequent mortgage has already been registered, as the Court was prepared in *Nia v Phuong* to grant an injunction at the suit of the first mortgagee to prevent the incoming second mortgagee from registering the second mortgage in breach of a covenant in the first mortgage prohibiting subsequent mortgages. The injunction was justified on a dual basis. Firstly, an incoming second mortgagee is on constructive notice of the terms of all interests recorded on title (including the prohibitive clause in the first mortgage), thus equity will restrain a prospective second mortgagee from acting in breach of a negative covenant of which he has notice. Secondly, a proposed second mortgagee seeks registration of a second mortgage as an agent of the mortgagor, and as such is caught by an injunction issued against the mortgagor restraining registration.

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[40] (1988) 5 BPR 1,386
[41] (1870) LR 5 CP 589
[42] (1993) 6 BPR 97440 at 13,142

As a matter of practice, the first mortgagee will generally not learn of a further encumbrance by equitable mortgage until after it has been granted and monies advanced. Thus it is too late to seek to stop the transaction but it is not too late to stop its registration (which cannot occur without production of the Certificate of Title).

K. The right to foreclose

1. The nature of foreclosure

Extinguishment of the equity of redemption is known as "foreclosure". Under Old System Title, a first mortgagee was the legal owner of the security subject to the mortgagor's equity of redemption. In the event of default, the first mortgagee could commence proceedings to extinguish the equity of redemption (foreclosure proceedings). Foreclosure involved the court giving the mortgagor six months to pay the mortgage debt, in default of which the equity of redemption would be extinguished and the first mortgagee could retain the security absolutely.

Unlike Old System title, mortgagees under the Torrens System are not legal owners of the security. Accordingly foreclosure under the Real Property Act land works differently.

2. Regulation of foreclosure by the Real Property Act

Foreclosure of Real Property Act land is now exclusively governed by sections 61 and 62 of that Act. Those sections read as follows:

Section 61

> (1) When default has been made in the payment of the interest or principal sum secured by a mortgage or covenant charge for six months, a registered mortgagee or covenant chargee, as the case may be, or his or her solicitor, attorney, or agent may make application in the approved form to the Registrar-General for an order for foreclosure.
>
> (2) An application under this section shall state:
>
> (a) that default has been made for 6 months in the payment of the principal sum or interest secured by the mortgage or covenant charge,
>
> (b) that the land, estate or interest mortgaged or charged has been offered for sale at a public auction by a licensed auctioneer, after notice was given in accordance with section 57 to the mortgagor or covenant charger and all other persons (if any) required to be given notice under that section,
>
> (c) that the amount of the highest bid at the sale was not sufficient to satisfy the money secured by the mortgage or covenant charge, together with expenses occasioned by the sale, and

(d) that notice in writing of the intention of the mortgagee or covenant chargee to make the application has been served on:

(i) the mortgagor or covenant charger,

(ii) all registered mortgagees, chargees or covenant chargees under registered mortgages, charges or covenant charges which have less priority than that of the applicant, and

(iii) each caveator (if any) who claims as an unregistered mortgagee or chargee to be entitled to an estate or interest in the land mortgaged or charged.

(2A)

(a) The notice of intention to make the application may be given personally or by post to the Public Trustee where, at the time such notice is so given:

(i) the mortgagee or covenant chargee has knowledge of the fact that the mortgagor or covenant charger is dead, and

(ii) there is no personal representative of the mortgagor or covenant charger in New South Wales.

Every notice given to the Public Trustee under this subsection shall be accompanied by a statement containing such particulars as may be prescribed.

(b) Any notice given in accordance with the provisions of paragraph (a) shall be as valid and effectual as if given to the personal representative of the mortgagor or covenant charger unless probate of the will or letters of administration of the estate of the mortgagor or covenant charger is granted to some person other than the Public Trustee within one month after such notice has been so given.

(c) The provision made by this subsection for the giving of notice of intention to make application for an order for foreclosure shall be in addition to and not in derogation from the provision made by section 46B of the *Moratorium Act 1932* for the giving of notices.

(3) Such application shall be accompanied by a certificate of the auctioneer by whom such land was put up for sale, and such other

proof of the matters stated by the applicant as the Registrar-General may require.

(4) The statements made in such application shall be verified by the statutory declaration of the applicant or other person applying on the applicant's behalf.

(5) In the case of any mortgage in respect of which the giving of notice is dispensed with under section 58A, subsection (2) shall operate as if the words "after notice given to the mortgagor as in this Act provided" were omitted from that subsection.

Section 62

(1) Where an application is made in accordance with section 61 for an order for foreclosure, the Registrar-General may:

(a) issue the order to the applicant, or

(b) require the applicant to offer the land mortgaged or charged for sale and to do so in accordance with the directions of the Registrar-General.

(2) If the applicant is required to offer the land for sale and it is not sold or an insufficient amount is realised by the sale to satisfy the principal sum and interest due, and all expenses occasioned by the sale, the Registrar-General may issue to the applicant an order for foreclosure.

(3) Every order for foreclosure issued by the Registrar-General and recorded in the Register has the effect of vesting in the mortgagee or covenant chargee who applied for it all the estate and interest of the mortgagor or covenant charger in the land mentioned in the order:

(a) in every case, free from any right of a mortgagee, chargee or covenant chargee under a registered mortgage, charge or covenant charge which has less priority than that of the applicant, and

(b) in the case of mortgaged land, free from any right and equity of redemption of the mortgagor or any person claiming through or under the mortgagor.

3. Foreclosure procedure

For a registered mortgagee to apply for foreclosure, the following conditions must first be met:

(a) There has been a continual default for at least 6 months;

(b) A s 57(2)(b) notice has been served on the mortgagor (if not effectively dispensed with under s 58A), on any subsequent registered mortgagee or chargee, and on any caveator claiming a mortgage or charge;

(c) The security has been offered for sale at a public auction by a licensed auctioneer;

(d) The highest bid at the auction was insufficient to both discharge the mortgage and pay the costs of the sale; and

(e) Notices of intention to apply for foreclosure are sent in accordance with s 61.

The application is made to the Registrar-General, and is supported by statutory declarations proving the above matters and a certificate of the auctioneer who put the security up for sale. The Registrar-General can, however, then require additional evidence to be submitted.

After the application is made, the Registrar-General can then decide to issue an order for foreclosure, or to require the applicant to make another attempt at selling the security in the way that the Registrar-General directs.

If the order is made, it vests the security in the applicant mortgagee free of the equity of redemption and free of lower-ranking mortgages or charges.

For the procedure to be utilised by an equitable mortgagee seeking to foreclose, see below.

4. Foreclosure by an equitable mortgagee

An equitable mortgagee is not a mortgagee or chargee within the definition of those terms in the Real Property Act, and so cannot take advantage of the statutory foreclosure provisions of sections 61 and 62 of that Act.

Old System equitable mortgages carried the general law right to foreclose, but only if the equitable mortgage represented an agreement to grant a legal mortgage, or if the mortgage was by deposit of title deeds: see *James v James*[43]. For a second or subsequent mortgagee to foreclose, however, that mortgagee had first to pay out all prior mortgages or accept the security subject to those mortgages. Unlike mortgagees, chargees of land have no right of foreclosure: *United Travel Agencies Pty Ltd v Cain*[44].

The position of equitable mortgagees of Torrens System land has been persistently equated with that of an Old System equitable mortgagee rather than an Old System chargee (see for example *Ryan v Sullivan*[45]), with foreclosure under the general law an available remedy provided that the equitable mortgage is by way of deposit of titled deeds or if an agreement exists for the execution of a legal mortgage (which would normally be implied if the equitable mortgage is in registrable form).

The general law procedure for foreclosure for an equitable mortgagee is altogether different from the statutory procedure that applies with respect to a registered mortgagee. After the mortgagor defaults, the equitable mortgagee may commence proceedings for foreclosure by Statement of Claim in the Supreme Court, naming as defendants the mortgagor and any subsequent mortgagees or other encumbrances

[43] (1872) LR 16 Eq 153
[44] (1990) 20 NSWLR 566
[45] [1956] VLR 99

(who also have a right to redeem the security). The Court will then direct the taking of accounts as to what monies are outstanding under the mortgage, and will then make a determination as to that sum. The Court will then order the mortgagor to pay out the mortgage within a fixed period, traditionally 6 months in duration, and in default of redemption within that period the mortgagor shall be foreclosed from redemption. On foreclosure, the mortgagor is directed to convey the security to the equitable mortgagee, and in default of such conveyance the property will be conveyed to the equitable mortgagee by way of a vesting order of the Court. In each case, however, the conveyance is subject to any prior encumbrances.

It should be noted that the general law foreclosure procedure does not require any auction of the security. The rights of subsequent encumbrancers are protected by their right to redeem the mortgage if they so desire. The rights of prior encumbrancers are protected as the form of the foreclosure order will provide that all prior encumbrances remain over the security notwithstanding foreclosure and transfer to the equitable mortgagee.

In practice an equitable mortgagee may prefer to register the mortgage and proceed under the Real Property Act.

5. What if the mortgagor wants the property sold instead?

The issue of a mortgagor opposing the foreclosure of the security does not arise in relation to registered mortgages, as the foreclosure procedure in that case (under RPA sections 61 and 62) does not involve court proceedings but rather an application to the Registrar-General, and such application can only be made when there has already been an attempt to sell the property at public auction which has failed.

In relation to foreclosure under the general law by an equitable mortgagee (requiring curial proceedings) the mortgagor would be able to oppose foreclosure and invoke the Supreme Court's inherent jurisdiction to seek an order for sale in a manner analogous to that provided in section 103 of the Conveyancing Act.

Section 103 allows persons including the mortgagor, the mortgagee, and probably also subsequent mortgagees (who are persons that might be said to be interested in the right of redemption and/or are entitled to redeem) to seek judicial sale of mortgaged land. The court has power to determine the terms of the sale and who is to sell the property.

In *Yarrangah Pty Ltd v National Australia Bank Ltd*[46] Young J held that s 103 of the Conveyancing Act was not applicable to Real Property Act land (by reason of s 90 of the Conveyancing Act which limits the application of sections in Part 7 Division 1 of the Conveyancing Act). His Honour considered, however, that there was an inherent power in a Court of Equity to make orders analogous to those provided for in section 103. This proposition has since been confirmed in *Guardian Mortgages v Miller*[47]. Thus although section 103 is not directly applicable, orders analogous to those available under that section may be made by invoking the Supreme Court's inherent jurisdiction.

[46] (1999) 9 BPR 17,061
[47] [2004] NSWSC 1236

L. The right to preserve the security

Whether or not expressly provided for in the mortgage, a mortgagee has the right to recover such monies that have been properly spent for the purpose of preserving the security: *Elders Trustees & Executor Co Ltd v Eagle star Nominees Ltd*[48].

Even if the mortgage expressly provides differently, a mortgagee is not entitled to recover costs improperly incurred improperly, such as

> costs which had been unjustifiably or vexatiously incurred by the mortgagees so as to impose an unwarrantable burden of the mortgagors[49].

To the extent that the monies that are spent do not merely preserve the security but represent improvements to it, the mortgagee's right to recover these monies is more restricted. In relation to improvements, the general rule is that the mortgagee is entitled to be repaid the cost of those improvements only if the mortgagor has consented to, or acquiesced in, the mortgagee making the improvements, or otherwise only to the extent that he monies have enhanced the value of the security: see *Shepard v Jones*[50]; *Matzner v Clyde Securities Ltd*[51].

M. The right to register an equitable mortgage

Provided that the terms of an equitable mortgagee include an express or implied covenant by the mortgagor to furnish the mortgagee with a legal (and, hence, registered) mortgage, the mortgagee can seek specific performance of that covenant and thereby obtain an order that the mortgagor shall perform all acts within the power of the mortgagor to facilitate the registration of a mortgage.

N. The right to enforce personal covenants

A mortgagee usually has, under the mortgage, both a proprietary right in the security as well as personal rights against the mortgagor to sue on any and all covenants in the mortgage. The situation can arise, however, where the personal rights are lost and a registered mortgagee has only the proprietary right. This occurs when the mortgagor has a good defence against the mortgagee in a contractual claim, but the registered mortgagee's interest in the land itself is preserved by indefeasibility of title under s 42 of the Real Property Act[52].

Provided that the right to sue under the personal covenants is not lost, a mortgagee is free to pursue only the personal covenant's and to neglect to enforce the mortgagee's rights in the security. This may be done for tactical reasons, for example because the security is a development site and the mortgage mezzanine finance[53].

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[48] (1986) 4 BPR 9205

[49] *Re Shanahan* (1941) 58 WN (NSW) 132 at 136; see also *Elders Trustees & Executor Co Ltd v Eagle star Nominees Ltd* (1986) 4 BPR 9205 at 9209.

[50] (1981) 21 Ch D 469

[51] [1975] 2 NSWLR 293

[52] If the mortgage was forged the contract between the registered proprietor and the mortgagee is a nullity but the charge on the land remains enforceable.

[53] By seeking to take possession the mezzanine financier may derail the completion of the construction and/or be prevented by the construction funder by the terms contained in the Deed of Priority.

Personal covenants are not protected by indefeasibility of title under s 42 of the Real Property Act except to the extent that they define the registered mortgagee's interest in land. As stated in *PT Ltd v Maradona Pty Ltd*[54]:

> Registration does not validate all the terms of the instrument which is registered. It validates those which delimit or qualify the estate or interest or are otherwise necessary to assure that the estate or interest to the registered proprietor.

His Honour went on to note that the terms validated by registration would include any term defining the debt secured under the mortgage.

O. The right to pursue any and all remedies simultaneously

In general, a mortgagee is free to pursue its remedies in any order and in any combination it sees fit.

1. Marshalling

Even in a situation involving marshalling[55], in which a mortgagee may prejudice the subsequent security-holder by realising securities in one order rather than another, the subsequent security-holder lacks the right to restrain (by court proceedings) the prior mortgagee from realising the mortgagee's securities in any order the mortgagee may see fit: see *Mir Projects Pty Ltd v Lyons*[56]. Instead, the subsequent security-holder is merely afforded a right akin to subrogation to proceed against any unrealized security of the prior mortgagee, subsequent in priority to the mortgagee.

2. Consumer Credit Code, restrictions on suing guarantor

Section 81 of the Consumer Credit Code prevents a "credit provider" under the auspices of that Code from enforcing a judgement against a guarantor unless the credit provider has already obtained a judgement against the principal debtor and has waited 30 days after sending a written demand to the debtor to meet that judgement. There are exceptions to this rule: if the debtor cannot be found or is insolvent, or if the Court excuses the credit provider "on the ground that recovery from the debtor is unlikely".

3. Multiple proceedings - estoppel

In *Port of Melbourne Authority v Anshun Pty Ltd*[57] established that in some cases a plaintiff may be estopped from bringing a second action against a person if a previous action has been brought and the case raised in the second action is so closely connected with the case raised in the first action that the only proper course was to bring both actions in the same proceedings, in the circumstances where to run the actions in different proceedings risks inconsistent judgements. The rule, in effect, prevents a person from running a case, losing it, and then running only a slight variation on the first case in new proceedings designed to circumvent the court's original ruling. The rule has no applicability to the case of a mortgagee, for example,

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[54] (1992) 25 NSWLR 643 at p 679 per Giles J

[55] being the case in which there are two secured creditors, with the prior security-holder having security over two assets of the same debtor and the subsequent security-holder having security over one of those assets but not the other.

[56] [1977] 2 NSWLR 192

[57] *(No 2)* (1981) 147 CLR 589

suing for possession in one set of proceedings and later suing for a money judgement in a different set of proceedings.

4. No obligation to realise security before pursuing guarantor, borrower or personal covenants by mortgagor

A mortgagee is under no obligation to sell the security property prior to pursuing a guarantor. Even for Consumer Credit loans the only obligation is to wait for 30 days after obtaining judgement against the principal debtor & demanding payment.

P. The right to sue for shortfall

1. Generally

Generally speaking, a mortgagee who suffers a shortfall on the sale of the security property can sue both the borrower and any guarantors for the shortfall, relying on personal covenants to repay in the loan agreement[58] or guarantee (the mortgagor will be either borrower or guarantor). Sometimes, however, guarantees are expressed to limit the guarantor's liability to the value of the security property (or to a set dollar amount) so that an action for a shortfall is not able to be brought against a guarantor within the terms of the guarantee.

2. Defences

There are many ways in which a borrower or guarantor might seek to defend against a suit brought by a lender for the shortfall. Here are some of the more obvious lines of defence:

(a) The defendant may seek to set aside the obligation to repay by way of the Contracts Review Act, the Trade Practice Act, or by the doctrine of unconscionability. These means are potentially available to set aside even those obligations that would otherwise be indefeasible by virtue of s 42 of the Real Property Act.

(b) The defendant may seek to set aside the obligation to repay by reason of *non est factum*, undue influence, fraud or similar defence. Although defences of this nature do not displace indefeasibility of title (assuming that the mortgagee has not itself acted in a fraudulent manner), indefeasibility of title extends no further than is necessary to delimit the interest of the mortgagee in the security (see *PT Ltd v Maradona Pty Ltd*[59]), and thus these are good defences to a suit for shortfall even in circumstances that section 42 would prevent their success against a claim for possession of the security.

(c) The guarantor may rely on a drafting error in the guarantee. Guarantees are highly technical documents, and if they are not correctly drafted they can operate to release the guarantor from its obligations in a number of circumstances, such as in the event of further advances to the borrower or an extension of the period of loan.

[58] Which may be part of the mortgage deed.
[59] (1992) 25 NSWLR 643

(d) The defendant may raise a cross-claim against the mortgagee claiming that it has sold the security property at an undervalue and that the amount of the undervalue must be set off against the shortfall.

Q. The right to exercise powers on default

1. Generally

Generally speaking, all powers that a mortgage provides may be exercised by the mortgagee on default of the mortgagor, may be exercised by the mortgagee in accordance with the mortgage. There are several exceptions to this general principal:

(a) The mortgagee cannot exercise power of sale unless either:

  i) a s 57(2)(b) notice (registered mortgages) or s 111(2)(b) (unregistered mortgages) has been served and not complied with, or

  ii) in the case of a non-monetary default, service of such a notice has been effectively dispensed with;

(b) The mortgagee cannot accelerate the repayment of principal unless the power of sale is also exercisable (for which, see above): see RPA s 57(5) and s 111(5) of the Conveyancing Act;

(c) The mortgagee cannot seek foreclosure unless there has been a continuous default for 6 months or more and the other requirements of RPA s 61 (registered mortgages) or the general law (unregistered mortgages) have been met;

(d) The mortgagee cannot enforce any covenant that is void as a penalty or as a clog on the equity of redemption (such as a covenant to pay an additional premium for late repayment in addition to interest); and

(e) The Consumer Credit Code has many further restrictions that apply in relation to mortgages coming within the purview of that Code (being with respect to credit for personal, domestic or household purposes).

2. Trivial defaults

In any action in common law, such as a possession suit or a suit on the personal covenant for repayment of the mortgage debt, the availability of a judgement to the mortgagee is not dependent on the size of the default under the mortgage, and provided at least some default can be shown both at the date of commencement of the proceedings and at the final hearing the mortgagee can proceed to enforcement of the mortgage based on the most trivial of defaults. That is because common law remedies are not at the court's discretion. Once judgement is obtained, however, if the defendant seeks a stay of enforcement, the Court then has a wide discretion in considering whether to grant or refuse the stay, and the size of the mortgagor's default is a factor the Court may take into account in this regard. In some cases involving trivial defaults, Master Malpass, one of the Common Law Division Masters, has awarded a judgement for possession to the mortgagee but then stayed enforcement of that judgement indefinitely, with the intent that the stay shall remain on foot so long as the mortgagor shall continue to make further payments under the mortgage in a timely manner, but with the mortgagee having the facility to seek the removal of the stay in the event of further default.

R. The right to accelerate repayment of principal

1. No general law right

There is no general law right for a mortgagee to accelerate the due date for repayment of principal on default, but if such a clause is inserted into the mortgage it will not be void as a penalty: see *Protector Endowment Loan and Annuity Company v Grice*[60].

2. Acceleration notices

Unless a mortgage imposes by its terms an additional requirement on the mortgagee to serve an "acceleration notice" in addition to complying with the statutory restrictions on acceleration contained in RPA s 57(5) and s 111(5) of the Conveyancing Act, there is no requirement to serve an acceleration notice in addition to any s 57(2)(b) or 111(2)(b) notice that may be required.

Notices under the two abovementioned sections, in order to be valid, must specify the default or defaults relied on and which the mortgagee requires be rectified.

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[60] (1880) 5 QBD 592